Citation: *B. K. v. Minister of Employment and Social Development*, 2015 SSTAD 44

Appeal No: AD-13-204

BETWEEN:

B. K.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet Lew

DATE OF DECISION: January 13, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on January 11, 2013. The Review Tribunal dismissed his application for disability benefits under the *Canada Pension Plan*, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2008.

[2] The Applicant is of the position that the Review Tribunal erred in assessing whether his disability is severe. The Applicant intends to obtain and file additional medical records in support of his claim for disability benefits. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

SUBMISSIONS

[3] The Applicant seeks leave on the following grounds, that:

> ". . . [he disagrees] with the Review Tribunal's decision that [his] disabilities were not severe. In fact, [his] disabilities and illnesses were so severe that [he] did not and could not leave the house except for brief time and related to obtain therapy."

[4] In his leave application filed on April 10, 2013, the Applicant advised that he required three to six months to collect detailed medical records, to show that "[his] illnesses (lymphoma-like symptoms, advanced ischemic heart disease, Crohn's disease, and the severe degenerated and herniated disc in middle and lower spine) were present on or before Dec 31, 2008 and are still present and severe". He also advised that he was scheduled for additional medical procedures and tests and asked for additional time to produce these records. I am unaware of any additional medical records having been filed with the Social Security Tribunal.

[5] The Respondent has not filed any submissions.

THE LAW

[6] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* states that the only grounds of appeal are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] For our purposes, a decision of the Review Tribunal is considered to be a decision of the General Division.

ANALYSIS

[9] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[10] There is no suggestion by the Applicant that the Review Tribunal failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any

errors in law nor identified any erroneous findings of fact which the Review Tribunal may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision. The Applicant has not cited any of the enumerated grounds of appeal.

[11] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. The Application is deficient in this regard and the Applicant has not satisfied me that the appeal has a reasonable chance of success.

New Facts

[12] Finally, the Applicant indicated that he would be producing various medical records to support his disability claim. The proposed additional records should relate to the grounds of appeal. The Applicant has not indicated how the proposed additional records might fall into or relate to one of the enumerated grounds of appeal. If the Applicant is requesting that we consider these additional medical records, re-weigh the evidence and re-assess the claim in his favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-hear the merits of the matter.

[13] If the Applicant intends to file the additional medical records in an effort to rescind or amend the decision of the Review Tribunal, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements that must be met to succeed in an application for rescinding or amending a decision. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party. In this particular instance, the Applicant was required to have made an application to rescind or amend within one year of having received the decision of the Review Tribunal issued on January 11, 2013. He is now well out of time.

[14] Paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

[15] Even if the Applicant was not time barred from making an application to rescind or amend, it strikes me that the records which he proposes to file likely would not constitute new facts under section 66 of the DESDA. The records likely were available and could have been discovered prior to the Review Tribunal hearing, with the exercise of reasonable diligence.

[16] This is not a re-hearing of the merits of the claim. In short, there are no grounds upon which I can consider any additional medical records for the purposes of a leave application or appeal, notwithstanding how supportive the Applicant regards them to be in his claim for disability benefits.

CONCLUSION

[17] The Application is refused.

Janet Lew
Member, Appeal Division