Citation: *Estate of S. G. v. Minister of Employment and Social Development*, 2015 SSTAD 103

Appeal No: AD-14-503

BETWEEN:

Estate of S. G.

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: Valerie Hazlett Parker

DATE OF DECISION: January 28, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is refused.

INTRODUCTION

[2] The Claimant first applied for a *Canada Pension Plan* disability pension in April 2007. This application was denied by the Respondent, and not appealed. The Claimant again applied for a *Canada Pension Plan* disability pension in May 2011. This application was granted after reconsideration by the Respondent. It found the Claimant to be disabled fifteen months prior to the application date, which was February 2010. Payments commenced four months after this date.

[3] Sadly, the Claimant passed away. His estate (the Applicant) continued to appeal his claim, seeking payment of the disability pension retroactively to 2007 when he first applied for the disability pension.

[4] The appeal was transferred to the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The Applicant filed a Notice of Readiness with the Tribunal dated October 17, 2013. On June 17, 2014 the General Division of the Tribunal dismissed the appeal based on the written record before it.

[5] The Applicant sought leave to appeal to the Appeal Division of the Tribunal. Prior to deciding whether to grant leave to appeal, the parties were invited to file written submissions. The Applicant did not file any submissions; the Respondent filed submissions within the time provided to do so. I also held a pre-hearing teleconference to discuss procedural matters. At this teleconference, the parties agreed on a further schedule to file further submissions on matters that were discussed. The Applicant filed further submissions and documents in support of the claim. The Respondent also filed a brief letter in reply. I have considered all of the written materials that have been filed in making my decision.

ANALYSIS

[6] In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

[7] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (DESD) Act, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal". Subsection 58(1) of the DESD 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] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[9] Therefore, I must decide if the Applicant has presented a ground of appeal under section 58 of the DESD Act that has a reasonable chance of success on appeal.

[10] The Applicant put forward a number of arguments in support of the Application. First, she argued that she was not given notice of when the decision would be made, and was not given the opportunity to present her case to the Tribunal. The Applicant filed a Notice of Readiness dated October 17, 2013 with this Tribunal. This notice stated that the Applicant had no further documents to file in support of the claim, and was ready to have the matter decided by the

Tribunal. The Respondent did not file a Notice of Readiness and did not file any further documents with the Tribunal after the Applicant filed her Notice of Readiness.

[11] The General Division made its decision with no further notice to the parties, or providing an opportunity to be heard orally. The *Social Security Tribunal Regulations* provide that claims may be heard in a number of ways, including by teleconference, videoconference, in person or in writing. There is no guarantee that each claimant will receive an in person hearing. The *Regulations* also provide that after a Notice of Readiness is filed or the time to do so has expired, the General Division is to make a decision on the case, or if it determines that a further hearing is required, set a hearing (see section 28 of the *Regulations*). The Applicant had filed a Notice of Readiness which clearly indicated that she was ready for the matter to be decided without any further oral or written submissions from her. Hence, I am satisfied that she was given an adequate opportunity to file documents and present her case to the Tribunal.

[12] While it was an error for the Respondent not to have filed a Notice of Readiness, which would have been copied to the Applicant and perhaps given her a clearer idea of when the matter would be decided, I am not persuaded that the Respondent's failure to do so was a breach of any of the principles of natural justice. This circumstance did not deprive the Applicant of the opportunity to present her case, respond to the Respondent's case or to have the matter decided by an impartial decision maker. Therefore, this ground of appeal does not have a reasonable chance of success on appeal.

[13] Further, in my request for submissions I asked that the parties address whether subsection 60(8) of the *Canada Pension Plan* (CPP) would apply in this case. This provision allows for a CPP disability pension to be paid retroactively in the event that the claimant was incapable of forming or expressing an intention to make an application for this pension. The Applicant argued that the Claimant's condition and medical treatment, along with his physical impairments, made it impossible for him to "fight the appeal". She did not contend that he was not able to form or express and intention to make an application for disability benefits. The Respondent argued, first, that this issue ought not to be considered as it had not been raised at the Review Tribunal hearing. The nature of the appeal under the DESD Act is not a new hearing, but a review of the decision on the grounds set out in section 58 of the DESD Act. In addition, it

argued that there was no evidence to support any contention that the Claimant lacked any mental capacity.

[14] On the information before me I am satisfied that the Claimant was not incapable of forming or expressing an intention to make an application for this disability pension. He chose to focus his energy on fighting the cancer that afflicted him, not for a disability pension. Therefore, no further retroactivity of the disability pension may be awarded on this basis.

[15] The General Division decision correctly stated the law with respect to the maximum period for which a CPP disability pension can be paid retroactively from the date of application, which is fifteen months prior to the application date. It also correctly concluded that the application made in 2007 was finished and not able to be considered by the General Division as there was no appeal from the Respondent's decision to deny the disability pension claim at that time. Therefore, there is no reasonable chance of success based on any argument regarding the 2007 application.

[16] Finally, the Applicant included additional medical documents with her final submissions to support the disability claim. The production of new evidence is not a ground of appeal that can be considered under section 58 of the DESD Act. Therefore it is also not a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[17] The Application is refused as the Applicant has not presented a ground of appeal that has a reasonable chance of success on appeal.

Valerie Hazlett Parker
Member, Appeal Division