Citation: *Minister of Employment and Social Development v. R. T.,* 2015 SSTAD 335

Appeal No. AD-15-28

BETWEEN:

Minister of Employment and Social Development

Applicant

and

R. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF DECISION: March 10, 2015

DECISION

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

INTRODUCTION

[2] The Respondent applied for a *Canada Pension Plan* disability pension in April 2010. He claimed that he was disabled by a number of medical conditions. His condition was terminal. The Applicant denied his claim initially and after reconsideration because the Respondent had been in receipt of a *Canada Pension Plan* retirement pension since December 2008. The *Canada Pension Plan* (CPP) does not allow a claimant to replace a retirement pension with a disability pension unless an application to do so is received within 15 months of the commencement of payment of the retirement pension. The Respondent appealed the denial of his disability pension claim to the Office of the Commissioner of Review Tribunals. Pursuant to the *Jobs, Growth and Long-term Prosperity Act* the matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013. The General Division held a hearing, and on October 17, 2014 allowed the Respondent's appeal, finding that he was disabled, and that he was incapable of forming or expressing the intent to apply for a CPP disability pension from March 2009 until April 2010. Thus, his retirement pension could be replaced with a disability pension.

[3] The Applicant sought leave to appeal from the General Division decision. It argued that the General Division erred in law and in fact as it applied the legal test for incapacity under the CPP and when it determined that the Respondent lacked this capacity.

[4] The Respondent submitted that the General Division did not err, and had sufficient evidence to reach the decision it did. In addition, the Applicant chose not to attend the General Division hearing, and should not be permitted to repeat arguments that were presented at the General Division in its written submissions, or to now advance arguments that could have been presented at the hearing but were not. Finally, the Respondent also argued that the Applicant ought not to be permitted to add evidence to the appeal record that was not properly before the General Division at that hearing and that to permit this appeal to go forward would be a breach of the principles of natural justice.

ANALYSIS

[5] 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.

[6] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the *Act* sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division (this section is set out in the Appendix to this decision). Therefore, I must decide whether the Applicant has presented a ground of appeal under section 58 of the *Act* that has a reasonable chance of success on appeal.

[7] The Applicant argued that the General Division erred in law and in fact when it applied the legal test for incapacity under the CPP in this case. It argued that the capacity to form or express the intention to make an application for a CPP disability pension is no different than the capacity to form or express the intent to make other choices. It argued that the Respondent made other choices during the time of alleged incapacity, which the General Division decision did not consider. In contrast, the Respondent argued that the General Division did not err with respect to the legal test for incapacity under the CPP. The General Division referred to the correct test, as set out in its decision.

[8] A review of the General Division decision confirms that the legal test for incapacity set out in the relevant legislation was identified. The General Division also examined the evidence that was before it. It is not clear, however, whether the General Division decision examined all of the evidence and applied it to the legal test for incapacity. If not all of the evidence was considered, the General Division may have made its decision without regard to the material before it. On this basis, the Applicant has presented a ground of appeal that has a reasonable chance of success on appeal.

[9] The Applicant also contended that the General Division decision should not have relied on the Certificate of Incapacity and the Declaration of Incapacity signed by Dr. Ready as they were contradictory. With this argument, the Applicant asks this Tribunal to reevaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact. The Tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the Tribunal who made the findings of fact (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). This ground of appeal does not have a reasonable chance of success on appeal.

[10] In addition, the Respondent argued that the Applicant should not now be permitted to re-litigate its case by presenting arguments that weren't persuasive at the General Division as grounds of appeal. The repetition of evidence or arguments is not a ground of appeal under the *Department of Employment and Social Development Act*.

[11] The Respondent also argued that as the Applicant chose not to attend the hearing in person, or to cross-examine the Respondent or his witnesses at the hearing, it should not now be permitted to introduce arguments to support its case that could have been presented at the General Division hearing. It seems that by raising arguments that could have been presented at the General Division hearing, it is attempting to re-litigate this matter. The Applicant has not, however, responded to this allegation. As I have granted leave to appeal on other grounds, I need not decide this issue at this time. I am prepared to accept submissions and law on this issue at the hearing of this appeal.

[12] The Respondent submitted, further, that the Applicant should not be permitted to add documents to the appeal record that were not properly before the General Division at that hearing. I agree. The Applicant had filed a Request pursuant to section 4 of the *Social Security Tribunal Regulations* asking for a decision on whether particular documents were before the General Division, and should therefore be included in the Appeal Record. I have made a decision on that Request already. No ground of appeal is disclosed by this argument.

[13] Finally, the Respondent argued that the Applicant knew that the Respondent was terminally ill, and chose not to attend the General Division hearing, and to permit the matter

to continue would be a breach of natural justice. The Respondent's circumstances are certainly tragic. Nonetheless, this argument does not point to a ground of appeal set out in section 58 of the *Department of Employment and Social Development Act*. Therefore, it does not have a reasonable chance of success on appeal.

CONCLUSION

[14] The Application is granted as the Applicant has presented at least one ground of appeal that has a reasonable chance of success on appeal.

[15] At the pre-hearing teleconference in this matter, the parties agreed to an expedited schedule for the filing of submissions for the appeal. In addition, if a party wishes to rely on evidence presented at the General Division hearing, it should provide a transcript of that evidence to all parties and the Tribunal in advance of the hearing of the appeal.

[16] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.