Citation: *D. R. v. Minister of Human Resources and Skills Development,* 2015 SSTAD 366

Appeal No: AD-13-731

BETWEEN:

D. R.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Shu-Tai Cheng

DATE OF DECISION: March 19, 2015

DECISION

[1] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on May 14, 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, 2011.

[2] The Applicant takes 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.

[3] While the Review Tribunal decision was written in French, the Applicant filed the Application for Leave to Appeal (Application) in English and his representative has corresponded to the Social Security Tribunal (SST) in English. For these reasons, this decision is written in English.

SUBMISSIONS

[4] The Applicant seeks leave on the following grounds: that his family physician could not refer him to a rheumatologist before the Review Tribunal hearing, a referral in the months following the decision was refused, he was only able to get an appointment in August 2013, he was also referred to a vascular surgeon only in June to August 2013, and the results of these appointments would be provided to the SST. With the filing of new medical documents in May and June 2014, the Applicant added the grounds: that a letter submitted at the Review Tribunal hearing from the Reverend of his church (noting a significant decline in his physical abilities) demonstrates that it would be impossible for him to commit to a regular work schedule and that it was possible, but financially difficult, for the Applicant to obtain a disability assessment from a rheumatologist.

[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* (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] 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] The grounds relied upon by the Applicant fall into two categories: (1) new facts in the form of new medical documents resulting from appointments with specialists after the Review Tribunal decision and (2) reference to a document that was before the Review Tribunal.

[11] The grounds related to "new facts" are discussed in the next section, below.

[12] The Board had considered the Applicant's submissions as they related to the letter from the Reverend and more generally the Applicant's efforts to return to work within his limitations and referred to these arguments in its decision at pages 6, 8 and 11.

[13] 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.

[14] 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

[15] Finally, the Applicant indicated that he would be producing various medical records to support his disability claim and additional materials were filed in May and June 2014. 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 DESD Act. Neither the leave application nor the appeal provides any opportunity to re-hear the merits of the matter.

[16] 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 DESD Act 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 May 14, 2013. He is now well out of time.

[17] Paragraph 66(1)(b) of the DESD Act 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.

[18] 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

[19] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division