Citation: *V. S. v. Minister of Employment and Social Development*, 2015 SSTAD 571

Appeal No. AD-15-197

BETWEEN:

V. S.

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: Hazelyn Ross

DATE OF DECISION: May 7, 2015

DECISION

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

INTRODUCTION

[2] On February 11, 2015 the General Division of the Social Security Tribunal, ("the Tribunal"), issued a decision denying the Applicant a *Canada Pension Plan*, ("CPP"), disability benefit. The Applicant has filed an application seeking leave to appeal, ("the Application"), the General Division decision.

ISSUE

[3] The Tribunal must decide whether the Appeal has a reasonable chance of success.

THE LAW

[4] Appeals of a General Division decision are governed by sections 56 to 59 of the *Department of Employment and Social Development Act*, ("DESD Act"). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "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."

[5] 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."

SUBMISSIONS

[6] The Applicant's representative submitted that she is entitled to a CPP disability pension because she is disabled; continues to be unable to work; and there was medical evidence to support that she was disabled prior to the minimum qualifying period (MQP). The Applicant's representative also submitted that due to the Applicant's language difficulties, incorrect information about the Applicant's attempts to find alternative work had been submitted to the Tribunal.

ANALYSIS

[7] Applications for leave to appeal are the first stage of the appeal process. They require an applicant to meet a threshold that is lower than that which must be met on the hearing of the appeal on the merits. However, 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 found that an arguable case at law is akin to whether, legally, an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[8] The grounds of Appeal are set out in subsection 58 (1) of the DESD Act. These are the only grounds on which an appeal can be sustained. They are,

> (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.

[9] In order to assess the possibility of success and to grant or refuse the Application, the Tribunal must first determine whether any of the Applicant's reasons for making the Application fall within any of the grounds of appeal set out above. The Applicant's representative has indicated that the appeal he would rely on all of the three stated grounds of appeal. On examining his first submission that the Applicant was disabled prior to the MQP and continues to be disabled to date, the Tribunal finds that this is no more than a statement of disagreement with the General Division decision. In making this submission the Applicant and her representative have not shown how the General Division erred. The General Division considered the medical evidence that was before it including the medical report of Dr. Kijenak which latter report was issued about ten months before the December 31, 2013 MQP date.

[10] The General Division, as the trier of fact, is charged with weighing the evidence before it. The Applicant and her representative disagree with the weight the General Division ascribed to Dr. Kijenak's report in its assessment of the severity of the Applicant's disability. Disagreement with a decision is not, however, a ground of appeal. Leave to appeal cannot be granted on this basis.

[11] The Applicant's representative also submits that her language difficulties caused incorrect information to be put before the Tribunal. The Tribunal records reveal that Croatian is the Applicant's mother tongue. Her initial interviews with the Respondent were conducted with the aid of a Croatian interpreter. However, it appears that no interpreter was scheduled for the December 2014 hearing. The complaint, however, is not with the conduct of the hearing; it is with the information that was provided to the Tribunal.

[12] In its decision, the General Division records that the Applicant testified that she applied for jobs to four or five different places including a Habitat for Humanity Restore Store. Her representative says she applied to four or five places daily. This is a vastly different picture of the Applicant's attempts to obtain alternative employment from that which, it appears, she testified to at the General Division hearing. Nonetheless, for the following reasons the Tribunal is not persuaded of the error.

[13] The Applicant has had the same representation since 2013. In the Tribunal's view it is reasonable to expect that the Applicant's representative knows the Applicant and is well versed in her story. Therefore, it is also reasonable to conclude that the Applicant's representative would have been aware of any language difficulty she might have been experiencing during the hearing and that he would have alerted the General Division to any such difficulty. Indeed, it was incumbent upon the Applicant's representative to do so at the earliest opportunity. That no such difficulty was raised during the hearing undermines the Applicant's present position as the basis for an appeal. In this regard, the Tribunal relies on its decision in *Kvito*[1] in which it held that "as the Appellant proceeded with the hearing without raising any issues, she implicitly waived any alleged breaches and is precluded from raising such a breach for the first time on appeal."

[1] *Kvito, Elianor v. Canada (MESD),* SST-AD -13-1601, March 9, 2015.

[14] In light of the foregoing, the Tribunal finds that the Applicant has not raised an arguable case or one that has a reasonable chance of success on appeal.

CONCLUSION

[15] The Application is refused.

Hazelyn Ross
Member, Appeal Division