Citation: *R. G. v. Minister of Employment and Social Development,* 2014 SSTAD 147

Appeal No.: AD-13-150

BETWEEN:

R. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

HEARING DATE : June 10, 2014

DECISION

[1] The application for leave to appeal is refused.

INTRODUCTION

[2] By a decision issued May 28, 2013, a Review Tribunal determined that the Applicant was not entitled to a *Canada Pension Plan (CPP)*, disability pension. In its decision, the Review Tribunal concluded that as of her Minimum Qualifying Period (MQP), date of December 31, 2009, the Applicant did not suffer from a severe disability that meets the definition of, contained in CPP ss. 42(2)(a).

GROUNDS OF THE APPEAL

[3] The Applicant seeks Leave to Appeal this decision, (the "Application"). Counsel for the Applicant submits that,

a) There was sufficient objective medical evidence and documentation on file supporting the Applicant's contention that as of December 2009 her condition is severe and prolonged;

b) The Review Tribunal failed to properly consider the medical evidence and documentation on file;

c) The Review Tribunal misapprehended the relevant facts.

The essence of the Applicant's complaint is that the Review Tribunal based its decision on an erroneous finding of fact that it made without regard for the material before it (CPP ss. 58 (1)(c).

[4] The Applicant's Counsel submitted the Application requesting Leave to Appeal, ("the Application"), to the Social Security Tribunal, ("SST"). The SST received the Application on August 27, 2013, which is one day outside of the time permitted for filing under ss. 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act). Ss. 57(1)(b) prescribes as follows,

> **57.** *Appeal time limit*- (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,
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> b. in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

However, s. 57 also provides that the Appeal Division may extend the time limit for an Application up to a maximum of one year. In the present circumstance where the breach is negligible, the Tribunal is of the view that *Gatellaro*[1] can be applied. In particular, the Tribunal finds that the Applicant has demonstrated a continuing intention to pursue the Application and, further, there is no prejudice to the other party in allowing a one-day extension of the time for filing the Application.

ISSUE

[5] The issue before the Tribunal is whether the appeal has a reasonable chance of success.

THE LAW

[6] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the DESD Act. Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that the Appeal Division must either "grant or refuse leave to appeal." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[7] Subsection 58(2) of the DESD Act sets out the applicable test for granting leave and provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[1] *Canada (Minister of Human Resources Development) v. Gattelaro,* 2005 FC 833. Namely that the applicant demonstrates a continuing intention to pursue the Application.

[8] Ss.58(1) of the DESD Act sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower one than that which must be met on the hearing of the appeal on the merits. However, to be successful, the Applicant must make out some arguable case[2] or show some arguable ground upon which the proposed appeal might succeed. In *St-Louis*[3], Mosley, J. stated that the test for granting a leave application is now well settled. Relying on *Calihoo,*[4] he reiterated that the test is "whether there is some arguable ground on which the appeal might succeed." He also reinforced the stricture against deciding, on a Leave Application, whether or not the appeal could succeed.

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

ANALYSIS

[10] The grounds put forward by the Applicant constitute a sort of "rolled-up" ground as essentially they rely on the same facts. Accordingly, the Tribunal will deal with them concurrently.

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[2] *Kerth v. Canada(Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[3] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[4] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

[11] Counsel for the Applicant takes issue with the Review Tribunal's treatment of the medical evidence as a whole and the post-MQP evidence in particular. In its decision the Review Tribunal makes the finding that while the Applicant was disabled at the date of the hearing she was unable to establish that she had a severe and prolonged disability at the date of her MQP. Counsel for the Applicant disputes this conclusion, submitting that the medical evidence and documentation on file support an opposite finding. Paragraphs 42 to 45 are the impugned paragraphs of the Review Tribunal's decision. They are set out below:

> [42] However, the Review Tribunal must inquire as to whether or not the Appellant has proven on the balance of probabilities that she was unable to work at any meaningful job at the time of her MQP.
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> [43] The Review tribunal notes the medical evidence show that the Appellant was having health issues up to her MQP, but no doctor has said that she is unable to work. The Review Tribunal also notes that although the Appellant might have been having some mental issues prior to the MQP, she did not consult any health profession for that until after the MQP, and
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> [44] The medical reports may indicate that the Appellant is disabled. However, the later medical reports, i.e. those post-MQP, cannot say that she was disabled at the time of her MQP.
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> [45] the onus is on the Appellant to prove she is disabled. This, on the balance of probabilities, the Appellant has not been able to do.

[12] In setting out the grounds of the Application, Counsel for the Applicant submits that the Review Tribunal erred in its assessment of the severe criterion. He also takes issue with the Review Tribunal's treatment of the medical evidence as a whole. In the decision, the Review Tribunal makes the finding that while the Applicant was disabled at the date of the hearing she was unable to establish that she had a severe and prolonged disability at the date of her MQP. Counsel takes the position that the Review Tribunal erred when it stated at paragraph 43 that while the Applicant may have been having health issues up to her MQP, no doctor has said that she is unable to work." He states that the Applicant's physician, Dr. McNabb made just such a statement in her note dated October 9, 2009.

[13] The note in question reads, "R. G. has had to quit work because of her chronic right shoulder and arm pain. Sitting all day, her neck would become sore and then her pain spreads to her lower back. I have acknowledged and agreed with this decision."

[14] The Applicant's counsel submits that the Review Tribunal failed to recognize that Dr. McNabb was confirming the Applicant's disability as severe and prolonged. He goes on to submit that Dr. McNabb stated in her report of September 8, 2012, that she was of the belief that she had provided evidence showing that the Applicant's condition was severe and prolonged prior to her MQP date. The question, therefore, is whether Counsel's interpretation of Dr. McNabb's medical note is correct and whether he has raised an arguable case?

[15] The Tribunal finds that Dr. McNabb's note of October 9, 2009 cannot be said to be a ringing endorsement of the contention that as of October 9, 2009 the Applicant suffered from a severe and prolonged disability. In the Tribunal's view, the note states nothing more than that on or about September 9, 2009 the Applicant advised Dr. McNabb that she had quit her job and why; that Dr. McNabb acknowledged that the Applicant had quit her job; and that Dr. McNabb expresses agreement with the Applicant's decision. Dr. McNabb does not provide a prognosis concerning the Applicant's recovery or even whether or not she envisioned the Applicant being able to return to work. In the circumstances of the case, these are significant omissions. In the Tribunal's view, it is reasonable to expect that Dr. McNabb would have stated clearly if and, possibly, in what time frame she expected the Applicant to return to work. She did not do so. The Tribunal infers from the omission that Dr. McNabb omitted this information because the note was, as stated earlier, no more than an acknowledgement of what the Applicant had advised her doctor. In the Tribunal's view, the Review Tribunal did not commit an error in this regard.

[16] As to the issue of the failure of other doctors to state whether the Applicant's condition was severe and prolonged, the Tribunal is not persuaded by Counsel for the Applicant's submission that they did not do so because, unlike as with Dr. McNabb in 2012, they were not specifically asked to comment on whether her condition was severe and prolonged. In

the Tribunal's view, whether or not an Applicant's medical condition is severe and prolonged is the type of information that a physician can reasonably be expected to provide without being prompted. This is not a basis for granting Leave.

[17] Counsel for the Applicant has submitted that the objective medical evidence and documentation on file was sufficient to support the Applicant's contention that prior to the MQP date of December 2009 she suffered from a severe and prolonged disability. He contends that the Review Tribunal failed to properly consider the medical evidence and documentation on file and misapprehended the relevant facts. Counsel relies on Dr. McNabb's medical note of October 9, 2009 and her report of September 8, 2012 to establish these errors in the Review Tribunal's decision. However, nothing in the decision indicates that the Review Tribunal failed to consider the totality of the medical evidence and documentation that was before it or misapprehended the relevant facts, which is the absence of medical evidence that clearly supports that the Applicant had a severe and prolonged disability on or prior to the MQP.

[18] In light of the above analysis, the Tribunal is not satisfied that the Review Tribunal either failed to properly consider the medical evidence and documentation on file or misapprehended the relevant facts. Further, the Tribunal is not satisfied that there is a reasonable chance of success on appeal.

CONCLUSION

[19] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division