Citation: M. *Z. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 11

Appeal No: AD-13-33

BETWEEN:

M. Z.

Applicant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: March 6, 2014

DECISION: LEAVE GRANTED

DECISION

[1] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On March 5, 2013, a Canada Pension Plan Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On March 5, 2013, the Applicant received the decision of the Review Tribunal. On May 27, 2013, the Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal"), within the 90 days permitted under the *Department of Human Resources and Skills Development (DHRSD) Act.*

ISSUE

[3] To grant leave to appeal to the Appeal Division, the Member must decide if the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *DHRSD 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".

[5] Subsection 58(2) of the *DHRSD Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

APPLICANT'S SUBMISSIONS

[6] The Applicant set out four grounds of appeal in support of his application for leave to appeal the decision of the Review Tribunal (two of which I have classified together as "errors in law"):

i) The Review Tribunal failed to observe a principle of natural justice in that it did not provide a fair hearing to the Applicant, firstly by failing to provide him with adequate time to present his case and secondly, by pressuring him throughout to complete his evidence and present his case.

ii) The Review Tribunal erred in law in making its decision, in that:

(1) it failed to apply the principles set out in *Villani v. Canada (Attorney General)* 2001 FCA 248 by failing to take into account his particular circumstances (where his employment is concerned) in a "real world context" in assessing whether or not his disability qualified as being severe, and

(2) it failed to apply the principles set out in *Bulger v. (MHRD)* (May 18, 2000) CP 9164 (PAB) in determining that he was required to comply with various treatment options.

iii) The Review Tribunal based its decision on an erroneous finding of fact, without regard to the material before it. In particular, the Review Tribunal found that the Applicant engaged in a grain farming occupation and that the enterprise would be capable of providing substantial and gainful employment, that there were viable treatment options which he had yet to pursue, and that he could expect a significant improvement in his symptoms with aggressive weight loss.

RESPONDENT'S SUBMISSIONS

[7] The Respondent has not filed any written submissions.

ANALYSIS

[8] 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, some arguable

ground upon which the proposed appeal might succeed is needed in order for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).

(i) Failure to Observe a Principle of Natural Justice

[9] The Applicant submits that the Review Tribunal failed to provide sufficient time for witnesses to give evidence or for any submissions to be made and placed time pressures on the Applicant. This is not an assessment of the merits of the appeal, so for the purposes of this leave application, I need not address the submissions made on behalf of the Applicant as to whether the Review Tribunal provided the parties with a fair hearing. (I need not address any questions also as to whether the evidence any witnesses intended to give was material and relevant to the application or might have been unduly repetitive.) I am satisfied, based on the Applicant's submissions, that there is an issue as to whether a fair hearing may have been accorded to the Applicant. This raises a ground upon which the appeal might have a reasonable chance of success and as such, I allow the application for leave to appeal.

(ii) Error in Law

(a) Failure to Apply *Villani*

[10] Subparagraph 42(2)(a)(i) of the *Canada Pension Plan* requires that for a disability to be severe, the person must be incapable regularly of pursuing any substantially gainful occupation.

[11] The Applicant is involved in a small hay operation and also does some trapping. The Review Tribunal found that his "earnings of perhaps $14,000, particularly through part-time efforts, were in fact found to be substantially gainful employment". The Applicant submits that the Review Tribunal erred in law in failing to apply the principles set out by the Federal Court in *Villani,* in that it did not assess his disability in a "real world context". The Applicant submits that in determining whether he is employable within the meaning of severe as set out by *Villani,* the Review Tribunal

ought to have taken into account the fact that he is capable of performing any work only with the assistance of his spouse, and that this employment is not remunerative.

[12] There is an arguable case to be made as to how *Villani* applies in determining whether an applicant's disability is severe for the purposes of subparagraph 42(2)(a)(i) of the *Canada Pension Plan*, when he is engaged in some employment. I am of the view that the issue as to how *Villani* might apply when an applicant is engaged in some employment raises a ground upon which the appeal might have a reasonable chance of success and as such, allow the application for leave to appeal.

(b) Failure to Apply *Bulger*

[13] The Applicant submits that the Review Tribunal was required to follow *Bulger* and that in failing to do so, it erred in law in finding that the Applicant's inability to lose weight and engage in a swimming program constituted a failure to comply with treatment. The Applicant further submits that any failure to comply with recommended treatment programs is not always unreasonable when viewed in the context of an Applicant's circumstances, including his particular medical condition. The Applicant referred to page 8 of the *Bulger* decision:

> While the Board agrees with the Minister's contention that Appellant has not always been fully compliant with the various recommended treatment programs, the Board nonetheless finds that Appellant's failure to fully engage or pursue these programs was not always unreasonable. Compliance must be viewed in the context of Appellants circumstances. Persons afflicted with fibromyalgia and experiencing the constant diffuse pain, lack of proper sleep, loss of energy, feelings of despair and associated depression cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or a trauma injury. Another factor that cannot be overlooked is quite often the lack of publicly funded secondary health care facilities including pharmacotherapy.

[14] Apart from the question as to whether the Review Tribunal properly made a finding of fact on the issue of the Applicant's failure to comply without any evidentiary basis, the Applicant submits that it was not unreasonable for him to comply with treatment recommendations, given his circumstances and medical condition. He

submits that it was not unreasonable, given the lack of available treatment facilities in his community and the question as to whether any of those facilities could accommodate any specific requirements his medical condition might demand. In essence, the Applicant submits that the Review Tribunal erred in requiring that he pursue all available treatment options, irrespective of whether or not it was appropriate for his circumstances.

[15] In my view, the issue as to what standard should apply in determining reasonableness of non-compliance with treatment recommendations raises a ground upon which the appeal might have a reasonable chance of success.

(iii) Erroneous Finding of Fact

[16] The Applicant submits that the Review Tribunal based its decision on erroneous findings of fact that it made without regard for the material before it. The Applicant submits that the Review Tribunal erred in finding that:

a) Swimming was an appropriate treatment for the Applicant's condition, when there was no evidence that any of his medical practitioners recommended this option.

b) His symptomology would improve and he would see improved function if he were to pursue all treatment options, including those made by the Review Tribunal, when there was no evidence that he would necessarily respond to any treatment.

c) He would be able to resume working again if he were to pursue all treatment options, including those made by the Review Tribunal, when there was no evidence that he would be able to resume working again.

d) He was engaged in a grain farming occupation, when the evidence showed that his actual involvement in the operations was rather meagre.

e) The farming enterprise was capable of providing substantial and gainful

> employment, when the evidence showed that the farm generated a loss for the years 2007 to 2011 and in the Applicant's submissions, therefore did not qualify as being substantially gainful employment.

[17] To be clear, I am not requiring that there be an actual demonstrated error on the part of the Review Tribunal, but in assessing this ground of appeal raised by the Applicant, I need to satisfy myself that the Review Tribunal made the findings which the Applicant submits the Review Tribunal made.

[18] The Review Tribunal set out the evidence before it. The only reference to swimming is at paragraph 41 of its decision. The Review Tribunal had enquired about "the aerobic suggestion". The Applicant had testified that the nearest indoor pool was some distance away and that it was prohibitively expensive for him to drive to go swimming. The Analysis section did not contain any specific references to swimming. It does not appear to me as if the Review Tribunal made a specific finding that swimming was an appropriate treatment for the Applicant's condition and I therefore find it unnecessary to determine this issue for the purposes of the leave application.

[19] I will address b) and c) together. The Applicant submits that the Review Tribunal made a finding that he would improve and resume working again, if he were to pursue treatment options. It was open to the Review Tribunal to have come to a decision based on its interpretation and analysis of the evidence, but the issue is whether the decision may have been based on erroneous findings of fact without regard for the material before it. These findings appear implicit in the Analysis section of the decision. If these findings of fact prove to be erroneous, as the Applicant submits, this could well go to one of the central issues in this case as to whether or not the Applicant's disability was severe as defined by the *Canada Pension Plan.* In my view, if the Review Tribunal may have based its decision on erroneous findings of fact without regard for the material before it, it raises a ground upon which the appeal might have a reasonable chance of success.

[20] I will address d) and e) together. The Applicant submits that the Review

Tribunal made a finding that he was engaged in a grain farming occupation and that the farming enterprise was capable of providing substantial and gainful employment. These findings appear in the Analysis section. If these findings of fact prove to be erroneous, as the Applicant submits, this could well go to one of the central issues in this case as to whether or not the Applicant was capable or incapable regularly of pursuing substantially gainful employment for the purposes of the *Canada Pension Plan.* In my view, if the Review Tribunal may have based its decision on erroneous findings of fact on these critical points, without regard for the material before it, it raises a ground upon which the appeal might have a reasonable chance of success.

CONCLUSION

[21] For the reasons stated above, the Application is granted.

[22] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division