Citation: *K. S. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 36

Appeal No. AD-13-5

BETWEEN:

K. S.

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 7, 2014

DECISION: LEAVE GRANTED

DECISION

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

INTRODUCTION

[2] On January 10, 2013, a Canada Pension Plan Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On or about February 14, 2013, the Applicant received the decision of the Review Tribunal. On May 8, 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 *(HRSD) Act.*

ISSUE

[3] To grant leave to appeal at 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 cited two general grounds in support of his application for leave to appeal:

- The Review Tribunal based its decision on an erroneous finding of fact without regard for the material before it. In particular, the Applicant submits

that the erroneous finding of fact rendered the Review Tribunal unable to "give proper weight to [his] efforts to remain employed", and secondly, led to an unfair assessment of [his] medical treatment".

- The Review Tribunal erred in law in making its decision, in that it failed to apply the principles set out in *Villani v. Canada (Attorney General)* 2001 FCA 248, namely that it failed to take into account his particular circumstances in a "real world context" in assessing whether or not his condition qualified as being severe, as defined by the *Canada Pension Plan*.

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 granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

(a) Erroneous Findings of Fact

i. Efforts to Seek Employment

[9] The Applicant submits that the Review Tribunal based its decision on an erroneous finding of fact that it made without regard for the material before it. While the Applicant submits that the error lies in failing to give proper weight to the evidence, he also submits that the Review Tribunal made an erroneous finding of fact that he made no efforts to obtain employment after he quit work in September 2009. The Applicant refers to paragraph 28 of the Review Tribunal's decision, which states,

> "The **Appellant has made no effort** to obtain employment not precluded by any functional limitations since he quit working in September 2009, nor has he pursued

any retraining or educational upgrading program that would permit him to obtain employment not precluded by his functional limitations." [My emphasis]

[10] While the Applicant did not refer to it in his submissions, paragraph 34 of the Review Tribunal's decision states,

> [34] The Tribunal concluded the **failure by the Appellant to make any effort to obtain work** or attend retraining or educational upgrading programs since he stopped working in September 2009, the conservative treatment, if any, of the Appellant's condition since he stopped working in September 2009, the failure by the Appellant to follow treatment recommendations of a neurologist and psychiatrist, and the continued usage of marijuana reported by the Appellant's psychiatrist as possibly exacerbating the Appellant's anxiety, led to the conclusion the Appellant did not have a "severe" disability before the end of his MQP of December 31, 2011. The Tribunal is of the opinion the Appellant failed to establish he was incapable regularly of pursuing any substantially gainful occupation before the end of his MQP." [My emphasis]

[11] The Applicant submits that the Review Tribunal erred and overlooked crucial evidence by finding that he had not undertaken any efforts to locate employment after September 2009, when the evidence was to the contrary. The Applicant submits that after September 2009, he in fact continued to seek employment and applied for several jobs, but received no response. His evidence in this regard is set out at paragraph 10 of the Review Tribunal's decision, which states, "With the exception of a couple applications submitted after he quit work in September 2009…" The Applicant also enrolled in the EI Self Employment Program and tried to start a home business selling indoor light fixtures, as he thought that a home-based business would allow him to manage his medical condition. In his leave application, the Applicant explained that the business failed, due to his lack of education, training and experience. The Review Tribunal noted that the Applicant had testified that he would have continued the business had it been successful.

[12] To be clear, I am not assessing the merits of the application, nor am I requiring that there be a demonstrated error on the part of the Review Tribunal. While there may be an issue as to whether or not the Applicant correctly identified the finding of fact which is said to be erroneous, or interpreted or understood it correctly, that is of no relevance in a leave application. As long as the Applicant can show that the appeal has a reasonable chance of success, that is sufficient grounds to grant leave. In this case, the Applicant has to identify what he perceives to be an erroneous finding of fact upon which the Review Tribunal based its decision. He has met this test and I therefore grant leave on this ground.

[13] The Applicant also submits that the Review Tribunal "did not give proper weight to [his] efforts to remain employed and found that he had made no effort to obtain employment, despite evidence to the contrary". Framed this way, this submission goes to the issue of the weight to assign to the evidence. A Review Tribunal is permitted to consider the evidence before it and attach whatever weight it determines appropriate. It is also open to a Review Tribunal to assess the quality of the evidence and determine what evidence, if any, it might choose to accept or disregard. Had his appeal been limited to a matter of the weight to assign to the evidence, I would have found that ground of appeal to be without any reasonable chance of success such as to justify leave.

ii. <u>Medical Treatment</u>

[14] The Applicant submits that the Review Tribunal based its decision on an erroneous finding of fact that it made without regard for the material before it, yet he does not identify what the erroneous finding of fact is as it relates to his medical treatment. He does not disagree with the Review Tribunal's findings relating to his medical treatment. I find that this ground of appeal has no reasonable chance of success and deny leave on this ground.

[15] The Applicant objects to how the Review Tribunal, to some extent, applied its findings of fact to determine whether the Applicant's disability was severe. The Applicant submits that the Review Tribunal was unfair in assessing the appropriateness of his treatment regime. The Applicant notes that the Review Tribunal found that he had not pursued physiotherapy, psychotherapy or medication which had been recommended to him

for treatment of back pain, depression and anxiety. The Applicant notes that he had testified that he was unable to afford the cost of physiotherapy until after he began receiving Ontario Disability Support Program benefits in approximately October 2012. He felt that the Review Tribunal ought not to have found that he had failed to seek appropriate treatment recommendations when he did not pursue physiotherapy, given that he was facing financial constraints up to approximately October 2012.

[16] The Applicant also notes that he had testified that he had ceased taking anti- anxiety medications, Zoloft in particular, to treat his anxiety and depression, due to actual and potential negative side effects. The Applicant felt that the Review Tribunal ought not to have found that he had failed to seek appropriate treatment recommendations by failing to take medications to treat his anxiety and depression, given the adverse side- effects he had encountered or might encounter from taking them. The Applicant is of the position that it was reasonable for him to reject any medications if they actually or could lead to adverse side-effects.

[17] The Applicant feels that it is unfair for the Review Tribunal to have concluded that by ceasing medications and not pursuing physiotherapy, he therefore did not have a severe disability as defined by the *Canada Pension Plan*, when he was able to explain why he did not follow certain treatment recommendations.

[18] The Applicant did not make any submissions in his application for leave in response to the Review Tribunal's findings that he had not pursued psychotherapy.

[19] In its reasons, the Review Tribunal referred to *MHRD v. Mulek* (September 13, 1996), CP 4719 (PAB):

> "It has been consistently held by this Board that an applicant for a disability pension is obligated to make all reasonable efforts to undertake and submit to programs and treatments recommended by the treating and consulting physicians. Such programs quite often offer the only hope of ever regaining the capacity to engage in gainful occupation. Only when those measures fail after reasonable attempts and efforts, can it be determined that the disability is severe as that term is defined."

[20] It is unclear from the leave application whether the Applicant equates what he regards as an unfair assessment of the evidence by the Review Tribunal with bias on the part of the Review Tribunal, but while he disagrees with the decision of the Review Tribunal, that alone does not indicate any bias or unfair treatment. While an applicant is not required to prove bias or unfair treatment for the purposes of a leave application, at the very least, an applicant ought to set out some bases for his submissions. It is insufficient to restate the evidence that was before the Review Tribunal and to suggest that the Review Tribunal ought to have drawn a separate set of conclusions, as evidence of bias or unfairness. In this particular case, the Review Tribunal cited some authority to support its decision. The Applicant needs to show some supporting references or set out some basis in his submissions as to how the Review Tribunal may have been unfair. As he has not done so, I find that this ground of appeal falls short in demonstrating that there could be a reasonable chance of success and I therefore deny leave on this ground.

(b) Failure to Apply *Villani*

[21] The Applicant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court in *Villani v. Canada (Attorney General),* 2001 FCA 248, in that it did not assess his disability in a "real world context". He submits that the Review Tribunal must consider factors such as a person's "age, level of education, language proficiency and past work and life experience." He further submits that in this particular case, the Review Tribunal neglected to consider his particular circumstances, despite referring to *Villani* at paragraph 24 of its decision. While he cites a number of factors which he submits the Review Tribunal ought to have taken into consideration in its decision, assessing these factors goes beyond the scope of this leave application. I find that the issue of whether or not the Review Tribunal properly applied or failed altogether to apply *Villani* against the backdrop of the Applicant's particular circumstances raises a ground upon which the appeal might have a reasonable chance of success. As such, I would allow the application for leave to appeal on this particular issue.

CONCLUSION

[22] The Application is granted.

[23] 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