Citation: *W. W. M. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 40

Appeal No. AD-13-785

BETWEEN:

W. W. M.

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 25, 2014

DECISION: LEAVE REFUSED

DECISION

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

INTRODUCTION

[2] On February 27, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On or about March 22, 2013, the Applicant received the decision of the Review Tribunal. On November 19, 2013, the Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal"), approximately five months after the time permitted for filing, under section 57 of the *Department of Employment and Social Development (*DESD*) Act.*

ISSUES

[3] Should the Appeal Division allow further time within which an application for leave to appeal is to be made?

[4] Does the appeal have a reasonable chance of success?

THE LAW

[5] According to subsection 57(2) of the DESD Act*, "*the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant".

[6] According to subsections 56(1) and 58(3) of the DESD 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".

[7] 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".

APPLICANT'S SUBMISSIONS

[8] The Application Requesting Leave to Appeal and Notice of Appeal is dated October 21, 2013. The Honourable Joy Smith, Member of Parliament for Kildonan-St. Paul, prepared a letter dated October 25, 2013, supporting the Applicant's claim for disability benefits. The Social Security Tribunal received the Application and Ms. Smith's supporting letter on November 19, 2013.

Late Filing of Application

[9] The Applicant addressed the lateness of his leave application in his letter of October 21, 2013:

> *"My request to your office is beyond the 90 days indicated for application.* The reason for this delay is that with each "decision letter" from CPP and The Review Tribunal, they have indicated, "There must be some kind of work you can do." This statement, which appears in each letter and seems to be the basis for the denial of my claim for benefits, does not include any supporting information on how they come to this conclusion, denying me the ability to form a case for an appeal. Of course, without some type of support, this statement becomes opinion and not fact.
>
> In each of my responses to these decisions, I have made "Formal Requests" for this information to be sent to me. This would allow me to put together my grounds for appeal. As you know, the length of time taken by CPP and The Review Tribunal for review, analysis, and decision is extremely lengthy, at times up to 24 months, so I have waited patiently for a response to my "formal requests", believing this information would be sent and allow me to form a basis for my appeal.

[10] Ms. Smith advised that the Review Tribunal's finding that the Applicant could do some kind of work led to his delay in filing the appeal materials. The Applicant found that the reasons of the Review Tribunal were insufficient to allow him to understand how it arrived at its finding that he could do some work, and hence left him unable to properly prepare an appeal. He claims that he had made numerous "Formal Requests" for information as to how the Review Tribunal arrived at its decision, and was still awaiting a

response. Despite the fact that he did not receive a response, he proceeded nonetheless to file a leave application.

Application for Leave

[11] In his letter of October 21, 2013, the Applicant set out a number of grounds of appeal in support of his application requesting leave to appeal the decision of the Review Tribunal. They include the following, that:

a) The Respondent submitted that he could perform some type of lighter or sedentary work on a full-time or part-time basis,

b) The Respondent submitted that he had not investigated SI joint injections and could improve with such treatment,

c) The Respondent submitted that by increasing his daily physical activity, stretching and massage, he would see some relief in his condition, and

d) The Review Tribunal found that his long and varied work history, computer literacy and written communication skills would enable him to pursue some type of work.

[12] The Applicant submits that there is no factual foundation upon which the Respondent could make these submissions or for the Review Tribunal to make its findings. He submits that the decision to deny his claim for disability benefits is arbitrary and without justification.

[13] In particular, the Applicant claims that the evidence discloses that he had in fact investigated SI injections but elected not to pursue them, due to his age and physical condition. He also claims that he had in fact increased his daily physical activity by leaving a sedentary occupation for a more physically demanding one, and by also adding controlled exercise. He claims that the Review Tribunal misapprehended the medical evidence physical and failed to appreciate that it takes him considerable time and effort to generate any written communications, which would undermine his ability to seek employment.

[14] In short, the Applicant submits that the Review Tribunal based its decision on erroneous findings of fact made without regard for the material before it.

[15] The Applicant also submits that the Review Tribunal decision be overturned, given the lengthy delays in receiving a favourable decision since his initial application is without what he regards "supported opinion". Further, the Applicant feels that both he and his family physician have provided sufficient detailed information to meet the "severe and prolonged" criteria for Canada Pension Plan disability benefits.

Additional Considerations

[16] The Applicant submitted a letter dated January 21, 2014, in which he provided a summary of his medical condition, as "indicated in [his] original application. He also made supplementary submissions regarding the definition of disability. He cited various authorities from different jurisdictions.

[17] On February 1 and 7, 2014, the Applicant e-mailed the Social Security Tribunal, in follow-up for a response. He attached a letter to his e-mail of February 7, 2014, suggesting that some form of recovery would be appropriate in his circumstances, given that he had encountered lengthy delays. He also requested that the Social Security Tribunal consider whether policy section 2.4 might apply in his circumstances. He enquired as to whether a hearing would be required and if a decision could be made on the basis of documents and submissions on file. (The policy section refers to materials which appeared on the website of the Social Security Tribunal.)

[18] On or about February 24, 2014, the Applicant submitted a CT scan report of his lumbar spine dated January 23, 2014, taken approximately one month after his minimum qualifying period, the date by which he is required to have been found disabled. The CT scan shows degenerative changes at the L3-L4 and L4-L5 levels. The CT-scan also shows generalized disc bulging with a broad-based disc protrusion slightly compressing the thecal sac.

[19] In an e-mail dated February 25, 2014, the Applicant requested that there be a (1) pre-hearing, (2) settlement conference or (3) dispute resolution process, to settle his appeal. He

again referred to policy section 2.4. He wrote that if the parties were to reach a settlement, they could request the Review Tribunal base its decision on a signed agreement between all parties.

[20] In an e-mail dated March 20, 2014, F. K. submitted a letter of support on behalf of the Applicant. Mr. F. K. has known the Applicant for over 20 years. He has observed the Applicant's condition progressively deteriorate, particularly in the past five years. Mr. F. K. advises that he has assisted the Applicant with basic cleaning and maintenance of his home and with transportation to medical appointments. He notes that the Applicant seldom participates in sedentary social activities.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

<u>Late Filing of Application</u>

[22] In *Canada (Minister of Human Resources Development) v. Gattelaro,* 2005 FC 833, the Court set out the four criteria which the Appeal Division should consider and weigh in determining whether to extend the time period beyond 90 days within which an applicant is required to file his application for leave to appeal, as follows:

1. A continuing intention to pursue the application or appeal
2. The matter discloses an arguable case
3. There is a reasonable explanation for the delay and
4. There is no prejudice to the other party in allowing the extension.

[23] I will deal with the issue of prejudice firstly. The Respondent was notified that the Applicant had filed a leave to appeal on or about November 19, 2013. The Respondent has not filed any submissions in response to the leave application or in respect of the issue as to

whether it would be appropriate to allow an extension of time for filing of the leave application. The Respondent has not filed any submissions regarding any prejudice it might suffer if an extension were to be allowed.

[24] In *Canada (Minister of Human Resources Development) v. Dawdy,* 2006 FC 429, the Court found that a delay of approximately 10 months could arguably be considered prejudice to the Minister.

[25] In *Leblanc v. Minister of Human Resources Development*, 2010 FC 641, the Court found that there was no prejudice with a delay of approximately 9 months and, that to find otherwise on the facts, fell "outside the range of possible acceptable outcomes and was unreasonable". The Court said,

> "The Board found that the Minister would be prejudiced in preparing her response to the appeal due to the passage of nine months The Board stated that witnesses' memory would be diminished and that their power of recollection would decrease. The Board was also concerned that there be finality to proceedings under the *Canada Pension Plan.* I would note that the witnesses in this case will likely be the applicant and her medical witnesses. In my opinion, a nine month delay would not effect (*sic)* the applicant's memory with respect to her medical condition as I believe a person is quite capable of remembering her medical condition. As to the medical witnesses, they would have notes and reports on which they could rely. In my view, the Board's determination that there was prejudice to the Minister falls outside the range of possible acceptable outcomes and was unreasonable.
>
> As a result of my finding, the application for judicial review is allowed and the matter is referred back to a differently constituted panel or member of the Pension Appeals Board for redetermination."

[26] Here, we are dealing with a delay of approximately five months. For the reasons expressed in *Leblanc,* I find that there is no prejudice to the Respondent if an extension of time were to be allowed. While this aspect of the test for allowing an extension of time is met, I must also be satisfied that the other three criteria are met.

[27] It is perhaps clear that after October 21, 2013, the Applicant had a continuing intention to pursue an appeal. What is less clear is whether he had a continuing intention between the time he was required to file his leave application in June 2013 and October 21, 2013, when he prepared his leave application.

[28] In his letter of October 21, 2013, the Applicant indicated that he had made “formal requests” for information to be sent to him, to enable him to prepare an appeal of the Review Tribunal’s decision. The materials before me do not contain copies of any such requests or notes of any telephone requests or messages from the Applicant, to evidence any continuing intention to pursue the appeal since June 2013. There may be a gap in the file materials, but in my view, it was incumbent upon the Applicant to provide evidence of a continuing intention.

[29] Even if I accept that the Applicant made “Formal Requests” in writing and by telephone communications, I note that there was a further delay in filing the Application after October 21, 2013. The Applicant has not provided any justification as to why there was an additional delay in filing the Application after October 21, 2013. Even if I had not found that there was no delay after October 21, 2013, the Applicant is still required to provide a reasonable explanation for the delay in filing the Application after June 2013.

[30] The Acting Director of Tribunal Operations and Communications of the Office of the Commissioner of Review Tribunals sent the decision of the Review Tribunal by registered mail to the Applicant on or about February 27, 2013. In the accompanying letter, the Acting Director wrote,

- If you do not agree with the Review Tribunal’s decision, you can ask for an appeal to the Pension Appeals Board (PAB).

- If you wish to appeal the decision, you must apply to the PAB within 90 days... We have also enclosed an application form.

[31] The Applicant explains that he delayed in filing a leave application, largely because he felt that the Review Tribunal had failed to provide sufficient reasons in its decision to explain how it found that he is able to do some kind of work. He felt that he would be unable to prepare the appeal materials without sufficient reasons. He explained that he made “Formal Requests” seeking an explanation of the Review Tribunal’s decision, but after several months without any response, decided to seek assistance from his Member of

Parliament. He felt that the OCRT or Review Tribunal would give a more timely response to enquiries from a Member of Parliament.

[32] The Applicant felt that he was entitled to wait for an indefinite period of time, given that several months had elapsed from the time of his initial application to the time that the Review Tribunal had rendered its decision. Indeed, he wrote that the length of time taken by CPP and the Review Tribunal for review, analysis and decision writing "is extremely lengthy, at times up to 24 months". I note that the hearing before the Review Tribunal took place on January 15, 2013 and that a decision was rendered little more than a month later, on February 27, 2013.

[33] The letter dated February 27, 2013 from the OCRT explicitly stated that if an applicant wished to appeal the decision, an application had to be made within 90 days. There is no indication in the letter from the OCRT that an applicant could seek an extension of time for filing a leave application. It is unknown whether the Applicant made any enquiries prior to November 19, 2013 to determine whether he could seek an extension of time for filing a leave application.

[34] While the Applicant says that he was unable to prepare his application as he did not understand the reasons underlying the findings of the Review Tribunal that he could perform some type of work, ultimately he was able to raise some arguments for an appeal on this very issue, namely, that the Review Tribunal did not provide adequate reasons for its decision. The leave application set out other grounds that could have enabled the Applicant to proceed (though I can appreciate that he might have wanted to file the application setting out all of his grounds for appeal together).

[35] While the Applicant says that he did not understand the reasons of the Review Tribunal and therefore could not prepare a leave application, at the end of the day, he was in fact able to prepare a leave application without the benefit of any response to his requests for information. Had the Applicant fully turned his mind to preparing the leave materials at a much earlier date, I find that he could have filed the leave application within the time permitted for filing. In other words, I do not accept that the Applicant has provided a reasonable explanation for the delay in filing the leave application up to October 21, 2013.

[36] While there may have been a continuing intention established by October 21, 2013, the Applicant is required to also provide a reasonable explanation for any ongoing delays. Here, no explanation has been offered for the delay after October 21, 2013.

[37] Finally, in dealing with whether the matter discloses an arguable case, I will review this in the context of the application for leave. The test for granting a leave to appeal is arguably somewhat broader, in that it requires an applicant to show that the appeal has a reasonable chance of success.

Application for Leave

[38] 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).

[39] Subsection 58(1) of the DESD Act set 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;

(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.

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

(i) Failure to Observe Principle of Natural Justice

[41] The Applicant does not state outright that the Review Tribunal failed to observe a principle of natural justice, but I understand from his submissions that he feels that there is a breach of natural justice in that he has had to endure lengthy delays, from the time of his application to the date that this leave application is being considered.

[42] I have reviewed the general chronology of this matter, from the time that the Applicant filed his Application for Disability Benefits filed on May 24, 2011. A medical adjudicator with Service Canada sent the Applicant a letter dated September 24, 2011, indicating that there had been unsuccessful attempts to contact him. There is no indication as to how many and when those attempts might have been made. The adjudicator also advised that his application for disability benefits was denied. On October 19, 2011, the Applicant submitted a letter requesting reconsideration of the decision denying him benefits. On December 5, 2011, another medical adjudicator sent him a letter confirming that his application for disability benefits was denied.

[43] The Applicant appealed the decision to the OCRT on February 23, 2012. On March 1, 2012, the OCRT sent a letter to the Applicant acknowledging receipt of his appeal to a Review Tribunal. On March 21, 2012, the OCRT provided some materials to assist him in preparing for his hearing. On March 29, 2012, the OCRT provided the Applicant with a copy of documentation prepared by the Department of Human Resources and Skills Development, which it used to make its decision on his disability application. On May 14, 2012, the OCRT wrote to the Applicant to summarize what had been recently discussed and to provide some information about the hearing before the Review Tribunal. On October 30, 2012, the OCRT wrote to the Applicant, in follow-up to a recent telephone conference, confirming that he was available for a Review Tribunal hearing on January 15, 2013. On December 3, 2012, the OCRT wrote to the Applicant reminding him that a Review Tribunal hearing was scheduled for January 15, 2013. The Review Tribunal hearing proceeded on that date and the Review Tribunal rendered its decision on February 27, 2013. The Applicant received a copy of the Review Tribunal's decision on March 22, 2013.

[44] The Applicant filed his Application requesting leave on November 19, 2013. The Social Security Tribunal wrote to him on November 19, 2013, acknowledging receipt of his application.

[45] While the Applicant may have experienced delays during the appeals process, the DESD Act indicates that the types of delays described by him are not one of the grounds of appeal. If there has been a breach of natural justice, it seems that the Applicant would have to demonstrate that it had been committed by the Review Tribunal (in failing to observe a principle of natural justice) and that he has been prejudiced by the delay. I am sensitive to the fact that even a minor delay is causing financial hardship for the Applicant, but delays are inevitable with any process and here, I do not find that the delays have been beyond what can be expected in such a process.

[46] I do not find that there were any undue or excessive delays throughout this process, including before the Review Tribunal, to find that there was a breach of the principles of natural justice. The lengthiest delay of apparent inactivity that has taken place appears to have been the timeframe between when the decision of the Review Tribunal was rendered to when the application for leave was filed. I am not satisfied that the Applicant's submission that there have been delays raises either an arguable case or a reasonable chance of success, and I refuse the application for leave on this basis.

(ii) Erroneous Findings of Fact

[47] For the purposes of this leave application, I do not require 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.

[48] The Applicant submits that the Review Tribunal erred in making findings of fact, without regard for the material before it, in that:

a) The Respondent found that he could perform some type of lighter or sedentary work on a full-time or part-time basis,

b) The Respondent found that he had not investigated SI joint injections and could improve with such treatment,

c) The Respondent found that by increasing his daily physical activity, stretching and massage, he would see some relief in his condition, and

d) The Review Tribunal found that his long and varied work history, computer literacy and written communication skills would enable him to pursue some type of work.

[49] The Applicant has failed to distinguish between the Respondent and the Review Tribunal. They are not one and the same. The Review Tribunal is an administrative tribunal, independent of any of the parties, including the Respondent. The Review Tribunal acts at arm's length and is not bound by any submissions from any of the parties before it.

[50] The grounds for appeal are based on errors committed by the Review Tribunal, not the Respondent or another party. There is no right to appeal a Review Tribunal's decision based solely on submissions made by a Respondent.

[51] In this case, the Review Tribunal set out the submissions of both parties in its decision. The three points a) to c) above formed part of the Respondent's submissions. The Review Tribunal did not adopt these submissions as part of its findings or decision. These submissions did not appear in the Analysis section of the decision.

[52] While the Applicant submits that the Respondent found that he had not investigated SI joint injections and that he could improve with such treatment, the Review Tribunal had written that, "The medical evidence suggests that there are treatments (e.g. SI joint injections) and neuropathic pain medications that have not yet been tried and could provide relief". I find that there is a difference between the two, such that it cannot be said that the Review Tribunal adopted the Respondent's submissions as part of its findings of fact.

[53] The Review Tribunal found that the Applicant has a long and varied work history, computer literacy and communication skills which would enable him to pursue some type of work. I find that the Review Tribunal drew these conclusions based on the evidence before

it. It was open to the Review Tribunal to have come to a decision based on its interpretation and analysis of the evidence, provided that there was no palpable or overriding error in its findings of fact. 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 not done so. The Applicant does not dispute that he has a varied work history or that he is computer literate. While he feels that the Review Tribunal should have taken his physical limitations into account, he does not disagree with the Review Tribunal's findings either that he has good communication skills. As the Applicant has not identified the finding of fact made by the Review Tribunal which is said to be erroneous, I am not satisfied that he has raised an arguable ground or that there is a reasonable chance of success. I refuse the application for leave on this basis.

Additional Considerations

a) New Facts and Submissions

[54] Although the Applicant has filed additional records and submissions, including a CT scan of his lumbar spine taken on January 23 2014, I am unable to consider any new materials. The Applicant has not stated why he filed the additional medical records or how they might fall into one of the grounds of appeal. If the Applicant has filed the medical report in an effort to rescind or amend the decision of the Review Tribunal, he must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and he must also file an application for rescission or amendment with the same Division that made the decision (or in this case, the General Division of the Social Security Tribunal). There are additional requirements that an Applicant must meet to succeed in an application for rescinding or amending a decision. Section 66 of the DESD Act also 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 has no jurisdiction in this case 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. In short, there are no grounds upon which I can consider the additional records.

[55] Even if I were permitted to consider new facts, I would not have been persuaded that the CT-scan taken on January 23, 2014, shows that the Applicant is severely disabled. The CT-scan is simply a diagnostic tool that does not speak to the severity of the Applicant's disability.

[56] This is not a re-hearing of the merits of this matter, and I am unable to consider as well any additional submissions which the Applicant has filed.

b) Delays

[57] I have previously addressed the Applicant's submissions that he should be entitled to benefits, owing to the fact that he has encountered numerous delays throughout the process, and I will not repeat them here.

c) Conferences and Other Procedures

[58] Finally, the Applicant enquires as to whether a pre-hearing, settlement conference or dispute resolution can be scheduled to settle his appeal. Sections 15 and 16 of the *Social Security Tribunal Regulations* allow a Tribunal Member to request that the parties participate in a pre-hearing or dispute resolution process, while section 17 allows a Tribunal Member to hold a settlement conference with the parties for the purposes of resolving the appeal or application. While the *Regulations* do not set out any grounds whereby a Member can exercise his or her discretion, I am of the opinion that there should not only be some indication of the issues to be determined at such a hearing, but also an indication that such a hearing would be of some value to the parties. I am not persuaded that such a hearing would be of any value and I decline to exercise my jurisdiction.

CONCLUSION

[59] For the reasons expressed above, the Application is refused.

Janet Lew

Member, Appeal Division