Citation: *M. C. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 20

Appeal No: AD-13-47

BETWEEN:

M. C.

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 26, 2014

DECISION: LEAVE GRANTED

DECISION

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

INTRODUCTION

[2] On June 12, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. The Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on July 5, 2013, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

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

THE LAW

[4] 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".

[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".

APPLICANT'S SUBMISSIONS

[6] The Applicant prepared lengthy submissions, including a detailed "Background" and "Conclusions" which summarize the Applicant's medical condition and his restrictions and limitations. The "Background" duplicates the Background written submissions before the Review Tribunal, while the "Conclusions" more or less mirrors the written closing submissions. Neither the "Background" nor the "Conclusions" addresses the leave issues. The detailed "Background" and "Conclusions" as they are set out are unnecessary as I have a copy of the documentary

evidence and submissions that were before the Review Tribunal. To be clear, the leave application is not an opportunity for the Appeal Division to re-hear and reassess the evidence or any submissions before the Review Tribunal. It is not a re-hearing of the merits of the claim.

[7] The Applicant submits that the Review Tribunal made errors of mixed law and fact in denying his appeal for a disability pension, as it failed to consider relevant evidence, considered irrelevant evidence and misapprehended the evidence before it.

[8] The Applicant set out two general grounds of appeal in support of his application for leave to appeal the decision of the Review Tribunal:

i) It erred in law in making its decision, in that it failed to:

1. apply the principles set out in *Villani v. Canada (Attorney General)* 2001 FCA 248 by neglecting to consider the Applicant's particular circumstances such as his age, training, and prior work experience and by failing to consider his employability in the "real world".

2. apply the principles set out in *E.J.B. v. Canada (Attorney General),* 2011 FCA 47 by only considering the Applicant's main disabling condition instead of his entire condition.

3. apply the principles set out in *The Attorney General of Canada v. Dwight St.-Louis,* 2011 FC 492 by not referring to any of the medical documentation, particularly those around the time of his minimum qualifying period, in its analysis of the Applicant's case.

4. apply the principles set out in *Cochran v. Canada (Attorney General of Canada),* 2003 FCA 343, by focusing on the Applicant's current medical health without considering the medical evidence around the time of his minimum qualifying period.

5. notwithstanding the Applicant's testimony, apply the principles set

out in *MHRD v. Ethier,* CP 6086 (July 1998), by not considering whether it was realistic that the Applicant was capable in undergoing any retraining.

ii) Based its decision on erroneous findings of fact, without regard to the material before it, in that it "ignor[ed] relevant evidence addressing the severity of the Applicant's impairments" and ought to have assigned "considerable weight" to the conclusions stated in the medical opinions. The Applicant submits that it necessarily committed an error of fact by finding that the Applicant did not have a severe disability, when presented with "overwhelming evidence to the contrary".

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

Errors in Law

[10] 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 Development)*, [1999] FCJ No. 1252 (FC).

[11] Subsection 58(1) of the DESD *Act* states that the only grounds of appeal are 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.

[12] The decision of the Review Tribunal is considered a decision of the General Division.

[13] The Applicant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General),* 2001 FCA 248, in that it did not assess his disability in a "real world context". 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. It is sufficient to show that the Review Tribunal may not have considered some of the factors contemplated by *Villani* or other personal circumstances of the Applicant in assessing the severity of his disability, as they may have been determinative of the final issues. Here, the Review Tribunal may have engaged in some analysis and considered his age in assessing the severity of his disability, but my role is not to evaluate the merits of this submission or assess how some of the factors affect the determination of severity. As long as the Applicant raises this issue and shows that the Review Tribunal may not have applied *Villani* and may have overlooked factors for consideration, this creates an arguable case. I find that the issue of whether the Review Tribunal properly applied or failed altogether to apply *Villani* raises a ground upon which the appeal might have a reasonable chance of success. As such, I allow the application for leave to appeal on this particular issue.

[14] The Applicant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court of Appeal in *E.J.B. v. Canada (Attorney General),* 2011 FCA 47 by failing to consider the Applicant's entire condition, and not the main disabling condition. Assuming that what the Applicant says is true, that the Review Tribunal failed to consider the Applicant's entire condition, there is an arguable case to be made not only in how *E.J.B.* applies, but also what the cumulative effect of his conditions might have had in determining whether his disability is severe. I find that the issue of whether or not the Review Tribunal properly applied or failed altogether to

apply *E.J.B* and its impact upon the ultimate issue raises a ground upon which the appeal might have a reasonable chance of success. As such, I allow the application for leave to appeal on this particular issue.

[15] The Applicant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court in *The Attorney General of Canada v. St.-Louis,* 2011 FC 492 by failing to refer to any of the medical documentation, particularly those around the time of his minimum qualifying period, in its analysis of the Applicant's case.

[16] I am of the view that the Applicant has not fully articulated the substantive impact of the *St. Louis* decision. In *St.-Louis,* the Court considered the Attorney General of Canada's application for judicial review of the decision to grant leave. The issue before the Court was whether the Pension Appeals Board erred in granting leave. The Court examined whether, in granting leave, the application before the PAB raised an arguable case. As part of its determination as to whether the leave application raised an issue of law or of relevant significant facts not appropriately considered by the Tribunal, the Court examined the Review Tribunal decision. The Court said that while the Review Tribunal was correct to conclude that the appellant there had not made reasonable efforts to undertake and submit to programs and treatments recommended by treating and consulting physicians, the analysis did not stop there. The Court held that the Review Tribunal was also required to apply *Villani*, by assessing an applicant's background as well as his medical condition. In short, if *St.-Louis* were to apply, any analysis of an applicant's disability undertaken by a Review Tribunal must necessarily include a review and assessment of all relevant factors, including an applicant's "background" and his medical condition. Any analysis is incomplete if it focusses solely on a limited number of factors, such as his compliance with treatment recommendations.

[17] I do not propose to assess the merits of the application nor undertake any interpretation of the Review Tribunal's decision. There is an arguable case as to whether or not the Review Tribunal conducted a comprehensive review of the factors in

its analysis. 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 on this issue.

[18] The Applicant also submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court of Appeal in *Cochran v. Canada (Attorney General of Canada),* 2003 FCA 343 in that it did not consider the medical evidence around the time of his minimum qualifying period, in coming to its decision and instead, focused on the health of the Applicant at the date of the hearing.

[19] These two submissions above appear to be at some odds. On one hand, the Applicant submits that the Review Tribunal did not consider any of the medical evidence, but on the other hand, the Applicant submits that the Review Tribunal did consider the medical evidence and that it was selective in the evidence it chose to consider in coming to its decision. I have not been asked to treat these two submissions as alternative submissions.

[20] The difficulty that I have with these submissions is that there was relatively little in the way of documentary medical records or expert opinions concerning the Applicant's medical condition around the time of his minimum qualifying period. For instance, Dr. Bednar (who was retained for the purposes of a defence medical assessment) prepared a medical report dated September 29, 2010 and focused on the Applicant's current symptomatic complaints, functional status and treatment response, as well as the long- term prognosis. Hence, it may have been that the Review Tribunal was limited in what was available for it to consider around the time of the Applicant's minimum qualifying period.

[21] I will accede to the Applicant's submissions on these points however, as it is not clear what medical evidence the Review Tribunal assessed in its analysis. Even if it was clear what medical evidence the Review Tribunal may have considered, there may be an arguable case as to whether the Review Tribunal focused on the health of the Applicant at the date of the hearing, to the exclusion of the medical evidence around the time of his minimum qualifying period. I find that the issue of whether the Review Tribunal

properly applied or failed altogether to apply *Cochran* raises a ground upon which the appeal might have a reasonable chance of success. As such, I allow the application for leave to appeal on this issue.

[22] The Applicant further submits that the Review Tribunal erred in failing to apply the principles set out by the Pension Appeals Board in *MHRD v. Ethier,* CP 6068 (July 1998), by not considering whether it was realistic that he could undergo any retraining. The Pension Appeals Board wrote at paragraph 17:

> 17 The Respondent stated that he may be able to work part-time for a period of two hours per day provided all his limitations could be respected. This answer must be attributed more to his honesty and sincerity than to common sense. It is not realistic on the basis of all the evidence that he could pursue on a regular basis any substantially gainful occupation.

[23] Assuming that the Applicant is correct, that the Review Tribunal found that he could retrain and hence concluded that he did not meet the criterion of a severe disability as defined by the *Canada Pension Plan,* without giving any consideration to the medical evidence, this raises an arguable ground upon which the appeal might have a reasonable chance of success. As such, I allow the application for leave to appeal on this issue.

Errors in Findings of Fact

[24] The Applicant submits that the Review Tribunal 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. He identified three erroneous findings of fact by the Review Tribunal, that it:

(a) Ignored relevant evidence which addressed the severity of the Applicant's impairments.

(b) Assigned "considerable weight" to the conclusions stated in the various medical opinions.

(c) Failed to find that the Applicant's disability is severe as defined by the *Canada Pension Plan,* despite the medical evidence before it.

[25] 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. In this case, the Applicant has not identified any specific findings of fact which he alleges the Review Tribunal made erroneously. Rather, the Applicant employs generalities about how the Review Tribunal assessed the evidence. In order to determine whether the appeal might have a reasonable chance of success where an erroneous finding of fact is alleged, the Applicant needs to, at the very least, properly identify a specific finding of fact.

[26] I will address (a) and (b) together. In my view, the Applicant has improperly characterized these issues as findings of fact when they are in fact, part of the processes which a Review Tribunal goes through in coming to its decision.

[27] It is open to a Review Tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and to decide on its weight. A Review Tribunal is permitted to consider the evidence before it and attach whatever weight, if any, it determines appropriate and to then come to a decision based on its interpretation and analysis of the evidence before it. An applicant is still required to identify what the erroneous findings of fact might be. Without having done so, I am unable to consider granting leave under this ground.

[28] The Applicant submits that the Review Tribunal erred in making a finding of fact that the Applicant's disability is not severe, despite the evidence before it. The Applicant has blurred the distinction between findings of fact and the ultimate decision to be made. The Review Tribunal may have based its decision on a finding of fact that was not supported by the evidence, but the applicant needs to point out what that finding of fact is that is not supported by the evidence. It is insufficient to say that the Review Tribunal ought to have concluded differently based on the evidence before it.

Essentially he is asking us to reassess and reweigh the evidence in his favour. As he has not shown an alleged erroneous finding of fact, I am unable to consider this submission.

CONCLUSION

[29] While the Applicant failed to show that there were any erroneous findings of fact, he has raised some grounds that satisfy me that the appeal has a reasonable chance of success and for that reason, the Application is granted.

[30] 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