Citation: *S. R. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 41

Appeal No. AD-13-8

BETWEEN:

S. R.

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 REFUSED

DECISION

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

INTRODUCTION

[2] On April 8, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On or about April 30, 2013, the Applicant received the decision of the Review Tribunal. On June 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 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 submits that the decision of the Review Tribunal is unjust and that there is supporting medical evidence of both his incapacity to perform or sustain any type of work and of the prolonged nature of his condition. His reasons for leave to appeal are as follows:

> "The decision made is not just. Regardless of my educational background, there is strong evidence of my incapability to do or sustain any type of work. Recent x- rays

and CT scans and symptoms assure what I am claiming. Therefore, I beg of you to re-examine the facts, and weigh the fate of 5 children with their parents."

[7] The reasons for appeal are as follows:

"It's obvious from medical facts that my conditions are chronic and lasting and also unfixable. I am suffering from arthritis, and bone degeneration, no surgery or cure can change the fact that I am disabled."

[8] The Applicant filed a medical report dated June 21, 2013 of Dr. Bashir Jalutha, a general practitioner. Dr. Jalutha noted the past medical history and the Applicant's various physical limitations and restrictions. Dr. Jalutha wrote,

"Mr. S. R. with history of chronic neck since 1991 has constant pain, mild to moderate radial to both arms associate with weakness and parasthesis of the arms, intermittent headache, blurred vision. MRI on May 2011 showed large arachnoid cyst with effect on cerebellum and secondary tesillar descend, in addition there is right side Posterolateral C5-C7 disc herniation result in nerve impingement and some distortion of the cord which progress lead to restrict his neck range of motion. Seen spinal surgeon who recommended surgical intervention and advised to avoid physical contact, trauma, need MRI follow up. Also has chronic back pain and right knee pain due to progressive osteoarthritis and chondromalacia. Currently doing physiotherapy and taking pain killer. As a result his chronic medical condition resulted in limitation of his daily activities, such as sitting, standing for long periods of time or walking, playing sports, which has all effected his family life. Stress related anxiety, decreased focus in concentration and forgetfulness, unable to function and work."

[9] A review of the materials before the Review Tribunal indicates that the Applicant did not obtain or file any medical opinions of Dr. Jalutha prior to June 21, 2013. It is unclear when the Applicant first saw Dr. Jalutha in regards to his medical condition.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[11] 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).

[12] 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.

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

[14] The Applicant largely has not specified how the reasons he has cited fall into any of the grounds of appeal. The Applicant has not cited any errors of law which the Review Tribunal might have made, nor does he allege that the Review Tribunal based its decision on an erroneous finding of fact. On the face of it, it appears that the Applicant simply disagrees with the decision of the Review Tribunal and says that the Review Tribunal should have come to a different decision, based on the evidence before it.

[15] The Review Tribunal was permitted to consider the evidence before it and attach whatever weight it determined appropriate. It was also open to the Review Tribunal to assess the quality of the evidence and determine what facts, if any, to accept or disregard. I note that the Review Tribunal reviewed the evidence of various health practitioners, in its section, "Evidence of Medical Professionals".

[16] If the Applicant is requesting that we re-assess the medical evidence and decide in his favour, I am unable to do this, as I am required to determine whether any of his reasons

fall within any of the grounds of appeal and whether any of them have a reasonable chance of success.

[17] The Analysis of the Review Tribunal is reproduced in its entirety below:

> **Severe**
>
> > [28] The severe criterion must be assessed in a real world context *(Villani* v. *Canada*(A. *G.),* 2001 FCA 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.
> >
> > [29] In this case, the Appellant has a good education and is young enough for retraining should that be necessary.
> >
> > [30] Although he reports being in constant pain, he has neither exercised options on treatment as suggested nor has he provided a pain assessment report.
> >
> > [31] Medical evidence does not rule out all types of work, and little change to his daily activities was indicated in those reports.
> >
> > [32] The cumulative evidence does not support a finding of a severe disability to the Appellant.

[18] I have some reservations about the grounds of appeal articulated by the Applicant in his Application Requesting Leave to Appeal to the Appeal Division. The reasons cited by the Applicant could very well be interpreted and understood to mean that he simply disagrees with the decision of the Review Tribunal, based on the evidence and facts as he understands them. If he is strictly asking us to re-assess the medical evidence in his favour, this ground of appeal must necessarily fail.

"Decision made is not just"

[19] The Applicant submits that "the decision made is not just", but from this phrase alone, it is unclear whether he means that the Review Tribunal failed to observe a principle of natural justice. If so, he needs to set out some basis upon which the Review Tribunal may have been unjust or failed to observe a principle of natural justice. I cannot infer that the Review Tribunal acted unjustly, on the basis that the Review Tribunal ought to have decided

differently based on the facts and opinions before it. The Review Tribunal was acting well within its jurisdiction to come to a determination based on an assessment of the evidence before it.

[20] The one dilemma with the Review Tribunal's decision with which I might grapple for the purposes of considering this leave application is the adequacy of its reasons. Did the Review Tribunal fail to observe a principle of natural justice that it be required to provide adequate reasons for its decision? On the face of it, it may not be readily apparent upon what basis the Review Tribunal arrived at its decision. For instance, the Review Tribunal held that the medical evidence does not rule out all types of work, yet it did not identify the medical evidence it relied upon to support its findings that not all types of work could be ruled out. The Review Tribunal also held that the cumulative evidence does not support a finding of a severe disability to the Appellant, yet it did not identify what that cumulative evidence is. Indeed, while the Review Tribunal set out the testimony of the Applicant and the expert opinion before it, it appears to have made few findings of fact on the evidence.

[21] It may be that it is insufficient for the Review Tribunal to have found that the "cumulative evidence does not support a finding of a severe disability", without at least referring to some of the evidence that it might have accepted, what it might have found to be compelling or what it might have rejected outright. Apart from noting the Applicant's education, age, and treatment options that had yet to be exhausted, and suggesting that the medical evidence did not rule out all types of work, it is difficult to see what analysis of the medical evidence the Review Tribunal performed. It seems rather generic to state that the medical evidence does not rule out all types of evidence and that the cumulative evidence does not support a finding of a severe disability to an applicant. This by no means suggests that the Review Tribunal did not undertake any analysis, or that its reasoning was faulty or deficient. Rather, it is simply unclear where support for these two statements is found. Without at least some passing reference to the evidence upon which it might have relied, it seems that the reasons may well be deficient.

[22] The Federal Court of Appeal addressed this very issue and reviewed the duty of the Pension Appeals Board to provide reasons in *Doucette v Minister of Human Resources and*

Development, 2004 FCA 292 and *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187. In *Doucette*, Nadon J.A. stated that:

> [7] In the case of the Pension Appeal Board, the duty to give reasons arises from subsection 83(11) of the statute. In this case, reasons have been given; the issue is the adequacy of those reasons. *Sheppard, supra* [*R. v. Sheppard*, [2002] 1 S.C.R. 859], provides one basis upon which to assess those reasons. Do the Board's reasons provide a sufficient basis for this court to exercise its review function? An example of reasons which did not meet that test is found in *Canada (Minister of Human Resources Development) v. Quesnelle*, at paragraph 8 [2003] F.C.A. 92:
>
> > The Board is under a statutory duty to provide the parties with reasons for its decision: *Canada Pension Plan*, subsection 83(11). In my opinion, in omitting to explain why it rejected the very considerable body of apparently credible evidence indicating that Ms. Quesnelle's disability was not "severe", the Board failed to discharge the elementary duty of providing adequate reasons for its decision. The size and complexity of the record before it called for an analysis of the evidence that would enable the parties and, on judicial review, the Court, to understand how the Board reached its decision despite the mound of apparently credible evidence pointing to the opposite conclusion.
>
> ...
>
> [11] It is obvious that the Board could have explained its reasoning more fully, but one can nonetheless discern the Board's reasoning from the language it has used. Consequently, as I am satisfied that the Board's reasons allow us to exercise our review function, I have no difficulty concluding that they are adequate.
>
> [12] To conclude on this point, I would add that our Court, like other courts of appeal, must be mindful of Binnie, J.'s remarks in Sheppard, supra, that we should not intervene because we are of the opinion that the courts below failed to express themselves in a way acceptable to us. The reasons under review should be fairly considered and in performing that exercise, we should, as Binnie J. suggests, examine the record on which the decision under review is based. We must guard ourselves from being too eager to conclude that reasons do not pass muster.

[23] In *Quesnelle*, the Federal Court of Appeal considered the decision of the Pension Appeals Board. The Board wrote that had it considered all of the evidence and that it had found the testimony of the Appellant and Dr. Leung to be credible, and on that basis, allowed the Appeal. This apparently was the totality of the Board's explanation of the basis of its decision. In finding that the Board had failed to discharge the elementary duty of providing adequate reasons for its decision, the Court stated that "in the absence of any

indication in the Board's reasons that it engaged in a meaningful analysis of the evidence, its decision cannot stand". The Court also stated that, "without reasons that adequately explain the basis of a decision, neither party can be assured that, when a decision goes against it, its submissions and evidence have been properly considered." The Court held that the decision "could not pass muster as 'reasons' on any standard of adequacy".

[24] The Court in *Quesnelle* said in *obiter* that the Pension Appeals Board ought to be held to a higher standard, given that it was comprised of federally appointed judges and unlike those serving on administrative tribunals, were not unfamiliar with the writing of reasons for decision in matters where a careful analysis of the law and conflicting evidence is required. While the decision here is that of a Review Tribunal, I am of the view that there must be at least some analysis offered in its decision. While I do not think that a Review Tribunal is required to refer to or analyze every piece of evidence before it, it should address those that have significant probative value.

[25] In *Giannaros,* the Court felt that the decision of the Review Tribunal which it was reviewing had been sufficiently developed to understand why it reached the conclusion that it did. The Court felt that there was no doubt that the Board thoroughly reviewed and considered all of the medical evidence prior to reaching its conclusion.

[26] In *Page v Workplace Health, Safety and Compensation Commission of New Brunswick,* 2006 NBCA 95, Turnbull J.A., in partial dissent, examined the issue of the sufficiency of reasons, in examining the decision of the Appeals Tribunal established under that province's *Workplace Health, Safety and Compensation Commission Act,* S.N.B. 1994, c. W-14.

> [40] …In para. 9, I found that had the Appeals Tribunal had jurisdiction to make the decision it did I would still have remitted the matter because the reasons for its decision do not comply with the standard for reasons set by this Court in the *Boyle* case. In *Boyle*, Bastarache, J.A., as he was then, defined the standard for written decisions required by s. 21(10) of the *WHSCC Act.* He said in para. 26 as follows:
>
> > […] Reasons must explain to the parties why the Tribunal decided as it did; it must avoid the impression that its decision was based on extraneous considerations or that it did not consider part of the

> evidence. Reasons must also be sufficient to enable the Court of Appeal to discharge its appellate function; the Tribunal must therefore set out the evidence supporting its findings in enough detail to disclose that it has acted within jurisdiction and not contrary to law.
>
> [41] Sufficient reasons also avoid, to a considerable degree, the perception of decisions that are arbitrary or capricious and do enhance public confidence in the judgments and fairness of administrative tribunals; *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.
>
> [42] In *Mattina v. Workplace Health, Safety and Compensation Commission (N.B.)* 2005 NBCA 8 (CanLII), (2005), 279 N.B.R. (2d) 104, [2005] N.B.J. No. 22 (C.A.)(QL) Robertson, J.A. noted in para. 6 that the "Appeals Tribunal [has an] obligation to provide intelligible reasons that adequately address the arguments that had been advanced […] This Court might well […] set aside its decision because of the failure to give adequate reasons," and he listed previous decisions of this Court that have discussed that issue.
>
> [43] In summary, sufficient reasons must generally contain an analysis of the evidence, the issues or position of the parties, the findings of fact and principal evidence that supports those facts and, where applicable, the statutory provisions that are relied on to support the authority of the administrative tribunal to decide as it does.
>
> [44] Of particular importance to a reviewing court's judicial review of an administrative tribunal's decision is a reasoned decision that permits the reviewing court to do its task: a "pragmatic and functional analysis" to select the applicable standard, or standards, to review the tribunal`s finding or findings.

[27] In *Harvey v Canada (Attorney General),* 2010 FC 74, the Court examined whether in that case the reasons provided by the Pension Appeals Board were adequate.

> [40] The Applicant claims that the reasons provided by the Board are so deficient that they breach the principles of natural justice. I do not agree.
>
> Admittedly, the reasons are brief but they are acceptable considering the circumstances of this case.
>
> [41] In the present case, the sole new piece of evidence put forward on the application for leave was the W.C.B. report and no other ground of appeal was raised.

> [42] In the reasons, the Board does address that W.C.B. report and concludes that it does not meet the test to grant the leave to appeal. The reasons under review must be fairly considered and should examine the record on which the decision is based (*Doucette v. (Minister of Human Resources Development)*, 2004 FCA 292 (CanLII), 2004 FCA 292, [2005] 2 F.C.R. 44 (QL)). There was very little contradictory evidence in the record before the Review Tribunal as detailed in its reasons and one can understand from the reasons given by the Board that the new document did not, in its opinion, provide new information that was different than that was already on the record. This is not a case where the Applicant submitted new or complex evidence that might have led the Board to grant the application. I am satisfied that, in the face of the sole document put before the Board, the reasons are adequate and show a sufficient analysis.
>
> [43] As Justice Binnie stated in *Sheppard* and the Federal Court of Appeal reiterated in *Doucette*, the courts must not intervene simply because the reasons are not expressed in a way that is acceptable to them (*Doucette* at paragraph 12). The reasons given by the Board, although brief, cannot be said to breach natural justice and the Court will not intervene.

[28] I am guided also by *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), 2011 SCC 62, 2011 SCC 62 (CanLII), [2011] 3 SCR 708 [*NL Nurses*]. The Supreme Court of Canada stated at paragraph 22,

> "It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis."

[29] Had the Review Tribunal simply written that it had considered all of the cumulative medical evidence, I may not have considered this to be sufficient. However, there is some analysis in the overall decision, and for that reason, find that the reasons are sufficiently developed to understand why the Review Tribunal reached the conclusion that it did. I do not find that there was a breach of natural justice and therefore would not interfere with the Review Tribunal's decision.

Report of Dr. Jalutha

[30] Although the Applicant has filed the medical report dated June 21, 2013 of Dr. Jalutha in support of his leave application and appeal, I am unable to consider any new materials. The Applicant has not stated why he has filed the most recent medical report of Dr. Jalutha or how it may 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 Review Tribunal). There are additional requirements that an Applicant must meet, in order 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. I find that the Applicant has failed to meet the basic formal requirements in seeking a rescission or amendment of the decision. Even if he had met them, the Appeal Division in this case has no jurisdiction 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. This is not a re-hearing of the merits of the claim. In short, there are no grounds upon which I can consider the medical report dated June 21, 2013 of Dr. Jalutha, notwithstanding how supportive the Applicant feels it might be.

CONCLUSION

[31] For the reasons which I have set out above, the Application is refused.

Janet Lew
Member, Appeal Division