Citation: *K. G. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 42

Appeal No. AD-13-9

BETWEEN:

K. G.

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 April 9, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On April 14, 2013, the Applicant received the decision of the Review Tribunal. The Applicant filed an application requesting leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on May 22, 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 referred to the "Board" in his Application Requesting Leave, but I understand that to be in reference to the Review Tribunal. The Applicant cites two grounds of appeal in support of his application for leave to appeal the decision of the Review Tribunal. He submits that the Review Tribunal erred in law in making its decision and that it based its decision on an erroneous finding of fact.

[7] The Applicant submits that:

> "The Tribunal effectively circumvented the legal test by applying the evidence in such a manner as to ignore the language of the statute thereby subverting the benevolent purposes of the legislation. They dealt in generalities thereby depriving Mr. K. G. of the very protection which the Plan was designed to provide. They ignored the language of the statute by concluding, that since Mr. K. G. is capable of doing certain household chores he is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as "any" occupation within the meaning of subparagraph 42(2) (a) (i) of the Plan.
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> The Board based its decision on an erroneous finding of fact. The Board failed to consider all of the medical evidence before it in deciding that the applicant was not disabled under the CPP. The application of the facts removed the "real world" from the analysis and, more importantly, circumvented the benefit of the words used in that provision being interpreted in a large and liberal manner, with any ambiguity flowing from those words being resolved in favour of the claimant for disability benefits.
>
> Effectively, the ambiguity is used to deny the claim for disability benefits."

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[9] 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).

[10] 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.

[11] A decision of the Review Tribunal is considered to be the decision of the General Division.

(i) <u>Error in Law</u>

[12] The Applicant submits that the Review Tribunal erred in "circumventing the legal test", i.e. that it failed 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". The Applicant submits that in concluding that he is capable of doing certain household chores and is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation, the Review Tribunal failed to consider all of the medical evidence before it and failed to properly apply the facts to the law. He also claims that the "real world" analysis must be interpreted in a large and liberal manner and that any ambiguity in what constitutes the "real world" is to be resolved in an applicant's favour.

[13] The Applicant submits that the Review Tribunal failed to consider all of the medical evidence before it. If this were the Applicant's only submission, I would have refused the application requesting leave, as 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.

[14] However, the Applicant also submits that the Review Tribunal failed to apply *Villani*. 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 and past work history in determining the severity of his disability, but I am not concerned with hearing the merits of the submission and whether or not *Villani* may have been applied and if it was properly applied. As long as the Applicant raises this issue and shows that there may have been factors overlooked by the Review Tribunal, this creates an arguable case. I find that the issue of whether or how the Review Tribunal applied *Villani* in assessing the severity of an Applicant's disability for the purposes of the *Canada Pension Plan* 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.

(ii) <u>Erroneous Finding of Fact</u>

[15] 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 he perceives to be the erroneous finding fact upon which the Review Tribunal based its decision. To be clear, I am not requiring that there be an actual demonstrated error on the part of the Review Tribunal. In order for me 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.

[16] The Applicant claims that the Review Tribunal failed to consider all of the medical evidence before it. This is not a finding of fact. A consideration of the evidence is a process which a Review Tribunal goes through in deciding whether an appellant qualifies for disability benefits.

[17] 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 me an alleged erroneous finding of fact, I am unable to consider granting leave under this ground.

CONCLUSION

[18] The Application is granted.

[19] 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