Citation: *M. R. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 43

Appeal No. AD-13-160

BETWEEN:

M. 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 June 4, 2013, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable to the Applicant. On or about August 29, 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 prepared a letter explaining the reasons she wishes to appeal the decision of the Review Tribunal. The reasons include the following:

i) Her representative wished to file "formal submissions" but was advised by the Review Tribunal that while he could speak for her, "a submission was not necessary". She advises that her letter includes the main points of the submissions.

ii) She disagrees with the findings of the Review Tribunal that her disability is not severe and prolonged. She feels that there was sufficient information before the Review Tribunal to enable it to find that she has a severe and prolonged disability. At the time of the hearing on March 20, 2013, she had just had revision surgery to her knee in November 2012 and insufficient time had passed without knowing whether the surgery had been successful, but information since then confirms the prolonged nature of her disability.

iii) She has several problems which limit her employability. She questions how she can approach anyone within the Portuguese community for assistance when she is unable to look after her own personal needs.

iv) Dr. Burnell prepared a letter dated July 29, 2013 and confirmed that there has been little improvement from her pre-operative condition and that she would not be able to return to work. She points out that Dr. Burnell feels that he is not in a position to declare her unfit for any occupation without a functional capacity assessment by a qualified physiotherapist.

v) She refers to a letter dated June 25, 2013 prepared by her attending physician Dr. G.L. Fuzeta, which confirms that he has treated her for depression following her surgery in October 2008.

vi) She had hoped that the Review Tribunal would consider that she has a limited command of the English language and no formal education, and that "all [she] is able to offer an employer is the ability to perform work of a physical nature".

The letter includes a chronology documenting her medical and work history.

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

[9] Subsection 58(1) of the DESD Act sets 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.

[10] The decision of the Review Tribunal is considered to be a decision of the General Division for our purposes.

[11] The leave application is not an opportunity to re-hear the case or to reassess any of the medical evidence to determine whether the Applicant meets the definition of disabled as defined by the *Canada Pension Plan.*

[12] In essence, the Applicant requests that we re-assess the medical evidence and decide in her favour. I am unable to do this, as I am required to determine whether any of her reasons fall within any of the grounds of appeal and whether any of them have a reasonable chance of success. Most of the Applicant's reasons disclose no grounds of appeal for me to consider.

[13] The only reasons cited by the Applicant which may fall into the grounds of appeal are i) and vi).

[14] If the Review Tribunal declined to receive submissions from the Applicant's representative, this may fall within the first ground, that there was a failure to observe a principle of natural justice.

[15] If the Review Tribunal did not consider her educational background and limited language abilities, this may fall within the second ground, that the Review Tribunal made an error in law.

(i) Failure to Observe Principle of Natural Justice

[16] The Applicant does not state outright that the Review Tribunal failed to observe a principle of natural justice or that she did not receive a fair hearing, but she advises that the Review Tribunal declined to receive formal written submissions from her representative. The Applicant includes in her letter the main points of that submission, which summarizes her work and medical history, and how her medical conditions affect her capacity and employability.

[17] The Applicant's representative provided a letter dated September 28, 2012 to the Office of the Commissioner of Review Tribunals, but it is unclear whether the written submissions he intended to give to the Review Tribunal is a duplicate of his letter of September 28, 2012. If so, then clearly no issue arises as to whether there was a fair hearing. It would have been wholly unnecessary for the Review Tribunal to receive a copy of the letter which it already had in its file materials. However, I cannot necessarily come to that conclusion. It might have been helpful had the Applicant provided a copy of the written submissions prepared by her representative, or at least fully reproduced them.

[18] While the Review Tribunal may have declined to receive written submissions from her representative, the Applicant does not suggest that they were denied the opportunity to make full oral submissions otherwise. Indeed, she states that the Review Tribunal advised them that her representative could speak on her behalf. Her

representative could have then availed himself of the opportunity to read verbatim any written submissions which he might have prepared.

[19] In any event, if the main points of the written submissions are reproduced in the Applicant's letter of appeal, it appears that all of these points were before the Review Tribunal in some form (other than of course the updated information on her medical conditions). The Review Tribunal had all of the medical evidence and testimony of the Applicant before it and considered how her medical conditions impacted her.

[20] Given these considerations, I cannot come to the conclusion that the Applicant's position for this leave application is that she did not receive a fair hearing before the Review Tribunal. As such, I decline to determine whether the refusal by the Review Tribunal to accept written submissions raises a ground upon which the appeal might have a reasonable chance of success.

(ii) Error in Law

[21] The Applicant wrote that she was hopeful that the Review Tribunal would take her limited command of the English language and limited formal education into account in assessing her disability. She wrote,

> I was hopeful that the Appeal Tribunal would take into consideration the fact that individuals, like myself, with limited command of the English Language and no formal education all we can offer to an employer is the ability to perform work of a physical nature. When, due to illness or injuries, we lose the ability to perform manual labor we find themselves (*sic)* with nothing else to offer and thus become unemployable. This is what happened to me.

[22] The Review Tribunal clearly took the Applicant's limited command of the English language into account in assessing her disability but it does not appear to have given much, if any, consideration to her lack of formal education.

[23] However, while education is of some relevance, applicants are still required to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence and evidence of employment efforts and possibilities is still required: *Villani v Canada*

(Attorney General of Canada), 2001 FCA 248. It is not sufficient to say that education and language are barriers to one's employment, as there must be sufficient medical evidence to support a disability. As the Federal Court of Appeal pointed out in *Villani,* not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension.

[24] In this case, the Review Tribunal assessed the medical evidence and found that it did not establish that the Applicant's disability was severe. Indeed, it found that there was nothing to suggest that she was unable to continue working as a health care aide (for some indefinite period) after September 2009. The Review Tribunal also found that she was not continuously disabled after 2008, up to the time of her minimum qualifying period of December 31, 2012.

[25] I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[26] The Application is refused.

Janet Lew
Member, Appeal Division