Citation: *F. D. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 23

Appeal No: AD-13-200

BETWEEN:

F. D.

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 28, 2014

DECISION: LEAVE GRANTED

DECISION

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

BACKGROUND & HISTORY OF PROCEEDINGS

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal of January 11, 2013. The Review Tribunal had determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that her disability was not "severe" at the time of her minimum qualifying period of January 31, 2009. The Applicant filed an application for leave to appeal (the "Application") with the Appeal Division of the Social Security Tribunal (the "Tribunal") on April 19, 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 a two-page document titled, "Responses to specifics in decision". The Applicant disagrees with the decision of the Review Tribunal, and in particular, with the following paragraphs of the decision, that:

18) she developed a wrist problem.

The Applicant responds that she broke her arm in an accident which occurred on May 5, 2005 (the "Accident"), and over the next few years, experienced various issues, including wrist damage.

19) her retraining program was scheduled to take 24 weeks.

The Applicant explains that the training program had been scheduled to complete on July 11, 2008, but she was unable to complete it until September 4, 2008.

21) she had a frozen shoulder.

The Applicant responds that she was subsequently diagnosed as having two full thickness tendon tears. She says that her shoulder injury has been consistently mentioned since 2007 and that it has drastically impacted her abilities. She considers her shoulder to be a contributing factor as to why she is unable to work.

24) she belongs to an ATV club.

She denies that she has ever held membership in such a club and explains that she simply rides as a passenger behind her husband. They ride in a very slow and careful manner on the Trans Canada Trail.

32) Dr. Acob examined her arms.

She explains that he examined only her ankle, not her arms. (Paragraph 32 of the Review Tribunal's decision makes no reference to Dr. Acob.)

34) Dr. Leifso noted the Applicant's ankle to be stable.

She explains that a Workers' Compensation Appeals Tribunal ("WCAT") decision in 2012 dismissed some of Dr. Leifso's assumptions (e.g. that she has radiculopathy) and upheld the decision that she has had constant and prolonged issues with her ankle since her Accident. A second WCAT decision in May 2012 agreed that she has constant, severe and prolonged ankle issues that require chiropractic attention in relation to the injury.

[7] The Applicant described her medical history and how her disability restricts and limits her. She contends that the Review Tribunal ought not to have placed any weight

on the fact that had stopped at a driver licensing office to renew her driver's licence following her Accident, instead of directly going to the hospital. She submits that, if anything, the incident should have enhanced her credibility, as it showed that she persevered and adhered to her schedule and continued with her usual activities, in spite of her injuries.

[8] The Applicant explained that although she returned to work after her Accident, she went on modified duties for 15 months and had to rely on workplace accommodations. Despite the fact that her employer was supportive and work colleagues assisted her, ultimately her employer requested that she take a medical leave as she was unable to perform her usual workplace duties.

[9] The Applicant refutes any suggestion that any efforts to mitigate her unemployment were minor. She explained that she had undertaken various efforts to look for alternate employment. For instance, she took a five (5) month retraining course, but it only served to exacerbate her right shoulder. She applied for "hundreds of positions" under the guidance of WorkSafe BC and although had some interviews, did not secure any employment, as prospective employers felt that she lacked the requisite skills and abilities. And, despite expending a lot of energy during her job search efforts, she sought an extension of her job search program with WorkSafe BC and had it extended from mid-September 2008 to mid-January 2009.

[10] The Applicant submits that the Review Tribunal ought not to have determined that her disability could not have been severe if she was able to rely on Advil alone to deal with her chronic pain and if she found it be "extremely effective". She explained that she avoids pain relief medication because she is hypersensitive to medication and experiences various side effects from using them. She noted that as Advil leaves her sleepy and muddled, she would be unable to take any if she was required to work or drive.

[11] The Applicant described the medical investigations she underwent. She described the recommendations she received from various practitioners, including from a

physiotherapist at the Hand Clinic. She described various functional limitations and restrictions. She contends that the Review Tribunal misunderstood the limitations she experienced while riding as a passenger on an all-terrain vehicle ("ATV").

[12] The Applicant submits that when her multiple injuries are considered together, they demonstrate elevated challenges. She submits that she is unable to do any work other than typing, and as such, is not competitively employable. She notes that minimum shifts in British Columbia are four hours long and that she is unable to regularly sustain work at a productive level for that duration.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[14] 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 (T.D.).

[15] 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.

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

[17] The leave application is not a re-hearing of the merits of the claim. It is not an opportunity to re-hear the case or to re-assess any of the medical evidence in determining whether the Applicant meets the definition of disabled as defined by the *Canada Pension Plan* and I therefore decline to consider the medical and work history, where they are unrelated to or disclose no grounds of appeal for me to consider.

[18] The Applicant refers to errors in paragraphs 18, 19, 21, 24, 32 and 34 of the Review Tribunal's decision. Other than paragraph 24, these paragraphs however did not form any basis upon which the Review Tribunal made its decision. The Review Tribunal did not refer to these other paragraphs in its Analysis section. These other paragraphs simply formed part of the evidence before the Review Tribunal, so it cannot be said that there were any errors in law or erroneous findings of fact arising out of them, other than possibly paragraph 24.

(i) Failure to Observe Principle of Natural Justice

[19] The Applicant has not identified any failure by the Review Tribunal to observe a principle of natural justice.

(ii) Errors in Law

[20] The Applicant has not expressly identified any error in law which the Review Tribunal may have committed in making its decision. She suggests however that the Review Tribunal should not have taken the following into account in assessing her disability, that she:

a) went to renew her drivers' licence instead of directly going to the hospital following her workplace injury in May 2005;

b) worked for 15 months following her injury, without considering the fact that she had an accommodating employer; and

c) took only Advil and found it to be highly effective in dealing with her chronic pain, and did not require additional medication such as narcotic pain relievers, without appreciating that she experienced side-effects from taking Advil.

[21] The Applicant also refutes any suggestion that her efforts to mitigate her unemployment were minor.

[22] The Applicant has not identified the specific error in law which she alleges the Review Tribunal committed, but if I understand her correctly, she submits, in essence, that the Review Tribunal committed an error in law in that it (1) applied the wrong considerations or gave too much weight to these considerations in assessing whether her disability is severe for the purposes of the *Canada Pension Plan* and (2) applied the wrong test in determining whether she had sufficiently mitigated her unemployment.

Review Tribunal Assessment of Disability

[23] In assessing whether an applicant is disabled for the purposes of the *Canada Pension Plan,* a Review Tribunal must review the medical and other expert opinions and records, but a Review Tribunal is not restricted to simply considering an applicant's diagnoses, symptoms and prognoses. The diagnoses, symptoms and prognoses make up but only part of the overall picture of an applicant's disability, and are insufficient on their own to address the question of whether an applicant's disability is severe. There are numerous factors that a Review Tribunal can consider in its assessment of an applicant's disability.

[24] A Review Tribunal would necessarily want to see how an applicant's medical condition and his symptoms impact his activities of daily living, recreational and social pursuits and work and volunteer efforts. This could include but would not be limited to considering an applicant's capabilities versus functional limitations, whether he requires or seeks assistance with work duties, household maintenance and chores or personal care, or whether he has abandoned or is doing certain activities less frequently or has

modified how he performs those activities. A Review Tribunal could also look at the recommendations for treatment for an applicant, his treatment history and efforts at mitigation and the type and dosage of medication he uses. I would not propose to constrain what factors a Review Tribunal might consider to be relevant in its assessment of an applicant's disability, as each case is different from another individual's circumstances. One factor may be more material in one case than another, while it may have no relevance in another case.

[25] I do not know of any authorities which would limit what the Review Tribunal can consider in its analysis of an applicant's disability. In my view, the considerations should have some relevance and materiality to the issue of the severity of an applicant's disability.

[26] As for the issue of the weight to assign to the evidence, 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.

[27] Here, the Applicant submits that the Review Tribunal ought not to have considered that she did not go directly to the hospital, that she worked for 15 months following her Accident and that she took Advil and found it to be effective. For the reasons expressed above, I find this ground of appeal to be without any reasonable chance of success such as to justify leave.

Mitigation Efforts

[28] The Review Tribunal considered the Applicant's attempts to mitigate her unemployment were minor. It stated that when she did undertake any employment, it was as a "secret shopper" for Costco, after her MQP date of January 31, 2009. The Review Tribunal seemed to require that she could only mitigate her status by actually taking on employment. This raises the question as to what test the Review Tribunal

considered and applied in requiring the Applicant to mitigate her unemployment. I find that the issue of whether the Review Tribunal considered and applied the proper test in determining whether the Applicant had sufficiently mitigated her unemployment status 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.

(iii) Erroneous Finding of Fact

[29] A Review Tribunal is permitted to draw conclusions and make findings of fact based on the evidence before it, but any findings of fact may be grounds for appeal if the findings of fact are made erroneously in a perverse or capricious manner or without regard for the material before it.

[30] 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.

[31] The Applicant refers to errors in paragraphs 18, 19, 21, 24, 32 and 34 of the Review Tribunal's decision. Other than paragraph 24, these paragraphs however did not form any basis upon which the Review Tribunal made its decision. They were simply part of the evidence before the Review Tribunal, so it cannot be said that there were any erroneous findings of fact arising out of these paragraphs, other than possibly in paragraph 24. I will consider this submission below.

[32] The Applicant responds to some of the findings of fact made by the Review Tribunal in paragraphs a) to g) of her document titled "Responses to specifics in decision". She has not articulated any erroneous findings of fact which the Review Tribunal may have made. Indeed, I find that her responses in paragraphs a) to g) are intended to explain and lessen the impact of any findings which the Review Tribunal made. As such, I do not consider the submissions set out in paragraphs a) to g) to be possible bases for grounds of appeal for this leave application.

[33] The Applicant suggests in paragraph h) of her document "Responses to specifics in decision" that the Review Tribunal made erroneous findings of fact about her attempts to mitigate her unemployment. I will consider this submission below.

Riding an All-terrain Vehicle

[34] The evidence before the Review Tribunal was that the Applicant rides an ATV, and that while she is able to "off-road", she needs a flat trail. At paragraph 24 of its decision, the Review Tribunal found that the Applicant rides an ATV with her husband as a leisure activity. The Review Tribunal said nothing more about where or how she rides. The Review Tribunal stated that it struggled to reconcile this activity with the Applicant`s testimony that she was in chronic pain. The Applicant acknowledges that she rides on an ATV but says that it is not without limitations. She says that she is unable to do off-road tracks and says that she rides as a passenger with her husband in a slow and careful manner, on flat trails. The Applicant does not dispute the finding of fact which the Review Tribunal made that she rides an ATV, but instead, offers an explanation for how she is able to ride an ATV. In my view, this does not qualify as a finding of fact which might be erroneous and it does not raise an arguable ground.

Mitigation Efforts

[35] The Review Tribunal found that the Applicant's attempts to mitigate her unemployment were minor. The Review Tribunal wrote that "when she did undertake unemployment she did so as a "secret shopper" for Costco …" The evidence before the Review Tribunal was as follows, that:

a) In 2008, she had attempted a retraining program;

b) She engaged in an intensive job search under the guidance of WorkSafe BC over a period of several months. She had approached "hundreds" of prospective employers in search of a new job. She received a number of interviews but was found to be "grossly underqualified" for the jobs for which she applied; and

c) She had completed some web design work but discontinued the work, as using

a mouse aggravated her wrist injury.

[36] There was also reference to the fact that she had run her own home-based dress-making business, but it appears that she did this sometime prior to her May 2005 injury.

[37] It is not my role at this juncture to determine whether the Review Tribunal based its decision upon its finding that her efforts to mitigate her unemployment were minor, and that the finding of was erroneous, made without regard for the material before it. I am not assessing the merits of the application, nor am I requiring that there be a demonstrated error on the part of the Review Tribunal. While there may be an issue as to whether the Review Tribunal might have given little or no weight to her evidence, that is of no relevance in a leave application. As long as the Applicant can show that the appeal has a reasonable chance of success, that is sufficient to grant leave. In this case, the Applicant has to identify what she perceives to be an erroneous finding of fact upon which the Review Tribunal based its decision, made without regard for the material before it. Here, there is an arguable case to be made that the Review Tribunal found her attempts to mitigate her unemployment were minor, when there may have been evidence to the contrary, and this could have been a basis upon which the Review Tribunal based its decision to deny her application. I allow the application for leave on this particular ground too.

CONCLUSION

[38] The Application is granted.

[39] 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