Citation: *D. H. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 53

Appeal No. AD-13-198

BETWEEN:

D. H.

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 REFUSED

DECISION

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

INTRODUCTION & HISTORY OF PROCEEDINGS

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal of January 2, 2013. The Review Tribunal had determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2010.

[3] On April 9, 2013, the representative for the Applicant filed an Application for Leave to Appeal and Notice to Appeal (the "Application") with the Pension Appeals Board. The Appeal Division of the Social Security Tribunal (the "Tribunal") received the Application on April 11, 2013. The Application was regarded as incomplete until approximately December 13, 2013, when the Applicant filed supplementary materials.

ISSUE

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

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (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".

[6] 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

[7] The Applicant prepared a document titled, "Grounds for Appeal", with accompanying "Allegations of facts". He also provided a letter dated January 31, 2013 prepared by Tammy-Lynn Smith of the Vancouver Island Vocational & Rehabilitation Services ("VIRS") and a letter dated February 4, 2013, from his family physician, Dr. Stephen Noble.

[8] Ms. Smith states that retraining is not an option for the Applicant without medical clearance. Dr. Noble is of the opinion that the Applicant has severe chronic low back pain and an intellectual disability. Dr. Noble considers retraining to be "virtually impossible" for the Applicant, as he has limitations with sitting for more than 30 minutes, and even if he could be successfully retrained, working would be virtually impossible due to his medical problems. Dr. Noble is of the opinion that the Applicant would experience frequent absenteeism due to flare-ups of back pain.

[9] The Applicant disagrees with the decision of the Review Tribunal, and in particular, with the following, that:

a) He has not sought treatment or made any efforts to cope with his pain, whereas the Applicant feels that he has pursued all reasonable treatment options. The Applicant notes that the Review Tribunal referred to the fact that his physicians had recommended physiotherapy to him following surgery, but he submits that the Review Tribunal's focus deflected attention away from the fact that no one has recommended treatment for other medical conditions.

b) He is capable of and should have undergone a functional capacity evaluation or vocational testing. The Applicant submits that the evidence does not support a finding that he is capable of undergoing a functional capacity evaluation or vocational testing. He relies on the VIRS letter of January 31, 2013.

c) He is prevented from upgrading or retraining because of his learning disability. The Applicant is of the view that it is his physical disability, more so than his learning disability, that impedes him from doing any vocational upgrading or retraining.

d) He is physically able to retrain to a less physical job, to work on a regular basis and have a gainful occupation, whereas the Applicant says that he is unable to retrain or to work on a regular basis and have a gainful occupation.

e) He has not attempted to find work. The Applicant on the other hand says that this ignores the fact that no one is prepared to hire him because of his limited education, inability to read or write or his medical condition, which precludes him from being able to reliably attend for work or to attend every scheduled shift.

f) His age or demeanour should be taken into consideration in determining whether his disability is severe.

[10] The "Allegations of fact" provide a chronology of the Applicant's educational background, work experience and medical history, up to the present date. The Applicant described various restrictions and limitations involving his medical condition.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[12] 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).

[13] 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.

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

[15] 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 factual history provided, where it discloses no grounds of appeal for me to consider.

(i) Failure to Observe Principle of Natural Justice

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

(ii) Errors in Law

[17] The Applicant has not expressly identified any error in law which the Review Tribunal may have committed in making its decision. He does state however that the Review Tribunal took his age and demeanour into account in assessing his disability. He wrote,

> "And I disagree that I should be denied benefits because of my age or because the Tribunal Council liked how I presented myself at the meeting, something I have worked hard at over my life to compensate my intelligence when around people. Or that they liked the sound of my voice, suggesting I should go in for a radio DJ, at the close of the meeting."

[18] From this, I understand that the Applicant suggests that the Review Tribunal should not have considered his age, demeanour or sound of his voice in assessing his disability, or allowed such factors to colour medical considerations. In short, he submits that to the extent

that the Review Tribunal took his age, demeanour and sound of his voice into account, that constituted an error in law.

[19] The test for disability is that it be severe and prolonged. The test clearly contemplates medical considerations. However, the Federal Court of Appeal has said that the severe criterion must be assessed in a real world context that can take various factors such as age, level of education, language proficiency, and past work and life experience into consideration: *Villani v. Canada (Attorney General)* 2001 FCA 248. Given this, the Review Tribunal was permitted to consider factors such as the Applicant's age and language proficiency in assessing the severity of his disability. I do not see how consideration of his age or language proficiency could form the basis of a ground of appeal.

[20] *Villani* does not specifically state that one's sound of voice is one of the factors that can be taken into account in assessing disability. In this particular case, while the Review Tribunal may have made gratuitous comments regarding the Applicant's voice following the hearing, it does not appear that this factored into its decision. The Review Tribunal considered other factors in applying *Villani*. It wrote,

> "With respect to the factors set out in the *Villani* decision above, the Appellant is relatively young at 31 years of age. We found his language proficiency and his ability to articulate his thoughts in an organized manner to be impressive. As well, he demonstrated superb enunciation and above-average vocabulary. We find these to be transferable skills which would otherwise assist the Appellant to find and maintain regularly substantially gainful employment."

[21] I find this ground of appeal – that the Review Tribunal applied the wrong considerations in assessing his disability – to be without any reasonable chance of success such as to justify leave.

(iii) Erroneous Finding of Fact

[22] 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 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.

[23] 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.

Medical Treatment Options

[24] The Applicant submits that the Review Tribunal found that he had not sought treatment or made any efforts to cope with his pain, other than having a trial of physiotherapy after surgery. Upon reviewing the decision, the Review Tribunal in fact does not state that the Applicant had not sought out any treatment or had not made any efforts to cope with his pain. The Review Tribunal stated that the Applicant had "very little physiotherapy treatment following his surgery" and that he does not do exercises on a daily basis. The Applicant does not disagree with these findings of fact.

[25] The Review Tribunal did not actually find that the Applicant had not sought treatment or made any efforts to cope with his pain. On this issue, the Applicant has not pointed to a finding of fact made by the Review Tribunal which might be erroneous.

[26] The Applicant submits that the Review Tribunal suggests that the fact he has done little physiotherapy is misleading as it suggests he has little motivation, but in fact, the basis for suggesting that the Applicant has little motivation refers to the fact that the Applicant is not doing exercises on a daily basis. In other words, the findings of fact which the Applicant is suggesting that we find to be erroneous were not made by the Review Tribunal. I find that there is no reasonable chance of success on this point such as to justify leave.

Functional Capacity Evaluation and Vocational Assessment

[27] The Applicant submits that the Review Tribunal found that he is capable of and should have undergone a functional capacity evaluation or vocational testing. The Applicant submits that the evidence does not support such a finding and refers to the VIRS letter of January 31, 2013.

[28] The Review Tribunal relied on the statement of Dr. Noble and the Applicant's testimony that he has not undergone either a functional capacity evaluation or vocational testing to find that he had failed to mitigate his disability. The Review Tribunal did not expressly state that the Applicant is capable and should have undergone a functional capacity evaluation or vocational testing. This finding of the Applicant's capability however can be inferred from the fact that the Review Tribunal found that the Applicant should have gone undergone a functional capacity evaluation or vocational testing.

[29] The difficulty with this submission is that the Applicant does not suggest that the Review Tribunal was in error in coming to this finding, based on the evidence before it at the time of the hearing. The Applicant relies on the letter from VIRS, which was obtained and produced after the hearing and after the Review Tribunal had rendered its decision. The Applicant does not submit that the Review Tribunal was wrong to have made its findings based on the evidence before it at the time of hearing, but instead, was wrong based on the evidence that was produced subsequent to the hearing. Had Ms. Smith's opinion that the Applicant is unable to retrain without medical clearance been before the Review Tribunal at the time of hearing, I might have been prepared to consider whether there is an arguable case to be made that the Review Tribunal made an erroneous finding of fact without regard for the material before it.

Learning Disability

[30] The Applicant submits that the Review Tribunal found that he is prevented from upgrading or retraining because of his learning disability. The Applicant is of the view that it is his physical disability, more so than his learning disability, that impedes him from doing any vocational upgrading or retraining. Although I am not assessing the merits of the grounds of appeal for the purposes of this leave application, I query how the cause of his inability to upgrade or retrain is of any significance or relevance to the central issues and to the determination of whether one's disability qualifies as being severe. It does not appear to me that the Review Tribunal based its decision on the reasons as to why he may not have pursued any upgrading or retraining. I do not find that this point raises an arguable ground.

Vocational Rehabilitation or Retraining

[31] The Applicant submits that the Review Tribunal found that he is physically able to retrain to a less physical job, to work on a regular basis and have a gainful occupation, whereas the Applicant says that he is unable to retrain or to work on a regular basis and have a gainful occupation.

[32] In its Analysis section, the Review Tribunal quoted from *Noiles v. MEI* (October 27, 1995), CP 03417 (PAB):

> "Firstly, there is no evidence that the Appellant cannot be retrained to do more sedentary work. Retraining does not necessarily have to involve development of academic skills, it may well involve development of manual skills. Secondly, there is very little evidence to indicate any attempt on the part of the Appellant to develop manual or other skills that would render him employable."

[33] Despite referring to *Noiles*, the Review Tribunal did not specifically make any findings of fact that the Applicant is able to retrain, though it did find that the Applicant should be able to find and maintain regularly substantially gainful employment. Notwithstanding the Applicant's prior work experience largely in physically demanding occupations, it cannot necessarily be inferred that the Review Tribunal felt that vocational rehabilitation or retraining would necessarily be required for the Applicant. It may be that the Review Tribunal found that retraining is not required, given that it considered the Applicant to already possess transferable skills. The Review Tribunal simply did not address the issue of vocational rehabilitation and retraining in its findings. As such, I do not find that this point raises an arguable ground.

Work Attempts

[34] The Applicant submits that the Review Tribunal found that he has not attempted to find work. The Applicant on the other hand says that this ignores the fact that no one is prepared to hire him because of his limited education, inability to read or write or his medical condition, which precludes him from being able to reliably attend for work or to

attend every scheduled shift. The Applicant also says that he is unable to pursue employment because he would not be able to regularly be a reliable employee due to the "infrequency (*sic)* of … herniated disc's flare-ups and the nerve damage". The Applicant does not dispute the finding of fact which the Review Tribunal may have made regarding his efforts to find work, but instead, offers an explanation for the finding made. This does not qualify as a finding of fact which might be erroneous and it does not raise an arguable ground.

VIRS and Noble Letters

[35] Although the Applicant has filed additional opinions in support of his leave application and appeal, I am unable to consider any new materials. I note that the Review Tribunal had already considered a number of medical records, including various reports of Dr. Noble and diagnostic imaging reports, which addressed the issue of the Applicant's back pain and sciatica. The records before the Review Tribunal were current to October 5, 2012.

[36] The Applicant has not stated why he has filed the letter of Ms. Smith or the letter dated February 4, 2013 of Dr. Noble, other than to bolster the existing opinions before the Review Tribunal. He has not indicated how the additional opinion might fall into one of the grounds of appeal.

[37] 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 General Division of the Social Security Tribunal). There are additional requirements that an Applicant must meet 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. 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 letter of Ms. Smith or the updated medical opinion of Dr. Noble, notwithstanding how supportive the Applicant feels they might be.

CONCLUSION

[38] Given the considerations expressed above, the Application is refused.

Janet Lew
Member, Appeal Division