Citation: *C. W. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 116

Appeal No. AD-14-107

BETWEEN:

C. W.

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: May 22, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on June 17, 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, 2012.

[3] The Applicant filed a Notice of Appeal – General Division with the Tribunal on September 12, 2013, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

[4] As the appeal is from a decision of a Review Tribunal, the Applicant should have filed an Application Requesting Leave to Appeal with the Appeal Division of the Social Security Tribunal. I am prepared to accept the Notice of Appeal as an Application Requesting Leave to Appeal (the "Application").

ISSUE

[5] Does this appeal have a reasonable chance of success?

THE LAW

[6] 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".

[7] 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".

[8] 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.

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

[10] I am required to determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success, before leave can be granted.

APPLICANT'S SUBMISSIONS

[11] In the Application filed on September 12, 2013, the Applicant wrote the following:

> I don't agree with the decision for a couple of reasons. Statistics show people in my age group have trouble getting work. You want me to get training. I ask for what can you promise me a job that I can. You say education is consider (*sic).* It has not been in this case. Besides that, there is my health…

[12] In essence, the Applicant submits that:

a) The Review Tribunal erred in finding that he should be able to seek alternative employment. The Applicant submits that, apart from medical considerations, it is unrealistic for someone his age to secure employment. (The Applicant is currently 56 years old.)

b) The Review Tribunal erred in finding that he should be able to undergo retraining. The Applicant submits that, apart from medical considerations, it is unrealistic for someone with a Grade 9 education to undergo retraining.

c) The Review Tribunal failed to consider his limited education in determining whether he is disabled as defined by the *Canada Pension Plan.*

[13] The Applicant filed further submissions with the Tribunal on January 9, 2014. He submits that the Review Tribunal erred in finding that he had acknowledged not having any learning disabilities. While he may not have been formally diagnosed with having attention deficit disorder, he submits that there are other types of learning disabilities and that the evidence before the Review Tribunal clearly showed that he has a learning disability of some sort.

[14] The Applicant further submits that the Review Tribunal erred in finding that he is capable of carrying 50 pounds a distance of 5 kilometers. He says that it would be optimistic to think that he might even be able to carry this weight a distance of 25 meters.

[15] The Applicant further submits that the Review Tribunal should have considered his learning limitations in determining whether retraining and hence, seeking sedentary work, is at all realistic in his circumstances. This submission is similar to the one set out in the Application.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

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

[18] I am required to determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success. The Applicant has not used the language of the DESD Act in setting out the grounds for appeal, but I would not find that to be fatal to any application. In this particular instance, the Applicant, in essence, submits that the Review Tribunal made various findings of fact without regard for the material before it. He also submits that the Review Tribunal erred in law, in failing to take his age, limited education and learning limitations into account when assessing the practicability of retraining for sedentary work and in determining whether he is disabled as defined by the *Canada Pension Plan*.

[19] 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, I need to satisfy myself that the Review Tribunal made the errors which the Applicant submits the Review Tribunal made.

[20] Similarly, where there are alleged errors of findings of fact on the part of the Review Tribunal, I need to satisfy myself that the Review Tribunal made the findings which the Applicant submits the Review Tribunal made. 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.

(a) Learning Disability

[21] The Applicant submits that while he may not have been formally diagnosed with attention deficit disorder, there are other types of learning disabilities. He submits that the evidence before the Review Tribunal clearly showed that he has a learning disability of some sort, and that the Review Tribunal erred by not taking this into account.

[22] The Applicant is asking that, in considering this submission, we accept that he is *de facto* learning disabled, even if the evidence before the Review Tribunal was that he had been tested for and found not to have any learning disabilities.

[23] Had there been some evidence that the Applicant has some learning limitations, I might have been able to consider whether this submission raises an arguable ground, and it may have been a ground upon which the appeal might have had a reasonable chance of success. There is no basis upon which to make a different finding of fact, based on the evidence that was before the Review Tribunal, and there is no basis therefore to find that there is a reasonable chance of success under this ground.

(b) <u>Alternative Employment & Retraining</u>

[24] The Applicant further submits that the Review Tribunal erred in law in expecting that he should be able to secure alternative employment or undergo retraining. Apart from medical considerations, his age, limited education and learning disability would be barriers to re-entry into the workforce or to retraining.

[25] The Applicant submits that the Review Tribunal should have considered his learning limitations in determining whether retraining and ultimately seeking sedentary work was at all realistic in his circumstances. In essence, the Applicant submits that the Review Tribunal erred in law in failing 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".

[26] The Applicant submits that in determining whether he is employable within the meaning of severe as set out by *Villani,* the Review Tribunal ought to have taken into account the fact that he is learning disabled. I find no credence to this submission, as the evidence before the Review Tribunal was that the Applicant had been tested and found not to have any learning disabilities.

[27] The difficulty I have with the submissions regarding the Applicant's age and education is that he is still required to demonstrate that he suffers from a "severe and prolonged disability" that renders him "incapable regularly of pursuing any substantially gainful occupation". Medical evidence and evidence of employment efforts and possibilities are still required: *Villani*. It is not sufficient to say that age and education 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.

[28] There was relatively little medical evidence before the Review Tribunal which addressed the Applicant's functionality and capacity. The Review Tribunal referred to the Medical Report dated May 31, 2011 of the Applicant's family physician, Dr. P. John Rottger, in which he opined that the Applicant was "able for sedentary work only". (Curiously, the Review Tribunal made no reference to Dr. E. Janzen's consultation report dated January 7, 2010. Dr. Janzen provided an opinion in response to the Applicant's queries about returning to work. I make no findings in relation to Dr. Janzen's opinion, or to the fact that the Review Tribunal made no reference to his report.)

[29] The Review Tribunal assessed the medical evidence and found that it did not establish that the Applicant's disability was severe as defined by the *Canada Pension Plan*. Indeed, in relying upon the family physician's medical report dated May 31, 2011, the Review Tribunal found that there was nothing to suggest that the Applicant was unable to do sedentary work.

[30] In light of the family physician's medical report that the Applicant was capable of doing sedentary work, the Review Tribunal – at least on the face of it -- considered the Applicant's education and age, in determining his prospects for retraining. The Review Tribunal wrote:

> Mr. C. W. is still a young man and is proficient in the English language. Though he does not have an extensive formal education, from his income information, we can conclude that he has a long work history. We do not find, therefore, that the Appellant's personal characteristics would significantly disadvantage his employability.
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> . . .
>
> Though he indicated a preference for physical work and only has a Grade 9 formal education, he was certainly at an age where some retraining could open options for returning to the workforce".

[31] Notwithstanding the opinion from the family physician, the Review Tribunal was still required to determine the ultimate issue as to whether, in light of the medical evidence and the Applicant's personal circumstances, such as his age and education, he could be considered disabled under the *Canada Pension Plan.* In my view, the Review Tribunal was required to not only examine the Applicant's oral testimony, but also the experts' opinions and determine

if they could withstand the test of practical reality. While in the abstract the Applicant could well be capable of sedentary work and retraining, is it realistic, once his age and education are taken into account, for him to be capable regularly of pursuing any substantially gainful occupation? In my view, there is a failure to appreciate *Villani* and how it is to be applied if a determination of one's disability does not meaningfully take these practical realities into account.

[32] While the Review Tribunal found that the Applicant's personal characteristics would not significantly disadvantage his employability, and that he was -- at age 55 with a Grade 9 education – "certainly at an age where some retraining could open options for returning to the workforce", it is unclear if the Review Tribunal also examined whether the Applicant's personal characteristics rendered him incapable regularly of pursuing any substantially gainful occupation. The test to apply when determining disability is not an applicant's employability, but rather, whether he is incapable regularly of pursuing any substantially gainful occupation.

[33] I am satisfied that the Applicant raises an arguable case and that the appeal has a reasonable chance of success.

(c) <u>Functional Limitations</u>

[34] The Applicant submits that the Review Tribunal erred in finding that he is capable of carrying 50 pounds a distance of 5 kilometers, given his physical limitations.

[35] The Questionnaire for Disability Benefits Canada Pension Plan asks an applicant a series of questions including how long and how far he is able to walk, and how much and how far he is able to lift or carry.

[36] In its decision, the Review Tribunal found that the Applicant has "some considerable functionality". It wrote,

> He is able to walk 5 kilometers, and uses that ability as his primary exercise mode. His Questionnaire indicates that he can lift/carry 50 pounds.

[37] The Review Tribunal did not actually state that he was able to lift or carry 50 pounds a distance of 5 kilometers. I understand the Review Tribunal to have found that the Applicant

is able to do each activity separately and not necessarily simultaneously. As indicated above, in order for me to find that there was an error in its findings of fact, I need to satisfy myself that the Review Tribunal made the findings which the Applicant submits that the Review Tribunal made. I do not find that to have been the case here, and as such, it cannot be said that the Review Tribunal committed an error in its finding of fact. I find that this ground of appeal falls short in demonstrating that there could be a reasonable chance of success and I therefore deny leave on this ground.

CONCLUSION

[38] While the Applicant was unsuccessful on some of the grounds set out in his leave application, he has raised at least one ground that satisfies me that the appeal has a reasonable chance of success and for that reason, 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