Citation: *B. Z. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 119

Appeal No. AD-13-188

BETWEEN:

B. Z.

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 27, 2014

DECISION

[1] The Social Security 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 of January 22, 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 December 31, 2012. The Applicant filed an application requesting leave to appeal (the "Application") with the Pension Appeals Board. The Application was considered received by the Appeal Division of the Social Security Tribunal (the "Tribunal") on or about April 18, 2013, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

[3] Does this 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 lists the following as grounds for appeal in her Application:

i. <u>Medical Considerations</u>

(a) She is blameless for her medical problems.

(b) She suffers from chronic neck and back pain, constant headaches, and unpredictable severe muscle spasms, which render her unable to sleep or do any activities and which leave her feeling depressed. The pain is always present.

(c) Dr. Samadi, a rheumatologist, tested her on January 27, 2012 and found that she had 14 out of 18 trigger points and hence, diagnosed her as having fibromyalgia. Dr. Samadi sent her to the Emergency Department at the hospital, as she was concerned about the Applicant's depressive state. While at the hospital, the Applicant was seen by Dr. Hong, psychiatrist, who prescribed medications for her depression and fibromyalgia. The Applicant remained in hospital for two days.

(d) Dr. Samuel Wong, an orthopaedic surgeon, recommended conservative management. Dr. Wong recommended against any invasive procedures or surgical intervention, as he was of the opinion that her condition is permanent and cannot be resolved.

(e) She has attempted mitigation of her health issues and has tried every treatment recommendation, including yoga clinic classes and gentle exercises. She takes various medications, despite experiencing numerous side-effects.

(f) The prognosis for any recovery is poor. She finds this to be quite upsetting.

ii. <u>Review Tribunal's Considerations of the Medical Evidence</u>

(a) The Review Tribunal erred in not accepting the opinions of her family physician Dr. Robson.

(b) The Review Tribunal erred in accepting the argument of the Respondent (set out in its letter dated June 2, 2010 at page 9 of the OCRT file) that an x-ray of the Applicant's neck taken in November 2006 showed no degenerative

findings, without giving consideration to the fact that she has had degeneration in her neck since 2010, as documented by an MRI done on November 14, 2010 of her cervical spine. She submits that the MRI taken on November 14, 2010 shows mild facet joint degeneration at C4-5 and C5-6 and mild bulging at C6-7. (see page 68 of the OCRT file)

(c) The Review Tribunal erred in finding that the medical report dated August 5, 2010 of Dr. Baryshnik stated that there was no support for her pain complaints, when in fact he had written that her pain has been persisting and increases with any activity, including walking. (see page 60 of OCRT file)

(d) The Review Tribunal erred in relying on an MRI done on June 13, 2010 and finding that there was a mild diffuse disc bulge at L5-S1, when the evidence showed a "moderate broad-based disc at L5-S1 causing moderate foraminal stenosis, more on the right".

(e) The Review Tribunal erred in finding that an MRI taken on February 14, 2011 was normal, when an MRI taken on November 10, 2010 showed abnormalities, such as mild degenerative changes at C4-C5, disc bulging at C6-7 and moderated broad-based disc and foraminal stenosis in her lumbosacral spine.

iii. <u>Impact of Decision</u>

(a) Disability benefits would be helpful to her family.

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

[9] Subsection 58(1) of the DESD Act states that the only grounds of appeal are 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] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

[11] 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.

i. Medical Considerations

[12] The medical considerations cited by the Applicant disclose no grounds of appeal for me to consider, as they do not identify any failures by the Review Tribunal to observe a principle of natural justice or identify any errors in law or findings of fact which the Review Tribunal may have made.

[13] This is not a re-hearing of the claim. If the Applicant is requesting that we re-assess the claim and substitute our decision for that of the Review Tribunal, I am unable to do this, given the very narrow provisions of subsection 58(1) of the DESD Act. The leave application is not an opportunity to re-assess the claim to determine whether the Applicant

is disabled as defined by the *Canada Pension Plan.* The Act requires that I determine whether any of the reasons for appeal fall within any of the grounds of appeal and whether any of them have a chance of success.

[14] The medical submissions set out by the Applicant simply are not relevant to a leave application.

ii. Review Tribunal Considerations of the Medical Evidence

[15] The Applicant submits that the Review Tribunal made numerous errors in its review and analysis of the medical evidence. I will deal with each separately.

[16] 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) The Review Tribunal erred in not accepting the opinions of her family physician Dr. Robson.

[17] The Review Tribunal noted the family physician's summary that his client "still suffers intensely. She remains disabled. She is unable to entertain any type of work whatsoever". The Review Tribunal was dismissive of the medical opinions of the Applicant's family physician, as it found that he strayed into advocacy territory on behalf of his patient, to the point that it coloured his impartiality. As such, the Review Tribunal followed *Canada (MHRD) v. Angheloni* 2003 FCA 140. The Review Tribunal wrote that the Federal Court held that when a family physician advocates on behalf of his patient in respect of an application for benefits and there are indications that his neutrality has been lost, the Pension Appeals Board (or here, the Review Tribunal) must be vigilant in assessing that evidence, particularly when the doctor does not testify at the hearing. *Angheloni* also required the Review Tribunal to assess the other medical evidence before it and determine whether it contradicted the family physician's opinion. The Review Tribunal was bound to

follow *Angheloni* where there were a number of experts' opinions which it found contradicted the family physician's opinions and which the physician had failed to address, when he was aware of them.

[18] There are no authorities that I am aware of which require a Review Tribunal or the General Division to accept all of the experts' opinions, including those of a family physician. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the Applicant's counsel in that case identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the Applicant's application for judicial review, the Court of Appeal held that,

> "First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact. . ."

[19] It is not inappropriate or improper for 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. Hence, I can find no error arising out of the fact that the Review Tribunal chose not to accept the opinions of the Applicant's family physician, in the face of what the Review Tribunal perceived as conflicting and contradictory opinions.

(b) **The Review Tribunal erred in accepting the argument of the Respondent (set out in its letter dated June 2, 2010 at page 9 of the OCRT file) that an x-ray of her neck taken in November 2006 showed no degenerative findings, without giving consideration to the fact that she has had degeneration in her neck since 2010, as documented by an MRI done on November 14, 2010 of her cervical spine. She submits that the MRI taken on November 14, 2010 shows mild facet joint degeneration at C4-5 and C5-6 and mild bulging at C6-7. (at page 68 of the OCRT file)**

[20] The Review Tribunal made no mention of the November 2006 x-rays or of any degeneration, in its decision. The Review Tribunal made reference to the November 14, 2010 MRI at paragraph 43 of its decision and stated that Dr. Bell was of the opinion that there was no disc herniation or spinal stenosis seen on his examination of November 14, 2010. The Review Tribunal's findings in this regard are consistent with the final opinion set out in the MRI report, at page 68 of the OCRT file. Hence, it cannot be said that the Review Tribunal mischaracterized or misstated the radiologist's findings in connection with the MRI of November 14, 2010.

[21] While the Applicant rightly points out that the Review Tribunal did not make mention of the fact that the MRI indicates that there was mild facet joint degeneration at C4-5 and mild disc bulging at C6-7, a Review Tribunal is not required to refer to each and every piece of evidence before it, and it can be presumed that the Review Tribunal considered all of the evidence: *Simpson, supra.*

[22] Even if the Review Tribunal had referred to the 2006 diagnostic reports, the degeneration may not have arisen by then. So, there may not necessarily be any inconsistency or error between the 2006 and 2010 reports.

[23] As well, the fact that degeneration and mild disc bulging is present is, in any event, by no means an indication of any symptomology or any measure of the severity of any symptomology that might be extant. The underlying cause of any neck symptomology does not necessarily speak to the severity of one's disability, and would not have been a determinative factor in assessing disability for the purposes of the *Canada Pension Plan*.

[24] I am not satisfied that the Applicant has raised an arguable ground or that there is a reasonable chance of success under this heading. I am unable to consider granting leave under this ground.

(c) **The Review Tribunal erred in finding that the medical report dated August 5, 2010 of Dr. Baryshnik stated that there was no support for her pain complaints, when in fact he had written that her pain has been persisting and increases with any activity, including walking. (see page 60 of OCRT file)**

[25] At paragraph 42 of its decision, the Review Tribunal wrote that,

> Dr. Baryshnik, neurologist, on August 5,2010, after a neurologic consultation at the request of Dr. Wong, reported in summary all the objective neurological findings were neutral as were all the electronic imaging and he stated that she appears to have mechanical back pain. No support for the pain complaints.

[26] I agree that the statement "No support for the pain complaints" is sloppy, at best. In the context of her submissions, it seems that the Applicant has understood that the Review Tribunal denies that she could be experiencing any pain symptoms. However, the Review Tribunal clearly accepts that the Applicant suffers from some disability and that she does experience pain, to the extent that it required her to participate in any fibromyalgia classes, any pain clinics or other modalities of health measures available in her geographical area to try to mitigate her health issues. It seems that the Review Tribunal was simply expressing Dr. Baryshnik's opinion that there were no objective neurologic findings to account for the Applicant's pain symptoms.

[27] I am not satisfied that the Applicant has raised an arguable ground or that there is a reasonable chance of success under this heading. I am unable to consider granting leave on this basis.

(d) **The Review Tribunal erred in relying on an MRI done on June 13, 2010 and finding that there was a mild diffuse disc bulge at L5-S1, when the evidence showed a "moderate broad-based disc at L5-S1 causing mode rate foraminal stenosis, more on the right".**

[28] The MRI is at pages 73 and 74 of the OCRT file. The report reads:

> At L5-S1, moderate degenerative disc disease with mainly Modic type II endplate signal changes. Moderate broad-based bulging of the disc with small stable central-protrusion superimposed. Mild facet osteoarthritis. **There is no spinal stenosis.** There is mild right greater than left foraminal- narrowing, unchanged.
>
> . . .
>
> OPINION: Stable spondylotic changes at L5-S1 with **mild broad-based disc bulge** and small-superimposed central protrusion without significant spinal stenosis. Mild right greater than left foraminal narrowing at this level, also unchanged.
>
> (my emphasis)

[29] In his consultation report dated June 17, 2010, Dr. Wong noted that the MRI showed evidence of a moderate-sized broad-based disc at L5-S1 causing moderate foraminal stenosis, more on the right.

[30] In his consultation report of August 5, 2010 (at page 60 of the OCRT file), Dr. Baryshnik also commented on the MRI. He was of the opinion that it showed spondylotic changes at the L5-S1 level and no significant spinal stenosis or significant intravertebral foraminal stenosis.

[31] It seems that the Review Tribunal referred to the radiologist's findings of the MRI, rather than to Dr. Wong's interpretation of the MRI, as the Review Tribunal decision largely uses the language used in the MRI report. The Review Tribunal used the word "diffuse" instead of "broad-based" in describing the disc bulge, but I do not find that there is any significant difference between the two. Where there was a seeming inconsistency in the interpretation of the MRI, the Review Tribunal preferred the radiologist's opinion. This was well within the Review Tribunal's purview.

[32] I am not satisfied that the Applicant has raised an arguable ground or that there is a reasonable chance of success under this heading. I am unable to consider granting leave on this basis.

(e) **The Review Tribunal erred in finding that a report dated February 14, 2011 stated that the MRI was normal, when an MRI taken on November 10, 2010 showed abnormalities, such as mild degenerative changes at C4-C5, disc bulging at C6-7 and mode rated broad-based disc and foraminal stenosis in her lumbosacral spine .**

[33] The Review Tribunal wrote that,

> Dr. Wong in a report dated February 14, 2011, provides a report in summary that confirms the electrodiagnostic studies were normal as was the MRI.

[34] In fact, Dr. Wong's report states the following:

> She had Electrodiagostic Studies last August which were reported as normal.
>
> . . .

> B. Z. had an MRI done last November showing mild degenerative changes and disc bulging at C4-5 and C5-6. Her previous MRI of the lumbosacral spine does show a moderate broad-based disc. Despite these findings on the MRIs of the cervical and lumbosacral spine, there is no evidence of any focal neurological deficits.

[35] The Review Tribunal was somewhat ambiguous about its interpretation of the MRI results. It is unclear whether the Review Tribunal was aware that the MRIs showed mild degenerative changes and disc bulging at C4-5 and C5-6 and a moderate broad- based disc of the lumbosacral spine. And, if so, did it consider these findings to be normal and of little or no consequence? At this juncture, I cannot assume that the Review Tribunal was aware that the MRI showed mild degenerative changes and disc bulging at C4-5 and C5-6 and a moderate broad-based disc of the lumbosacral spine, and considered these to be normal and of no clinical significance, even if the MRI also indicated that there was no evidence of any focal neurological deficits.

[36] It would have been helpful had the Review Tribunal provided some clarification, given that its decision seemed to largely hinge on the results of the diagnostic imaging. There certainly would have been support in the medical documentation that the MRI was normal. Even Dr. Robson – whose opinions the Review Tribunal dismissed entirely -- opined in his medical letter dated February 18, 2011 that the "CT and MRI do not show any bone or joint abnormalities". (Dr. Robson did add that a CT scan and MRI that did not show any bone or joint abnormalities did not mean that the Applicant did not have any pain.) I cannot assume that the Review Tribunal necessarily adopted or embraced Dr. Robson's opinion on this one point, that the CT and MRI do not show any bone or joint abnormalities, when it was so clearly dismissive of his opinions otherwise.

[37] One of the grounds of appeal for consideration is whether the General Division (or here, 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. Diagnostic results alone do not necessarily correlate with the degree of severity of one's disability, or to the extent of functional impairment. Ordinarily I might have found that stating that the MRI was normal – when the evidence could be construed as otherwise – to be of little or no

significance in determining whether an applicant's disability might be severe for the purposes of the *Canada Pension Plan*, but in this particular case, the Review Tribunal largely determined the severity of the Applicant's disability by focusing on the diagnostic results. Without explaining if and why it considered degenerative changes and disc bulging to be normal without any clinical significance, there may well be an arguable case for the Applicant to make. I am prepared to grant leave on this narrow basis.

iii. Impact of Decision

[38] The fact that disability benefits would be of some assistance to the Applicant and her family is of no relevance to a leave application. In assessing leave applications, the *Canada Pension Plan* does not confer any discretion upon me to consider the impact my decision may have on any of the parties.

[39] This extends also to a Review Tribunal, as the *Canada Pension Plan* does not confer any discretion upon it to consider other factors outside of the *Canada Pension Plan* in deciding whether an applicant is disabled as defined by that Act.

CONCLUSION

[40] While the Applicant was unsuccessful on most of the grounds set out in her leave application, she has raised one ground that satisfies me that the appeal has a reasonable chance of success and for that reason, the Application is granted.

[41] 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