Citation: *J. V. T. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 133

Appeal No. AD-13-44

BETWEEN:

J. V. T.

Applicant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: June 2, 2014

DECISION

[1] The Tribunal refuses 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 to the parties on April 2, 2013. A Review Tribunal determined that a *Canada Pension Plan, (CPP),* disability pension was not payable to the Applicant, because it concluded that the Applicant had failed to meet both criteria in the definition of disabled in CP subsection 42(2)(a). His condition was prolonged but not severe. The Minimum Qualifying Period (MQP) date was established as December 31, 2011.

[3] The Applicant submitted the Application requesting Leave to Appeal, ("the Application"), to the Social Security Tribunal, ("SST"), within the time permitted for filing under the *Department of Employment and Social Development Act* (DESD Act).

[4] The Applicant's reasons for requesting Leave to Appeal are set out at Box C of the Application. At Box C, Counsel for the Applicant states that the medical evidence supports a finding that the Applicant is disabled within the meaning of the legislation. He also advised the Tribunal that the Applicant expected to be in possession of additional medical evidence to support his position. The SST received the medical report on November 8, 2013. The Reasons for the Appeal are set out in Box D of the Application. The Applicant's counsel asserts that the Review Tribunal committed two errors. First, the Review Tribunal used the wrong test to assess the severity of the Applicant's condition. Second, the Review Tribunal erred in applying relevant facts to the test for disability. For administrative reasons, the Tribunal elects to treat Box C and Box D as setting out the grounds of the Application.

ISSUE

[5] Does the 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." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[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.

ANALYSIS

[10] An Application for Leave to Appeal is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits. However, to be successful, the Applicant must make out some arguable case[1] or show some arguable ground upon which the proposed appeal might succeed. *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).

---

[1] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD at para. 15.

[11] The Applicant submits that the Review Tribunal used the wrong test when it considered the severe criterion in CPP subsection 42(2)(a). He argues that in paragraph 44 of the decision, the Review Tribunal appeared to conclude that as the Applicant was still functioning in his daily life he did not meet the test of "severe".

[12] In paragraph 44 of its decision, the Review Tribunal comments on the Applicant's ability to perform the tasks of daily life and concludes that it is unable to draw the inference from the evidence that the Applicant would be unable to face the pressures of the workplace. The relevant paragraph is produced below:

> [44] The Tribunal must also consider whether, when the totality of the Appellant's health problems is considered together, they meet the standard of severity under the CPP. In the Tribunal's view that has not been established in the present case. The Appellant still functions in his daily life, driving a motor vehicle and going shopping with his spouse. He does some household work, though not a lot of it. He does these things despite all of his health problems. It might be said that if one is severely impacted, even 'in one's home life, by the constellation of health conditions he faces, then he must be unable to work in any gainful occupation, where surely the pressures of the workplace will be greater. That does not seem to be the case here, however.

[13] In the Tribunal's view, paragraph 44 cannot be read separately from paragraph 45 in which the Review Tribunal makes the point that it had little basis for assessing the Applicant's residual work capacity as he had made no attempts at alternative work, even as he continues to function in his daily life.

> [45] The problem with the contention that Mr. J. V. T. could do no gainful work, or at least not on a reasonably reliable basis, from and after his MQP date is that he has not tried hard enough to demonstrate that fact. Admittedly he did try going back to his business as a sort of supervisor and having others perform the actual physical labour, and that did not work out. He found he could not handle this either, although this was back in 2009, and it is doubtful the Appellant had reached maximum recovery from his injuries by then. He closed the business as of January 1, 2010. The Tribunal did not hear of any other attempts at alternative work after the end of 2009. There has not been a formal functional capacities assessment so that we could see, apart from failed work attempts, what the Appellant may or may not be capable of in terms of work.

[14] The Applicant has attacked the Review Tribunal's finding that it did not hear of any other attempts at alternative work. His Counsel has submitted that this is an error. He states

that the Review Tribunal was aware that the Applicant had interviewed for a position at Walmart. Further, he submitted that the Applicant had testified that he had returned to his construction business for a period of approximately six months in a supervisory role. Lastly, he submits that Heather Hingley-Campbell gave *viva-voce* evidence directly on this point, which the Review Tribunal alluded to in paragraph 25 of the decision, without stating that it rejected her evidence.

[15] With respect to the Applicant's interviewing for a position at Walmart, the Tribunal is of the view that the Review Tribunal made no error in this regard. An interview is not the same as actually taking up a position and working on site. One may or may not be successful on an interview. Therefore, the Tribunal finds it difficult to see how an interview can equate to an attempt at alternative work. Accordingly, the Tribunal rejects this submission as demonstrating a viable ground of appeal.

[16] Also, in regard to the submission that in assessing the severe criterion, the Review Tribunal misapplied the fact that the Applicant had attempted, unsuccessfully, to work as a supervisor in his construction business for about six months. However, in Counsel's own submission, the Review Tribunal did not ignore the fact that the Applicant had attempted to modify the tasks he performed in his business. Counsel notes that at paragraph 45 the Review Tribunal notes that other than his supervising his business it did not hear of any other attempts at alternative work. Accordingly, this submission cannot ground the appeal.

[17] In addition to querying the Review Tribunal's assessment of the Applicant's attempts to find alternative work, Counsel makes the further submission that the Review Tribunal had the evidence of Heather Hingley-Campbell, which it did not reject, on why the Applicant could not continue to perform certain non-physical aspects of his construction business. The Review Tribunal alluded to tasks such as estimating jobs, purchasing materials, planning the completion of the work and then carrying it out, then seeing to the collection of the accounts with his customers. Heather Hingley-Campbell's evidence appears to have been geared to explaining why the Applicant could not perform physical labour; work in a supervisory capacity; or retrain. However, the Review Tribunal appeared to have rested its decision, in part, on the fact that, the Applicant having closed his business

on January 1, 2010, there were no other attempts at alternative work after the end of 2009. As well, the Review Tribunal found that the Applicant had not undergone a formal functional capacities assessment, thereby making it difficult for it to assess his residual work capacity.

[18] In fact, at paragraph 48, the Review Tribunal expressly disagreed with Heather Hingley-Campbell's testimony and conclusion that the Applicant is incapable of any gainful employment. It noted that she had formed her conclusions after only one visit with the Applicant; that the visit took place a year after the MQP; and it queried her inability to explain the seeming inconsistency of the Applicant being able to perform some functions at home, but not being capable of gainful employment.

> [48] Ms. Hingley-Campbell holds the view that the Appellant cannot work. Her report is very helpful as a summary of the Appellant's health problems, and an explanation of various conditions and their possible causes. It summarizes the entire medical record, including treatment recommendations. It records her observations at a single interview of the Appellant at his home on December 29, 2012, but this is nearly a year after the MQP date. She indicated that pain is the Appellant's main problem, but not how he is able to function in some ways at home but yet unable to work even in a "paperwork" or sedentary job, even part-time. She says he is struggling with depression, yet we do not see the changing or escalating treatment regimen that usually accompanies an unstable case of depression. She reviews his educational and employment history and concludes that, together with the impact of his medical conditions, he is incapable of any gainful employment. With respect, we disagree.

[19] At paragraph 49, the Review Tribunal reached the conclusion that while, as Heather Hingley-Campbell testified, the Applicant cannot do a job that requires standing, lifting, turning, pulling, pushing, climbing, reaching or carrying, and that this would rule out some of what he used to do, not all of it was ruled out. The Tribunal is not persuaded that, in all the circumstances surrounding Heather Hingley-Campbell's conclusions and the absence of any further attempts at alternative work that the Review Tribunal erred in its assessment of the severe criterion of the Applicant's disability.

[20] As stated above the applicant did submit the medical report written by Dr. Scott Garner on August 14, 2013. The Medical Report is clearly written more than two and a half years after the MQP and while it was submitted after the Application it was clearly intended to be part of the Application. Faced with the decision as to how to treat this medical report,

the Tribunal considered the purpose for which it was submitted, its content as well as the timing of the report and the grounds of Appeal. The Tribunal finds that, the Application, not being a "new facts" Application, it cannot consider the medical report at the Application for Leave stage. The Application must clearly point to a possible error in the Review Tribunal's decision relative to the grounds of appeal.

[21] This new medical report is, at best, additional evidence that amplifies evidence that was before the Review Tribunal and which it considered when making its decision. It speaks to the Applicant's current condition as opposed to his condition at the MQP. Provided Leave to Appeal is granted, the report might be relevant at the hearing of the appeal. However, in all the circumstances of this Application, the Tribunal finds that it is tangential to the Application for Leave to Appeal the Review Tribunal decision. The Tribunal finds that it cannot form the basis on which leave to appeal the decision can be granted.

[22] In light of the above analysis, the Tribunal refuses the Application.

CONCLUSION

[23] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division