Citation: *Minister of Human Resources and Skills Development v. B. P.*, 2014 SSTAD 168

Appeal No. AD-13-788

BETWEEN:

Minister of Human Resources and Skills Development

Applicant

and

B. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 30, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on May 3, 2013. The Review Tribunal calculated the Respondent's minimum qualifying period to be December 31, 2012 and found him to be disabled under the *Canada Pension Plan*, with a date of onset of June 2012. The Review Tribunal determined that disability benefits were to commence in October 2012.

[3] The Applicant filed an Application for Leave to Appeal and Notice of Appeal (the "Application") on August 8, 2013, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

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

THE LAW

[5] 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".

[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".

[7] 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.

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

[9] 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

[10] In the Application filed on August 3, 2013, the Applicant wrote the following:

> 2. The Applicant is dissatisfied with the decision and, if leave is granted, hereby appeals on the following grounds:
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> i. New evidence;
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> ii. The [Review Tribunal] erred in fact and in law when it applied the wrong test for the determination of disability under the *Plan* and found the Respondent disabled;
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> iii. The RT erred in fact and in law when it ignored evidence that the Respondent remained capable of work;
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> iv. The RT erred in fact and in law by applying the wrong test for substantially gainful employment based on the Respondent's previously earned income;
>
> v. The RT erred in fact and in law when it relied on unsupported evidence.
>
> 3. Furthermore, the evidence does not support a determination that the Respondent's condition is severe and prolonged and he is therefore not entitled to a disability pension under the [*Canada Pension*] *Plan.*

[11] In its submissions, the Applicant also prepared a section titled, "Reasons to be Submitted in Support of the Appeal". This section consisted of a review and analysis of the medical evidence, amongst other things. This section also consisted of an overview of some of the principles to consider when determining whether an applicant is disabled for the purposes of the *Canada Pension Plan.*

RESPONDENT'S SUBMISSIONS

[12] The Respondent sent an e-mail to the Tribunal on January 31, 2014, in which he advised that his condition had deteriorated since the hearing before the Review Tribunal. He wrote,

> "I am sick, my memory is disabled and have clinical depression, I won my case at the tribunal. I had work (sic) but recently was let go because of my condition. I can not (*sic)* get a job, too old and ill. I wait for yet another stall, for how long now? It has been, I can not (*sic)* remember now but at least 6 months. I am at the end of my hope, I can not (*sic)* remember things, please let me know what is going on. I have just recently had more surgery on my heart, check my records, …"

ANALYSIS

[13] 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).

[14] 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.

[15] 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, the Applicant needs to satisfy me that the Review Tribunal made the errors which the Applicant submits the Review Tribunal made.

[16] Similarly, where there are alleged errors of findings of fact on the part of the Review Tribunal, the Applicant needs to satisfy me 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) New Evidence

[17] The Applicant submits that the Respondent testified before the Review Tribunal on February 13, 2013 that he earned approximately $1,000 per week. I understand this to be a typographical error, as the decision of the Review Tribunal indicates that the Respondent testified that he was able to earn approximately $1,000 per month. The Applicant submits that the Review Tribunal "considered this evidence and determined that this income did not constitute significantly gainful employment".

[18] The Applicant has filed a copy of a recent Record of Earnings for the Respondent which suggests that for the years 2011 and 2012, the Respondent had earnings of $10,004 and $52,625, respectively.

[19] Apart from the fact that these additional earnings change the minimum qualifying period and extend the contributory requirements to December 31, 2014, the Applicant submits that the recent Record of Earnings raises a genuine doubt as to whether the Review Tribunal would have reached the decision it did. In other words, the Applicant submits that the recent Record of Earnings demonstrates that the Applicant was substantially gainfully employed in 2012, such that he did not qualify as being disabled at the time of the hearing before the Review Tribunal, and thus ought to be disentitled to disability benefits.

[20] The Applicant relies on *Canada (Attorney General) v. Zakaria*, 2011 FC 136, at para. 37 to 39, that it can adduce new evidence in an application for leave to appeal a decision of the Review Tribunal and on *Kerth,* that if any new evidence is put forward

with its application, it must be such that it raises a genuine doubt as to whether the Review Tribunal would have reached the decision it did.

[21] *Zakaria* was decided prior to the enactment of the DESD Act. The DESD Act sets out the grounds of appeal to be considered in a leave application. There are no other grounds of appeal which I may consider outside of the DESD Act. *Zakaria* has no application to these leave proceedings.

[22] I am unable to consider the recent Record of Earnings or, for that matter, any new records or opinions, given the narrow constraints of subsection 58(1) of the DESD Act. The subsection requires that I determine whether any of the reasons for appeal the Applicant has cited fall within any of the grounds of appeal and whether any of them has a reasonable chance of success. The leave application is not an opportunity to re-assess the evidence or to re-hear the claim to determine whether the Respondent is disabled as defined by the *Canada Pension Plan.*

[23] If the Applicant intends to file the recent Record of Earnings in an effort to rescind or amend the decision of the Review Tribunal, it must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations,* and it 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 has no jurisdiction in this case 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. In short, there are no grounds upon which I can consider any recent records of earnings, additional records or opinions which the Applicant might intend to file.

[24] I agree that the recent Record of Earnings may very well raise a genuine doubt as to whether the Review Tribunal would have reached the decision it did, however, that is

not the test for me to determine and the recent Record of Earnings is of no relevance to this leave application.

(b) Error in Fact and Law – Application of Wrong Legal Test for Determination of Disability

[25] The Applicant submits that the Review Tribunal erred in law and in fact when it applied the wrong test for the determination of disability under the *Canada Pension Plan.* The Applicant submits that in determining whether the Respondent's disability was severe, the Review Tribunal took future possibilities into account. The Applicant submits that the Review Tribunal considered the possibility that the Respondent's cardiac condition and depression could deteriorate at some point in future as being one of the bases for finding him severely disabled.

[26] With respect, these considerations by the Review Tribunal appear to have been in the context of whether the Respondent's condition could be considered prolonged, and whether his condition might "improve to such an extent that it would allow him to return to significantly gainful employment". The Review Tribunal wrote,

> "The Tribunal then considered whether [the Respondent's] condition is prolonged. In this regard, [the Respondent] has been off full-time work since at least August of 2009. There is no indication from the medical evidence on the file that his condition will improve to such an extent that it would allow him to return to significantly gainful employment. In fact, while his condition is stable, it will not be reversed. His degenerative disc disease will, as the name implies, degenerate. And while [the Respondent's] depression currently seems stable, there could of course be a relapse."

[27] In other words, the Review Tribunal found that the Respondent is currently unable to pursue substantially gainful employment and that his disability is expected to be long continued and of indefinite duration. The Review Tribunal did not appear to use future possibilities as being a basis for finding the Respondent's disability to be severe, as it is defined under the *Canada Pension Plan*. I find that there is no arguable ground on this basis.

[28] The Applicant further submits that the Review Tribunal erred in determining that the Respondent's condition is prolonged on the basis that he had been off full-time work

since at least August 2009 and that, "[T]here is no indication from the medical evidence on file that his condition will improve to such an extent that it would allow him to return to significantly gainful employment". The Applicant submits that a determination of disability based on an inability to perform full-time work and on "significantly gainful work" is an error, as part-time employment can be indicative of a substantially gainful occupation and of a medical condition that is not severe and prolonged under the *Canada Pension Plan.*

[29] The question as to whether the Review Tribunal identified and applied the proper legal test for disability raises a ground upon which the appeal might have a reasonable chance of success.

[30] The *Canada Pension Plan* defines disability as a physical or mental disability that is severe and prolonged, and an individual is considered to have a severe disability if he is incapable regularly of pursuing any substantially gainful occupation. This raises another question. Did the Review Tribunal correctly define "severe" under the *Canada Pension Plan* as meaning "incapable regularly of pursuing any substantially gainful occupation" or did it apply another definition, "significantly gainful employment"? This raises a ground upon which the appeal might have a reasonable chance of success.

(c) <u>Error in Fact and Law – Evidence of Capacity Ignored</u>

[31] The Review Tribunal was acting within its jurisdiction as the trier of fact to assess and weigh the evidence before it. The Review Tribunal was not required to refer to all of the evidence before it in its decision: *Simpson v. Canada (Attorney General),* 2012 FCA 82. And, in this case, the Review Tribunal made no reference at all to either an Employer Questionnaire completed by a payroll technician in June 2011 or to a Record of Employment completed by the Alberta Motor Association in July 2009. It is unknown whether the Review Tribunal accepted or dismissed the evidence regarding the Respondent's employment.

[32] The Applicant submits that the Review Tribunal erred in finding that the Respondent is incapable of working, in the face of compelling and contradictory evidence

otherwise. The Applicant submits that the Review Tribunal accepted the Respondent's testimony explaining that he was constructively dismissed from his employment with the AMA in 2009, owing to his medical condition, without giving any consideration to any of the evidence submitted by his former employer. The Employer Questionnaire indicates that the Respondent had taken early retirement. The Questionnaire also indicates that the Respondent was able to handle the demands of his position, without any assistance from his colleagues. The Questionnaire also indicates that the Respondent had been on short-term and long-term disability for 187 and 189 days, respectively, although does not verify when he was on short- and long-term disability. A Record of Employment dated July 2009 completed by AMA also indicates that the Respondent had retired and that there were workforce reductions.

[33] None of the information from AMA was either corroborated or tested. The employer did not testify on behalf of either party. A review of the hearing file before the Review Tribunal indicates that the Applicant had made reference to both the Employer Questionnaire and the Record of Employment in its submissions, but that fact alone may not have necessarily alerted the Respondent to the Applicant's position that the Employer Questionnaire and the Record of Earnings contradict him. After all, it may be that the Respondent took early retirement or accepted any workforce reductions, if he did, because of his medical condition or because he felt that he had been constructively dismissed. There also is scant evidence as to the Respondent's duties and responsibilities and what physical demands were required of him, prior to his departure from AMA, so it may be that he could well agree that he did not require any assistance from his colleagues to perform his duties. In short, there may or may not be contradictions in the evidence, between the Respondent's testimony before the Review Tribunal and the employer's information.

[34] If the Applicant is going to make these submissions that there are contradictions in the evidence, it should have properly examined the Respondent on these points, and should also have called the Employer to testify. It is not for me on a leave application to determine and rule on whether there are contradictions in the evidence, which is what the Applicant is seeking, unless it is so obvious on the record.

(d) Error in Fact and Law – Application of Wrong Legal Test for Substantially Gainful Employment

[35] The Applicant submits that the Review Tribunal erred in fact and in law in finding that the Respondent was "not able to regularly engage in a significantly gainful occupation" and that his income from his part-time job "does not rise to the level of significantly gainful as that term of art can be applied to [his] situation". The Review Tribunal relied upon *Alexander v. MHRD* (June 5, 2000), CP 9448 (PAB), in finding that the Respondent could not be engaged in "significantly gainful employment", given the disparity in his income between his employment at the AMA and his current employment.

[36] The Applicant submits that the Review Tribunal erred in making a comparative analysis of the Respondent's current to past income levels. The Applicant cited *Fancy v. Canada*, 2008 FC 1414 at para. 13, which it submits stands for the proposition that the determination of whether a disability is severe within the meaning of the *Canada Pension Plan* does not involve a comparative analysis of one's current income to that of the past.

[37] There are three issues here:

> (1) as in paragraph 30 above, did the Review Tribunal correctly define "severe" under the *Canada Pension Plan* as meaning "incapable regularly of pursuing any substantially gainful occupation" or did it apply another definition, such as "significantly gainful employment";
>
> (2) what is the correct legal test for determining substantially gainful occupation; and,
>
> (3) did the Review Tribunal apply the correct legal test in determining whether the Respondent was engaged in a substantially gainful occupation?

[38] I am of the view that the issues brought up by the Applicant raise grounds upon which the appeal might have a reasonable chance of success. As such, I allow the application for leave to appeal on these issues.

(e) Error in Fact and Law – Reliance on Unsupported Evidence

[39] The Applicant submits that the Review Tribunal erred in finding the Respondent to be suffering from serious depression and that he was hospitalized in the summer of 2012. The Applicant submits that the Review Tribunal erred in relying solely upon the Respondent's testimony, without any independent corroborating evidence.

[40] The Applicant further submits that there is conflicting evidence "about the event leading to the hospitalization", though did not identify what that conflict might be. The Applicant refers to paragraphs 11, 21 and 32 of the decision of the Review Tribunal. At paragraph 11, the Review Tribunal noted that the Respondent had attempted suicide in either June 2011 or 2012, but ultimately decided that the event occurred in June 2012. The evidence indicates that the Respondent returned to work on a part-time basis at an auto-repair shop following this event, but it is unclear from the evidence as to when he began this part-time employment.

[41] The Applicant submits that the Review Tribunal erred in finding that the Respondent's pain levels had to be severe, as he had recently been prescribed OxyContin, in June 2012. The Applicant further submits that the Review Tribunal erred in making this finding, when there was no supporting evidence in the prescription history. The Applicant submits that the Review Tribunal erred in making a finding regarding the Respondent's pain levels, absent any medical evidence.

[42] The Applicant submits that as the Review Tribunal found the date of onset of disability to be June 2012, the fact that the Respondent alleges he was hospitalized and commenced taking OxyContin at approximately that time bears greater scrutiny, and as a consequence, there ought to be independent corroborating evidence to support these allegations.

[43] The Applicant submits that the Federal Court of Canada in *Warren v. Canada (Attorney General)*, 2008 FCA 377, at paragraph 4, established that a claimant must provide some objective medical evidence in support of his or her disability. The Applicant submits that the evidence before the Review Tribunal fell far short of meeting

this requirement, as the only evidence pertaining to the Respondent's depression came from reports dating back to 2005 and 2006. Paragraph 4 of *Warren* reads:

> 4 In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, [2003] F.C.J. No. 378, 2003 FCA 117; *Klabouch v. Minister of Social Development*, [2008] F.C.J. No. 106, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL)).

[44] Subsection 68(1) of the *Canada Pension Plan Regulations* provides for the following:

Determination of Disability

68. (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:

(*a*) a report of any physical or mental disability including

(i) the nature, extent and prognosis of the disability,

(ii) the findings upon which the diagnosis and prognosis were made,

(iii) any limitation resulting from the disability, and

(iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant; …

[45] The Applicant submits that the only evidence pertaining to the Respondent's depression is in reports from 2005 and 2006. However, Dr. John E. Clarke's report dated May 6, 2011 alludes to a risk of depression, though does not indicate the probability of that risk materializing. The report is dated one year prior to the date of onset of disability found by the Review Tribunal. In a handwritten letter date stamped received by the Pension Edmonton File Centre on February 22, 2011, the Respondent advised that he had been in a deep depression and had attempted suicide as he feared he could not work or support himself. He advised that he had been sent to the University of Alberta

Psychiatric Department Day Treatment Program. He included a two-page document from the Program, but the document is not addressed to anyone and does not bear the Respondent's name. There is no other documentation to verify if the Respondent participated in the program and if so, what duration and other treatment he may have undergone.

[46] While it most certainly would have been helpful had the Respondent obtained current medical records, including his family physician's clinical records and a prescription history, to corroborate the Respondent's oral testimony, it was up to the Review Tribunal to assess and weigh the evidence before it and determine if, on balance, it could be satisfied that there was sufficient evidence to support the Respondent's overall claim. Here, the Review Tribunal noted the Respondent's prior hospitalization in the year 2006, and suggested that there was an evidentiary foundation to support the claim that the Respondent suffers from serious depression. The Review Tribunal was entitled to draw the conclusions it did regarding the depths of the Respondent's depression, however seemingly weak or strong those evidentiary underpinnings might have been.

[47] As for the Respondent's prescription history, I would not expect there to be any evidence of a prescription for OxyContin if it was indeed first prescribed to him in June 2012, given that the prescription history is dated May 2011. That aside, I do not think that the law requires that there be independent, corroborating documentary evidence to support each and every factual point of a party's oral testimony, but in my view, there should be some independent, corroborating evidence to support the general thrust of his claim, and that evidence too ought not to be assessed in isolation but as part of the overall picture. For instance, while the Review Tribunal accepted that the Respondent had been recently prescribed OxyContin, suggesting that his pain level was clearly significant, the Respondent's type of pain control medication was not the only basis upon which it considered him to be severely disabled. After all, the Review Tribunal did write that it was clear that the Respondent "suffers from some severe health difficulties".

[48] I find that there is no arguable ground under this heading.

(f) "Reasons to be Submitted in Support of the Appeal"

[49] The Applicant prepared a review and analysis of the medical evidence that was before the Review Tribunal. The Applicant also summarized some of the principles to consider when determining disability under the *Canada Pension Plan.*

[50] The leave application is not an opportunity to re-hear the case or to reassess any of the medical evidence as to whether or not the Applicant meets the definition of disabled as set out in the *Canada Pension Plan* and I therefore decline to consider this review and analysis, other than to obtain some background, as it discloses no grounds of appeal for me to consider.

CONCLUSION

[51] The Application is granted.

[52] 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