Citation: *R. P. v. Minister of Employment and Social Development*, 2014 SSTAD 219

Appeal No. AD-13-203

BETWEEN:

R. P.

Applicant

and

Minister of Employment and Social Development
(Formerly 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: August 29, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on January 21, 2013. The Review Tribunal determined that a *Canada Pension Plan ("*CPP"), disability pension was not payable to the Applicant. It found that, as of his Minimum Qualifying Period ("MQP") date, the Applicant was not disabled within the meaning of the CPP. On or about April 10, 2013 the Applicant filed an application requesting Leave to Appeal (the "Application"), with the Pension Appeals Board (the "PAB"). The Tribunal received the initial Application on April 08, 2013. The Application was perfected on or about December 12, 2013 when the Applicant complied with the Tribunal's request for additional information.

[3] The Applicant's medical conditions from which he claims to suffer a severe and prolonged disability arise out of an April 2008 motor vehicle accident. The then self-employed Applicant complains of back pain, headaches, whiplash neck pain and non-restorative sleep. He has not worked at his former employment in telecommunications since 2009, as he found the work physically demanding and too difficult.

[4] The Applicant applied for CPP disability on August 12, 2010. The date of his MQP was agreed as December 31, 2009.

GROUNDS OF THE APPLICATION

[5] The grounds of the Application are that the Review Tribunal misapprehended the facts concerning his refusal to take medication. His objection is framed in the following terms: "the Tribunal seems to focus on reporting that I refuse to take medication for my condition several times in the Findings. This is entirely inaccurate. I take Oxycocet and cyclobenzaprine when the pain is unbearable. I take 3 tablets of 75 mg Lyrica every evening. I've tried anti-depressants on several occasions but I suffered severe side effects everytime. Moreover, I am

accused of not seeking medical help and/or treatment … this could not be further from the truth. I'm always seeking the counsel of specialists and make regular acupuncture and chiropractic visits."

[6] In the Tribunal's view, the Applicant is claiming that the Review Tribunal based its decision on an erroneous finding of fact that it made either in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The issue now before the Tribunal for determination is whether the Applicant's appeal has a reasonable chance of success?

THE LAW

[8] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the *Department of Employment and Social Development* ("DESD") *Act*. Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that 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.

[9] 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".

ANALYSIS

[10] On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower one than that which 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. In *St-Louis*[2], Mosley, J.

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Canada (A.G.) V. St. Louis*, 2011 FC 492

stated that the test for granting a leave application is now well settled. Relying on *Calihoo,*[3] he reiterated that the test is "whether there is some arguable ground on which the appeal might succeed." He also cautioned against deciding, on a Leave Application, whether or not the appeal would succeed.

[11] 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;
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> b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> 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.

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

[13] The Tribunal is 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 it can grant leave.

[14] The Tribunal has examined the Review Tribunal decision and the medical documents that were before the Review Tribunal in order to ascertain whether or not the Review Tribunal erred in its appreciation of the Applicant's refusal to take medications. At paragraph 31 of the decision, the Review Tribunal describes the content of a May 2009 medical report that includes a statement alleged to have been made by the Applicant that "he was not taking any pain medication on a regular basis."

[15] At para. 32, the Review Tribunal refers to the August 2009 chronic pain assessment report in which Dr. Nimni, a neurosurgeon, reports the Applicant informed him that the was reluctant to take any medications that would cloud his sensorium. In fact, Dr. Nimni writes "I

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

do believe some of his [the Applicant] pain is neuropathic, as well as nociceptive. I think he would benefit from a trial of a TCA such as Amitriptyline. He was very reluctant to do this and he will think about it because he is not too keen on taking medication that may alter his sensorium. We had a lengthy discussion today with regards to side effects of the medication that we would consider here at CPM. Once again, he is very reluctant to take any medications that would cloud his sensorium."

[16] At para. 33, the Review Tribunal again refers to a report of Dr. Nimni in which Dr. Nimni, states the Appellant was adamant about not taking any medications. It noted that Dr. Nimni returned the Applicant's care to his family physician. In fact, this was a Discharge Note from Dr. Nimni to Dr. Joza. Dr. Nimni updates Dr. Joza on the Applicant's care and explains his decision to discharge him. He writes, "I had been seeing R. P. on a weekly basis since August 25, 2009. He received a series of five paravertebral nerve blocks in the thoracic area of T6 to T9. He had some questionable results with these paravertebral nerve blocks. He reported getting about one to two days relief from these nerve blocks and then the pain would escalate again to baseline levels. Based on this, I think his pain is stemming from the nerve roots. I think his pain is also neuropathic in nature given the type and pattern of pain. At this point, five sessions of nerve blocks, he is still only getting one to two days' relief, and I do not think it is worth pursuing any further. He is still very resistant to pursuing any medications toward neuropathic pain. I have discussed this issue with R. P. at length on several occasions and even today he is adamant about not going on any medications.… there is nothing more that I can offer R. P. from my perspective. I am discharging him back to your care." This Discharge Note is dated October 6, 2009. It has a "Date of Visit" of October 6, 2009.

[17] At paragraph 41 of the decision, the Review Tribunal comments on the Applicant's medication regime, stating "during the day, when he is most active, he takes no pain medication at all." The Review Tribunal goes on to say, "while this is not completely determinative of his level of pain, it is indicative as to the level of tolerance that the Appellant is able to withstand in the activities of his daily living."

[18] The Review Tribunal went on to discuss the Applicant's pain management; his psychological state and his employability, noting in the following paragraphs that he had no history of treatment for psychological distress; retained some work capacity and appeared to be able to retrain; and had not attempted to obtain alternate work:

> [42] In December 2008, the Appellant saw Dr. D. Corey (Pain Management Specialist) to discuss his pain symptoms which at the time were suggestive of chronic pain disorder. There was a suggestion of an underlying psychosocial component to his pain symptoms. The Tribunal considered Mr. R. P.'s claim of depression but concluded that his psychological condition was not by itself severely disabling, although it contributed to his difficulty coping with pain. Prior to his car accident, there is no personal history of a psychiatric disorder. After his accident, there is nothing on file that would suggest he received any form of intensive treatment for psychological distress. And, today the Appellant's depression is not treated.
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> [43] The Tribunal acknowledges the Respondent's submission that although Mr. R. P. has physical limitations, he is not severely disabled to the extent to render him incapable of pursuing any substantially gainful work. The Tribunal is guided by the *Villani* case which provides criteria to determine a person's employability based on a real world context. In this case Mr. R. P. is young, well-educated, he is literate and fluent in English. During the hearing he *was* alert; he understood questions and provided knowledgeable answers in a cogent manner. The Tribunal was not persuaded that the Appellant is incapable of vocational retraining or more sedentary work.
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> [44] Unfortunately, the Appellant has not attempted alternate work. The Tribunal can accept that the Appellant is disabled from his own occupation, but it is not convinced that he lacks capacity for any kind of regular gainful employment. Where there is retained work capacity, an Appellant must show a serious health condition and that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition in order to succeed in establishing severity *(Inclima v. Canada (A. G.)*, 2003 FCA 1.17).

[19] The Applicant has submitted two medical reports to support/authenticate his claim that, contrary to the statements made by the Review Tribunal, he does take medications and that there is a physiological basis for his claim, namely an edema or swelling of the marrow at T7-T8. Both reports are dated November 26, 2013. They have both been created post-hearing and are in the nature of a progress report to the Applicant's family physician, Dr. Joza. The first report touches on the Applicant's medication regime and notes, in part, "he is currently taking

Lyrica 150 mg. b.i.d. which helps him sleep. He takes occasional Advil and clyclobenzaprine and rabeprazole." However, it is not clear to the Tribunal exactly when and in what dosage the Applicant commenced taking these drugs, which is the crux of the Applicant's complaint.

[20] If the Applicant were, in fact, taking medication for his various conditions when the Review Tribunal stated he was not, this would be an error. Notwithstanding the possibility of error in this regard on the part of the Review Tribunal, the question of materiality remains pertinent, that is, is this an error that is so material that it can be remedied only by a new hearing and, accordingly, by granting leave?

[21] While there are clearly other factors that went into the Review Tribunal decision, the question of whether or not an Applicant is taking medication can be of prime importance as an indicator of the Applicant's level of pain and by extension his or her capacity to work. For this reason, and on this narrow ground, the Tribunal would grant leave.

CONCLUSION

[22] The Application is granted.

Hazelyn Ross
Member, Appeal Division