Citation: *E. W. v. Minister of Employment and Social Development*, 2014 SSTAD 213

Appeal No.: AD-13-184

BETWEEN:

E. W.

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 26, 2014

DECISION

[1] The application for leave to appeal is granted in part.

INTRODUCTION

[2] By a decision issued April 12, 2013, a Review Tribunal determined that the Applicant was not entitled to a *Canada Pension Plan (CPP)*, disability pension. In its decision, the Review Tribunal concluded that as of her Minimum Qualifying Period (MQP), date of December 31, 2010, the Applicant did not suffer from a severe disability that meets the definition of, contained in CPP ss. 42(2)(a).

GROUNDS OF THE APPEAL

[3] The Applicant seeks Leave to Appeal this decision, (the "Application"). On her behalf, her representative cites error of law and misapprehension of the evidence as the grounds of the Application.

[4] The Applicant's representative has set out in detail the mistakes the Review Tribunal has allegedly made. Mistakes are alleged to have been made in relation to statements and/or findings made at paragraphs 10, 16, 17, 19, 22, 23, 27, 30, 31 and 34 of the decision. In the submission of the Applicant's representative, the alleged errors constitute a sufficient basis to satisfy the Tribunal that the Application ought to be granted.

[5] The Application is properly before the Social Security Tribunal, ("the SST"), being received on May 17, 2013, which date is within the time permitted for filing under ss. 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[6] Does the Appeal have a reasonable chance of success?

THE LAW

[7] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the 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.

[8] Subsection 58(2) of the DESD Act sets out the applicable test for granting leave and provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[9] Ss.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.

[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. 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 reinforced the stricture against deciding, on a Leave Application, whether or not the appeal could succeed.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[3] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

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

ANALYSIS

[12] As stated earlier, the Applicant's representative submits the Review Tribunal made a number of legal and factual errors, which errors are contained in paragraphs 10, 16, 17, 19, 22, 23, 27, 30, 31 and 34 of the Review Tribunal decision.

Mistakes in the Review Tribunal decision

[13] The first error the Review Tribunal is alleged to make is that at paragraph 10 it makes reference to the Applicant suffering from a "cervical spine sprain". The Applicant's representative argues that the objective medical evidence does not refer to such a condition, which indeed it does not. The only references to a spinal condition are contained in the MRI report dated February 13, 2009 which indicates the presence of degenerative disc disease at C5-C6 and in the medical report submitted by the Applicant's family physician. This report lists "OAC spine" as one of the medical conditions affecting the Applicant.

[14] Further examination of the impugned statement shows that at paragraph 10 of its decision, the Review Tribunal was only recounting the Applicant's testimony; as opposed to making a finding of its own. Accordingly, the Tribunal is satisfied the statement does not give rise to an error of any kind and cannot ground the Application.

[15] The second error is alleged to arise at paragraph 16 where the Review Tribunal makes reference to the Applicant's refusal to enter group therapy. The Applicant's representative submits the Review Tribunal failed to consider the Applicant's reasonable explanation for not attending group therapy. In fact, at paragraph 20 of the decision the Review Tribunal notes and sets out the Applicant's explanation for not engaging in group therapy. Further, there is no indication in the decision that the Applicant's failure to attend group therapy was a deciding factor in the Review Tribunal's decision.

[16] Next the Applicant's legal representative questions the Review Tribunal's reference of the Applicant's unsuccessful attempt to obtain Ontario Disability Support Payment. She

makes the allegation that the Review Tribunal was demonstrating its disbelief of the Applicant's assertion that her financial situation prevented her from obtaining appropriate treatment and medication. The Tribunal is not persuaded of this view. In the Tribunal's view, the reference to the Applicant applying for the benefit cannot be divorced from the preceding paragraph which dealt with the Applicant's financial difficulties and her inability to obtain prescription medicines. It is no more than a recounting of the Applicant's testimony and a statement of fact. In these circumstances it is difficult to see how this reference gives rise to any allegation of impropriety or bias on the part of the Review Tribunal.

[17] The Applicant's representative goes on to argue that in stating of the Applicant that "she has never been referred to a multidisciplinary clinic to manage her pain" the Review Tribunal was guilty of a contradictory evaluation of the medical evidence provided by the Multidisciplinary Health Care Assessment dated October 26, 2009, which is referenced at paragraph 23 of the decision. The Tribunal examined the document in question. The Assessment was carried out for the purpose of preparing and submitting a report to the Workplace Safety and Insurance Board. Its stated purpose was explained to the Applicant, who understood the assessment would consist of an examination and was without therapeutic relationship.

[18] The medical practitioners make only one recommendation regarding the applicant's depressed mood. They recommended that her family doctor arrange a psychosocial evaluation to address the emotional component of her injury. Therefore, the Review Tribunal's statement that the Applicant was never referred to a multidisciplinary clinic to manage her pain remains uncontradicted.

[19] The Applicant's representative next submits that the Review Tribunal's reference at paragraph 19 of her undergoing a routine MRI of her left risk was an error as the results of the MRI were not routine. On examining the report in question it becomes apparent that the word routine in this context is a descriptor of the technique used by the University Health Networks as opposed to a description of the results of the procedure. In fact, the results of the MRI show that outside of a "degenerative signal and low-grade, non- communicating horizontal tearing of the membraneous TFCC extending into the radial side attachment" all other aspects

examined were seen as normal. Accordingly, the Tribunal finds that the charge that the Review tribunal misapprehended the significance of the MRI is not borne out.

[20] The submission was also made that at paragraph 22, the Review Tribunal ignored the MRI diagnostic report of the Hamilton Health Services Network. At paragraph 22, the Review Tribunal addresses the Applicant's consultations with Dr. Walter Kean. These consultations were in respect of pain in the Applicant's left arm and wrist as well as for her back pain for which Dr. Kean prescribed indomethacin. While other medical reports are mentioned this particular MRI report is not. *Oliveira*[4] stands for the proposition that a Tribunal need not make express reference to all of the oral and documentary evidence that was before it, however, in this case, the Tribunal expressed the documentary evidence to be complete even as it omitted the MRI report. On its face this is an error.

[21] The Tribunal assessed the significance of the omission to the outcome of the Review Tribunal decision. In the Tribunal's view the omission has minimal significance as the issue it revealed was already mentioned in the medical report that was submitted with the Applicant's application for CPP disability benefits. Further, the Review tribunal's decision hinges not on the Applicant's conditions but rather on the severity of those conditions as evidenced by the treatment regimes either prescribed or followed. For these reasons the panel is not persuaded that the Review Tribunal error is sufficient to undermine the entirety of the decision.

[22] Two errors are alleged to have occurred at paragraph 24. First, that the Review Tribunal misquoted Fran Buchanan's session note when it said she was described as being well kempt, cheerful and coherent. In fact the Applicant is described as being "tearful, angry, well kempt and coherent." Clearly an error. Second that the Review Tribunal misapprehended the effort it takes for the Applicant to be "well kempt." She cannot achieve this without assistance. It was submitted that the document which contained the comment was only a session note. It was not a full and comprehensive determination of the Applicant's condition nor was it a full DSM-IV evaluation, the inference being that the Review Tribunal should have given little weight the note.

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[4] *Oliveira v. Canada (minister of Human Resources Development),* 2003 F.C.A. 213.

[23] With respect, the Review Tribunal could deal only with what evidence and documents that the Applicant had placed before it. Second, in referring to the Applicant's physical appearance, the Review Tribunal was doing no more than recounting or summarising the medical evidence. It is difficult to see where the error arises in this regard; that leaves the error in the Review Tribunal's description to be dealt with. Again, the Tribunal applied the criterion of whether had the error not been made, would the outcome be different. The Tribunal is not satisfied it would. The rationale for the Review Tribunal's decision is found at paragraph 31 of the decision, namely that the Review tribunal "determined that the Appellant has not reached maximum medical recovery… the medical reports in the file do not suggest a condition which is severe, either physically or mentally. In light of the Review Tribunal's rationale for its decision, the Tribunal is of the view that describing the Applicant as angry and tearful would not have had significant impact or changed the Review Tribunal decision.

[24] The Applicant's representative makes the further submissions that contrary to the statement at paragraph 27(d), neither she nor the Applicant stated that the Applicant was accepting of her condition and is unable to pursue further treatment. If true, that the submission was not made, the question then becomes whether this is an error sufficient to impugn the entire decision. Even accepting that the submission was never made, which the Tribunal does not accept, in light of the rationale for the decision, it is difficult to see how this would affect the decision so adversely as to ground an appeal. The fact is that the Applicant suffers certain medical conditions, indeed, that is the very basis of her application for CPP disability benefit. Further, the Review Tribunal was at all times cognizant of the Applicant's financial difficulties and their effect on her rehabilitation and treatment. Nonetheless, the Review Tribunal based its decision on the absence of any suggestion in the medical reports that the Applicant's conditions are severe.

[25] The Applicant's representative also contends that the Review Tribunal failed to properly apply the *Villani* factors. In her submission, the Applicant suffered from several disabilities that render her incapable regularly of pursuing a substantially gainful occupation. The Applicant's representative listed the disabling conditions as "frequent crying, decreased energy and motivation, depression, easily upset, irritable, wakened by pain, [having] low energy and [being] socially withdrawn" all of which combine to render the Applicant

competitively unemployable. As the Tribunal sees it, it is a question of the weight the Review Tribunal ascribed to the evidence. It is well settled that weight is a matter for the Tribunal hearing the case. In the instant case the Review tribunal, as the trier of fact, appears to have placed greater weight on the evidence that, at the date of the hearing, the Applicant was not taking pain medications nor was she being treated for her physical and mental conditions.

[26] Finally, the Applicant's representative takes issue with the Review Tribunal conclusion at paragraph 30 that the Applicant "has not reached maximum medical recovery." She submits that the statement as well as the statement that "further psychiatric treatment, along with appropriate medications, would likely led to significant improvement in her condition are speculative. She argues that this is a new test that was not contemplated by the ESDC Act. At the same time, she submits that the Review Tribunal finding that the Applicant has not met maximum recovery is supportive of a conclusion that her disability is prolonged. The Tribunal finds that the latter submission raises an arguable case on appeal.

[27] Accordingly, the Tribunal would grant leave to appeal, however, in light of the Tribunal's findings above, leave to appeal is limited to addressing the following areas:

a. The MRI diagnostic report of the Hamilton Health Services Network;

b. The misdescription of the Applicant as being "well kempt, cheerful and coherent";

c. The application of the *Villani* factors;

d. The impact of the Review Tribunal conclusion that the Applicant "has not reached maximum medical recovery.

CONCLUSION

[28] Leave to Appeal is granted in part.

Hazelyn Ross
Member, Appeal Division