Citation: *H. A. v. Minister of Employment and Social Development*, 2014 SSTAD 216

Appeal No. AD-13-196

BETWEEN:

H. A.

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: Janet LEW

DATE OF DECISION: August 28, 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 March 4, 2013. The Review Tribunal had determined that a Canada Pension Plan disability pension was not payable to the Applicant, as it found that his disability was not "severe" at the time of his minimum qualifying period of December 31, 2011. The Applicant filed an application requesting leave to appeal (the "Application") with the Pension Appeals Board. The Application was received by the Appeal Division of the Tribunal on or about April 25, 2013.

[3] After April 1, 2013, the Applicant ought to have filed the Application with the Tribunal. Appeals filed with the Pension Appeals Board are considered to have been filed with the Tribunal. The Application is considered to have been filed 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".

APPLICANT'S SUBMISSIONS

[7] The Applicant submits that the Review Tribunal erred as follows, in:

(a) Concluding that the medical evidence did not establish that he was suffering from a severe disability within the meaning of the legislation, and in doing so, not applying the appropriate test. In particular, the Review Tribunal failed to assess the Applicant's disability in a "real world context", by failing to consider his language and learning limitations, the latter impeded by post-traumatic stress disorder and chronic depression. The Applicant relies on *Villani v. Canada (Attorney General)*, 2001 FCA 248.

(b) Failing to consider the reasonableness of compliance with various treatment recommendations, in light of the Applicant's limited English and ability to participate in these programs.

(c) Failing to give any consideration or sufficient weight to the Applicant's subjective experiences, and instead, basing its decisions on the objective evidence. The Applicant relies on both *Laucht v. Minister of Human Resources Development,* C.E.B. & P.G.R. No.8826, Appeal No. CP20910 (PAB) and on *Osachoff v. The Minister of Human Resources Development* (July 7, 1997) CEB&PGR #8684.

(d) Failing to attach significant or any weight to the oral evidence of the Applicant as to the impact of his medical conditions, and failing to give sufficient weight to the evidence and opinions of Dr. Sohail, the psychiatrist. The Applicant submits that the Review Tribunal was required to weigh the uncontradicted oral evidence of the Applicant, as there would then be, together with the supportive medical evidence available, sufficient information to find in the Applicant's favour.

[8] The Applicant also requests a hearing *de novo* at the appeal of this matter, as he anticipates that new evidence will be available as to the continuing deterioration of his condition.

RESPONDENT'S SUBMISSIONS

[9] The Respondent has not filed any written submissions.

ANALYSIS

[10] 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 Development)*, [1999] FCJ No. 1252 (FC).

[11] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[12] 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.

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

[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, before leave can be granted.

[15] I will address submissions (a) and (b) above together, as both concern the Applicant's language limitations.

(a) Language Limitations

[16] The Applicant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248, in that it did not assess his disability in a "real world context", when considering his capacity to regularly pursue a substantially gainful occupation and when determining the extent of his compliance with various treatment recommendations.

[17] The Applicant points out that while the Review Tribunal made note of the Applicant's very limited English, it also noted that he had not made any attempts to improve his English, or that his limited English had not prevented him from working in Canada, as he was able to communicate in Farsi and Urdu at previous positions.

[18] The Applicant submits that the Review Tribunal erred in failing to take into account his post-traumatic stress disorder and chronic depression as obstacles to learning English, which in turn affects his capacity to regularly pursue a substantially gainful occupation. The Applicant submits too that his limited English also impedes his ability to participate in ongoing individual therapy, group therapy and day therapy for his post- traumatic stress disorder and chronic depression.

[19] In my view, it is sufficient to show, for the purposes of a leave application, that the Review Tribunal did not apply the principles set out in *Villani.* On the face of it, the Review Tribunal appears to have assessed the Applicant's personal circumstances and in particular, his language and how it impacted upon his capacity, when it wrote:

> "He is not proficient in either official language of Canada. The Appellant has work experience from Afghanistan as well as military service. In Canada, the Appellant has

> work experience in a restaurant environment and as a gas station attendant. Unfortunately, the Appellant has not taken any steps to learn either official language in Canada."

[20] The Court stated in *Villani* that, "The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere".

[21] That does not conclude the matter however, as the Applicant submits that there are other personal circumstances which the Review Tribunal failed to consider. The Court listed language as one of the personal circumstances of an applicant to take into consideration, but did not specifically list learning limitations. From this, I understand that the Applicant suggests that the Review Tribunal erred in limiting the *Villani* test to just the listed personal circumstances, without recognizing that there could be other personal circumstances that could impact an applicant's capacity.

[22] The issue as to whether the Review Tribunal might have committed an error in law if it limited the "real world test" to those personal circumstances specifically listed in *Villani* could well be a ground upon which the appeal has a reasonable chance of success, particularly if other personal circumstances may have been determinative of the final issues. On this basis, the Applicant has satisfied me that there is a reasonable chance of success

[23] The Applicant's other ground of appeal is that at paragraph 41 of its decision, the Review Tribunal failed to consider the Applicant's limited English as a barrier to participating in ongoing individual therapy, group therapy and day therapy for his post-traumatic stress disorder and chronic depression. The Review Tribunal wrote,

> [41] The reports from the Psychiatrist state the Appellant cannot work. They do not state, however, any objective basis upon which this conclusion was drawn. There is no mental status examination in any of the reports, no indication of the severity of any symptoms. In addition, the Appellant has not been recommended to attend ongoing individual therapy, group therapy, day programs or been hospitalized. He has not accessed any crisis lines because of his anxiety and PTSD. In fact, the Appellant now sees his Psychiatrist once every two months, and not every month as he did when first referred for this treatment.

[24] The Applicant submits that any non-compliance must take into account an "air of reality". In *Bulger v. Minister of Human Resources Development* (March 30, 2006), CP0916, the Pension Appeals Board held that while it agreed with the Minister's contention that the appellant in that case had not always been fully compliant with various treatment recommendations, his failure to fully engage or pursue the recommendations was not always unreasonable. At paragraph 8 of its decision, the Board wrote that,

> "Compliance must be viewed in the context of Appellants' circumstances. Persons afflicted with fibromyalgia and experiencing the constant diffuse pain, lack of proper sleep, loss of energy, feelings of despair and associated depression cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or a trauma injury. Another factor that cannot be overlooked is quite often the lack of publicly funded secondary health care facilities including pharmacotherapy."

[25] Here, however, there is no issue that the Applicant failed to pursue various treatment recommendations. Rather, the Review Tribunal raised these treatment options to illustrate that, in its opinion, the Applicant's disability could not have been that severe if his physicians did not even recommend these treatment options in the first instance. It might have been another issue altogether, had any of his physicians discussed these treatment options but dismissed them, owing to the Applicant's personal circumstances. The Applicant has not satisfied me on this basis that there is a reasonable chance of success under this ground of appeal.

(b) <u>Applicant's Subjective Experiences</u>

[26] The Applicant submits that the Review Tribunal erred in failing to give any consideration or sufficient weight to the Applicant's subjective experiences, and instead, based its decisions on the objective evidence. The Applicant relies on both *Laucht v. Minister of Human Resources Development*, C.E.B. & P.G.R. No.8826, Appeal No. CP20910 (PAB) and on *Osachoff v. The Minister of Human Resources Development* (July 7, 1997) CEB&PGR #8684.

[27] The Federal Courts have previously addressed this submission in other cases that Review Tribunals or Pension Appeals Boards have failed to consider all of the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel 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. . .

[28] I presume that the Review Tribunal considered all of the evidence before it, even if it did not refer to each and every piece of evidence. 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 – whether objective or subjective –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.

[29] Had the Review Tribunal stated that it was restricted to considering the objective medical evidence alone without any consideration of the Applicant's subjective experiences, that would have been a separate issue altogether.

[30] In any event, here, I see that the Review Tribunal appeared to have considered the Applicant's subjective experiences, when it wrote in its Analysis section:

> [38] The Appellant has endured significant tragedy as a soldier and witness to the war in Afghanistan. This has impacted him. The task of the Tribunal, however, is to determine whether it has so impacted the Appellant that he is unable regularly to pursue any substantially gainful employment at his MQP.

[31] If the Applicant is requesting that we re-assess and re-weigh the medical evidence and decide in his favour, I am unable to do this, as I am required to determine whether any of his reasons to appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success. The leave application is not an opportunity to re-assess and re-weigh the medical evidence or to re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.* The Applicant has not satisfied me that this ground raises an arguable case.

(c) Weight of Evidence

[32] The Applicant submits that the Review Tribunal erred in failing to attach significant or any weight to the oral evidence of the Applicant as to the impact upon his medical conditions, and in failing to give sufficient weight to the evidence and opinions of Dr. Sohail, the psychiatrist. The Applicant submits that the Review Tribunal was required to weigh the uncontradicted oral evidence of the Applicant, as there would then be, together with the supportive medical evidence available, sufficient information to find in the Applicant's favour.

[33] Again, I find *Simpson* to be instructive. It is for the trier of fact to determine the weight to assign to the evidence before it.

[34] The Applicant has not satisfied me that there is a reasonable chance of success under this ground of appeal.

(d) Request for *De Novo* Hearing before Appeal Division

[35] The Applicant requests a hearing de novo, where he anticipates that new evidence will be available as to his continuing deterioration. Subsection 58(1) of the DESD Act governs how the hearing before the Appeal Division is to proceed when leave has been granted. There is no entitlement to a hearing *de novo* as the grounds of appeal are limited to those considerations set out in subsection 58(1) of the DESD Act.

CONCLUSION

[36] The Application is granted on the narrow grounds of appeal set out above, namely, whether or not the Review Tribunal might have committed an error in law if it limited the "real world test" to those personal circumstances specifically listed in *Villani*.

[37] 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