Citation: *D. S. v. Minister of Employment and Social Development*, 2014 SSTAD 260

Appeal No. AD-13-13

BETWEEN:

D. S.

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: September 24, 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 April 11, 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, 2009 (the "MQP"). The Applicant filed an application requesting leave to appeal (the "Application") with the Tribunal on June 28, 2013, within the time permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

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

THE LAW

[4] 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".

[5] 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

[6] The Applicant submits that the Review Tribunal committed numerous errors in law and in findings of fact, and also committed various breaches of natural justice, as follows:

1. The Applicant submits that the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction:

a. The Review Tribunal did not provide the Applicant with an opportunity to fully present his case and also did not permit his representative, who is also his ex-wife, to conduct an examination in chief of him or to make any submissions.
b. The Review Tribunal "had much thicker files" than the Applicant and his representative.
c. At the outset of the hearing, the Review Tribunal gave a summary overview of the claim for another individual, with a completely different set of medical issues from the Applicant.
d. Well into the hearing, the Review Tribunal provided the Applicant with the Respondent's "Additional Comments" to one of the medical reports, but did not provide him with an opportunity to review or to respond to it.
e. The Respondent's representative made gratuitous comments following the hearing that she expected his claim would succeed.

2. The Applicant further submits that 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. The Review Tribunal failed to properly consider the medical evidence as to the limits of the Applicant's abilities, and in particular, Dr. Sharobim's statements that the Applicant has limitations with prolonged standing/sitting and walking long distances, limitations that would prevent him from maintaining even sedentary employment.
b. The Review Tribunal erred in finding the objective medical evidence to be "sparse". The Applicant submits that an x-ray and CT scan of the lumbar spine had been provided, which revealed degenerative changes in the Applicant's spine.
c. The Review Tribunal erred in its findings regarding the imaging of the Applicant's spine, at paragraph 38 of its decision.
d. The Review Tribunal erred in finding that the Applicant had not pursued various treatment recommendations, whereas, the evidence showed that

there were problems in finding a doctor and that he was unable to afford physiotherapy. The Applicant submits that had he been aware that this was an issue, he would have testified about his difficulties in accessing a chronic pain program.

e. The Review Tribunal erred in concluding that the Applicant did not enquire if Ontario Health offered any assistance in covering physiotherapy costs, when there was no testimony given on this point.

3. The Applicant further submits that the Review Tribunal erred in law in making its decision, whether or not the error appears on the face of the record:

a. The Review Tribunal erred in not following *Villani v. Canada (Attorney General)* [2001] F.C.J. No. 1217, 2001 FCA 248, deeming the Applicant able to do some kind of work, without identifying what work that might be.
b. The Review Tribunal erred in not following *Villani*, by failing to apply the "real world" test by not giving consideration to the Applicant's educational limitations, and by failing to consider the "whole person".
c. The Review Tribunal erred in failing to "attach significant weight to the uncontradicted oral evidence of the Applicant as to the impact of his medical condition on his ability to participate in substantially gainful employment".
d. The Review Tribunal erred in finding that there was insufficient evidence to show that the Applicant's condition was severe by the time of his MQP.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

[8] 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).

[9] 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.

[10] 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.

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

[12] 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.

a. <u>Breach of Natural Justice</u>

[13] The Applicant submits that the Review Tribunal made a number of breaches of natural justice. I will deal with each in turn.

[14] One of these is that the Review Tribunal "had much thicker files". While that may have been so, the Applicant should have raised an objection at the hearing, to determine whether full disclosure and production had been made. That would have been the most appropriate time to make the objection, as it would have been timely then to check the Applicant's file contents against those of the Review Tribunal. It may be that the Review Tribunal did not have any additional materials, and simply had copies of the same materials

or had copies of case law, correspondence or even file materials for other hearings which it might have held that same day. In any event, most of the documentation – such as medical and employment-related records - would have been generated by or originated with the Applicant. Typically, the Respondent has limited documentation, such as an earnings history and comments.

[15] As a matter of practice, copies of the parties' documents generally were distributed by the Office of the Commissioner of Review Tribunals at the earliest opportunity, in advance of the hearing. In this particular case, the Respondent had relatively short "Additional Comments". The Review Tribunal distributed a copy of the "Additional Comments" at the hearing. The Applicant does not suggest that there were any records which the Review Tribunal might have referred to within its decision which he does not have. I do not find there to be any reasonable chance of success on appeal, by virtue of the fact that the Review Tribunal appeared to have had a much thicker file than the Applicant.

[16] Although the Respondent's representative expected that the Review Tribunal would grant the appeal, this by no means would ever establish any error on the part of the Review Tribunal.

[17] The Review Tribunal did not provide the Applicant with an opportunity to review or respond to the "Additional Comments" of the Respondent. The "Additional Comments" were obtained in response to the relatively brief consultation report of Dr. Jack Hakoun, dated February 11, 2013. The author of the "Additional Comments" summarized the information which the Respondent had received from the Applicant, and also made additional comments. The "Additional Comments" are reproduced in their entirety, as follows:

> While it is recognized that [the Applicant] has his limitations due to his back pain, the information provided does not support he has a disability which would preclude him from all work. Although he has had back pain with leg radiation with little relief from medication, [the Applicant] recently had one of three injections with some relief. It would be expected continued treatment, further relief would be attained. Although finances were blamed for not attending a rehabilitation program, a referral to a chronic pain program would be expected if [the Applicant's] conditions were severe. As such, the opinion of HRSDC remains and it is respectfully requested his appeal be dismissed.

[18] Given the relative brevity of the "Additional Comments", I would not expect that any appreciable time would need to have been afforded for review. In other words, I do not think that a short recess or adjournment of the proceedings was necessary, given the brevity of the additional comments. The Applicant also does not suggest how his response might have differed, had he had time to review the "Additional Comments". I do not find there to be any reasonable chance of success on this ground. I might have concluded differently had there been any suggestion that the Applicant would have sought an adjournment of the proceedings to prepare a response or obtain another expert opinion, and if it was reasonable to have done so.

[19] The Applicant submits that in providing an opening overview, the Review Tribunal apparently identified another party with a different set of medical issues from the Applicant. This begs the question as to whether the Review Tribunal was confused about the identity of the Applicant and whether it was confused about the medical documentation. However, there is no outright allegation by the Applicant in this regard, and a review of the Review Tribunal's decision does not indicate that it was at all confused about the identities of any of the parties involved. I do not find there to be any reasonable chance of success on this ground.

[20] The Applicant submits that the Review Tribunal did not provide him with an opportunity to fully present his case and in particular, did not permit his ex-wife, a lay representative, to conduct an examination of him or to make any submissions.

[21] Not having the opportunity to fully present one's case does not always translate into an unfair hearing. There is no right to an indefinite amount of time to give evidence or make submissions. It would have been of some assistance had the Applicant outlined what submissions his representative had intended to make, which were not already before the Review Tribunal.

[22] The Review Tribunal may have conducted its own examination of the Applicant, in place of his representative, and then concluded by inviting the Applicant's representative to conduct any cross-examination on any issues which it might not have canvassed. If so, this would not amount to a breach of natural justice. There are no set rules by which a Review

Tribunal (or now, General Division) is bound to follow in how it ought to conduct its proceedings, provided that, a fair hearing was ultimately accorded to the Applicant. The Review Tribunal may have indicated that it did not need to hear further from the Applicant or his representative, if there were no additional questions or submissions which had not already been canvassed, either in the documentary materials or in the Applicant's testimony. However, there is no evidence – either in affidavit form or otherwise – before me to suggest that the Review Tribunal invited the Applicant's representative to conduct any examination or make any outstanding submissions towards the end of the hearing.

[23] Raising the issue of a breach of natural justice is, by itself, insufficient to succeed on appeal, otherwise this could well open the floodgates to countless appeals. While there are some deficiencies in the leave materials (I had expected at a minimum that the Applicant would have set out how the allegedly unfair proceedings impacted upon his case), I am prepared to grant leave, on the ground that the Review Tribunal did not permit his representative to conduct an examination of him or to make any submissions. By granting leave, I am not making any findings or accepting that indeed the Review Tribunal did not permit the Applicant's representative to make the case or to make submissions, or that if this indeed had occurred, that this necessarily caused any prejudice to the Applicant. In granting leave on this ground, the Applicant might well be advised to bring some evidence as to what cross-examination and submissions his representative had anticipated making, how they differed from or could have added to the evidence or submissions already before the Review Tribunal, and how they might have supported his claim for disability benefits.

b. Erroneous Findings of Fact

[24] The Applicant submits that the Review Tribunal made numerous erroneous findings of fact, without regard for the material before it. For there to be a reasonable chance of success on a leave application, at a minimum, the Applicant would have to set out – distinct from having to prove – that there was an erroneous finding of fact, that the Review Tribunal based its decision on this erroneous finding of fact, and that it was done without regard for the material before it. And, while the Applicant is not required to prove the Review Tribunal's error in a leave application, the Applicant needs to satisfy me that the Review

Tribunal made the finding which he alleges it made. At the very least, the Applicant should set out what he regards to be the erroneous finding of fact, together with the material which the Review Tribunal is alleged to have disregarded.

[25] Some of the Applicant's submissions made under this heading of "erroneous finding of fact" do not qualify as findings of fact. Nonetheless, I will address them under this heading for convenience's sake, as the Applicant has placed them here.

[26] Setting aside the issue as to whether the Review Tribunal's assessment of the objective medical evidence as "sparse" qualifies as a finding of fact, I do not see how this could in any way have been the basis upon which the Review Tribunal might have based its decision, and I find that this does not raise a reasonable chance of success. If anything, the Review Tribunal was merely expressing that there was little material before it upon which it could assess whether the Applicant is disabled.

[27] The Applicant submits that the Review Tribunal erred in failing to recognize that there were diagnostic examinations which revealed degenerative changes in the Applicant's spine. In fact, the Review Tribunal referred to the diagnostic examinations at paragraph 38 of its decision. In any event, signs of any degenerative changes – irrespective of how advanced those changes might be – do not speak to the severity of one's medical disability, and the findings arising out of any diagnostic examinations alone would not have been the basis for any decision. I find that this does not raise a reasonable chance of success.

[28] The Applicant submits that the Review Tribunal erred in its findings regarding the imaging of his spine. The Applicant submits that the CT scan dated October 14, 2009 found "mild to moderate left and moderate to severe right neural foraminal stenosis secondary to broad based diffuse disc bulge" and that this could certainly account for his pain. The Review Tribunal wrote,

> The Tribunal finds that the only medical testing done on Mr. D. S.'s back was in October 2009 and only indicated mild degenerative changes; vertebral bodies and disc heights were relatively preserved. **The CT scan of his lumbar spine showed right neural foramina narrowing at the L4-5 level and an old compression fracture was noted at T12leve**l. No further testing has been done since 2009. These investigative scans do not support a finding of severe disability as of the MQP of December 2009. (My emphasis)

[29] The Conclusion section of the CT scan dated October 14, 2009 reads,

> Degenerative changes most prominent at the L4/5 level resulting in mild to moderate left and moderate to severe right neural foraminal stenosis secondary to broad base diffuse disc. Mild neural foraminal stenosis is present on the left at the L3/4 level. There is no central stenosis throughout the lumbar spine.

[30] The Review Tribunal summarized the findings of the CT scan. It was not required to fully set out the findings of the CT scan, but that alone does not mean that the Review Tribunal erred. While the Applicant submits that the Review Tribunal erred, he has not specified how the Review Tribunal's summary was in error. Had there been an expert's opinion to support this submission, i.e. that the summary is inaccurate, this might have raised a reasonable chance of success. While I would not have assessed the merits of the matter, nor determined whether I might even accept the expert's opinion itself at the stage of a leave application, the provision of an expert's opinion may well have swayed me to accept that there is a reasonable chance of success, in connection with the issue of the accuracy of the Review Tribunal's summary of the findings of the CT scan.

[31] The Applicant further submits that the findings arising out of the CT scan would certainly account for his radiating pain. However, the etiology of any medical disability is not a basis upon which the *Canada Pension Plan* measures severity of one's disability, and there was no requirement for the Review Tribunal to determine the cause of the Applicant's radiating pain. Any "failure" by the Review Tribunal to determine the cause of the Applicant's pain does not qualify as an erroneous finding of fact.

[32] The Applicant further submits that the Review Tribunal erred in finding that he had not pursued the medical treatments offered to him. The Applicant submits that the evidence before the Review Tribunal was that he had difficulties locating a family physician and was unable to afford physiotherapy. In other words, he was justified in not pursuing physiotherapy or pursuing other medical options.

[33] The Applicant submits that the Review Tribunal also erred in concluding that he had not made any enquiries with Ontario Health for financial assistance in covering treatment costs, when there was no testimony regarding Ontario Health at all.

[34] Had he been aware of some of these issues, such as his difficulty in accessing a chronic pain program, the Applicant says that he could have addressed them at the hearing before the Review Tribunal. The Applicant submits that the Review Tribunal should have notified him that he was required to show that he had been compliant with all reasonable treatment recommendations.

[35] The Review Tribunal wrote:

> [39] While the Tribunal understands it was difficult to find a family doctor, it was three years after the Appellant stopped working before he found a doctor willing to treat him. After he had the testing done on his back in 2009 he did see the physiatrist as suggested by his clinic doctor. He tried twice to get the results of his testing but was unsuccessful. The onus is on the Appellant to pursue results persistently that may help in his recovery. He did not follow the suggestion that physiotherapy treatments may help with his pain as he said they were too expensive. He had not inquired if Ontario Health offered any assistance in this respect. He also needs drugs for high cholesterol. The Tribunal submitted that the Appellant must take responsibility for his own health and that he did not maximize all treatment options.
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> . . .
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> [41] The Appellant has not participated in any exercise regimen to help alleviate his back pain. He has not asked for or had a referral to a chronic pain program.

[36] The Review Tribunal found that the Applicant should have been more earnest in obtaining the results of his consultation with a physiatrist, and that he should have also undergone physiotherapy treatments, even if they were expensive, as financial assistance might have been available through Ontario Health.

[37] Ordinarily, if a Review Tribunal were to make an adverse finding against an applicant, it should, as a matter of fairness, raise the issue with the applicant. However, in a disability claim, one should address the issue of compliance with treatment recommendations without any prompting from the Review Tribunal, as compliance is one of the central issues that needs to be determined. After all, the onus of proof lies on an

applicant to make his case, and he needs to prove not only that his disability is severe, but that he has been compliant with all reasonable treatment recommendations. In *The Attorney General of Canada v. St-Louis*, 2011 FC 492, the Federal Court briefly reviewed the jurisprudence on this issue.

> [24] In *Canada (Minister of Human Resources Development) v. Mulek* (1996), 1996 LNCPEN 38, Appeal No. CP04719 it was held that when applying for disability benefits, the applicant must make all reasonable efforts to undertake and submit to programs and treatments recommended by treating and consulting physicians. In the case at bar, the Tribunal referred to this decision in concluding that the respondent did not make reasonable efforts. In fact, it noted that his sole reason for refusing the surgery was that his doctor could not guarantee that it would raise his energy level. In the event of non-compliance, the person seeking disability benefits must satisfy the Tribunal that the non-compliance was reasonable: *Bulger v. Canada (Minister of Human Resources Development)* (2000), 2000 LNCPEN 8, Appeal No. CP09164.

[38] The Review Tribunal correctly set out the evidence, that the Applicant had difficulty finding a doctor and was not undergoing physiotherapy, due to financial constraints. It cannot be said that the Review Tribunal made an erroneous finding of fact that he had not pursued the medical treatments offered to him, as there was some evidence before it.

[39] The Applicant submits that the evidence shows that he was justified in not pursuing physiotherapy or other medical options, largely as he had difficulties locating a family physician and was facing financial constraints. It was well within the Review Tribunal's purview however to conclude that the Applicant had not persistently pursued treatment by exploring options that might have been available to him to overcome some of his financial constraints. The Review Tribunal was aware that the Applicant had difficulties finding a family physician, but stated that even so, the Applicant did not see a physiatrist as suggested by his clinic doctor.

[40] The Applicant submits that the Review Tribunal also erred in concluding that he had not made any enquiries with Ontario Health for financial assistance in covering treatment costs, when there was no testimony regarding Ontario Health at all. It seems that this is a conclusion which the Review Tribunal made. It would seem that had the Applicant made any enquiries with Ontario Health, that he would have notified the Review Tribunal

(and this Tribunal) of this fact and perhaps included copies of any correspondence with Ontario Health. While this Tribunal generally does not consider new evidence either at a leave application or on appeal, documentation evidencing any correspondence with Ontario Health (pre-dating the hearing before the Review Tribunal) could have helped to support the Applicant's submissions that the Review Tribunal somehow misconstrued the evidence, or undermined any findings it made regarding his efforts to comply with all reasonable treatment recommendations.

[41] The Applicant has not satisfied me that there is a reasonable chance of success on the grounds that the Review Tribunal committed various erroneous findings of fact.

c. Error in Law

[42] The Applicant submits that the Review Tribunal made numerous errors of law. The Applicant submits that the Review Tribunal erred in not following *Villani,* firstly by not identifying what kind of work he might be capable of performing and secondly, by failing to apply the "real world" test.

[43] *Villani* does not require the trier of fact to identify what work an applicant might be capable of performing. The onus remains on the applicant throughout to prove that he is incapable regularly of pursuing any substantially gainful employment. I find that this ground does not raise a reasonable chance of success.

[44] The Applicant submits that the Review Tribunal failed to apply the "real world" test, as it did not take his educational limitations into account in determining whether he could be considered severely disabled. The Review Tribunal appears to have undertaken an assessment of the Applicant's personal circumstances, as it looked at his life experiences and transferable skills. The Tribunal found that he had "transferable skills" with which he could have "regularly sought gainful employment within his limitations". Given that the Review Tribunal appears to have undergone an assessment of his personal circumstances (at paragraph 42), I do not see that the Applicant raises an arguable ground on this point. As the Federal Court of Appeal stated in *Villani,*

> . . . The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[45] The Applicant submits that the Review Tribunal erred in failing to attach significant weight to his uncontradicted oral evidence as to the impact of his medical condition. The Federal Court of Appeal has 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. . .

[46] 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. It is for the trier of fact alone to determine the weight to assign to the evidence before it.

[47] 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. I find *Simpson* to be instructive and I presume that the Review Tribunal considered all of the evidence, including the Applicant's own subjective experiences, in arriving at its decision.

[48] The Applicant submits that the Review Tribunal also erred in finding that there was insufficient evidence to show that his condition was "severe" as of his MQP. The Applicant further submits that there was sufficient evidence presented on all the elements of the test for disability. Essentially, 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 on a leave application, as I am required to determine whether any of his reasons for 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.*

[49] The Applicant has not satisfied me that there is a reasonable chance of success on the grounds that the Review Tribunal erred in law.

CONCLUSION

[50] The Application is granted on the narrow grounds of appeal set out above, namely, that the Review Tribunal may have committed a breach of the principles of natural justice in not permitting the Applicant's representative to conduct any cross- examination or to make any submissions.

[51] 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