Citation: *G. E. v. Minister of Employment and Social Development*, 2014 SSTAD 306

Appeal No. AD-13-185

BETWEEN:

G. E.

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: October 22, 2014

DECISION

[1] The Application for Leave to Appeal the decision of the Review Tribunal is refused.

INTRODUCTION

[2] By a decision issued February 12, 2013 a Review Tribunal determined that a *Canada Pension Plan, ("CPP"),* disability pension was not payable to the Applicant. The Applicant has applied for Leave to Appeal the decision, ("the Application").

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submits that the decision of the Review Tribunal is wrong and she should be granted leave to appeal the decision because in making its decision the Review Tribunal made a number of factual and other errors, that if they had not been made, would have or could have resulted in a decision that was favourable to her. Counsel for the Applicant cites 6 ways in which the Review Tribunal fell into error, namely,

i. The Tribunal, acting reasonably, could not have concluded that G. E. did not suffer from a severe and prolonged disability;
ii. The Tribunal erred in their understanding of the test contained in s. 42 of the CPP legislation and did not properly apply it to the facts;
iii. The Tribunal disregarded important, weighty, credible evidence, both by medical practitioners and from G. E. and her daughter as to the extent and effect of her injuries and disability, and as to G. E.'s ability to return to work;
iv. The Tribunal substituted its own assessment of the effects of G. E.'s injuries for the assessment of her own doctors;
v. The Tribunal made assumptions that it should or could not have made in arriving at its decision;
vi. The Tribunal failed to consider all the facts, or consider the effect of the real world context in *Villani v. Canada*, when it determined that G. E. did not suffer from a severe disability.

ISSUE

[4] Is there a reasonable chance of success on appeal?

THE LAW

[5] The relevant statutory provisions are found in ss. 56(1), 58(2) and 58(3) of the *Department of Employment and Social Development Act*, ("the DESD Act"). Ss. 56 (1) clarifies that there is no automatic right to an appeal. Thus, an Applicant must seek and obtain leave to bring his or her appeal before the Appeal Division. Ss. 58 (3) of the DESD Act mandates that "the Appeal Division must either grant or refuse leave to appeal" while ss. 58 (2) sets out on what basis leave to appeal is refused. Leave will be refused where the Appeal Division is not satisfied that the appeal has a reasonable chance of success.

[6] 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.

ANALYSIS

[7] An Application for Leave to Appeal is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, however, some arguable case[1] or arguable ground upon which the proposed appeal might succeed is needed if leave is to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

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

[8] The first ground of the Application is that the Review Tribunal erred when it concluded that the Applicant was not suffering from a severe and prolonged disability; indeed, that the Review Tribunal's decision is unreasonable. The Tribunal finds that this ground of the Application is tied up with the second, third and fourth grounds of the Application, namely, that the Review Tribunal misapprehended the test contained in CPP paragraph 42(2)(a) and failed to properly apply the section to the facts and disregarded evidence as well as substituted its own assessment for the assessment of the Applicant's doctors.

[9] The test for severe and prolonged disability is articulated in the case law. The PAB decision of *Bains v. Canada (Minister of Human Resources Development) August 15, 1996 CP 4048* is among the earliest formulations of the test. In *Bains,* the PAB stated,

"for the disability to be "severe" not only must it preclude the applicant from returning to his former employment (or employment of like nature), but also from rejoining the workforce in any substantially gainful occupation, of whatever nature, the applicable test is whether the physical capacity exists to perform or undertake some form of such employment, regardless of whether or not such employment is readily available, whether or not the applicant is actually trained to do such work, or whether or not the applicant possesses the linguistic or communicative skills which the job might require."

[10] While this particular formulation of the CPP paragraph 42(2)(a) test may have been overtaken in part by subsequent case law, notably *Villani v. Canada (Attorney General) 2001 FCA 248,* which stressed the "whole person" assessment of the claimant for CPP disability benefits, in the Tribunal's view it remains a succinct statement of the legal test.

[11] The more recent case of *Inclima v. Canada (Attorney General) 2011 FCA 117* makes the case that applicants for CPP disability pension must demonstrate that they have a serious health problem that prevents them from obtaining and maintaining employment by reason of their health condition. This is the nub of the legal test in CPP paragraph 42(2)(a).

[12] On examining the Review Tribunal's decision, the Tribunal finds that in assessing the Applicant's employability and capacity to obtain and maintain any substantially gainful occupation, the Review Tribunal assessed the evidence concerning the Applicant's medical conditions, her medical treatments and whether or not she followed treatment recommendations and why; as well as the Applicant's attempts to obtain and maintain alternate employment. The Review Tribunal made its assessments and derived its findings in the context of the Applicant's previous engagement on the family farm and her self-employment projects. In the Tribunal's view, there is nothing in the decision of the Review Tribunal that could substantiate the claim that the Review Tribunal misapprehended or misapplied the test for severe and prolonged disability in CPP paragraph 42(2)(a). Accordingly, the second ground of the Application is rejected.

[13] Further, in the Tribunal's view, the Review Tribunal properly applied *Inclima*, as well as *Villani* in its assessment of whether or not the Applicant meets the CPP paragraph 42(2)(a) test for severe and prolonged disability in that the Review Tribunal considered her reported memory impairments; sleep and mood disturbance; and headaches. In the process, the Review Tribunal considered the medical reports and the comments of the doctors who treated the Applicant before arriving at its conclusions concerning how the Applicant's medical conditions affect her ability to obtain and maintain any substantially gainful occupation. Counsel for the Applicant submits that the Review Tribunal was not entitled to interpret the medical reports in the manner in which it did. The Tribunal does not concur with this position. In the Tribunal's view, it was open to the Review Tribunal.

The Medical Reports

[14] The Tribunal has reviewed the medical records that the Review Tribunal had before it. They include the Medical Report that accompanied the application for CPP disability benefits dated June 7, 2010. The Applicant's family physician, Dr. Amita Dayal, completed the CPP Medical Report, diagnosing the Applicant as suffering from chronic back pain; migraine headaches; and memory concerns.

Dr. Dayal completed a subsequent report dated June 28, 2012. In addition, the Review Tribunal also had before it Dr. Dayal's June 25, 2013 medical report updating the Applicant's medical conditions. In this latter report Dr. Dayal opines that the Applicant would not be able to rejoin the workforce given her chronic medical conditions and functional limitations.

Other Medical reports included;

- The results of a CT scan performed on June 17, 2010, which reported no significant abnormality.

- A January 23, 2007 CT scan of Applicant's lumbar spine showed degenerative disc disease at all three levels, however this was a pre-accident condition that worsened as evidenced by the report of D.C. DIAGNOSTICCARE X-RAY AND ULTRASOUND dated July 24, 2000.

- Medico-legal report by Dr. Shapero of the Markham Headache and Pain Treatment Centre dated March 15, 2004. Dr. Shapero examined the Applicant on Mach 15, 2004 and made treatment and medication recommendations that it appeared to the Review Tribunal the Applicant did not follow. While Dr. Shapero noted that the Applicant's activities of daily living had been affected; and while he expressed a guarded prognosis for recovery, Dr. Shapero did not state that the Applicant could not work.

- The psychological assessment of December 2 and 6, 2003 noted that the Applicant reported that she was predominantly disabled by physical restrictions, headaches, pain, difficulty finding well-paying jobs; anxiety or stress and fear of driving. In addition, the Applicant reported memory issues, headaches, muscle tension and fear of vehicular travel. Again, there was no conclusion that the Applicant's health condition prevented her from pursuing regularly any substantially gainful occupation.

- Dr. Joanna Hamilton's evaluation of December 10, 2004 did not reveal a brain injury. Dr. Hamilton found that the Applicant's challenges were largely the result of pain, anxiety and depression. She recommended psychological intervention; driver rehabilitation and confidence building sessions; and occupational therapy. Nonetheless, Dr. Hamilton did not find that the Applicant's health condition rendered her incapable regularly of pursuing any substantially gainful occupation. The Review Tribunal found that there did not appear to have been any follow-up to Dr. Hamilton's recommendations.

- Dr. Devlin's report of August 1, 2006 failed to find any specific findings that could indicate the presence of identifiable musculoskeletal impairments that would cause the Applicant's complaints. He concluded that the Applicant had not suffered a serious or permanent dysfunction with respect to her physical function. He did not comment on the Applicant's psychological or mental dysfunction as this was outside his area of expertise. Dr. Devlin did not state that the Applicant was incapable regularly of pursuing any substantially gainful occupation.

- Dr. Geoffrey Lloyd's report of October 13, 2006 indicated that the Applicant had probably sustained a soft tissue strain to her cervical and lumbar spine. However, Dr. Lloyd did not conclude that the Applicant was disabled from performing the less physically demanding aspects of her tasks on the farm. He noted the limitation of heavy lifting but stated that "from a physical perspective one would expect her to be able to maintain her own home, bookkeep, and contribute to the less physically demanding chores around the farm. Given the fact that she is left- handed, one would expect her to be able to continue participating in signage, with the provision that she did not have to lift heavy items into a position where she could restore them."

- The report dated December 04, 2003 of The Active Recovery Sports Injury and Rehabilitation Clinic stated it was designed to determine whether the Applicant "had a substantial inability to return to her pre-accident tasks including a farm labourer, sign writer and artist." The report concluded that the Applicant would have difficulty with tasks that require heavy and repetitive lifting, and perhaps sustained posturing

of the spine. However, it did not conclude that the Applicant was unable to obtain and maintain any substantially gainful occupation. It must be noted that in assessing the Applicant's work capacity the writers of the report defined "substantial inability" as a situation where "injuries must prevent the applicant from performing the duties of his or her occupation, not simply make the job more difficult, or make the applicant somewhat less productive." The report concluded that the Applicant demonstrated the required range of motion, fine motor, sitting, standing/walking, work pace and work stamina to perform her pre-accident occupations of self-employed artist/sign-writer/farm labourer even as the assessors found that the Applicant had demonstrated pain-limiting behaviour, meaning the Applicant did only what she was willing to do. Again, there was no recommendation that the Applicant was unable to work by virtue of her health conditions.

- With respect to the Applicant's use of marihuana, it was her family doctor who opined at Box 11 of the medical report that she suspected that the Applicant's daily use of marihuana was contributing to her cognitive difficulties.

[15] An initial Independent Activities on Normal Living Assessment was carried out on August 5, 2003, about 7 weeks after the Applicant's motor vehicle accident. This assessment appeared to be an in-home assessment. The Assessor recorded that the Applicant had assistance with some of the heavier and lifting tasks and recommended three mechanical aids to assist the Applicant in carrying out her activities of daily living. However, there was not a conclusion that the Applicant was incapable of carrying out her activities of daily living. A treatment record with a therapist (ML) shows that as of November 2003, the therapist found the Applicant showed improvement.

[16] With respect to the first four grounds of the Application raised by Counsel for the Applicant, applying a standard of reasonableness to its review of the Review Tribunal decision for the purpose of deciding the leave application, the Tribunal finds that the Review Tribunal did consider the totality of the medical evidence that was before it. The bulk of the medical evidence did not state that the Appellant suffered from a severe disability. The case law establishes that the Review Tribunal is entitled to prefer and to rely on the specialists

reports as opposed to that of the family doctor. Furthermore, at paragraph 21, the Review Tribunal clearly considered the evidence of the Applicant's daughter in making its decision as to the weight it would ascribe to the evidence and the impact of the evidence on its assessment of whether or not the Applicant's health condition satisfied the test for "severe and prolonged". Accordingly, the Tribunal rejects the submission that the Review Tribunal ignored the credible evidence of the Applicant's witness and doctors. Nor does the Tribunal accept that the Review Tribunal substituted its own assessment for those of the medical doctors. The purpose of medical evidence is to allow the decision-maker to decide whether or not the Applicant "suffers from disabilities which, in a "real world" sense, render him or her incapable regularly of pursuing any substantially gainful occupation." *(MHRD v. Angheloni, 2003 FCA 140.)* However, the decision maker is still required to exercise its judicial capacity and function, in respect to all of the evidence. *(Martin v. MHRD (August 10, 2001), CP 14001).* It was, therefore, open to the Review Tribunal in the exercise of its judicial capacity and function to assess all of the evidence, including the medical evidence and to come to the conclusions about the evidence and what that evidence established or failed to establish. Having carefully reviewed the medical evidence the Tribunal finds that the Review Tribunal neither,

a. disregarded important, weighty, credible evidence, both by medical practitioners and from G. E. and her daughter as to the extent and effect of her injuries and disability, and as to G. E.'s ability to return to work; nor

b. substituted its own assessment of the effects of G. E.'s injuries for the assessment of her own doctors; nor

c. made assumptions that it should or could not have made in arriving at its decision.

[17] The Tribunal has also reviewed the decision of the Review Tribunal. It notes that in the decision the Review Tribunal addressed the Applicant's oral testimony; the testimony of her witness as well as the documentary evidence before engaging in an extensive analysis of whether the evidence established that the Applicant suffers from a severe and prolonged disability. The Tribunal finds that the Review Tribunal properly addressed the Applicant's health conditions as well as her efforts to find and sustain employment in light of those health conditions. This is what the real world approach requires. Therefore, the Tribunal

rejects the sixth ground of the Application, namely that the Review Tribunal failed to consider all the facts, or consider the effect of the real world context in *Villani* when it determined that the Applicant did not suffer from a severe disability.

[18] The Tribunal assessed the Review Tribunal decision on a standard of reasonableness. In light of the above analysis, the Tribunal finds that the decision meets this standard. Accordingly, the Tribunal also rejects the first ground of the Application.

[19] Having rejected all of the grounds put forward as the basis of the Application, the Tribunal finds that the Applicant has failed to satisfy the Tribunal that the appeal has a reasonable chance of success. Accordingly, Leave to Appeal the decision of the Review Tribunal is refused.

CONCLUSION

[20] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division