

Citation: *R. B. v. Minister of Employment and Social Development*, 2014 SSTAD 328

Appeal No. AD-13-211

BETWEEN:

R. B.

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: November 13, 2014

DECISION

[1] The Social Security Tribunal (the “Tribunal”) refuses leave to appeal.

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on January 15, 2013, denying him a disability pension under the *Canada Pension Plan*, (“CPP”). The Applicant received the Review Tribunal decision on March 5, 2013 and filed his Application requesting Leave to Appeal (the “Application”) with the Pension Appeals Board on May 15, 2013. As the Application was filed after April 1, 2013 the Pension Appeals Board traversed it to the Tribunal, to be treated as an application from a decision of the General Division of the Tribunal. The Applicant has a Minimum Qualifying Period date of December 31, 2011.

GROUND OF THE APPLICATION

[3] The Applicant submits that the Review Tribunal erred by making incorrect findings concerning the evidence or through discrepancies in its decision. The errors the Applicant allege the Review Tribunal made are,

- 1) Misstating the Applicant’s employment status at the time of his accident;
- 2) Misapprehending his efforts at mitigation, particularly his failure to take prescribed medications;
- 3) Misapplying or considered inappropriate factors in relation to the real world aspect of the test for severe.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] 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 Act*, (“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.

[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”.

ANALYSIS

[7] 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 case¹ or show some arguable ground upon which the proposed appeal might succeed.

[8] 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.

[9] In order to grant leave to appeal, the Tribunal is required to be satisfied that the appeal has a reasonable chance of success. This means that the Tribunal must first determine whether any of the Applicant’s reasons for appeal fall within any of the grounds of appeal. Only then can the Tribunal assess the chance of success of the appeal.

ANALYSIS

[10] The Tribunal is not satisfied that the appeal has a reasonable chance of success.

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.

¹ *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[11] The first submission that the Applicant makes is that the Review Tribunal erred in its finding concerning his employment status at the time of his motor-cycle accident. He states that at the time of his accident he had been assigned to a pool of personnel who had qualified for the position of Acting Commanding Officer. The Tribunal finds that there is no error in the Review Tribunal's assessment of the Applicant's status as at paragraph 14 the Review Tribunal stated "he noted that he had applied for the job of CEO of the Search and Rescue Boat and had been short-listed but was not successful in his application due to his health." Further at paragraph 38 of its decision, the Review Tribunal specifically notes that the Applicant had qualified to be an Acting Commanding Officer on a Coast Guard vessel. Thus, this objection is not borne out and cannot form a ground of appeal.

[12] The Applicant submits that it can be implied from statements in the Review Tribunal decision that he took no steps to help to alleviate his problems. The Applicant explained that he did not take medications that are known to cause stomach ailments, therefore he does not take prescribed medications unless absolutely necessary. However, the Tribunal finds that this submission is belied by the Review Tribunal finding at paragraph 43 that the Applicant "clearly tried to manage his treatment options." Accordingly, the Tribunal rejects this submission as a ground of appeal.

[13] The Applicant also submits that the Review Tribunal erred in relation to its finding that he could do alternative work. He submits that the issue is not whether or not he could do light or sedentary work; this issue is that his injuries prevent him from engaging in consistent and regular work of any kind. The Tribunal finds that while the Review Tribunal clearly noted there were medical reports that state that the Applicant was unable to do any work, it was open to the Review Tribunal to reject these conclusions as the Review Tribunal also found that these reports did not provide any explanation why in the face of evidence that the Applicant's physical condition had improved, why he could not have pursued lighter work. Further, the medical reports presented did not provide an explanation for why the Applicant's back pain would be disabling. In light of these findings of the Review Tribunal, the Tribunal finds that it was open to the Review Tribunal to make the findings it did, thus there was no error in this regard.

[14] Also, in relation to the Review Tribunal assessment of the Applicant's efforts to find alternative work, the Applicant contended that his limited hearing capacity limits the type of work he can do. The Review Tribunal noted in its decision that the Applicant wears hearing aids; that he used hearing aids throughout the hearing and had no hearing difficulty during the hearing. Furthermore, the Review Tribunal noted that the medical report of the ENT specialist showed that with the use of hearing aids, the Applicant's hearing remained unchanged and stable. On the basis of these findings the Tribunal is not satisfied that the Applicant could successfully raise his hearing difficulties as part of a ground of appeal.

[15] In addition, the Applicant submitted that the Review Tribunal was in error in concluding that he had not attempted alternative work. He put forward two reasons for the alleged error. First, he stated that prior to finding employment with the Coast Guard he engaged in demanding physical labour that he can no longer do; second he was never offered alternative employment. The Tribunal finds that the first reason does not ground an appeal. By its very nature, the term "alternative work" does not contemplate the return to one's previous occupation. As for never being offered alternative employment, the onus is on the Applicant to seek alternative employment, which he did not do. Furthermore, alternative employment is not limited to other employment with one's employer.

[16] The Applicant also refers to the Review Tribunal's statements concerning years for which he either had low or no earnings. The Tribunal finds that the Review Tribunal referenced the Applicant's pre-coast Guard earnings in the context of the Applicant's ability to pursue any substantially gainful employment.

[17] The Review Tribunal placed undue importance on his ability to ride a motorcycle, asking the Applicant and his spouse questions that he was not certain were either relevant or appropriate. The Review Tribunal decision undermines this submission as at para. 45, the Review Tribunal expressly stated that they were impressed that the Applicant was continuing to pursue his hobby. The Review Tribunal viewed this as evidence of the Applicant's recovery as well as being good for the Applicant's emotional health. Further, the Tribunal members agreed "that although the Applicant could not return to his former job, he had no specific severe pathology and might be able to do some form of light work if he wished to do so."

[18] The Review Tribunal at paragraph 42 properly considered and applied the *Villani* principles to the Applicant's case noting that with his training as a carpenter and with the Coast Guard, the Applicant possessed knowledge and experience that was valuable in the workplace. Further the Applicant was not of an advanced age; however he had attempted no upgrading or made any serious attempt to find flexible employment.

[19] The Applicant submitted a Neuropsychological Assessment Report prepared by Dr. Charles J.A. Hayes, dated February 26, 2013. The report concluded that the Applicant did not have a traumatic brain injury but found a "maladaptive orientation to chronic pain that was linked to the Applicant's 2007 motor vehicle accident". There was also hearing loss that could impact his work as a "deckhand". The report found high levels of anxiety. Significantly, the report concluded that "it is likely that he (the Applicant) can make further gains in terms of quality of life and rehabilitation even though it is over five years since the collision." There was no statement that he was disabled from all forms of work; what there is is a statement that the Applicant "is handicapped because of his beliefs and his behaviours related to chronic pain".

[20] Further the report shows that Dr. Hayes reviewed the Applicant's medical and health files as well as administered a large battery of standardised tests and psychometric tools, observed the Applicant's behaviour and recorded his answers.

[21] The Applicant submitted a Functional Assessment Report prepared by Tom A. Stanley, Registered Physiotherapist, dated February 18 2013. Mr. Stanley, summarised the Applicant's situation as,

"Mr. R. B. is a 56-year-old Leading Seaman (Lifeboat) with Fisheries and Oceans Canada who was involved in a motorcycle accident on October 29th, 2007, suffering injury to his head, right shoulder, left hand and left knee. He continues to experience relatively high levels of pain and associated disability related to ongoing lower back pain. The continuing pain and associated disability impacts directly on his ability to perform significant work activities such as lifting, carrying, etc. and other avocational activities.

On February 16th, 2013, Mr. R. B. demonstrated physical abilities consistent with light level weighted activities, which is considered to be below a normative level for a male of his age and below a level considered required to perform his pre-injury work demands."

[22] As with Dr. Hayes' Neuropsychological Assessment Report, Mr. Stanley does not state that the Applicant was disabled from all work. Furthermore, both reports post-date the

Applicant's MQP and, in the view of the Tribunal, do not point to any error on the part of the Tribunal. Accordingly, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

CONCLUSION

[23] The Application is refused.

Hazelyn Ross
Member, Appeal Division