Federal Court Cour fédérale

Date: 20151120

Docket: T-74-15

Citation: 2015 FC 1300

Ottawa, Ontario, November 20, 2015

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

TODD D. TRACEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision dated April 3, 2014, by a member of the Social Security Tribunal-Appeal Division [SST-AD], refusing the Applicant leave to appeal a decision of the Review Tribunal [RT]. The RT had previously determined that a Canada Pension Plan [CPP] disability pension was not payable to the Applicant.

I. Context

[2] The Applicant applied for a CPP disability pension on March 29, 2011 and his application was rejected by a Service Canada medical adjudicator on July 26, 2011. The medical adjudicator determined that the Applicant did not have a disability that was both severe and prolonged, which continuously prevented him from working since December 31, 2008, the end of his minimum qualifying period [MQP]. The Applicant applied for the reconsideration of his file and on November 7, 2011, his application was again rejected by a different medical adjudicator on the same grounds.

[3] The Applicant appealed the decision denying him a CPP disability pension to the RT. A hearing was held on January 29, 2013, where the Applicant was represented by counsel. The RT dismissed the Applicant's appeal in a written decision dated April 25, 2013. After considering the evidence before it and the submissions of the parties, the RT concluded that on a balance of probabilities, the Applicant had not provided sufficient evidence to establish that he was suffering from a severe disability as defined in the applicable legislation. The RT found it unnecessary to make a finding on whether the Applicant's disability was prolonged given its conclusion on the severe criterion.

[4] The Applicant filed an application for leave to appeal with the SST-AD in May 2013. In a written decision dated April 3, 2014, the SST-AD refused the Applicant leave to appeal the RT decision on the basis that he had failed to raise a ground of appeal that had a reasonable chance of success. It is this decision that is subject to judicial review.

[5] Prior to making his application on March 29, 2011, the Applicant had previously applied for a CPP disability pension on at least two other occasions; both times the applications were denied.

II. Legislative Framework

[6] For the purposes of this application for judicial review, I have reproduced the relevant legislation below.

[7] Sections 223, 224 and 225 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, as they read when enacted, stated the following:

223. Section 2 of the *Department of Human Resources and Skills Development Act* is amended by adding the following in alphabetical order:	**223. L'article 2 de la *Loi sur le ministère des Ressources humaines et du Développement des compétences* est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :**
« Tribunal »	« Tribunal »
"Tribunal" means the Social Security Tribunal established under section 44	« Tribunal » Le Tribunal de la sécurité sociale constitué par l'article 44
224. Part 6 of the Act is replaced by the following:	**224. La partie 6 de la même loi est remplacée par ce qui suit :**
PART 5	PARTIE 5
SOCIAL SECURITY TRIBUNAL	TRIBUNAL DE LA SÉCURITÉ SOCIALE
Establishment and Administration	Constitution et administration

44. (1) There is established a tribunal to be known as the Social Security Tribunal, consisting of a General Division and an Appeal Division.

44. (1) Est constitué le Tribunal de la sécurité sociale qui est composé d'une division générale et d'une division d'appel.

225. The definitions "Pension Appeals Board" and "Review Tribunal" in subsection 2(1) of the Canada Pension Plan are repealed.

225. Les définitions de « Commission d'appel des pensions » et « tribunal de révision », au paragraphe 2(1) du Régime de pensions du Canada, sont abrogées.

[8] Section 83 of the *Canada Pension Plan Act*, RSC, 1985, c C-8 [CPPA], as it read between March 16, 2012 and March 31, 2013, provided:

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the *Old Age Security Act,* or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la *Loi sur la sécurité de la vieillesse* — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin

	d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.
(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.	(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.
(2.1) The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2).	(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).
(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.	(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.
(4) Where leave to appeal is granted, the application for leave to appeal thereupon becomes the notice of appeal, and shall be deemed to have been filed at the time the application for leave to appeal was filed.	(4) Dans les cas où l'autorisation d'interjeter appel est accordée, la demande d'autorisation d'interjeter appel est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé au moment où la demande d'autorisation a été déposée.
[…]	[…]
(11) The Pension Appeals Board may confirm or vary a decision of a Review Tribunal under section 82 or subsection 84(2) and may take any action	(11) La Commission d'appel des pensions peut confirmer ou modifier une décision d'un tribunal de révision prise en vertu de l'article 82 ou du

in relation thereto that might have been taken by the Review Tribunal under section 82 or subsection 84(2), and shall thereupon notify in writing the parties to the appeal of its decision and of its reasons therefor.	paragraphe 84(2) et elle peut, à cet égard, prendre toute mesure que le tribunal de révision aurait pu prendre en application de ces dispositions et en outre, elle doit aussitôt donner un avis écrit de sa décision et des motifs la justifiant à toutes les parties à cet appel.

[9] Subsections 58(1) and 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34, [DESDA] (formerly called the *Department of Human Resources and Skills Development Act*), read as follows:

58. (1) The only grounds of appeal are that	58. (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[10] Paragraph 42(2)(a) of the CPPA states:

(2) For the purposes of this Act,	(2) Pour l’application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n’est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d’une invalidité physique ou mentale grave et prolongée, et pour l’application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n’est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	(ii) une invalidité n’est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

III. Issues

[11] This application for judicial review raises the following issues:

A. What is the standard of review to be applied by this Court when reviewing decisions of the SST-AD on applications for leave to appeal?

B. Whether the additional evidence submitted by the Applicant is admissible before this Court?

C. Did the SST-AD commit a reviewable error in refusing the application for leave to appeal?

A. *Standard of Review*

[12] On April 1, 2013, the SST-AD replaced the Pension Appeals Board [PAB] pursuant to sections 223, 224 and 225 of the *Jobs, Growth and Long-term Prosperity Act,* SC 2012, c 19. While the PAB remained seized until April 1, 2014, of appeals commenced before April 1, 2013, the SST-AD inherited the PAB's jurisdiction with respect to applications for leave to appeal.

[13] Under the former provisions of the CPPA, a party dissatisfied with a decision of the RT could apply in writing for leave to appeal to the Chair or the Vice-Chair of the PAB, who in turn, could designate any member or temporary member of the PAB the power to grant or refuse leave to appeal. Although the legislation did not specify the test applicable for granting leave to appeal, the jurisprudence of this Court required that the party seeking leave to appeal raise an arguable case (See *Callihoo v Canada (Attorney General)*, 190 FTR 114, [2000] at paras 15 and 22, FCJ No 612 [*Callihoo*]; *Canada (Attorney General) v Zakaria*, 2011 FC 136 at para 36, [2011] FCJ No 189 [*Zakaria*]; *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100 at para 64, [2014] FCJ No 1187 [*Belo-Alves*]; *Fancy v Canada (Minister of Social Development)*, 2010 FCA 63 at paras 2 and 3, [2010] FCJ No 276).

[14] The judicial review of a PAB decision granting or refusing leave to appeal involved the determination of two issues: 1) whether the correct test had been applied, and 2) whether a legal or factual error had been made in determining whether an arguable case was raised. The first issue was reviewable on a standard of correctness and the second, on a reasonableness standard of review. (See *Callihoo*, at para 15; *Zakaria,* at paras 14 and 35; *Belo-Alves,* at paras 57 and 58).

[15] The Respondent invited this Court to depart from the two-step analysis described above on the grounds that it is inconsistent with the jurisprudence of the Supreme Court of Canada and thus, creates uncertainty in the law. The Respondent argued that the test for granting leave is now set out in section 58 of the DESDA and therefore, in determining whether leave to appeal should be granted or denied, the SST-AD is interpreting and applying its home statute. Relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Respondent further submitted that the presumption that the standard of review is reasonableness had not been rebutted.

[16] The Applicant was not represented by counsel before this Court and did not make representations on the standard of review.

[17] I agree with the Respondent that the two-step analysis which previously guided this Court when reviewing decisions of the PAB on applications for leave to appeal should be reconsidered. In my view, since the test for granting leave is now set out in the legislation, there should only be one step in the analysis, namely the determination of whether the SST-AD's decision granting or refusing leave to appeal was reasonable. Although it is imaginable that the SST-AD could

apply a test other than the one set out in the legislation, this would constitute, in my view, a reviewable error that could be captured under the reasonableness standard of review.

[18] In *Alberta (Information and Privacy Commission) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30 and 39, [2011] 3 SCR. 654 [*Alberta Teachers*], the Supreme Court of Canada stated that deference should be afforded to a tribunal when it is interpreting provisions of its own statute. In such a case, the default standard of review is reasonableness, unless the question is one which falls into one of the categories of questions to which the standard of correctness applies:

> [30] […] There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or vires" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, per LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).
>
> […]
>
> [39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's

> interpretation of its home statute on the deferential standard of reasonableness.

[19] When the SST-AD is determining whether leave to appeal should be granted or denied, it is interpreting its home statute. In contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success.

[20] Subsection 58(1) of the DESDA also enumerates the only grounds upon which an appeal can be brought: 1) the General Division of the Social Security Tribunal [SST-GD] (previously the RT) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; 2) the SST-GD erred in law, whether or not it appears on the face of the record; and 3) the SST-GD based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[21] In my view, the determination of whether an application for leave to appeal has a reasonable chance of success clearly falls within the expertise of the SST-AD, whose ultimate responsibility, if leave is granted, will be to decide the merits of the appeal, which will be reviewable on a standard of reasonableness. As stated in *Atkinson v Canada (Attorney General)* 2014 FCA 187 at para 31 of the decision:

> [31] In my view, the differences between the SST and the PAB's structure, membership and mandate do not diminish the need to apply a deferential standard in reviewing the SST's decisions. One of the SST's mandates is to interpret and apply the CPP and it will encounter this legislation regularly in the course of exercising its functions. Moreover, subsection 64(2) of the DESDA

> also restricts the type of questions of law or fact that the Tribunal may decide with respect to the CPP, presumably in order to better ensure that the SST is only addressing issues that fall within its expertise. These factors suggest that Parliament intended for the SST to be afforded deference by our Court, as it has greater expertise in interpreting and applying the CPP.

[22] Given that the ultimate decision on appeal is reviewable on a standard of reasonableness, the determination of whether leave to appeal should be granted or denied should also be subject to the same standard of review. Furthermore, I note that in subsection 58(2) of DESDA, Parliament left it to the SST-AD to be "satisfied" that the appeal has a reasonable chance of success. This wording, in my view, further supports the argument that deference should be afforded to the SST-AD's determination of whether leave should be granted.

[23] Finally, I find that the presumption that the standard of review is reasonableness has not been rebutted. The legal questions raised when the SST-AD is applying its home statute in determining whether an appeal has a reasonable chance of success, do not fall within the categories of questions to which the correctness standard of review applies, as set out in *Alberta Teachers*, cited above.

B. *Additional evidence submitted by the Applicant*

[24] The Respondent noted in its written submissions that the Applicant's affidavit and record contained a number of documents which were not before the RT or the SST-AD and argued that the documents were inadmissible in this application for judicial review. The documents in question consist of: 1) a clinic report dated January 29, 2014, detailing an examination of the Applicant on January 28, 2014, (Applicant's Record [AR], pp. 14-15); 2) an article from the

Canadians for Health Research (CHR) website (AR, pp. 8-9); 3) an undated article from Columbia Medical Centre (AR, p. 17); 4) a page of photographs of knees and shoes (AR, p. 18); and, 5) a CD.

[25] I reviewed the Certified Tribunal Record [CTR] and the first two documents were in fact communicated to the SST-AD. The clinic report is date stamped received by the SST-AD on February 19, 2014 (CTR, p. AD1D-2). The CHR website article was also sent by the Applicant by email to the SST-AD on November 22, 2013 (CTR, pp. AD1C-1 and AD1C-2). The remaining two documents and CD were not part of the CTR.

[26] The Applicant also attempted to introduce additional documentation during the hearing before me. This documentation consisted generally of various letters, excerpts from the internet on the Applicant's condition and statistical information and reports from doctors. The Respondent raised an objection to its introduction into the record.

[27] I note that, with the exception of the excerpts from the internet and the handwritten annotations from the Applicant appearing on the documents, the documents attempted to be introduced at the hearing already formed part of the CTR. I also note that the handwritten annotations on the documents appear to be mostly expressions of disagreement with some of the information contained in the documentation.

[28] I agree with the Respondent that the record for judicial review is usually limited to that which was before the decision-maker. Judicial review is meant to assess whether the decision

under review was lawful and is not an assessment of its merits (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at paras 14 to 20, [2012] FCJ 93). The documentation that the Applicant asked to introduce into evidence at the hearing was not, as presented, before the SST-AD and it does not fall within the exceptions where new evidence can be adduced in judicial review proceedings. For these reasons, with the exception of the clinic report signed on January 29, 2014 and the CHR website article, the Applicant's new documents cannot be considered by this Court for the purposes of the application for judicial review.

[29] I would like to make a final comment on this issue before proceeding to my analysis of the reasonableness of the SST-AD's decision. Under the former scheme of appeals to the PAB, adducing new evidence constituted a ground of appeal and therefore an applicant seeking leave to appeal could submit new evidence to demonstrate an arguable case. Under the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves*, at para 108). The SST-AD was therefore under no obligation to consider the clinic report signed on January 29, 2014 and the CHR website article as an independent ground of appeal in determining whether the Applicant's application for leave to appeal had a reasonable chance of success.

C. *Did the SST-AD commit a reviewable error in refusing the application for leave to appeal?*

[30] Pursuant to subsection 58(2) of the DESDA, leave to appeal will be refused if the "Appeal Division is satisfied that the appeal has no reasonable chance of success".

[31] The Applicant had the burden of demonstrating to the SST-AD that his appeal possessed a reasonable chance of success. He raised a number of arguments as grounds of appeal which can be summarized as follows: 1) the RT failed to consider his submissions; 2) the RT failed to properly weigh his evidence; 3) the RT erred in finding that he was not suffering from a severe disability; 4) the RT was biased and breached natural justice; 5) the RT ignored the medical evidence that stated he could not work; and, 6) the RT made factual errors which the Applicant clarified.

[32] I am of the view that the SST-AD's decision refusing the Applicant leave to appeal was reasonable as it fell within the range of acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47).

[33] The SST-AD applied the correct test and addressed each of the Applicant's arguments in light of the RT's decision and the evidence on record. First, it noted that the RT had summarized all of the evidence and submissions presented at the hearing and had referred to them in coming to its conclusion. Relying on the decision of the Federal Court of Appeal in *Simpson v Canada (Attorney General),* 2012 FCA 82, [2012] FCJ No 334, the SST-AD reiterated that the RT did not have to refer to each individual piece of evidence but was presumed to have considered all of the evidence. The SST-AD also stated that assigning weight to the evidence was the job of the trier of fact, not the reviewing body and that the member hearing an application for leave to appeal could not substitute the trier of fact's views for its own. It found that the Applicant was seeking a restatement and reweighing of evidence and this was not a ground of appeal which had a reasonable chance of success.

[34] In response to the Applicant's argument that the RT ignored medical evidence and erred in concluding that he was not disabled, the SST-AD stated that the RT had considered the medical evidence and that it was not open to the SST-AD to reconsider the evidence and reach another conclusion. It found that this was not a ground of appeal that had a reasonable chance of success.

[35] With respect to the Applicant's argument that the RT was biased and breached natural justice, the SST-AD found that there was no factual basis and nothing in the decision that would support a finding of bias or a breach of natural justice.

[36] Finally, in regard to the factual errors alleged to have been committed by the RT, the SST-AD stated that in order to justify an appeal, the alleged errors must have been made in a capricious or perverse manner. It found that the alleged factual errors were neither perverse, nor capricious, nor significant and that this ground of appeal had no reasonable chance of success.

[37] In my view, the decision of the SST-AD addressed each of the grounds of appeal raised by the Applicant in his request for leave to appeal and having reviewed both the RT decision and the CTR, there was no misapprehension or ignoring of evidence, procedural unfairness or any other reviewable error on the part of the SST-AD.

[38] The RT conducted a thorough review of the evidence before it, including the medical evidence regarding the Applicant's condition, and it considered all of his submissions. It also applied the correct legal test for determining disability under the CPP.

[39] Paragraph 44(1)(b) of the CPPA sets out the statutory criteria for the CPP disability pension. To qualify for a disability pension, an applicant must be: 1) under the age of 65 years of age; 2) not be in receipt of the CPP retirement pension; 3) be disabled; and, 4) have made valid contributions to the CPP for not less than the MQP. The MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP, which in the case of a late applicant (like the Applicant) the disability must be continuous until the date of the application.

[40] Paragraph 44(2)(a) of the CPPA defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[41] The "severe" and "prolonged" criteria were considered by Justice de Montigny in the *Zakaria* decision, where he wrote at paragraphs 25 and 26:

> [25] A disability is "severe" only if the person is incapable regularly of pursuing any substantially gainful occupation. It is the capacity to work and not the diagnosis or the disease description that determines the severity of the disability under the Plan. Disability is not based upon the applicant's incapacity to perform his or her usual job, but rather any substantially gainful occupation: *Inclima v Canada (Attorney General)*, 2003 FCA 117, at para 3; *Canada (Minister of Human Resources Development) v Scott*, 2003 FCA 34, at para 7; *Villani v Canada (Attorney General)*, 2001 FCA 248, at para 50; *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33, at paras 14-17.
>
> [26] An applicant who seeks to bring himself within the definition of severe disability must not only show that he or she has a serious health problem but, where there is evidence of work capacity, must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health

> condition. Not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Applicants must still demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence is required, **as is evidence of employment efforts and possibilities**: *Inclima*, above, at para 3; *Klabouch*, above, at paras 16-17; *Villani*, above, at paras 44-46 and 50.
>
> [My emphasis.]

[42] In determining whether the Applicant suffered from a severe and prolonged disability, the RT referred to all of the Applicant's relevant medical records. It stated that the "severe" criteria must be assessed in a real world context and when assessing a person's ability to work, factors such as age, level of education, language of proficiency and past work must be considered. It further stated that to establish a severe disability, one must not only show a serious health problem, but where there is evidence of work capacity, one must also demonstrate that effort at obtaining and maintaining employment has been unsuccessful by reason of the health condition.

[43] The RT found that although the medical evidence showed that the Applicant had seen a number of specialists who referenced the fact he was not working, there was nothing in their reports which indicated that his disability was so severe that he was unable to work. The RT was troubled by the fact that the Applicant had not made a sincere effort to find alternative employment and remained unconvinced by his oral testimony as to the reasons why he had not done so. The RT found that the onus was on the Applicant to make a sincere effort to find work, and that by not doing so, he had not met the test set out in the case law.

[44] Furthermore, the RT also stated that in order to be successful, an applicant for a disability pension is obligated to abide by and submit to treatment recommendations and if this is not done, the applicant must establish the reasonableness of his non-compliance. While noting the Applicant's argument that his condition was chronic and had not improved despite following all treatment recommendations, the RT highlighted that on at least three occasions, the Applicant had not followed the treatment recommended by his doctors. The RT considered the Applicant's explanations for not doing so, but nonetheless felt that the Applicant should have been more willing to follow all treatment recommendations given the Applicant's claims as to the severity of his disability. In the end, the RT concluded that on the balance of probabilities the Applicant had not provided sufficient evidence to establish he was suffering from a severe disability as defined in the legislation. The RT found it unnecessary to make a finding on the prolonged criterion.

[45] The RT expressly addressed all of the issues raised by the Applicant and it applied the appropriate legal test for establishing a disability. It was thus reasonable for the SST-AD to conclude that the Applicant had not raised any grounds of appeal which had a reasonable chance of success and its decision falls within the range of acceptable outcomes which are defensible in respect of the facts and the law.

[46] During the hearing, the Applicant tried to convince me that he was entitled to a disability pension by highlighting the medical evidence with which he disagreed. The function of this Court on a judicial review application is not to reassess the evidence or reweigh the factors considered by the RT in order to reach a different conclusion regarding the Applicant's

admissibility to a disability pension, nor is it the role of the SST-AD when determining whether leave should be granted or denied.

[47] While I am sympathetic to the Applicant's medical difficulties, his application for judicial review will be dismissed for the reasons set out above. Counsel for the Respondent requested no costs and none will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

Each party shall bear its own costs.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-74-15
STYLE OF CAUSE:	TODD D. TRACEY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 16, 2015
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	NOVEMBER 20, 2015

APPEARANCES:

Todd D. Tracey	FOR THE APPLICANT (ON HIS OWN BEHALF)
Hasan Junaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT