Citation: *N. G. v. Minister of Employment and Social Development,* 2014 SSTAD 347

Appeal No: AD-13-740

BETWEEN:

N. G.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

HEARING DATE: November 26, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: December 1, 2014

DECISION

[1] The appeal is allowed. The matter is referred to the General Division.

INTRODUCTION

[2] The Appellant completed high school and has held a number of jobs. He has also taken a number of educational courses, mostly to obtain different work. The Appellant last worked in 2009. He claimed that he stopped work because he was disabled under the *Canada Pension Plan* (CPP) by chronic pain, difficulties with his legs and nerve damage in his right arm. The Review Tribunal concluded that the Appellant was not disabled prior to his Minimum Qualifying Period of December 31, 2009. He was granted leave to appeal from this decision to the Appeal Division of the Social Security Tribunal.

[3] The Appellant claimed that the Review Tribunal made errors of fact regarding his work activities, his plan for work if he received a CPP disability pension, and his educational activities. He also asserted that the Review Tribunal did not consider the ulnar nerve dysfunction that he suffered in his right arm. Finally, the Appellant sought to introduce new evidence at the appeal hearing.

[4] In response, the Respondent asserted that any errors made by the Review Tribunal were not significant and did not render its decision unreasonable. Alternatively, the Respondent argued that the Review Tribunal did consider all of the Appellant's medical conditions, including the ulnar nerve dysfunction. In the further alternative, the Respondent argued that if this condition was not considered this was not an error as ulnar nerve dysfunction was first diagnosed after the Minimum Qualifying Period. Finally the Respondent argued that new evidence should not be considered.

ANALYSIS

Standard of Review

[5] The Respondent submitted that the proper standard of review for a decision made by the General Division of the Tribunal is that of reasonableness. The Appellant made no

submissions on this issue. The leading case on this is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. I accept the Respondent's detailed submissions on this issue as a correct statement of the law and find that the standard of review to be applied in this case is reasonableness.

[6] There are three matters to which the standard of review must be applied in this case: alleged errors of fact made in the Review Tribunal decision regarding the Appellant's ability to work, its consideration of the Appellant's ulnar nerve dysfunction, and whether the reasons given by the Review Tribunal in its decision are sufficient. Finally, I considered whether new evidence could be presented at the appeal hearing.

Errors of Fact

[7] The *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal that can be considered by the Appeal Division of the Social Security Tribunal (see Appendix attached hereto). One ground of appeal is 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.

[8] The Appellant argued, first, that the Review Tribunal made such an error as it mischaracterized his evidence regarding his ability to work. The Review Tribunal decision stated that the Appellant spent time working on his boat. The Appellant asserted that what he meant by this was that he worked "in his mind" designing boats but could not physically do any work on a boat. Similarly, the Review Tribunal decision stated that if the Appellant was granted a CPP disability pension his plan was to move to Vancouver Island to work on small engines and brakes. The Appellant argued that he testified that he thinks about how braking systems that do not require the use of hands could be designed for a recumbent bicycle. He did nothing active in this regard. The Appellant argued that the Review Tribunal relied on these errors in making its decision, which rendered the decision unreasonable.

[9] In contrast, the Respondent argued that even if these factual errors were made, they did not affect the outcome of the decision as there were many other factors that the Review Tribunal relied on to make its decision. These included the Appellant's educational background, his varied work history and the medical evidence. It argued that as the Review Tribunal decision did not hinge on the findings of fact that were alleged to have been made in error, the decision was not unreasonable and should stand.

[10] There was no transcript or recording of the Review Tribunal hearing that I could review. After hearing the arguments of the parties and considering the written material in the appeal file, I find that the Review Tribunal made findings of fact without regard to the material before it. The Review Tribunal decision referred to the Appellant having an active lifestyle, working on a boat almost every day and wishing to move to Vancouver Island to take mechanical engineering and work on cars. This was contrary to what the Appellant claimed he testified. It is clear from reading the decision that these findings of fact were important to the Review Tribunal's decision-making. Therefore, if these findings of fact were made in error, they would render the decision unreasonable.

[11] The Appellant also argued that the Review Tribunal did not consider that he suffered from ulnar nerve dysfunction. He argued that this condition must have existed prior to the Minimum Qualifying Period (MQP) and was therefore relevant. In addition, he should not be faulted for not having timely medical reports to support his claim as he did not have a family physician prior to the MQP.

[12] The Respondent argued that the Review Tribunal must have considered this condition as the decision specifically summarized another report from Dr. McLean, who diagnosed the nerve dysfunction. In the alternative, it relied on the decision of the Federal Court of Appeal in *Simpson v. Canada (Attorney General)* 2012 FCA 82 which set out that a decision need not refer to each and every piece of evidence that was before it, but is presumed to have considered all of the evidence. Finally on this issue counsel for the Respondent also argued that because the nerve dysfunction was diagnosed after the MQP it was not relevant to the legal issue before the Review Tribunal and so was perhaps not considered for that reason.

[13] I do not accept the Respondent's argument that evidence regarding the ulnar nerve dysfunction was not relevant to the Review Tribunal decision. One cannot conclude that simply because the medical reports regarding this condition were written after the MQP the condition did not exist until then. This is especially so in light of the note from Dr. Burton in 2009 that stated that the Appellant had been unable to work since 2005.

[14] I also do not accept the Respondent's argument that because the decision referred to another report penned by Dr. McLean it must have considered all of his reports, including those that discussed the nerve dysfunction. Although the Review Tribunal is presumed to have considered all of the evidence, this presumption can be rebutted. In this case, the decision makes no reference at all to any nerve condition or to any of the Appellant's arm limitations. I therefore find that the presumption has been rebutted, and the nerve dysfunction was not considered by the Review Tribunal. This was an error made by the Review Tribunal, as it must consider all of the Appellant's medical conditions in making its decision.

[15] Lastly, the Review Tribunal decision set out a lengthy list of post-secondary educational courses that the Appellant took. There was no explanation in the decision for disregarding the evidence that the Appellant was unable to complete some of these courses, or that he had to change courses to accommodate his physical limitations. Therefore, I find that the Review Tribunal made an error of fact without regard to the material before as it did not consider all of the information about the Appellant's education.

Sufficiency of Reasons

[16] The Appellant also referred to a note written by Dr. Burton dated 6/15/9 which stated that the Appellant had been unable to work from 2005 to that date. This note, although presented to the Review Tribunal was not mentioned in the decision. In *R.v. Sheppard* 2002 SCC 26 the Supreme Court of Canada considered when an appellate court should intervene because the reasons of the prior decision maker are inadequate. It concluded that an appellate court should intervene when the decision maker does not explain why it rejected contradictory evidence that was before it. That reasoning was adopted by the Federal Court of Appeal in a CPP disability case in *Doucette v. Minister of Human Resources Development* 2004 FCA 292 and is binding on me. In this case the Review Tribunal had evidence that the Appellant was

not able to work in Dr. Burton's note of 6/16/9 which it did not appear to have considered. It failed to mention this evidence or explain why it was not given any weight. The Review Tribunal also had evidence that Appellant was not able to complete educational programs, but did not explain why it rejected this evidence. These are errors made by the Review Tribunal, which render the decision unreasonable.

New Evidence

[17] The Appellant also presented some additional medical reports to support his claim on appeal. These reports were not presented at the Review Tribunal hearing. The Respondent objected to the introduction of any new evidence at the appeal. Section 58 of the DESD Act states clearly the only grounds of appeal that can be considered by the Appeal Division of this tribunal. They are errors in law, errors in fact, or breaches of natural justice. The introduction of new evidence is not a listed ground of appeal. There is an alternate procedure available under the DESD Act for parties to seek the rescission or amendment of a decision on the basis of new material facts. I therefore concluded that the new evidence proffered by the Appellant was not to be considered in this appeal.

CONCLUSION

[18] The appeal is allowed. The errors made by the Review Tribunal rendered that decision unreasonable. The matter is referred to the General Division of this tribunal for a hearing *de novo* as issues of credibility and the weight to be given to the evidence must be determined.

Valerie Hazlett Parker
Member, Appeal Division

Appendix: *Department of Employment and Social Development Act*

58. (1) The only grounds of appeal are that

(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.

59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.