Citation: *D. W. v. Minister of Employment and Social Development,* 2014 SSTAD 354

Appeal No: AD-13-887

BETWEEN:

D. W.

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

DATE OF DECISION: December 10, 2014

TYPE OF HEARING: On the Written Record

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 12, 2013, a Review Tribunal dismissed the Appellant's claim.

[3] The Appellant filed an Appeal from that decision with the Pension Appeals Board on June 18, 2013. The file was transferred to the Appeal Division of the Social Security Tribunal in accordance with section 260 of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[4] The hearing of this appeal was conducted on the written record, after the time for filing submissions had expired. The Appellant did not file any written submissions. The Respondent filed written submissions. I have considered the Application for Leave to Appeal and the Respondents submissions in reaching my decision.

THE LAW

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[6] Subsection 59(1) of the DESD Act provides that 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.

ISSUE

[7] The Tribunal must decide whether the appeal should be allowed because there was a breach of natural justice, or the Review Tribunal made an error in fact or in law.

SUBMISSIONS

[8] In the Leave to Appeal Application the Appellant submitted that the appeal should be allowed because:

a) He was "cut off" during the Review Tribunal hearing and was not able to present his case fully; and

b) The Review Tribunal did not consider all of his medical conditions;

[9] The Respondent submitted that the appeal should be dismissed because:

a) The Appellant was not denied natural justice;

b) The Appellant did not raise issues of natural justice at the hearing, so has implicitly waived the right to do so; and

c) The Review Tribunal decision was reasonable

ANALYSIS

Standard of Review

[10] The Appellant made no submissions regarding what standard of review should be applied when considering this appeal. 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 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. The standard of correctness should be applied to questions of jurisdiction, natural justice or constitutional questions.

Application of Standard of Review to this Case

[11] The issue of whether the Appellant was denied natural justice by not being able to fully present his case will be determined on the basis of correctness. Whether the Review Tribunal erred in not considering all of his medical conditions will be reviewed on the basis or reasonableness. Finally, whether the Review Tribunal erred in its application of the law to this case will be determined on the basis of reasonableness as it concerns the application of law closely related to the work of the tribunal.

Natural Justice

[12] First, I must consider the Respondent's argument that since the Appellant did not argue at the hearing or immediately thereafter that the principles of natural justice were breached because he could not present his full case, he is precluded from doing so now. The Respondent relied on the decision of the Federal Court in *Mohammadian v. Canada* [2000] 3 FC 371, wherein Justice Pelletier stated that on a policy basis Appellants should be required to complain at the first opportunity when it is reasonable to expect them to do so.

[13] This is a correct statement of the law that I must apply to this case. The Appellant filed the Application with the Pension Appeals Board in June 2013, within the time required to do so after the hearing. In this document he raised arguments regarding his inability to properly present his case. I find that this was the first reasonable opportunity for him to do so. The Review Tribunal hearing was conducted when that tribunal was winding up its work. The Social Security Tribunal took on any remaining work from this tribunal on April 1, 2013, less than one month after the decision in question was rendered. It was unclear to many how the transition from the Office of the Commissioner of Review Tribunals and

Pension Appeals Board to the Social Security Tribunal would occur. Therefore it was logical for the Appellant to make this argument in his Leave to Appeal Application. Hence, I find that the Appellant was not precluded from making this argument when he did.

[14] Next, I must consider one of the principles of natural justice - that each party to a proceeding is entitled to present his entire case before a decision is made. The Appellant argued that he was "cut off" during the hearing, and not able to fully present his case to the Review Tribunal. The Review Tribunal heard evidence from the Appellant, had medical records, an application form, questionnaire and other documents completed by the Appellant, all of which it considered when making its decision. The Appellant provided no specifics of what evidence was not presented or how he was otherwise prevented from presenting his case fully. On this basis I am satisfied that there was no breach of natural justice at the Review Tribunal hearing.

Errors of Fact

[15] The Appellant argued, in addition, that the Review Tribunal erred as it did not consider all of his medical conditions, including a frozen shoulder (which resolved) and anxiety and depression which required counselling. In *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36 the Supreme Court of Canada concluded that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable. Therefore, the fact that two of the Appellant's medical conditions, which the Appellant did not describe as disabling, were not specifically mentioned in the decision, in this case, did not render the decision unreasonable. When examined as a whole, the decision is reasonable.

Error of Law

[16] The Review Tribunal decision stated that the Appellant had not attempted employment, a requirement to obtain a disability pension. There was some question whether this was a correct statement of the law as the Federal Court of Appeal concluded that where there is evidence of work capacity, a person must show that effort at obtaining and

maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[17] The Appellant made no submissions on this. The Respondent argued that the Review Tribunal did not make an error of law in making the statement it did. The Review Tribunal decision did not specifically state that evidence of attempts at work is required only if capacity to work is shown. However, when the decision is reviewed as a whole I am satisfied the Review Tribunal concluded that the Appellant had some residual capacity to work before it considered whether he had put forward any evidence that his ability to obtain or maintain employment was unsuccessful by reason of his disability. Therefore, the Review Tribunal decision is reasonable in this regard.

CONCLUSION

[18] The appeal is dismissed because the Review Tribunal decision is correct with regard to the principles of natural justice, and reasonable with respect to findings of fact and law.

Valerie Hazlett Parker
Member, Appeal Division