Citation: *V. T. v. Minister of Employment and Social Development,* 2014 SSTAD 403

Appeal No.: AD-13-30

BETWEEN:

V. T.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

TYPE OF HEARING: On the Written Record

DECISION DATE: December 30, 2014

PARTIES

Appellant	-	V. T. (self-represented) Respondent's
Representative	-	Hasan Junaid

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] By a decision issued May 2, 2013, a Review Tribunal determined that the Appellant was not entitled to a *Canada Pension Plan*, ("CPP"), disability pension. In its decision the Review Tribunal concluded that as of her Minimum Qualifying Period, ("MQP") date, the Appellant did not suffer from a severe disability that meets the definition of, contained in CPP para. 42(2)(a). The Appellant's MQP was established as December 31, 2011.

[3] The Appellant sought Leave to Appeal the Review Tribunal Decision. On June 11, 2014 the Appeal Division of the Social Security Tribunal, ("the Tribunal"), granted leave in accordance with the provisions of s. 260 of the *Jobs, Growth and Long-term Prosperity Act.*

GROUNDS OF THE APPEAL

[4] The self-represented Appellant did not make her Application for leave in the form prescribed by the SST. The Tribunal inferred her intent from her handwritten notes and comments that she inserted into the text of the Review Tribunal decision. The Tribunal granted leave on three grounds, namely,

a) the Review Tribunal may have incorrectly assessed the number of hours the Appellant worked for Greenpeace;
b) the Review Tribunal erred when it discussed her ability to recall dates in that the Review Tribunal decision does not mention the Applicant reading from prepared notes during the hearing; and
c) the Applicant has a reasonable explanation for failing to follow or for discontinuing prescribed medical treatment.

[5] As provided for by s. 42, of the SST Regulations; following the granting of leave to appeal, the parties were given the opportunity to make submissions to the Appeal Division. The Tribunal received two handwritten documents from the Appellant. As with her Notice of Appeal, she did not make any specific submissions in the expected sense. The Appellant repeated statements she had made earlier in the leave application, the nub of which was that her position with Greenpeace was a part-time, door to door, canvassing position. She was assigned a 6 hour shift, with two breaks, three days a week. The Appellant claims she never completed her shifts; instead she would spend time in coffee shops. In addition, the Appellant stated that because of her health condition, she was forced to take two extended periods of leave. In later submissions, the Appellant stated her employment with Greenpeace was terminated after the six month probationary period. The Tribunal infers that the Appellant is taking the position that her employment with Greenpeace cannot be seen as retained work capacity, but rather as evidence of her inability to obtain and maintain substantially gainful employment.

[6] For his part, the Respondent's representative submitted that the Review Tribunal had not made any errors in its decision. In his submission "reasonableness" was the appropriate standard of review to be applied to the Review Tribunal decision.[1]By this standard the Review Tribunal decision, with respect to the three grounds on which the Appeal Division granted leave to appeal, is reasonable. Consequently, the intervention of the Appeal Division of the Tribunal was not warranted. The Respondent's representative made the further submission that, leave to appeal having been granted, the present proceeding is not a hearing *de novo*; rather it is an appeal in the nature of a judicial review. Consequently, the Appellant's post-decision statements and assertions constituted additional evidence, which was not admissible in the appeal.[2]

THE STANDARD OF REVIEW

[7] For the purposes of these proceedings, decisions of the Review Tribunal are considered to be decisions of the General Division. The questions currently before the Tribunal are either questions of fact, or mixed questions of fact and law, in that they involve a determination of

[1] At paragraphs 24-29 of the Respondent's submissions.
[2] Para. 34 of Respondent's submissions.

whether or not the Review Tribunal based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it with respect to the grounds on which leave to appeal was granted.

[8] In *Atkinson,*[3] the Federal Court of Appeal reiterated that the appropriate procedure to be applied when determining the applicable standard of review involves, first considering whether,

> 22…"prior jurisprudence has established the appropriate standard of review to be applied to the issue or category of question at hand (*Dunsmuir* at paragraph 62). If this first inquiry is "unfruitful, or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review" then the court must engage in a contextual standard of review analysis to determine the applicable standard (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 48 [*Agraira*]). This second contextual inquiry involves considering the factors set out at paragraphs 51 to 61 of *Dunsmuir – i.e.* the presence or absence of a privative clause; the purpose of the tribunal in view of its enabling legislation and the tribunal's expertise; and the nature of the question at issue – and examining whether these factors point towards a standard of reasonableness or correctness in the case at hand."

[9] Applying a contextual analysis to the Tribunal decision, the Federal Court concluded that the Tribunal's interpretation and application of CPP paragraph 42(2)(a) are reviewable on a standard of reasonableness. Thus, *Atkinson,* as noted by the Respondent's representative, meets the requirement that a reviewing Court first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision-maker with regard to a particular category of question.

[10] In the instant case the Review Tribunal was also interpreting and applying CPP paragraph 42(2)(a), its home statute. In *Dunsmuir,* the Supreme Court of Canada stated that where a Tribunal is interpreting its home statute the presumption is that "reasonableness" is the applicable standard of review. Therefore, applying the reasoning of the Federal Court of Appeal in *Atkinson,* the Tribunal agrees that the Review Tribunal decision must be reviewed against the reasonableness standard as defined in *Dunsmuir*, as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

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[3] *Atkinson v. Canada (Attorney General),* 2014 FCA 187 at para. 22.

THE LAW

[11] The statutory provisions governing appeals to the Appeal Division are found in Sections 58 and 59 of the *Department of Employment and Social Development Act*, ("the DESD Act"). Section 58 provides for three grounds of appeal, namely,

> 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.

[12] Section 59 prescribes the powers of the Appeal Division as follows,

> 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.

ISSUE

[13] The Tribunal must decide if, in the context of assessing whether the Appellant met the severe prong of the para. 42(2)(a) definition, the Review Tribunal,

a. committed an error of fact in its assessment and treatment of the number of hours that the Appellant worked for Greenpeace and the impact on her work capacity;

b. failed to properly consider the Appellant's impaired memory, namely, that the Appellant read from prepared notes; and

c. failed to properly consider that the Appellant had a reasonable explanation for failing to follow or for discontinuing prescribed medical treatment.

PRELIMINARY ISSUE

Are the Appellant's Post -decision Statements and Assertions admissible in the Appeal Proceedings?

[14] As noted earlier, on June 18, 2014 and June 23, 2014, the Appellant filed two documents with the Tribunal. These documents have been treated as her submissions made pursuant to Section 42 of the Tribunal Regulations. Counsel for the Respondent takes the position that these documents are not properly submissions but are, in fact, new evidence. He argues that given the nature of the hearing before the Appeal Division, these documents are not admissible. Whether or not these submissions are admissible will depend on the nature of the appeal before the Appeal Division.

[15] Counsel for the Respondent likens the appeal before the Appeal Division to an appeal before an Umpire, which the Respondent's representative states were considered an appeal in the nature of judicial review. By analogy, therefore, and despite the wider remedial powers contained in DESD Section 59, the appeal before the Appeal Division is also in the nature of judicial review. Judicial review proceedings are narrower in scope than those of a full appeal. As such, the reviewing body will rely on the materials that had been available to the decision maker below. In the case of the Appeal Division, if the proceedings before it are not a full appeal, then the Appeal Division can only consider such documentation and evidence as was before the General Division, or as in the instant case, the Review Tribunal.

[16] In this regard, the Tribunal relies on its reasoning in *Bartucci v. Canada* (*Minister of Employment and Social Development), AD 13-48, Ross, October 2014*. The Tribunal also concurs with the reasoning of the Respondent's representative. Accordingly, the Tribunal finds that in the proceedings before the Appeal Division being in the nature of judicial review, no further or new evidence is admissible and to the extent that the Appellant's submissions are in fact new or additional evidence the submissions will be excluded.

[17] On examination, the Appellant's submissions consist largely of statements that she made prior to the Review Tribunal hearing. In her submissions of June 18, 2014, the Appellant refers to the hardships she is currently experiencing including the after effects of her accident; the sale

of the family home at an undervalue (the Appellant attached the real estate listing); her forced move to a condominium; her financial need; and her frustration at being denied the CPP disability pension; all of which is documented at paragraph 15 of the Review Tribunal decision.

[18] In the same submission, the Appellant refers to her employment experience with Greenpeace stating that she worked fewer hours than recorded in the Review Tribunal decision, took leave during June, July and August 2013 because of her health condition and that ultimately her employment was terminated before the end of her six-month probationary period. These statements are in contrast to those the Appellant made at the May 11, 2013 hearing, where she told the Review Tribunal that she had been on staff at Greenpeace since October 2012. Clearly, the hearing was held at or around the end of the probationary period.

[19] Further, as at the hearing, the Appellant raises the question of suicide, which she does in the larger context of threatened actions if she continues to be denied a CPP disability pension. The Review Tribunal referred to "suicide ideation" on the part of the Appellant at paragraph 16 of its decision. The June 23, 2014 submission is in much the same vein. Thus, it is clear that the Appellant's submissions are repetitive of prior statements and are neither new nor submissions in the true sense.

[20] The Appellant being self-represented, the Tribunal can only infer that it was her intent that her handwritten statements reflect her position that she has a severe and prolonged medical condition that renders her incapable regularly of pursuing any substantially gainful occupation. Accordingly, the Tribunal, despite the urgings of the Respondent's representative, will not exclude the Appellant's handwritten statements in so far as they reiterate the Appellant's position. However, in so far as the handwritten statements purport to place new evidence before the Tribunal, that evidence will be excluded. Furthermore, given the repetitive content, the Tribunal gives little weight to the Appellant's handwritten submissions as it finds they add little to its determination of whether the Review Tribunal decision is reasonable.

[21] The new materials, namely the real estate listing, will be excluded from the materials before the Tribunal as they constitute material that was not before the Review Tribunal when it made its decision.

ANALYSIS

Is the Review Tribunal decision "reasonable"?

[22] The Appellant has submitted that the Review Tribunal erred in its assessment of her retained work capacity. The Review Tribunal concluded at paragraph 54 of its decision that the Appellant's job with Greenpeace was evidence of residual work capacity. The Review Tribunal based its conclusion on the evidence before it, which the Tribunal infers was the Appellant's oral testimony (see paragraphs 18 and 19). The Tribunal reaches this conclusion because when the Appellant filed her application for CPP disability pension in October 2011, she was unemployed.

[23] The Tribunal finds that, the onus being on the Appellant to establish that her disability was severe and prolonged; it was incumbent upon her to provide accurate information to the Review Tribunal. At paragraph 18 of its decision the Review Tribunal records that the Appellant "generally works from 3 p.m.-9 p.m. upwards of 4-5 days weekly." This meant the Appellant was working between 24-30 hours per week. In these circumstances, the Tribunal finds it is reasonable for the Review Tribunal to conclude the Appellant retained capacity to work. The Appellant seeks to dispute this record. In the Application for Leave she states she worked "4 hrs. per day, 3-4 days per week" in other words about a half of the time the decision records her as working. If true, this was information entirely in the possession of the Appellant and it was reasonable to expect she would have provided it at the hearing.

[24] The Tribunal finds that *Inclima v. Canada (Attorney General), 2003 FCA 117* applies. The Appellant was required to show that her efforts at obtaining and maintaining employment were stymied by reason of her health condition. She did not do so at the hearing. The Tribunal finds that her post-decision assertion does not discharge her onus.

[25] If it were true that the Review Tribunal misconstrued the Appellant's evidence about her hours of work with Greenpeace, it was incumbent upon her to provide objective evidence that could corroborate her claim. The Tribunal would have accepted this evidence not as new evidence but as evidence of the Review Tribunal's error. As it stands, the Tribunal finds, on a balance of probabilities that the evidence before the Review Tribunal is that the Appellant was

assigned 6-hour shifts 4-5 days a week. The Tribunal reiterates its finding that, in all the circumstances arising in regard to this issue, the Review Tribunal's decision meets the test for reasonableness.

[26] Moreover, the Tribunal finds the information the Appellant now seeks to provide was not provided at the hearing before the Review Tribunal. Thus, it is in the nature of new evidence, and properly should be excluded. Accordingly, by either measure, this ground of appeal fails.

Did the Review Tribunal fail to properly consider the Appellant's memory impairments?

[27] The Appellant contends that the Review Tribunal failed to consider the fact that she suffers from memory loss to the extent that she used prepared notes at the hearing. The Respondent's representative submits that the substance of the Review Tribunal decision demonstrates that it rendered its decision fully cognisant of the Appellant's issues with her memory. To support his submission, the Respondent's Counsel points to paragraphs 14 and 49 of the decision which make specific reference to the Appellant's difficulties. In the submission of the Respondent's representative in paragraph 49 of the decision, the Review Tribunal specifically acknowledges that the Appellant has memory issues but, nonetheless, remains able to give coherent testimony, including testimony about dates for herself and her fiancé as well as medications taken and discontinued and her employment history and post- accident work attempts. The Tribunal concurs.

[28] Given that the Review Tribunal made these observations about the Appellant, the Tribunal does not accept that the Review Tribunal would have failed to observe that she was reading from prepared notes. In the circumstances, the Tribunal finds the Review Tribunal did not commit an error in this regard and its conclusions about the Appellant's memory and capacity are reasonable. The ground of appeal also fails.

Did the Review Tribunal fail to properly consider that the Appellant had a reasonable explanation for failing to follow or for discontinuing prescribed medical treatment?

[29] While putting this forward as a ground of appeal, the Appellant made no submissions on the issue. The Respondent's representative submits that the Review Tribunal made a reasonable

decision based on the Appellant's testimony and the medical evidence. The Tribunal concurs. In the Tribunal's view the onus was on the Appellant to satisfy the Review Tribunal that she had a reasonable explanation for her failure to properly follow or to decide to discontinue prescribed medical treatment. At the hearing, the Appellant offered the explanation that she had an aversion to taking medications. The Review Tribunal, having the benefit of all of the medical evidence and her explanation before it, was not satisfied. In the Tribunal's view this was a reasonable conclusion for the Review Tribunal to make. Accordingly, the appeal also fails on this third and final ground.

CONCLUSION

[30] The Appellant appeals from the decision of the Review Tribunal dismissing her appeal and finding that a CPP disability pension was not payable to her. On the grounds on which Leave to Appeal was granted, the Tribunal finds that the Appellant has not met her onus to show that the decision of the Review Tribunal was not reasonable. Accordingly, the appeal fails and is dismissed.

Hazelyn Ross
Member, Appeal Division