Citation: *E. W. v. Minister of Employment and Social Development*, 2015 SSTAD 25

Appeal No: AD-13-184

BETWEEN:

E. W.

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: January 08, 2015

PARTIES

Appellant	-	E. W.
Respondent's Representative	-	Michael Stevenson

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] By a decision issued April 12, 2013, a Review Tribunal determined that the Applicant 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 of December 31, 2010, the Applicant did not suffer from a severe disability that meets the definition of, contained in CPP para. 42(2)(a). The Appellant applied to the Social Security Tribunal, ("the Tribunal"), for leave to appeal the Review Tribunal decision. The Tribunal granted leave in part, limiting the appeal to the following:

a. The impact of the MRI diagnostic report of the Hamilton Health Services Network;

b. The misdescription of the Applicant as being "well kempt, cheerful and coherent";

c. The application of the *Villani*[1] factors;

d. The impact of the Review Tribunal conclusion that the Applicant "has not reached maximum medical recovery.

ISSUES

[3] The issues before the Tribunal are whether the Review Tribunal committed an error of law in respect of its,

a. omission of the MRI dated February 13, 2009 of the Hamilton Health Services Network;

b. description of the Appellant as being "well kempt, cheerful and coherent";

[1] *Villani v. A. G. 2001 FCA 248*.

c. application of the *Villani* factors;

d. conclusion that the Appellant has not yet achieved maximum medical recovery?

SUBMISSIONS

[4] Once leave has been granted, s. 42 of the *Social Security Tribunal Regulations SOR/ 2013-60*, ("the *Regulations*"), gives the parties 45 days to either file submissions with the Appeal Division or to file a notice stating that they have no submissions. On October 14, 2014 the Tribunal received submissions from the Appellant's representative. The submissions consisted of a medical report from a psychologist, Mark Hagen. Mr. Hagen created his report on October 10, 2014 and it derived from a review of the Appellant's medical file and a clinical diagnosis and assessment that was carried out over four sessions between September 15, 2014 and October 19, 2014.

[5] In his medical report, Mr. Hagen presents the following Clinical Diagnosis and Concluding Remarks:

> "In her clinical presentation E. W. reports chronic pain, depression and sleep problems. The chronic pain has been medically determined and accepted in the June 5, 2014 WSIB Tribunal decision.
>
> The writer has interviewed and assessed (four sessions, September 15 - October 10, 2014) E. W.'s psychosocial status. From a DSM-IV perspective E. W. is suffering from a "major depression" with an underlying "medical condition" (chronic pain), due to the sequelae of her accident October 15, 2008. The likelihood that with extensive psychiatric/psychological treatment that E. W. could return to some form of work is very close to zero. The family physician according to the WSIB decision supports such a clinical picture that is prolonged and severe.
>
> While the record seems to report, that E. W. might be able to return to some form of work from a kinesiological perspective, the writer finds good medical evidence that a return to work is next to impossible from a psychological perspective."

[6] The Tribunal has received no further submissions from the Appellant's representative.

[7] On October 17, 2014, the Tribunal received written submissions from Counsel for the Respondent in which he refutes the Appellant's position on the areas in issue. Counsel for the Respondent argued that with respect to the grounds on which leave to appeal was granted, the Review Tribunal's decision was reasonable and contained no reviewable error that would permit the Appeal Division to intervene.

[8] The Respondent's specific submissions are:, with respect to the MRI, while the MRI shows that the Appellant was suffering from Degenerative Disc disease at C5-C6 with bilateral neuroforaminal narrowing but with no central canal stenosis,"[2] this does not, by itself demonstrate a severe medical condition.

[9] As well, Counsel for the Respondent submits that the MRI report should be read together with an X-Ray of the cervical spine dated October 16, 2008. She submits that the X-Ray report does not show a severe medical condition, even though it showed that "there was loss of lordosis, an early C5-C6 disc space narrowing and the oblique views showed no further abnormalities." Counsel for the Respondent took the position that the omissions of the MRI and the X-Ray reports were not fatal to the Review Tribunal decision as the Review Tribunal did address these findings at paragraphs 22-23 of the decision.

[10] With respect to the misdescription of the Appellant's demeanour,[3] Counsel for the Respondent submitted that this was no more than a transcription error, which the Tribunal can correct. In the view of the Respondent's Counsel this misdescription does not affect the outcome of the Review Tribunal hearing as when the Appellant was assessed she scored between 65-70 on the Global Assessment of Functioning, ("GAF"), scale. Counsel for the Respondent submits that a GAF score of 65 to 70 indicates mild symptoms and dysfunction. Counsel for the Respondent also points out that the report mentioned that the Appellant was unwilling to take anti-depressants. All of which, in the view of Counsel for the Respondent would not materially affect the Review Tribunal decision.

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[2] MRI Diagnostic Report, Hamilton Health Sciences Network, February 13, 2009, at p. AD2-83, Tab 3
[3] AD2-72.

[11] Counsel for the Respondent made two submissions concerning the Review Tribunal's application of the *Villani* factors. First, Counsel submits that in order to apply the *Villan*i factors, the Review Tribunal first had to determine whether or not the Appellant suffers from a severe and prolonged medical condition. Referring to paragraphs 32 to 36 of the Review Tribunal decision, Counsel for the Respondent argued that the evidence falls short of showing a severe medical condition. Counsel for the Respondent also advanced the alternative argument that at paragraph 30, the Review Tribunal did consider the *Villani* factors, albeit briefly.

[12] With respect to the Review Tribunal conclusion that the Appellant has not yet achieved maximum medical recovery, Counsel for the Respondent submitted that this conclusion was supported by the medical evidence on file. In support, Counsel for the Respondent cites the multidisciplinary health care assessment carried out by Dr. Blackman and his report dated October 26, 2009. Counsel for the Respondent pointed out that Dr. Blackman found he was unable to conduct a full examination of the Appellant. In the submission of Counsel for the Respondent, when this limitation is coupled with the February 13, 2009 MRI of the Appellant's cervical spine and the EMG dated December 23, 2008 there is no suggestion that the Appellant's medical condition is severe as both the MRI and the EMG revealed treatable conditions.

ANALYSIS

The applicable Standard of Review

[13] The Tribunal accepts that where, as in the instant case, the Review Tribunal was interpreting and applying its "home" statute, "reasonableness" is the appropriate standard of review. A position reinforced by the Federal Court of Appeal in *Atkinson,*[4] a decision of the Appeal Division of the Tribunal. In *Atkinson,* the Federal Court of Appeal determined that, on a question of disability, reasonableness is the appropriate standard of review. The reasonableness standard requires the Tribunal to decide whether, taken as a whole, the decision falls within the range of possible acceptable outcomes which are defensible in respect of the facts and the law. Thus, the overarching task for the Tribunal is to assess whether, in light of the issues raised on appeal, the Review Tribunal decision, taken as a whole, is reasonable.

[4] *Atkinson v. Attorney General of Canada,* 2014 FCA 187, at paras. 24-33.

The Omission of the MRI report

[14] A stated earlier, the only submission that the Tribunal received from the Appellant's representative was the report of the psychologist, Mark Hagen. The Appellant's representative submitted that the psychologist's report supports the Appellant's position that she is incapable regularly of pursuing any substantially gainful occupation. For the following reasons, the Tribunal is not persuaded by Mr. Hagen's report. First, the report was prepared well after the hearing, and thus was not a document that was before the Review Tribunal when the hearing was held. The Appellant cannot seek to rely on it now. Secondly, the psychologist report was prepared almost 4 years after the MQP, as such the Tribunal finds that it cannot reliably speak to the Appellant's psychological state and or medical conditions as they existed at the time of her MQP.

[15] What the Tribunal really is left with are the submissions of the Respondent's Counsel, who on the materiality of the omitted MRI report submits that even had the MRI report been included, the inclusion would not have altered the Review Tribunal decision. Therefore, its omission was not material. The Tribunal considered the submission of Counsel for the Respondent in the context of case law and the actual Review Tribunal decision. It is settled law that a decision-maker need not refer to every piece of evidence or document tendered in his or her decision. As submitted by Counsel for the Respondent, the Supreme Court of Canada, ("SCC"), reaffirmed this principle in *Newfoundland and Labrador Nurses' Union*[5]. At paragraph 16 of its decision, the SCC states that, "Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either reasons or the result under a reasonableness analysis."

[16] Counsel for the Respondent has conceded that the Review Tribunal did not mention the MRI of 2009. In addition, he conceded that the Review Tribunal also did not mention the X-Ray report of October 16, 2008. In fact, at paragraph 26 of the decision, after alluding to other medical reports, the Review Tribunal categorically states, that there were no further medical records on file. However, the Tribunal record shows that these reports were in fact before the

[5] *Newfoundland and Labrador Nurses' Union, 2011 SCC 62.*

Tribunal. Therefore, the question is, whether these omissions are a sufficient basis to disturb the Review Tribunal decision. In other words would the likely outcome have been different had the Review Tribunal turned its mind to these two documents. Counsel for the Respondent submits the outcome would likely have been the same. The Tribunal concurs.

[17] The Review Tribunal decision centred mainly on the absence of support for a severe medical condition. This included the fact that the Appellant had taken very few steps to manage a pain she described as severe as well as the results of the GAF, which also did not support a severe disability in the CPP sense. Accordingly, while the statement that there were no further medical reports on file and the subsequent omission of the two reports in question may have been an error, given the basis on which the Review Tribunal came to its decision the Tribunal is not persuaded that this error is fatal to the decision. The Tribunal makes this finding because it agrees that the omitted MRI and X-ray reports do not support a conclusion that, at the date of those reports, the Appellant's medical condition was severe.

The Review Tribunal misdescription of the Appellant

[18] Counsel for the Respondent conceded that the psychological assessment of November 2009 did not use the word "cheerful" to describe the Appellant. In fact, Dr. Buchanan describes her as being, 'tearful, well kempt and coherent." This latter description accords with the Review Tribunal statements at paragraph 24 that the assessment records the Appellant as reporting that she cries multiple times a day and has decreased energy and motivation. In the Tribunal's view, the Review Tribunal decision does not indicate that its misdescription of the Appellant played a significant part in its decision making. As noted before, the Review Tribunal decision centred mainly on the fact that the Appellant had taken few steps to manage her pain despite categorising that pain at almost the highest level; as well as the results of the GAF, and the Appellant's unwillingness to pursue treatment for her depression. Accordingly, the Tribunal finds that the description of the Appellant at paragraph 24 of the decision should correctly read, "tearful, well kempt and coherent."

The application of the *Villani* factors.

[19] In the Application for Leave to Appeal, the Appellant's representative argued that the Review Tribunal misapplied the *Villani* factors. In the view of the Appellant's representative, the real world context includes the Appellant "crying multiple times per day, decreased energy and motivation, depression, easily upset, irritable, wakened by pain and being socially withdrawn" as well as the other difficulties that caused her to stop working. The logical conclusion to be drawn from this submission is that the Review Tribunal should have considered these circumstances as constituting *Villani* factors. In the submission of the appellant's representative, the Review Tribunal failed to do so; and this failure is an error of law.

[20] The Tribunal finds that this depiction is not an entirely accurate interpretation of what constitutes the *Villani* factors. In *Villani*, the Federal Court of Appeal identified an Appellant's education level, employment background and daily activities as "real world" details relevant to a severity determination pursuant to CPP subparagraph 42(2)(*a*)(i). Even allowing that the categories of factors that might be termed *Villani* factors are not closed, the Tribunal finds that while the details listed may relate to the Appellant's daily activities, they do not speak to either her age or her educational level or past employment history.

[21] In any event, the Tribunal is not persuaded that the Review Tribunal was necessarily required to engage in an exhaustive examination of the Appellant's *Villani* factors. *Villani* requires that a Tribunal assess severity of disability taking into account an Appellant's employability as indicated by factors such age, educational level and employment history. However, other factors also determine whether an Appellant can be found to be disabled within the meaning of CPP subparagraph 42(2)(*a*)(i). These include an Appellant's failure to mitigate by seeking alternative work or retraining; an Appellant's failure to follow prescribed treatment recommendations; or where the objective medical documentation does not support a finding of severe disability, all of which the Review Tribunal found to exist in the Appellant's case. Accordingly, the Tribunal finds that it was reasonable for the Review Tribunal to not explore more fully the application of the *Villani* factors to the Appellant's case. Support for this position

is found in *Doucette*[6] where the Federal Court of Appeal held that "where the true cause of the claimant's disability was his failure to make greater effort between the time of his accident and his MQP there is no need to make an in-depth "real world" analysis of the constraints on the claimant's capacity to return to the workforce by his educational level, language proficiency and past work or life experience."

Did the Review Tribunal apply the wrong test when it concluded that the Appellant had not yet reached maximum recovery?

[22] At paragraph 31 of its decision the Review Tribunal expressed the determination that the Appellant "has not reached maximum medical recovery." In the view of the Review Tribunal there was likely room for improvement of the Appellant's medical conditions if the Appellant were to follow the appropriate treatments. The Appellant's representative argued that "not reaching maximum medical recovery" is a new test that was not contemplated by the *Department of Employment and Social Development ("DESD") Act*. The Appellant's representative also puts forward the alternative submission that the Review Tribunal finding that the Appellant has not reached maximum recovery was supportive of a conclusion that the Appellant's condition was prolonged.

[23] The Tribunal is not satisfied that the statement "has not reached maximum medical recovery" constitutes a new test. In *Lauzon,*[7] the Pension Appeals Board ("PAB") addressed this question, noting that "if the medical prognosis at the time of treatment cannot project not necessarily a cure but a recovery to the degree that the individual in question would within a foreseeable and reasonable time, having regard to the nature of the injuries and the resultant disability, recover sufficiently to enable him or her to pursue or engage in some form of substantially gainful employment, the disability may be held to be prolonged. The issue is whether the applicant's future return to the work force in whatever capacity within a reasonable time is medically uncertain." Thus, the concept of maximum medical recovery is not new. To the extent that the Review Tribunal speculates on the possibility of the Appellant's recovery if she were to receive the appropriate medical treatments, this must follow on the inability of Dr. Blackman to properly assess the Appellant's functional capacity in light of her decision to stop

[6] *Doucette v. MHRD* 2004FCA 292
[7] *MNHW v. Lauzon*, (October 2, 1991) CP 2126 CEB &PG922

participating in the assessment. Therefore, despite the statements in *Lauzon,* the Tribunal is not persuaded that Dr. Blackman's inability to assess the extent of the Appellant's recovery necessarily indicates that her disability is prolonged.

The Decision of the Review Tribunal is reasonable.

[24] In *Canada Post Corp. v. Public Service Alliance of Canada*,[8] Evans J.A. suggested that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). In this case, the reasons showed that the Review Tribunal turned its collective mind to the questions at issue and came to a result well within the range of reasonable outcomes permitted to deny CPP disability benefits to the Appellant. Where the Review Tribunal committed errors, the Tribunal finds that the errors are not so material to the decision as to allow the Tribunal to disturb it.

CONCLUSION

[25] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division

[8] *Canada Post Corp.v.Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221.