Citation: *J. M. v. Minister of Employment and Social Development*, 2015 SSTAD 79

Appeal No: AD-14-476

BETWEEN:

J. M.

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: January 20, 2015

TYPE OF HEARING: On the Written Record

DECISION

[1] The appeal is dismissed and the decision of the General Division is confirmed.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan* disability pension in 2011. In order to be granted the disability pension she had to be found to be disabled on or before her Minimum Qualifying Period which was December 31, 1989. The Appellant claimed that she was disabled by fibromyalgia in 1988. She continued to suffer from this disability until 2007, when she suffered a serious stroke. The Appellant claimed that although the stroke resolved the fibromyalgia, she continues to be disabled as a result of limitations from the stroke.

[3] The Respondent denied the Appellant's disability claim initially and after reconsideration. She appealed to the Office of the Commissioner of Review Tribunals. On April 1, 2013 her appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division heard the appeal and dismissed the Appellant's claim on May 26, 2014.

[4] The Appellant sought leave to appeal from the Appeal Division of this Tribunal. Leave to appeal was granted on the basis that the General Division may have erred in law when it stated that the factors set out in the *Villani v. Canada (A.G.), 2001 FCA 248* decision did not apply, and in its application of the *Eng v. M.S.D.* decision in this case (October 22, 2007, CP24980).

[5] Prior to granting leave to appeal, the Appeal Division sent written questions to the Appellant which she answered. It also requested submissions from both parties, which were filed with the Tribunal. Leave to appeal was granted. The *Social Security Tribunal Regulations* provide that if leave to appeal to the Appeal Division is granted the parties have 45 days within which to file written submissions to support their case. The Appellant did not file any further submissions. The Respondent filed lengthy submissions on the appeal. I have considered all of the written materials filed by both parties in support of the leave to appeal application and the appeal in reaching my decision.

[6] The Appellant argued that this appeal should be allowed because the General Division made a number of errors. She submitted that the General Division based its decision on erroneous findings of fact that it made in a perverse manner as it ignored testimony of her witnesses, and discounted the testimony of her daughter because she was twelve years old at the MQP. She also contended that the decision in *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1988] 1 S.C.R. 27 stated that benefit-conferring legislation ought to be interpreted in a broad and generous manner, and any doubt arising from the language of such legislation ought to be resolved in favour of the claimant. The General Division did not do this, but adopted a strict abstract approach to the severity requirement of disability in the *Canada Pension Plan* (CPP).

[7] In addition, the Appellant submitted that the evidence regarding her stroke was presented, not to establish a disabling condition, but to establish that she continues to be disabled despite no longer suffering from fibromyalgia. She also contended that it was unreasonable to require that she produce medical evidence from some twenty years ago, as the records were not maintained by her doctors. Instead, the General Division should have been satisfied that she was disabled from the testimony presented at the hearing.

[8] The Appellant also argued that the decision of the Federal Court of Appeal in *Villani* should have been applied in her case. She made no submissions regarding the applicability of the decision in *Eng* or what standard of review should be applied to this appeal.

[9] The Respondent argued that the standard of review that should be applied to this case was correctness, as leave to appeal was granted on questions of law. It also argued that the General Division made no error in its application of the *Villani* or *Eng* decisions. Regarding the other issues raised by the Appellant, the Respondent contended that the General Division made no error in weighing the evidence before it. The Respondent submitted that the appeal should be dismissed.

[10] Therefore, I must decide whether the General Division erred in fact or in law.

ANALYSIS

[11] The Appellant presented a number of arguments in support of her appeal. First, she argued that the General Division based its decision on erroneous findings of fact that it made in a perverse manner when it discounted the testimony of her witnesses and her diary regarding her fibromyalgia, its severity, and when it began. She also argued that the evidence regarding her stroke in 2007 was presented to establish that her disability continued after fibromyalgia symptoms resolved. Similarly, evidence regarding her attempt to work in a home based business in 1996 was proffered to establish that her disability continued, not that she was capable of working. With these arguments, she essentially asks the Appeal Division to reweigh and reevaluate the evidence to reach a conclusion in her favour. *In Gaudet v. Attorney General of Canada* 2013 FCA 254 the Federal Court of Appeal found that a reviewing tribunal is not to retry the issues, but to assess whether the outcome in the decision being reviewed was acceptable and defensible on the facts and the law. In this case, the General Division decision summarized the written evidence that was before it and the testimony at the hearing. It weighed this evidence and concluded that there was insufficient medical evidence to establish that the Appellant was disabled under the CPP. The decision of the General Division is defensible on the facts in this regard. The General Division made no error of fact.

[12] The Appellant also argued that it was unreasonable to expect her to find and present medical evidence from over twenty years before the hearing date to establish her claim. The Pension Appeals Board dealt with a similar situation in *Briggs v. Minister of Social Development* (June 20, 2005 CP21930). In that case, the claimant, Mrs. Briggs, applied for a *Canada Pension Plan* disability pension in 2001. Her Minimum Qualifying Period was December 31, 1973. She was not able to produce any medical records for the time of the Minimum Qualifying Period. The Court concluded that she had not proven that she was disabled. The Pension Appeals Board wrote

> The Appellant must prove that her disability is severe and prolonged. If the medical records are not now available due to the passage of time or delay in applying, this works to the detriment of the Appellant and not the Respondent.

I find this reasoning persuasive in this case as the facts are very similar. Like Mrs. Briggs, the Appellant in this case had to establish that she was disabled at the Minimum Qualifying Period a number of years prior to her application. She also had no medical evidence to support her claim. On this basis, I find that the General Division made no error in fact or in law when it placed weight on the evidence before it, including the lack of medical evidence at the Minimum Qualifying Period.

[13] The Appellant also contended that the General Division should apply a broad and generous interpretation of the CPP provisions as it is benefit-conferring legislation (see *Rizzo v. Rizzo Shoes Ltd*.). Instead, the General Division applied a strict and abstract approach to the severity requirement. The Appellant has correctly stated the principle in the *Rizzo Shoes* case. However, there is no ambiguity in the meaning of "disabled" in the CPP. The General Division decision correctly set out the definition of "disabled" and applied it to the facts of the case. As there is no doubt about its meaning in the legislation, there was no reason for the General Division to interpret this term differently than had been done. The General Division made no error in law in this regard.

[14] The Respondent also argued that the General Division did not err in relying on the *Eng* decision. The Appellant made no submissions with respect to the application of the reasoning from this decision to her case. The *Eng* matter was decided by the Pension Appeals Board. Although this decision is not binding on this Tribunal its reasoning may be persuasive in a particular case. On the materials presented on this appeal, I can find no reason to conclude that the General Division erred in law by referring to this decision in its reasoning.

[15] The remaining issue to be determined was raised by the Respondent: what standard of review ought to be applied to determine whether the General Division erred in law. The Supreme Court of Canada in *Dunsmuir v. New Brunswick* 2008 SCC 9 concluded that there are two standards of review that could be applied to a decision of an administrative tribunal: reasonableness or correctness. Further, 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. Correctness is to

be applied to questions of jurisdiction, constitutional matters and questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

[16] In *Atkinson v. Attorney General of Canada* 2014 FCA 187 the Federal Court of Appeal examined this issue with respect to a decision of the Appeal Division of this Tribunal. The Federal Court of Appeal concluded that the reasoning in *Dunsmuir* applied. Questions of fact and mixed fact and law are to be reviewed on the standard of reasonableness. Questions of law related to the Tribunal's home statute are to be decided on the basis of reasonableness. Questions of law that are of importance to the legal system and are outside the expertise of the Tribunal are to be decided on the basis of correctness.

[17] The Appellant made no argument about what standard of review should be applied in this case. The Respondent argued that in spite of the decision in *Dunsmuir*, this Tribunal should apply the standard of correctness to errors of law made by the General Division. The Respondent argued that the Appeal Division of the Tribunal was modeled after the Office of the Umpire which was one of the tribunals it replaced. The Umpire applied the standard of correctness in questions of law in spite of the decision in *Dunsmuir*. This Tribunal should therefore apply the standard of correctness

[18] In addition, the Respondent argued that the wording in section 59 of the *Department of Employment and Social Development Act* (DESD Act) gives the Appeal Division the authority to substitute its decision for that of the General Division. This remedial power indicates that the legislature intended for the Appeal Division to be able to correct errors of law made by the General Division. Therefore, it should not show deference to the General Division decisions on questions of law, and should apply the standard of correctness.

[19] Finally, the Respondent argued that the wording in the DESD Act, which established this Tribunal, is very similar to that of the *Federal Court Act*, which held that the Umpire was to provide a "circumscribed review" of decisions. This included applying the correctness standard of review to questions of law on appeal before it.

[20] I need not decide this issue in this case as I find that the General Division conclusion that the *Villani* factors did not apply in this case was both unreasonable and incorrect. In *Attorney General of Canada v. Bell* 2013 FCA 155 the Federal Court of Appeal concluded that as the Umpire had not applied settled case law in making its decision, the decision was unreasonable. In this case, the General Division did not apply the reasoning in *Villani*, which is a settled statement of the relevant law. In fact, although the decision stated that the Appellant's disability must be examined in a real world context, it also stated that the *Villani* factors did not apply as the disability was found not to be severe. It did not examine any of the Appellant's personal characteristics in making the decision. This was unreasonable.

[21] In addition section 68 of the *Canada Pension Plan Regulations* requires that a claimant provide, with their application for a CPP disability pension, information regarding their medical condition, treatment and prognosis, as well as their education, employment experience and activities of daily life. It is clear from this that the Appellant's personal characteristics are relevant in determining whether she is disabled. It was incorrect for the General Division to not consider these factors.

[22] In summary, whether the standard of review is reasonableness or correctness, the General Division erred in law, and fell below the standard when it did not apply the *Villani* factors to the claimant's circumstances in this case.

CONCLUSION

[23] Despite the error made by the General Division in its application of the *Villani* decision in this case, the General Division decision is confirmed. The Appellant was not able to produce any medical evidence to support her disability claim. The General Division weighed the oral evidence and was not satisfied that it was sufficient to overcome the lack of medical evidence and establish that the Appellant was disabled. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 the Supreme Court of Canada concluded that the reasons for a decision must be read together with the outcome to serve the purpose of showing whether the result fell within a range of possible outcomes. When this is done in this case, I find that the outcome is defensible on the

facts and the law as it is within the range of possible outcomes. Therefore the appeal is dismissed and the decision of the General Division is confirmed.

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.

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

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.