Citation: *Minister of Employment and Social Development v. M. V.*, 2015 SSTAD 88

Appeal No: AD-14-542

BETWEEN:

Minister of Employment and Social Development

Appellant

and

M. V.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF DECISION: January 21, 2015

TYPE OF HEARING: On the Written Record

DECISION

[1] The Appeal is granted and the matter is referred to the General Division for reconsideration.

INTRODUCTION

[2] The Respondent applied for a *Canada Pension Plan* disability pension in March 2012. He claimed that he was disabled by a knee injury, ongoing knee pain and limitations. The Applicant denied his claim initially and on reconsideration. The Respondent appealed to the General Division of this Tribunal. On July 2, 2014 the General Division allowed his appeal and granted the Respondent a disability pension.

[3] The Applicant sought leave to appeal that decision. On December 1, 2014 I granted leave to appeal, considering three grounds of appeal: that the General Division may have erred in fact in its interpretation of a handwritten medical report, that the General Division erred in concluding that any attempts to work would cause further deterioration to the Respondent's knee, and that the General Division erred when it did not give reasons for rejecting medical evidence that the Respondent could perform less physically demanding work.

[4] I must decide whether the General Division made an error of fact or an error of mixed fact and law such that the appeal should be granted.

[5] Pursuant to the *Social Security Tribunal Regulations*, parties have 45 days from the granting of leave to appeal to file further submissions to support their position. On December 23, 2014 the Respondent filed a letter that stated that he had no more submissions to make. The Respondent filed submissions within the time permitted to do so. I have considered the written material in the file, including submissions and the medical evidence presented to the General Division in reaching my decision.

ANALYSIS

[6] The Appellant submitted that the proper standard of review for the decision made by the General Division was reasonableness. The Respondent made no submissions on this issue. The leading case that deals with what standard of review should be applied to a decision is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that decision, 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 submissions on this issue as a correct statement of the law. Since the alleged errors in this case were errors of fact and errors of mixed fact and law, the standard of review to be applied is that of reasonableness.

[7] The *Department of Employment and Social Development Act* provides for the grounds of appeal that can be considered and the remedies that can be granted by the Appeal Division on an appeal (see Appendix to the decision).

[8] The first ground of appeal considered in this case was whether 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 when it stated that the handwritten word in one medical report was "restricted" as it should have been "motivated". The Appellant argued that this error influenced the General Division's decision and was thus a factual error made without regard to the material before it. Leave to appeal was not granted on this ground of appeal however, the parties were invited to make submissions on this. Neither party made any such submissions.

[9] Upon review of the material filed before the General Division, I cannot determine whether the General Division erred in its interpretation of the handwriting in this report. The writing is not clear. The General Division decision referred to this report, and also the other evidence presented. I am not persuaded that it based its decision on an error of fact made in a perverse or capricious manner or without regard to the material before it when it considered this. The conclusion reached by the General Division on this issue was

reasonable and defensible on the facts and the law. The appeal therefore does not succeed on this ground.

[10] The Appellant also argued that the General Division erred when it concluded that any attempts to work would cause the Respondent's knee to deteriorate without referring to any medical evidence to support this. While it is true that there was no medical evidence to support this contention, the General Division also considered the Respondent's testimony that he feared his condition would worsen if he attempted other work or retraining, that he could only manage activities of daily living, and of his specific limitations. It was on this basis that the General Division concluded that the Respondent was incapable of regularly pursuing work or retraining, and that his condition would deteriorate if he attempted this. I am not persuaded by the Appellant's argument that this conclusion, based on all of the evidence, was based on an error of fact made in a perverse or capricious manner, or without regard to the material before it. This conclusion was reasonable and defensible on the facts and the law.

[11] The last ground upon which leave to appeal was granted was that the General Division failed to provide reasons for rejecting medical evidence that was contradictory to the conclusion it reached. There are a number of decisions that deal with a tribunal's obligation to provide sufficient reasons for its decision. In *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA187 the Federal Court of Appeal concluded that in omitting to explain why it rejected a body of credible evidence, the Pension Appeals Board had failed to provide adequate reasons for its decision. In this case the General Division did not provide any explanation for rejecting the medical evidence. This evidence was clear that the Respondent should have been able to perform a less physically demanding job. By not providing any explanation for rejecting this evidence, the General Division made an error of mixed fact and law, which renders the decision unreasonable. Hence the appeal must be granted.

CONCLUSION

[12] The Appeal is granted for the reasons set out above. The matter is referred back for reconsideration before a different Member of the General Division.

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.