Citation: *R. P. v. Minister of Employment and Social Development,* 2015 SSTAD 354

Appeal No. AD-13-203

BETWEEN:

R. P.

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
HEARING DATE:	February 10, 2015
TYPE OF HEARING:	Person by Videoconference
DATE OF DECISION:	March 17, 2015

PARTIES

Appellant	-	R. P.
Appellant's Representative	-	Aryan Hamyd
Respondent's Representative	-	Hasan Junaid

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] By a decision issued January 23, 2013 a Review Tribunal determined that the Appellant was not entitled to a *Canada Pension Plan,* ("CPP"), disability pension as he had not established he was suffering from a severe and prolonged disability on or before his Minimum Qualifying Period, ("MQP"), date. The Appellant sought Leave to Appeal the Review Tribunal Decision. On August 29, 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

[3] Leave to Appeal was granted on the narrow ground that if the Review Tribunal did, in fact, mischaracterise the Applicant's use of medication for his medical conditions, this may ground the appeal.

THE STANDARD OF REVIEW

[4] For the purposes of this appeal decisions of the Review Tribunal are considered to be decisions of the General Division. The applicable statutory provisions 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 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.

[5] 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.

[6] The questions currently before the Tribunal is a mixed question of fact and law, in that it involves a determination of whether or not the Review Tribunal based its decision on erroneous findings of fact as well as whether the Review Tribunal properly applied the law in respect of an appellant's obligation to follow recommended medical treatment.

[7] Both parties agreed and the Tribunal finds that reasonableness is the applicable standard of review of the Review Tribunal decision. This accords with the position of the Federal Court of Appeal in *Atkinson*.[1]

ISSUE

[8] The Tribunal must decide the following issues:

a. Did the Review Tribunal misapprehend and/or mischaracterise the Appellant's evidence concerning his use of medication?

b. 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?

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

PRELIMINARY QUESTIONS

[9] At the hearing the Appellant's Counsel sought to introduce and rely on a number of medical documents that had not been before the Review Tribunal hearing. The Appellant's counsel argued that while the appeal before the Tribunal was not an appeal *de novo*, it was possible for the Tribunal to consider new facts or additional evidence. He argued that *F.D. v. DESD*[2] supported his position; that new facts are admissible provided they relate to one of the grounds of appeal. Counsel submitted that the new material was admissible as it related to DESD ss. 58 (1)(c), namely that the Review Tribunal based its decision on erroneous findings of fact, specifically, its mischaracterisation of the Appellant's usage of medication.

[10] In *F.D.*[3] Member Lew commented on the possibility of considering new facts or additional records on an appeal before the Tribunal. At paragraph 50, Member Lew stated that "in exceptional circumstances, it may be possible to consider new facts or additional records in the context of an appeal, but they must be referable to one of the three enumerated grounds of appeal set out in subsection 58(1) of the DESDA."[4] When asked to explain how the present circumstances fit into the category of "exceptional circumstances" the Appellant's counsel replied that about one half of the documents speak to the severity of the Appellant's injuries and how they prevent him from working. He argued that if the documents were to be excluded this would prevent him addressing the ground of appeal.

[11] Counsel for the Respondent countered that the case presented no exceptional circumstances. He pointed out that the Appellant was represented and had had an opportunity to present the evidence at the Review Tribunal hearing. His failure to do so meant that the Review Tribunal was prevented from considering the evidence the Appellant was now seeking to introduce. The Review Tribunal could not consider evidence that had not been before it; and in the argument of the Respondent's Counsel, the Appellant could not now seek to perfect the evidence.

[12] With respect to the type of evidence that was admissible on an appeal, the Respondent's Counsel submitted that, as on judicial review before the Federal Court, the Tribunal was limited

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[2] *Davidson v. Canada (Minister of Employment and Social Development),* AD-13-200, Lew, October 20, 1014.
[3] *Davidson v. Canada (Minister of Employment and Social Development),* AD-13-200, Lew, October 20, 1014.
[4] *Davidson, supra.*

to accepting new evidence in three circumstances. These circumstances arise where there are issues of bias with respect to the lower tribunal's decision maker; where issues of procedural fairness during the lower tribunal's proceedings arise or where there are jurisdictional issues.[5]

[13] After hearing the submissions of the parties, the Tribunal rendered an interlocutory decision excluding the materials on the basis that the Appellant had failed to establish to the satisfaction of the Tribunal that exceptional circumstances meriting the acceptance of the material existed.

ANALYSIS

Did the Review Tribunal misapprehend and/or mischaracterise the Appellant's evidence concerning his use of medication?

Appellant's Arguments

[14] On his behalf, Counsel for the Appellant argues that the Review Tribunal was wrong in its assessment of the Appellant's use of medication. Counsel for the Appellant went through a number of medical reports that he submitted the Review Tribunal failed to give appropriate or any weight. These medical reports were:

1. The In-Home (Chiropractic Assessment) carried out by Dr. Rosenberg dated December 12, 2008;
2. A Psychological Assessment by Dr. Jeffrey Price dated October 28, 2008;
3. A Driving Anxiety Assessment carried out by Dr. Perlmutter dated January 28, 2009;
4. A Physical Medicine and Rehabilitation Assessment by Dr. Quartly dated February 2, 2009
5. A Psychological Assessment by Dr. Pilowsky dated August 24, 2009
6. An Orthopaedic Assessment by Dr. Ogilvie-Harris dated October 3, 2009;
7. Psychological Assessments by Dr. Day dated December 8, 2008 and April 3, 2009.

[15] The Tribunal accepts the submission of the Appellant's Counsel that all of these medical reports speak to the Appellant's health conditions. However, the crux of the question before the Tribunal was whether or not the Review Tribunal erred in its appreciation of the Appellant's

[5] *Bekker v. Canada*, 2004 FCA 186 AT PARA. 11; *Carry the Kettle First Nation v. O'Watch*, 2007 FC 874, at para. 52.

usage of medication. Dr. Rosenberg's assessment did not touch on the Appellant's use of medication but focused on his activities of daily living and any modifications required to assist the Appellant.

[16] Similarly, Dr. Price's psychological assessment did not touch on the Appellant's use of medication even though it records his willingness to pursue psychological intervention. The driving anxiety testing that the Appellant underwent was for the purpose of assessing his level of anxiety in regards to being a driver of a motor vehicle and the extent to which such anxiety might negatively impact on his being a driver.

[17] In her report Dr. Caroline Quartly, the Physical and Rehabilitation Specialist, did express "grave concerns about the Appellant's ability to return to being substantially gainfully employed." However, again, Dr. Quartly was not commenting on the Appellant's adherence to a prescribed medication regime.

[18] Counsel for the Appellant contended that the Review Tribunal gave no weight to the medical report provided by Dr. Ogilvie-Harris. Dr. Ogilvie-Harris is an Ortho-paedic surgeon who has treated members of the National Ballet of Canada, a fact that the Appellant's Counsel submitted made Dr. Ogilvie-Harris the best qualified medical practitioner who treated the Appellant. Nonetheless, Dr. Ogilvie-Harris also did not comment on the Appellant's adherence to a prescribed medication regime, which is the issue under review, except to note that the Appellant "has tried various medications including anti-inflammatories. They have not helped him much and gave him side effects." However, Dr. Ogilvie-Harris did go on to find that the Appellant was suffering from a chronic pain syndrome that would limit his return to work, although to what extent was not clear. Dr. Ogilvie-Harris was also of the opinion that the Appellant would probably require retraining into a job which is sedentary or light in nature in the future.

[19] The last report that Counsel for the Appellant touched on was the Psychological Assessment performed by Dr. Pilowsky and dated October 28, 2009. Dr. Pilowsky was asked to respond to the question, "do the physical and/or psychological injuries and impairments prevent Mr. R. P. from returning to his pre-accident employment?" Dr. Pilowsky answered this question in the affirmative. She stated, "it is my professional opinion that due to the physical and

psychological distress Mr. R. P. has endured, he is unable to return to his former employment, search for subsequent employment or start a new position in the sales field."

[20] When asked to expand on her response, Dr. Pilowsky commented that the Appellant "lacks the physical and psychological stamina required to carry out duties of any employment position, as he remains in pain, is anxious in a vehicle, suffers from a sense of worthlessness, and is discouraged and unmotivated by his depressed state. As such, any form of employment would likely elicit a further deterioration in this man's psychological functioning." While uncertain about the results, Dr. Pilowsky was of the opinion that the Appellant would benefit from psychotherapeutic treatment.

[21] Counsel for the Appellant argued that these medical documents supported a finding of disability.

[22] On the question of whether the Appellant had a reasonable explanation for failing to follow prescribed medical treatment, Counsel for the Appellant argued that Dr. Nimni's report failed to mention that the Appellant had a bad reaction to the three different medications Dr. Nimni prescribed. Counsel for the Appellant submitted that this bad reaction was the reason the Appellant was reluctant to take more medication and he points to Dr. Czok's report that mentions that the Appellant is unable to tolerate a variety of anti-inflammatories. However, Dr. Czok was reporting what the Appellant told her, namely, "he indicated that the nonsteroidal anti-inflammatory medication caused gastric side effects."

[23] Counsel for the Appellant went on to argue that when Dr. Nimni examined the Appellant there were compelling reasons for the Appellant's aversion to medication, namely that the Appellant could not tolerate the adverse effects and that this was mentioned in Dr. Czok's report of April 21, 2009. Counsel for the Appellant went on to argue that the Review Tribunal relied on Dr. Nimni's report to the exclusion of most of the medical reports that supported the Appellant's position, resulting in the errors complained of.

Arguments of the Respondent

[24] The Respondent's representative took the position that the decision of the Review Tribunal was, per *Dunsmuir*, entirely reasonable. On the ground on which leave to appeal was

granted, the Respondent submitted that the Review Tribunal decision indicates that it was alive to the issue and did not ignore the report of Dr. Czok or other medical reports that supported the Appellant. Furthermore, in the submission of the Respondent's representative, the Review Tribunal weighed the evidence contained in the medical reports, which it was in the best position to do; applied the *Villani* factors; and found the facts.

[25] In the submission of the Respondent's representative there was no basis on which the Tribunal should disturb the Review Tribunal decision.

ANALYSIS

Decision

[26] The Tribunal has considered the points raised on appeal by the parties. For the reasons set out below, the Tribunal finds that the Appellant has failed to meet his onus to establish that the Review Tribunal failed to properly appreciate his use of medication and mischaracterised his refusal to follow prescribed medical treatment.

[27] The Appellant argues that the Review Tribunal unfairly relied on the opinion of Dr. Nimni to find that he unreasonably refused to take prescribed medication or treatment. Counsel for the Appellant argued that there were a number of medical reports that concluded that the Appellant was disabled from all work and that there were medical reports that provided a reasonable explanation for his failure to follow prescribed medical treatment.

[28] The Tribunal agrees that all of the medical reports cited by the Appellant's Counsel do speak to some level of impaired function; however, only Dr. Ogilvie-Harris and Dr. Czok specifically allude to the Appellant's refusal to take medication. Dr. Ogilvie-Harris noted that the Appellant discontinued use of medication because of side effects; while Dr. Czok noted that the Appellant "was treated with a variety of medications including non-steroidal anti-inflammatory medication which he could not tolerate." Both are instances of self-reporting and the Appellant would have had the opportunity to provide this information to the Review Tribunal.

[29] With respect to Dr. Nimni's report to which the Appellant and his Counsel were opposed, the represented Appellant would have had the opportunity to rebut the content of the report at the Review Tribunal. However, the Review Tribunal noted in its decision that the Appellant testified that at the time of the hearing he was taking no medication during the day and Lyrica to help him sleep.[6] This appears to accord with the statements in Dr. Nimni's "Discharge Note" that the Appellant was "still very resistant to pursuing any medications towards neuropathic pain. I have discussed this issue with R. P. at length on several occasions and even today he is adamant about not going on any medications."

[30] Further, Dr. Pilowsky noted that when she saw the Appellant in October 28, 2009, he was taking only Advil for his pain. In these circumstances, the Tribunal finds, on a balance of probabilities, that the Review Tribunal did not mischaracterise the Appellant's use of medication. The Review Tribunal had the benefit of all of the medical evidence and any explanation provided by the Appellant but found that the Appellant was not taking medication that had been prescribed for his pain. In all the circumstances of the case, the Tribunal finds this was a reasonable conclusion for the Review Tribunal to make.

[31] Furthermore, even if the Appellant did have a reasonable explanation for refusing to follow prescribed medical treatment, the Tribunal finds that this refusal was not the sole basis for the Review Tribunal decision. In the Tribunal's view, the primary reason for the Review Tribunal decision is to be found at paragraphs 43 and 44, where the Review Tribunal after assessing the Appellant's employability in light of *Villani* found that appellant's age, education, fluency in English and other factors caused it not to be persuaded that the Appellant could not be retrained or find more sedentary work. In other words, the Review Tribunal found that the Appellant had retained work capacity.

[32] At paragraph 44, the Review Tribunal found that the Appellant had not attempted to find alternate employment, and it is this failure to find alternate employment in the face of a finding of retained work capacity that the Review Tribunal found fatal to the Appellant's appeal.[7]

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[6] Review Tribunal decision at para. 41. For pain management, the Appellant currently relies on chiropractic care and acupuncture. He stated that in 2011 he started taking Lyrica before bed to help him sleep. During the day, when he is most active, he takes no pain medication at all. While this is not completely determinative of his level of pain, it is indicative as to the level of tolerance that the Appellant is able to withstand in the activities of his daily living.

[7] Review Tribunal decision at para. 44.

Inclima v. Canada (Attorney General), 2003 FCA 117 mandates that where a claimant is found to have retained work capacity, he or she is required to show that their efforts at obtaining and maintaining employment were stymied by reason of their health condition. The Review Tribunal found that the Appellant had failed to do so, and in all the circumstances of the case the Tribunal finds the Review Tribunal's conclusions concerning the Appellant's failure to find alternate employment reasonable.

[33] Counsel for the Appellant argued that given the Appellant's chronic pain condition he was unemployable. The Tribunal finds that this was not unequivocally established before the Review Tribunal and neither is it here. The Tribunal was referred to the decision in *Newfoundland and Labrador Nurses Union*[8] as support for the proposition that notwithstanding the fact that the Review Tribunal may not have referred to all of the arguments and medical reports that were made or put before it. In this context, the Tribunal finds that overall, the Review Tribunal decision is reasonable in that it demonstrates the existence of justification, transparency and intelligibility within the Review Tribunal decision-making process. Further, on considering the totality of the parties' submissions, the Tribunal finds that the Review Tribunal decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

CONCLUSION

[34] The Appellant appeals from the decision of a Review Tribunal dismissing his appeal and finding that a CPP disability pension was not payable to him. On the grounds on which Leave to Appeal was granted, the Tribunal finds that the Appellant has not met his 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

[8] Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board) 2011 SCC 62 at paras. 14-16, 18, 20-22.