Citation: *M. C. v. Minister of Employment and Social Development*, 2015 SSTAD 438

Appeal No. AD-13-35

BETWEEN:

M. C.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Janet Lew
DATE OF HEARING:	January 26, 2015
LOCATION OF HEARING:	Edmonton, Alberta
TYPE OF HEARING:	In person
DATE OF DECISION:	March 30, 2015

IN ATTENDANCE

Appellant	M. C.
Representative for the Appellant	Dr. John Wodak
Representative for the Respondent	Michael Stevenson (Counsel)

INTRODUCTION

[1] This is an appeal of the decision of the Review Tribunal issued on February 15, 2013, which dismissed the Appellant's application for disability benefits, on the basis that the Appellant did not prove that her disability is severe for the purposes of the *Canada Pension Plan*, by her minimum qualifying period of December 31, 2005. Leave to appeal was granted on March 31, 2014, on the grounds that the Review Tribunal may have based its decision on erroneous findings of fact, without regard for the material before it.

FACTUAL BACKGROUND

[2] The Appellant submitted an application for Canada Pension Plan disability benefits in November 2010. The Questionnaire for Canada Pension Plan Disability Benefits indicates that the Appellant was last employed in a grocery store between October 2001 and December 2003, when she stopped working, for both personal and medical reasons.

[3] In the Questionnaire, the Appellant advised that she has various illnesses or impairments which prevent her from working, including numbness and weakness in her hands and legs, migraine headaches (which had caused a mini stroke), chronic back pain, joint pain in her hips and neck and muscle spasms and pain in her spine. She alleges that she has been unable to work since December 2003. She described numerous functional limitations and restrictions, including limited sitting, standing, lifting, carrying or walking, without severe pain. The Appellant relied on the medical opinions of her family physician and neurologist, as well as various diagnostic examinations. She advises that her condition is progressive and that she has not seen any relief in her symptoms, despite complying with all reasonable treatment recommendations.

BRIEF HISTORY OF PROCEEDINGS

[4] The Review Tribunal issued its decision on February 15, 2013. On or about April 18, 2013, the Appellant sought leave to appeal on numerous grounds. The Appeal Division of the Social Security Tribunal granted leave on March 31, 2014, on the basis that the Review Tribunal may have erred in its findings on the medical evidence and evidence regarding her functionality.

[5] The Appeal Division scheduled an in-person hearing of the appeal for January 26, 2015, by mutual consent of the parties.

[6] The Appellant's submissions were set out in the leave application/Notice to Appeal. The representative for the Appellant (the "Representative") alleged numerous errors and omissions. The Representative filed additional submissions on June 27, 2014. He also outlined his concerns about access to justice issues and provided an interpretation of subparagraph 42(2)(a)(ii) of the *Canada Pension Plan.* The Representative filed further submissions on July 15, 2014, again raising access to justice issues.

[7] Counsel on behalf of the Respondent ("Counsel") filed submissions on May 15, 2014 and supplemental submissions on October 15, 2014. Counsel submits that the applicable standard of review is one of reasonableness, and that the decision of the Review Tribunal is overall reasonable.

REVIEW TRIBUNAL DECISION

[8] At the hearing before the Review Tribunal in January 2013, the Appellant gave evidence on the impact of her symptoms. The Appellant described the difficulties and functional limitations she encountered in November 2010 and testified that they were "about the same" in December 2003 and 2005 and at the hearing. The Review Tribunal determined that the Appellant's spouse did not have any relevant evidence to offer and thereby did not hear from him.

[9] The Review Tribunal found that there was limited medical documentation relating to the period around the Appellant's minimum qualifying period. While the Review

Tribunal "could not imagine how [the Appellant] could achieve substantially gainful employment in her present condition", it found that there was no medical evidence that this had been the case in either December 2003, when she ceased to work, or in December 2005, at her minimum qualifying period. The Review Tribunal considered the medical treatment to date, and came to the conclusion that the Appellant had yet to exhaust all reasonable treatment modalities.

[10] The Review Tribunal also considered *Villani v. Canada (A.G.),* 2001 FCA 248, and considered the Appellant's personal circumstances such as her age, level of education, and past work and life experience, in assessing her disability. The Appellant had received Employment Insurance benefits throughout much of 2004, but there was no evidence that she sought retraining to upgrade her education, and she was unable to recall any attempts to return to work. As for her life experience, the Review Tribunal noted that she regularly travelled by motor vehicle for an extended period of time, though it left her fatigued and in some discomfort. After taking some of her personal circumstances into account, the Review Tribunal concluded that the evidence did not establish that the Appellant had met the severe criterion as defined by the *Canada Pension Plan.*

[11] Since the Review Tribunal found that the Appellant's disability was not severe, it did not determine whether the Appellant's disability could be considered prolonged.

ISSUES

[12] The issues before me are as follows:

(a) What is the applicable standard of review?

(b) Did the Review Tribunal base its decision on an erroneous finding of fact without regard for the material before it?

(c) Can the Appeal Division consider any new grounds of appeal, including any raised by the Appellant during the hearing of the appeal? If so, did the Review Tribunal fail to observe a principle of natural justice?

(d) If the standard is reasonableness, is the decision of the Review Tribunal reasonable? If the standard is correctness, what outcome should the Review Tribunal have reached?

(e) If the Review Tribunal committed any errors, what is the appropriate remedy(ies), if any?

ISSUE 1: STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard. The correctness standard is generally reserved for jurisdictional or constitutional questions, or questions which are of central importance to the legal system as a whole and outside the expertise of the tribunal. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis. Ultimately if it disagrees with the decision of the decision-maker, the court must substitute its own view as to the correct outcome. The correctness standard is vital as it promotes and ensures just decisions, consistency and predictability in the law.

[14] Questions of fact and mixed questions of fact and law are decided on the reasonableness standard. Such a review necessarily attracts a deferential standard. *Dunsmuir* set out a list of factors which would lead to the conclusion that a decision-maker should be afforded deference and that a reasonableness test applies:

- A privative clause; this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of the law. A question of law that is of "central importance to the legal system . . . and outside the … specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 777, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[15] The Supreme Court of Canada in *Smith v. Alliance Pipeline*, [2011] SCC 7, [2011] S.C.R. 160, at para. 26, also set out the scope of the standard of reasonableness to include issues that (1) relate to the interpretation of the administrative tribunal's "home statute" or statutes closely connected to its function with which it has familiarity and expertise, (2) raise matters of fact, discretion or policy or (3) involve inextricably intertwined legal and factual issues.

[16] Counsel for the Respondent submits that reasonableness is the default standard of review subject to deference when a tribunal is "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity". He relies on a number of authorities where the courts have consistently held that reasonableness is the default standard of review: *Dunsmuir*, ibid, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, 2011 SCC 61 at para. 34; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 21. And, for cases involving disability under the *Canada Pension Plan*, Counsel submits that since *Dunsmuir*, the standard of reasonableness with a high degree of deference applies: *Gaudet v. Canada (Attorney General)*, 2013 FCA 254 at para 9. Counsel of course supposes that the issues involved here solely concern interpretation of the *Canada Pension Plan.*

[17] Counsel for the Respondent submits that I should follow *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 and that in applying the reasonableness standard of review, I ought not undertake a separate analysis of the Review Tribunal's reasons. Counsel notes that the Supreme Court of Canada described the review of an administrative decision as an organic exercise in which the reasons of the tribunal must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible acceptable outcomes. Counsel for the Respondent submits that, irrespective of whether the Review Tribunal committed any errors, the ultimate test we are to apply is to assess whether the decision of the Review Tribunal falls within the range of acceptable outcomes. He submits that I ought to find that the decision of the Review Tribunal falls within the range of acceptable outcomes.

[18] The Supreme Court of Canada set out the reasonableness approach in *Dunsmuir* at paragraph 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[19] The Appellant did not make any submissions on the standard of review, but submits that the decision of the Review Tribunal is unreasonable and indefensible on the facts.

ISSUE 2: DID THE REVIEW TRIBUNAL BASE ITS DECISION ON AN ERRONEOUS FINDING OF FACT WITHOUT REGARD FOR THE MATERIAL BEFORE IT?

[20] At paragraph 15 of its decision, the Review Tribunal wrote:

> The reason the Appellant stopped working, in December 2003, was numbness and weakness in her hands and legs, migraines (roughly 7 years ago)

[21] The Representative submits that the Review Tribunal erred in its findings regarding the medical evidence, and in particular, in finding that the Appellant stopped working due to numbness and weakness in her hands and legs and migraines, when there was evidence in the Questionnaire that she had stopped working due to other reasons as well. The Representative submits that even in 2003, the Appellant's primary disability was her back pain. Setting aside the fact that the Appellant ceased working two years prior to her minimum qualifying period, the Representative submits that if the Review Tribunal did not appreciate the severity of her back pain then, it likely could not have appreciated the severity of her back pain at her minimum qualifying period in December 2005.

[22] The Representative submits also that the Review Tribunal misquoted the Appellant on her evidence pertaining to the frequency of trips to see family, and the regularity of

lengthy trips made by motor vehicle. At paragraph 38(c) of its decision, the Review Tribunal wrote,

> The Appellant indicated that the pain over the years that had prohibited her from most activities, both work and social, was essentially the same today as it was in 2005. Today, she is taking minimal pain medication. She is also able to travel by motor vehicle for an extended period of time. She acknowledged that she was tired and in some discomfort when she arrived. However, she made such trips on a regular basis.

[23] The Appellant denies that she ever testified that she made lengthy road trips "on a regular basis" and claims that she reported having severe fatigue and discomfort after a long trip. The Representative submits that the Review Tribunal erred in its findings on the Appellant's functional capacity, restrictions and limitations.

[24] Counsel for the Respondent does not concede that the Review Tribunal based its decision on any erroneous findings of fact without regard for the material before it. He submits that any erroneous findings of fact had to have also been made in a perverse or capricious manner. He submits that here, the Review Tribunal did not cross into the threshold of acting perversely or capriciously. Counsel could provide no definition or practical examples of what constitutes perverse or capricious. Counsel provided a hypothetical scenario of when a decision could be considered perverse. Had the Review Tribunal found that the Appellant was paralyzed from a motor vehicle accident, that would have been preposterous and a perverse conclusion, as there is no evidence to support such a conclusion.

[25] With respect, I do not think that subsection 58(1)(c) of the *Department of Employment and Skills Development* ("DESDA") requires that any erroneous findings of fact to have been made in a perverse or capricious manner. The erroneous findings of fact can be made (1) in a perverse manner, (2) in a capricious manner or (3) without regard for the material before it.

[26] In assessing whether an appellant succeeds in establishing the ground of appeal under subsection 58(1)(c) of the DESDA, there are three components which must be established: (1) that the General Division or Review Tribunal based its decision on the

erroneous finding of fact, (2) that there is an erroneous finding of fact and (3) that it made the decision in either a perverse or capricious manner or without regard for the material before it.

[27] I find that the Review Tribunal erred when it summarized the evidence and suggested that the Appellant stopped working because of numbness and weakness in her hands and legs and migraines, when there were other reasons, such as chronic back pain, to explain why she stopped working in 2003. However, I do not find that this was necessarily a finding upon which the Review Tribunal based its decision. This evidence was not reproduced in the Analysis section. The Review Tribunal reviewed the Appellant's medical history and the documentary evidence. The Review Tribunal was not consumed with why the Appellant ceased working in December 2003, and was concerned with the Appellant's medical history at the minimum qualifying period and since then. The Review Tribunal reviewed the Appellant's various medical issues and her treatment history. The Review Tribunal referred to the Appellant's back injury and noted that she claimed it is the "cause of a substantial portion of her pain".

[28] On the other hand, the Review Tribunal's findings regarding the frequency of her road trips was one of the factors upon which it based its decision as to whether the Appellant's disability could be considered severe. There is no dispute that the Appellant took these trips and that they left her fatigued and in discomfort; this is clearly reflected in the decision. However, the Representative submits that the Review Tribunal misquoted the Appellant regarding the frequency of these road trips. As the hearing was not recorded and there is no transcript of the proceedings, it is difficult to determine precisely what the evidence was before the Review Tribunal, and whether it was altogether unclear or ambiguous, or whether the Review Tribunal simply misunderstood and mischaracterized it.

[29] The Appellant denies testifying that she "made [road] trips on a regular basis", and at paragraph 8 of her submissions (at page AD1-11) states that she and her husband travelled between Edmonton and Lethbridge "maybe three times a year, health and finances permitting". She also stated that one of her husband's three children resides in Edmonton and visits every second weekend. There is a substantial difference between whether these

road trips between Edmonton and Lethbridge occurred every second weekend or three times a year.

[30] Accordingly, I find that the Review Tribunal based its decision, in part, on an erroneous finding of fact made without regard for the material before it, when it found that the Appellant took "regular" road trips every second weekend between Edmonton and Lethbridge. Having concluded that the Review Tribunal based its decision on an erroneous finding of fact made without regard for the material before it, I must now determine the applicable standard of review, based on the line of authorities above.

[31] If I follow *Dunsmuir*, then I should apply a deferential standard of reasonableness. This requires that I determine whether the decision of the Review Tribunal can be justified, is transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. So, in this particular case, even if I should find that the Review Tribunal erred and based its decision on an erroneous finding of fact without regard for the material before it, the decision can still stand if I should find that it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[32] However, before I determine whether the decision of the Review Tribunal is overall reasonable, I will address another issue raised by the Representative during the hearing. The Representative submits that the Review Tribunal failed to observe a principle of natural justice, in having failed to take evidence from the Appellant's spouse.

ISSUE 3: CAN THE APPEAL DIVISION CONSIDER NEW GROUNDS OF APPEAL?

[33] The Review Tribunal wrote, "the Appellant's husband was unable to provide any evidence with respect to the earlier portions of the relevant time period, as he did not know the Appellant at that time".

[34] The Representative submits that the Review Tribunal never asked the Appellant or her spouse when they met, and then mistakenly assumed that the Appellant and her spouse "met on their wedding date". As such, the Review Tribunal did not take evidence from the

spouse. The Representative advises that the Appellant and her spouse in fact knew each other before the end of the minimum qualifying period. The Representative submits that the Review Tribunal ought to have asked when the Appellant and her spouse met, and submits that it should have taken his evidence. Essentially, the Representative is seeking to amend the leave application/notice of appeal. The Representative is not seeking a hearing *de novo* before the Appeal Division of the Social Security Tribunal.

a. <u>Should a new ground of appeal be considered?</u>

[35] Counsel for the Respondent submits that it is now too late for the Appellant and her Representative to raise a new ground of appeal, as it should have been raised in the leave application/notice of appeal. Counsel submits that there is no right of appeal and that as a party needs to seek leave to appeal under subsection 58(1) of the DESDA, the appeal ultimately is confined to those grounds which have been raised in the leave application. Counsel submits that the Appeal Division stands *functus* once it has rendered a decision on leave. He relies on *Canada (Attorney General) v. Merrigan*, 2004 FCA 253, and submits that it stands for the proposition that the jurisdiction of the Umpire is limited on appeal. (Subsection 58(1) of the DESDA is similar to section 115 of the former *Employment Insurance Act.*) Counsel submits that the Respondent will be greatly prejudiced if I should consider this ground of appeal, when it has not been previously raised, as he is not fully prepared to respond to it. Counsel however did not seek an adjournment of the hearing of the appeal.

[36] In *Merrigan,* the Federal Court of Appeal held that a letter from the respondent in that case was not before the Board of Referees and could not have been considered by the Umpire. While the decision speaks to the jurisdiction of the Umpire, I do not find that it has direct applicability in the proceedings before me, as I am dealing with the issue of the conduct of the Review Tribunal itself, rather than determining what issues were before the Review Tribunal.

[37] Other than *Merrigan,* the parties have not referred me to any other authorities that address the issue as to whether I have jurisdiction to hear any additional grounds of appeal, if it was not raised in the leave application or at any time prior to the hearing of the appeal.

[38] I agree that there is some prejudice to the Respondent, when no prior notice of the new ground has been given, and when it leaves the Respondent without an adequate opportunity to prepare for and fully respond to the matter. However, that prejudice can be cured by adjourning the matter, which would permit the parties to adequately prepare for and address the issues.

[39] I find that the leave decision is not a final decision, in the sense that it does not dispense of the proceedings before the Appeal Division, and therefore conclude that this issue is not *functus*.

[40] Various authorities suggest that finality of proceedings is preferable and that reopening of proceedings ought not to be permitted. In *R. v. H. (E.)*, 33 O.R. (3d) 202, [1997] O.J. No. 1110 (leave to appeal to the Supreme Court of Canada dismissed, S.C.C. File No. 25321. S.C.C. Bulletin, 1997, p. 1544), the Ontario Court of Appeal dismissed the accused H's appeal from conviction. H applied to reopen the appeal to argue a fresh ground of appeal. The Ontario Court of Appeal dismissed the applications. It held that once an appeal had been heard on its merits and finally disposed of by the issuance of an order, the statutory right of appeal had been exhausted. Finality was seen as an important goal. The Ontario Court of Appeal held that the application to reopen was an attempt to vest the Court with a jurisdiction reserved for the Supreme Court of Canada. As both applications before it related to appeals which had been disposed of on the merits, there was no jurisdiction to entertain either application.

[41] Here, I have yet to decide on the merits of the appeal. On the basis of this line of authorities, I can consider any new grounds of appeal which have not been previously raised in the leave application, provided that the Appellant satisfies me firstly that there is a reasonable chance of success on the new ground of appeal, and that it falls within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA.

[42] However, even if there is no issue of finality, another line of authorities suggests that new grounds of appeal ought not to be entertained, when it would cause serious prejudice to another party. In *Butera v. Mitsubishi Motors Corporation*, 2013 ONCA 125, the Ontario Court of Appeal said that permitting the appellants to advance a new argument

would be “manifestly unfair”, as effectively the other party had lost the opportunity to develop an evidentiary record.

[43] In *Osborne v. Gilbert*, 2007 ONCA 202, the appellant sought an adjournment to raise a new ground of appeal. The Ontario Court of Appeal dismissed the application, as it found that there was no merit to the proposed ground of appeal. In other words, the Ontario Court of Appeal might have been prepared to consider the new ground of appeal, even after the appellant’s factum had been filed, but for the fact that it found that there was no merit to the proposed ground.

[44] In *McKesson Canada Corporation v. Canada*, 2014 FCA 290, the Federal Court of Appeal examined the principles that should apply on a motion to amend a notice of appeal before it. Stratas J.A. relied on the principles set out in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) and upon the interpretive rule of the Federal Rules of Court, which provided for the concepts of fairness, avoidance of delay, cost-effectiveness, and a preference for adjudication of the real merits of cases.

[45] In *Canderel*, the Federal Court of Appeal considered an appeal from an interlocutory judgment of the Tax Court of Canada, which had dismissed the appellant’s motion for leave to amend her amended reply to the notice of appeal for a fourth time. The motion was made on the fifth day of the trial. The Federal Court of Appeal stated that an amendment could be granted at any stage of an action, for the purposes of determining the substantive issues between the parties. It was a matter of discretion to grant an amendment, and the trial judge should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors were seen to bear on the exercise of this discretion, but ultimately, in quoting Bowman T.C.J. in *Continental Bank Leasing Corporation et al. v. The Queen*, (1993), 93 DTC 298 (T.C.C.), at p. 302, “it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done”. Given the delay in the motion, the Tax Court considered the motion to constitute an abuse of process in that it could have been brought much earlier.

[46] In *Lane v. Carsen Group*, 2003 NSCA 42, the Nova Scotia Court of Appeal allowed an application for an order granting the appellant leave to amend its notice of appeal by adding a sixth ground of appeal. In allowing the application, Saunders J.A. wrote:

> In conclusion, I am persuaded that the inclusion of this additional ground is reasonably necessary for the proper presentation of the appeal, that it will enable justice to be done between the parties and that the amendment will not cause any prejudice to the respondent.

[47] I find that there is a reasonable chance of success on this new ground which the Representative for the Appellant raises, that the Review Tribunal may have failed to observe a principle of natural justice when it did not receive evidence from the Appellant's spouse.

[48] I recognize that the Respondent has not had prior notice of the proposed amendment to the leave application and has not had the opportunity to fully respond to the new ground of appeal. However, in weighing my discretion, I note that the Respondent has not sought an adjournment of the hearing of this appeal, and in my view, it would not be in the best interests of the parties to prolong this appeal. While the request to amend the leave application comes late, I am prepared to consider this new ground of appeal, on the basis that I should allow the full merits of the case to be adjudicated to allow justice to be done.

b. <u>Did the Review Tribunal fail to observe a principle of natural justice?</u>

[49] Without a record or transcript of proceedings before the Review Tribunal, it is unclear how the Review Tribunal determined that the Appellant's spouse did not have any relevant evidence to give, if there was no evidence proffered as to how long the Appellant had known her spouse prior to marriage. The issue must have arisen somehow, as the Review Tribunal referred to it in its decision.

[50] I can only assume that the Review Tribunal relied on the representatives for both parties to make the appropriate cases on behalf of their respective clients. Presumably the Representative would have sought to call the Appellant's spouse to give evidence. Yet, the Representative submits that it was incumbent upon the Review Tribunal to elicit evidence from the Appellant's spouse, and to enquire of him as to when he first knew the Appellant. I

do not see that as being the duty of the Review Tribunal, to canvass these types of questions with potential witnesses. That properly falls upon an appellant, any counsel or representatives.

[51] It would have been a different matter altogether, had the Representative called the Appellant's spouse as a witness, and the Review Tribunal had refused to allow him to testify at all, irrespective of when he and the Appellant might have met. I might have been prepared to find that that the Review Tribunal failed to observe a principle of natural justice, had it refused to allow a witness with potentially relevant and material evidence to testify. But, as I have found that it was not the role of the Review Tribunal to call potential witnesses and elicit evidence from them, I find that there was no failure by it to observe a principle of natural justice. Given that I have found that there was no such failure, I do not need to determine the applicable standard of review when a failure to observe a principle of natural justice is involved.

[52] As a footnote, I would not consider any new evidence on appeal, unless it addresses any of the grounds of appeal. But, when raising allegations that a witness was excluded from testifying, it might be of some assistance to provide some evidence as to what testimony he or she might have been expected to give. Under those circumstances, I would have allowed new evidence.

[53] I return now to the issue of the overall reasonableness of the decision of the Review Tribunal.

ISSUE 4: REASONABLENESS OF DECISION

[54] The fact that the Review Tribunal made an erroneous finding of fact does not necessarily render its decision to be overall unreasonable. In assessing the reasonableness of the decision, I need to determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law before it. It does not involve any fact finding, re-weighing of evidence, conducting my own assessment or interfering with or substituting my decision for that of the Review Tribunal.

[55] The Representative for the Appellant submits that the decision cannot be reasonable, given that there are errors throughout the decision. The Representative submits that the Review Tribunal was selective in the facts and submissions it chose to address, to the point that it acted in a perverse and capricious manner. For instance, it did not address the Appellant's old compression fracture, which is the source of her disability; it gave incomplete quotations regarding any imaging reports; it failed to reproduce much of the evidence and written submissions; and it drew conclusions when there was no evidentiary foundation to support those conclusions.

[56] The Representative pointed to two specific findings made by the Review Tribunal in paragraph 38A of the Review Tribunal decision, that:

(a) the Appellant had not explored all treatment modalities.

(b) it was unimaginable how the Appellant could achieve substantially gainful employment in her present condition.

[57] However, with respect to subparagraph 56(a) above, the Review Tribunal had also found that, other than the referral to a neurologist, that there had been no referrals to further specialists or a pain clinic, and that the Appellant had not, at any relevant time, been hospitalized. And, at paragraph 20 of its decision, the Review Tribunal noted that the Appellant's family physician, Dr. Chan, was of the opinion that there was "limited treatment available for her conditions currently, and she has maximized her medical therapy". The Representative submits that, in other words, the Review Tribunal erred when it came to a finding that the Appellant had not explored all treatment modalities, when nothing further had been recommended to her.

[58] With respect to subparagraph 56(b) above, the Review Tribunal concluded at paragraph 41 that the Appellant does not have a severe and prolonged disability. The Representative submits that paragraphs 38A and 41 of the Review Tribunal decision are in direct conflict with each other. At paragraph 38A of its decision, the Review Tribunal found the Appellant to be disabled presently, but at paragraph 41 of its decision, did not find her to be disabled.

[59] Counsel for the Respondent on the other hand submits that the decision of the Review Tribunal is overall reasonable, in that, notwithstanding the fact that it specifically referred to the Appellant's (mistaken) ability to travel by motor vehicle for an extended period on a regular basis, the Review Tribunal was aware of the Appellant's functional limitations. The Review Tribunal set out her limitations at paragraph 16 of its decision. It noted her limitations with respect to sitting and driving. Counsel submits that even if the Review Tribunal based its decision on an erroneous finding of fact without regard for the material before it, the issue is not significant enough to affect the overall decision.

[60] Counsel submits that the decision is overall reasonable, as the Review Tribunal considered most, if not all, of the Appellant's medical conditions, other than her stroke, and considered other factors too, in assessing the severity of her disability. Counsel submits that the decision of the Review Tribunal can be justified, is transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[61] The fact that a decision does not include all of the facts and submissions does not necessarily render it unreasonable, particularly when those facts and submissions are not considered wholly relevant or material to the issues at hand. The Supreme Court of Canada affirmed this approach in *Newfoundland*, at paragraph 16:

> 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 the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). 1n other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[62] The Review Tribunal did not act improperly and its decision was not unreasonable, by virtue of the fact that it did not fully reproduce the imaging reports, or much of the evidence and written submissions, or did not address the cause of her disability. As the

Federal Court of Appeal stated in *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, "it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP".

[63] Of more concern is whether the Review Tribunal made findings or drew conclusions without any evidentiary foundation to support those conclusions. The Representative points to the Review Tribunal's finding that the Appellant had failed to explore all treatment modalities, which he submits contradicts the family physician's opinion that there was limited treatment available and that the Appellant had maximized her medical therapy.

[64] However, despite this opinion, the Appellant subsequently underwent additional investigations and had a consultation with a neurologist in February 14, 2011. The neurologist recommended assessment regarding a possible component of fibromyalgia. Paragraph 35 of the Review Tribunal decision indicates that the Appellant did not offer any evidence that she had undergone an assessment regarding a possible component of fibromyalgia. From that perspective, it cannot be said that the decision was unreasonable, and that some of its conclusions were without any evidentiary basis. I do not find that to have been the case.

[65] While the Review Tribunal found the Appellant to be incapable regularly of pursuing any substantially gainful occupation by the hearing date, that does not necessarily equate to finding her disabled for the purposes of the *Canada Pension Plan,* as it would need to have also found that she had a severe and prolonged disability at her minimum qualifying period, as it had set out in paragraph 39 of its decision. The Review Tribunal could have been more clear as to its conclusions in paragraph 41, but reading the conclusion against the backdrop of its reasoning, there can be no doubt that it did not find the Appellant to be disabled for the purposes of the *Canada Pension Plan* by her minimum qualifying period.

[66] I agree with the submissions of Counsel that the Review Tribunal considered a number of other factors in assessing whether the Appellant's disability was severe for the purposes of the *Canada Pension Plan.* It considered the medical evidence and, to some degree, noted the Appellant's symptoms and how they affected her overall functionality, the

treatment history, whether there were other treatment options that could be explored, and the Appellant's personal circumstances, in assessing her disability. The Review Tribunal concluded that the Appellant had some capacity and looked to see whether she had made any efforts to obtain and maintain employment, or if she had undergone any retraining or schooling. While the evidence may well have supported another outcome that could be seen as reasonable, that is not the test for me to apply. As the reasons enable me to understand how the Review Tribunal came to its decision, and as I find that the conclusion falls within the range of acceptable outcomes, under the reasonableness standard of review, I must defer to the Review Tribunal.

CONCLUSION

[67] The Appeal is dismissed.

Janet Lew
Member, Appeal Division