Citation: ***Minister of Employment and Social Development v. R. T.*****, 2015 SSTAD 514**

Date: April 22, 2015

File number: AD-15-28

APPEAL DIVISION

Between:

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

Appellant

and

R. T.

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Videoconference on April 20, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Counsel for the Appellant	Vanessa Luna
The Respondent	R. T.
Counsel for the Respondent	Lisa Belcourt
Observer	D. T.
Observer	S. Y.

INTRODUCTION

[1] The Respondent applied for and began to receive a *Canada Pension Plan* retirement pension in December 2008. In April 2010 he applied for a *Canada Pension Plan* disability pension. The Appellant refused the application for a disability pension as the *Canada Pension Plan* (CPP) does not permit a retirement pension to be replaced by a disability pension unless the claimant is found to be disabled, and the application to replace the retirement pension is made within fifteen months of when the retirement pension starts. In this case, the application for CPP disability pension was not made within the fifteen month time limit. The Respondent appealed this decision to the Office of the Commissioner of Review Tribunals. On April 1, 2013 the matter was transferred to the General Division of the Social Security Tribunal (Tribunal) pursuant to the *Jobs, Growth and Long-term Prosperity Act*.

[2] The General Division held a hearing. At that time the Respondent argued that during the relevant time he was incapable of forming or expressing the intention to make an application for a CPP pension, which would allow the time limit to replace the retirement pension with a disability pension to be extended (the relevant legislation is in the Appendix to this decision). The General Division allowed the Respondent's claim, and found that he was incapable of forming or expressing the intention to make an application from March 2009 when he was diagnosed with cancer until April 2010 when the application was

completed and received by Service Canada. It also found that the Respondent was disabled under the CPP as of November 2008.

[3] The Appellant sought leave to appeal from this decision to the Appeal Division of the Tribunal. Leave to appeal was granted on March 10, 2015. On appeal, the Appellant did not dispute the Respondent's disability. It disputed the finding that he was incapable of forming or expressing the intention to make an application from March 2009 to April 2010. It argued that the General Division decision misapplied the legal test for incapacity, that it made findings of fact without regard to the material before it and ignored significant evidence such that the decision was unreasonable. The Respondent argued that the General Division decision correctly set out the test for this incapacity, that it made clear findings of fact based on the evidence presented, and that deference is owed to the General Division with regard to findings of fact. In addition, the Respondent argued that when the General Division decision is examined in context of the record and the evidence presented at the hearing it is reasonable, and the appeal should be dismissed.

[4] After consultation with the parties at a pre-hearing teleconference, this appeal proceeded by videoconference for the following reasons: the parties were represented by counsel, the availability of videoconference in the area where the Respondent resides, the accommodations required for the Respondent, the cost-effectiveness and expediency of the hearing choice. This hearing was expedited because of the Respondent's grave medical condition.

ANALYSIS

The Law

[5] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of this *Act* sets out the only grounds of appeal that can be considered. In this case, leave to appeal to the Appeal Division of the Tribunal was granted on the basis that the General Division may have made an erroneous finding of fact without regard to the material before it. This may have resulted in the General Division misapplying

the legal test for incapacity to form or express an intention to make an application in section 60 of the CPP.

[6] The parties agreed and I am satisfied that this would be an error of mixed fact and law. The leading case regarding what standard of review is to be applied in this case is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, 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. Therefore, the standard of review to be applied in this case is reasonableness.

[7] The incapacity provision of the CPP (s. 60) is a narrow and precise exception to the timelines within which an applicant can replace a retirement pension with a disability pension (see *Canada (Attorney General) v. Danielson*, 2008 FCA 78). The Federal Court of Appeal concluded that to determine whether a claimant is so incapable, medical evidence and evidence of the claimant's activities are relevant. In addition, the Federal Court of Appeal concluded, in *Sedrak v. Canada (Social Development)*, 2008 FCA 86 that this capacity in the CPP is no different than the capacity to make any other choices that present themselves to an applicant. These legal principles have been relied on and applied in a number of Federal Court of Appeal cases.

General Division Errors

[8] It is settled law that an appellate body is not to reweigh the evidence that was before the original decision maker, but only to assess whether its decision was reasonable. Deference is owed to the General Division regarding findings of fact. In this case, the General Division made a number of findings of fact that were not dispute d by the parties on appeal. These findings included that the Respondent reduced his hours of work in 2008, could not recall when he worked in 2009 although he received Employment Insurance benefits in that year, that he took on a more supervisory role at work and completed less physically demanding tasks, that he attended for numerous medical appointments in Lindsay, ON and Toronto, ON some two hours away from his home by car, that his wife was

supportive and arranged for and drove him to these appointments, managed the household finances and completed CPP application forms for him to sign. In addition, the General Division found as fact that the Respondent consented to numerous medical tests and treatments, and focused on his health after receiving the cancer diagnosis in 2009.

[9] Counsel for the Minister relied on the decision of the Pension Appeals Board in *Y.C. v. Minister of Human Resources and Skills Development*, CP26648 (PAB). In that case, the claimant did not apply for survivor and orphan benefits until approximately two years after the untimely death of her husband. She sought further retroactivity of these benefits on the basis that she was incapacitated under s. 60 of the CPP. The Pension Appeals Board decided that while there was evidence that she was distraught as a result of her husband's death, there was also evidence that she was involved in and made decisions regarding her own medical care during that time. Therefore, she was not incapable of forming or expressing an intention to make an application under the CPP. Counsel for the Respondent argued that this decision was not binding upon this Tribunal, and that it was factually different as there was nothing to indicate that Ms. C. had any other person to support and guide her through her medical and other issues. The Respondent argued that in this case his wife arranged for and managed his treatment appointments, and took him to them. I note, however, that although the Respondent argued that his wife assisted him, he did not contend that she made any decisions on his behalf.

[10] Although this decision is not binding on me, I find it persuasive. It applied the principles set out in the Danielson and *Sedrak* decisions, to demonstrate what evidence should be examined to determine whether a claimant is incapable under s. 60 of the CPP. Like *Y.C.* the Respondent has endured very trying circumstances. Despite this he participated in his medical care and made medical decisions during the period of alleged incapacity. He also adjusted his work conditions. I am satisfied that the evidence the General Division considered supported the conclusion that the Respondent was not incapable under s. 60 of the CPP.

[11] The Appellant argued, further, that the General Division ignored significant evidence that demonstrated the Respondent's capacity to participate in his medical care, which would

demonstrate that the Respondent had capacity to form or express the intention to make an application. This evidence included that the Respondent was counselled about liver transplantation, that he had a good understanding of live donor transplantation and had family members who were interested, that he had a good understanding of transplantation and the long waiting list for this treatment. This evidence was contained in the medical reports that were before the General Division at its hearing. The Respondent argued that this evidence should be examined in the context of a claimant with a terminal disease, who participated in this treatment as it was the only viable option to live.

[12] While it may be that the Respondent felt that he had no choice but to undergo very intrusive medical procedures to prolong his life, I note that none of this evidence suggested that the Respondent did not comprehend his treatment or was not able to make medical decisions for himself. I am satisfied that this evidence was significant to the issue of the Respondent's capacity under section 60 of the CPP, and that the General Division erred when it did not consider this evidence in reaching the decision. I am persuaded that the General Division made a finding of fact, that the Respondent was not capable of forming or expressing an intention to make an application, without regard to this material that was before it.

[13] Further, the Respondent's family physician completed a Certificate of Incapability on February 24, 2013 where he stated that the Respondent was able to manage his financial affairs and had a good knowledge of financial matters. He also stated that at the time of the Respondent's application for CPP disability pension he believed that the Respondent was incapable of managing his own affairs due to physical illness associated with severe anxiety related to his terminal illness. On March 21, 2013 this same physician completed a Declaration of Incapacity wherein he stated that the Respondent was incapable of forming or expressing the intention to make an application, and that this incapacity began in November 2008 and was ongoing. Clearly these documents are contradictory. In the General Division decision these documents are noted. The decision did not, however, state what weight was given to each document, or how it dealt with their contradictory nature. The Appellant argued that this was an error. The Supreme Court of Canada, in *R. v. Sheppard* (2002 SCC 26), stated that a decision maker, in its decision, must give reasons for findings of fact made

on contradictory evidence and upon which the outcome of the case is dependent. In this case, the General Division gave weight to this evidence but did not give any reasons for doing so, or explain how it resolved the inconsistency in the two documents. I am satisfied that this was an error.

[14] As I am satisfied that the General Division erred, the next consideration is whether these errors rendered the General Division decision unreasonable. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada concluded that reasons for a decision must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. Although reasons may not include all the arguments, jurisprudence or other details a reviewing body would have preferred that does not impugn the validity of the decision (see also *Construction Labour Relations – An Alberta Association. v. Driver Iron Inc. et al* 2012 SCC 65). In light of this I must decide if the General Division decision falls within the range of outcomes that is acceptable and defensible on the facts and the law.

[15] The General Division decision contains a detailed summary of the Respondent's testimony as well as that of his wife and Mr. Brown, his supervisor at the golf course. It also summarized the Dr. Ready's opinion, including the Declaration of Incapacity and Certificate of Incapability that he penned in support of the Respondent's claim. The decision did not, however, analyze the inconsistencies in these two documents. The decision also did not contain any reference to reports of medical specialists who treated the Respondent, including his oncologist and the physician who counselled him regarding liver transplantation. These doctors set out, clearly in their reports, that the Respondent understood his health condition and was involved in his care. The reports contained no indication that anyone other than the Respondent made medical decisions on his behalf. While a decision need not refer to every piece of evidence that was before it at a hearing, it must refer to significant evidence, and analyze inconsistencies in evidence.

[16] In *Canada (Attorney General) v. Kirkland* 2008 FCA 144 the Federal Court of Appeal set aside a decision of the Pension Appeals Board which found that the claimant was incapable under s. 60 of the CPP because the reasons for the decision did not adequately deal

with the evidence that the claimant had some decision-making capacity. The circumstances are the same in this case. The General Division had evidence that the Respondent was making decisions regarding serious medical treatment and testing with his specialists, during the time of claimed incapacity. It did not provide any explanation for not giving this evidence any weight, or for disregarding it. In addition, counsel for the Appellant contended that the evidence that the General Division did consider also established that the Respondent had some capacity to make decisions – i.e. that he was able to adjust his work hours and duties. I find this argument persuasive when it is viewed in context of all of the evidence that was before the General Division at its hearing.

[17] I am satisfied that the General Division decision did not provide reasons for its finding of fact that the Respondent was not capable of forming or expressing an intention to make an application in light of contradictory evidence, and that the General Division decision was dependent, at least in part, on this finding of fact. For these reasons, I am persuaded that the General Division decision was unreasonable, and that the appeal should be allowed.

[18] Finally, counsel for the Respondent argued that the Appellant chose not to attend the General Division hearing in person or by an alternative to personal attendance. It should not now be permitted to raise arguments that could have been raised at that hearing. Counsel for the Appellant acknowledged that it did not attend the hearing, and was prepared to accept the consequences of its non-attendance.

[19] It is unfortunate that the Appellant did not attend the hearing. I agree with counsel for the Respondent that if it had done so, some of the issues before me may have been resolved without the need for this appeal. In this case, it is heartbreaking that the Respondent has had to endure years of litigation which may have been shortened by the Appellant's personal attendance at the hearing. However, while it would have been preferable for the Appellant to have attended the General Division hearing, the Tribunal cannot force any party to participate in litigation. If a party chooses not to do so, it takes the risk of the matter proceeding in its absence. That is what the Appellant did in this case.

Remedy

[20] Since I have found that the General Division decision was unreasonable, I must decide what remedy is appropriate in this case. Section 59 of the *Department of Employment and Social Development Act* provides that the Appeal Division may dismiss an appeal, refer the matter back to the General Division or give the decision that the General Division should have given.

[21] In the circumstances of this case, including the Respondent's grave health condition, the detailed findings of fact made by the General Division that were not disputed by either party, and the record before me I am satisfied that it is appropriate to give the decision that the General Division should have given in this case.

[22] The undisputed facts may be summarized as follows: The Respondent worked for a number of years at a golf course maintaining the grounds. He worked seasonally from approximately May to October each year. In the winter months he relied on Employment Insurance benefits. In 2007 the Respondent began to suffer from flank pain. It was initially thought to be caused by a pulled muscle. In 2008 the Respondent reduced his work hours due to pain, fatigue, and other symptoms. In November 2008 he attended for a medical scan which was abnormal and eventually led to a diagnosis of liver cancer in March 2009. This diagnosis was devastating to the Respondent and his wife. His efforts then became focused on testing and treatment for this disease, which included numerous trips from his home in X, ON to Toronto, ON some two hours' drive away. The Respondent's wife was very supportive and arranged and drove the Respondent to his appointments, and attended them with him. In 2010 the Respondent underwent a live donor liver transplant, which surgery was described as successful. Unfortunately, the Respondent continues to suffer from cancer, and his condition is terminal.

[23] The Respondent applied for a CPP disability pension after the time period in which he could replace his retirement pension with a disability pension. The only way that he could extend this time period was if he was found incapable of forming or expressing an intention to make an application (s. 60CPP). The Respondent's case hinged on this. The Appellant did not dispute that he was disabled under the CPP.

[24] The law is clear the capacity to form or express an intention to make an application is no different than the capacity to make other choices. To determine whether the Respondent had this capacity the medical evidence as well as evidence regarding the Respondent's activities is to be examined. The evidence is summarized above. The medical evidence of Dr. Ready is inconsistent. He reported in one certificate that the Respondent was not capable of managing his affairs when he applied for a CPP disability pension but was not so incapable in February 2013 when this report was penned, and in another certificate that he was incapable of forming or expressing an intention to make an application from November 2008 and ongoing. No explanation for this inconsistency was provided. Therefore, it is not possible to place much weight on this evidence.

[25] On January 19, 2010 Dr. Grieg reported that the Respondent was placed on the transplant waiting list and was counselled with respect to those issues. On February 21, 2010 Dr. Levy reported that he discussed live donation with the Respondent and his wife, explained that the Respondent did not have a long time to wait, and that he took this information well. On February 25, 2010 Dr. Lilly reported that the Respondent had a good understanding of transplantation and that because of his blood type he could expect to wait many months for a transplant. None of these specialists made any note regarding any incapacity of the Respondent to understand this complex medical information, or to make decisions regarding his treatment.

[26] On a review of this uncontested evidence, I am not satisfied that the Respondent was continuously incapable of forming or expressing an intention to make an application under section 60 of the CPP from March 2009 to April 2010. He was able to make medical decisions during this time, able to make arrangements to work or gain income. Although his wife assisted and supported the Respondent, I am not satisfied that she made any decisions for him.

[27] I am very sympathetic to the Respondent's situation. The Tribunal was established by specific legislation. As such it only has the powers given to it by the legislation. It has no discretionary powers. Decisions must be based on the law, without regard to

compassionate arguments. This may result in a decision that seems harsh; however, nothing can be done about this.

[28] For these reasons, the appeal must be allowed and the Respondent's claim dismissed.

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.

58. (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.

Canada Pension Plan

60. (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

66.1 (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced, request cancellation of that benefit.

(1.1) Subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable

Canada Pension Plan Regulations

46. 2 (1) A beneficiary may submit to the Minister, within the interval between the date of commencement of payment of the benefit and the expiration of six months after that date, a request in writing that the benefit be cancelled.

(2) Despite subsection (1), if there is a determination that an applicant for a disability pension under the Act or a comparable benefit under a provincial pension plan is deemed to have become disabled for the purpose of entitlement to the disability pension or benefit and is in receipt of a retirement pension, and the time when the applicant is deemed to be disabled is before the date on which the retirement pension became payable, the applicant may submit to the Minister, within the period beginning on the day of commencement of payment of the retirement pension and ending 60 days after the receipt by the applicant of

the notice of the determination, a request in writing that the retirement pension be cancelled