Citation: ***H. W. v. Minister of Employment and Social Development*****, 2015 SSTAD 773**

Date: June 22, 2015

File number: AD-15-12

APPEAL DIVISION

Between:

H. W.

Appellant

and

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

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Videoconference on June 11, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	H. W.
Representative for the Appellant	Jim Farrell
Counsel for the Respondent	Hasan Junaid
Observer	F. W.
Observer	Ryan Koo (law student)
Observer	Lorri Mackay (law student)
Observer	Isabelle Saumier-Castonguay (law student)

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled by chronic pain which was formally diagnosed after the Minimum Qualifying Period (the date by which a claimant must be found to be disabled to receive a *Canada Pension Plan* disability pension). The Respondent denied her claim initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing and dismissed the appeal.

[2] The Appellant was granted leave to appeal on January 28, 2015 on two grounds: that the General Division erred when it disregarded medical evidence, and that it may have been biased.

[3] This appeal was heard by videoconference for the following reasons:

a) Credibility was not expected to be a prevailing issue;

b) The information in the file, and the submissions of the parties in support of their position on appeal;

c) The fact that the parties were represented;

d) The availability of videoconference in the area where the Appellant resides; and

e) The cost-effectiveness and expediency of the hearing choice.

PRELIMINARY MATTER

[4] The Appellant filed documents with the Tribunal that were not before the General Division. The Appellant wished to introduce this evidence to support her claim that the non-traditional health care providers who treated her were qualified to do so. The Respondent argued that this new evidence was inadmissible on appeal as the nature of an appeal to the Appeal Division of the Social Security Tribunal is not a *de novo* hearing.

[5] The *Department of Employment and Social Development Act* governs the operation of the Social Security Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered (see the Appendix to this decision). An appeal may consider of an error in law, an error in fact, or a breach of natural justice. The presentation of new evidence is not a ground of appeal that can be considered. The hearing of an appeal is not a new hearing on the merits of the disability claim. Accordingly, new evidence is inadmissible unless it goes to one of the grounds of appeal. The documents that were not before the General Division were not considered on this appeal as they did not relate to one of the grounds of appeal.

ANALYSIS

[6] The Respondent argued that the standard of review to be applied in this case is that of reasonableness for questions of fact or mixed law and fact, and correctness for questions of natural justice including bias. The Appellant argued that the General Division decision was incorrect as it was biased.

[7] The leading case on what standard of review should be applied 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. The correctness standard of review applies to issues of jurisdiction and natural justice. Therefore, I find that questions of fact or mixed law and fact are to be examined against the standard of reasonableness, and the question of bias is to be examined on the standard of correctness.

Errors of Fact

[8] The Appellant argued that the General Division made erroneous findings of fact in a perverse or capricious manner or without regard to the material before it as it disregarded all of the reports written by non-traditional health care practitioners. She argued that it did so without considering their qualifications, and simply stated that these reports were not objective medical evidence. She also pointed out that Dr. Boyd was the first practitioner to indicate that the Appellant might have suffered from chronic pain, and that subsequent treating health care practitioners confirmed this in their reporting of her symptoms and treatment.

[9] The Appellant also argued that the General Division erred in fact when it disregarded the reports written by Dr. Pop and Dr. Harth because they were penned after the Appellant had applied for the disability pension. She argued that these doctors did not act as advocates for her, but confirmed that she had suffered from pain for a long time without resolution despite treatment.

[10] In contrast, the Respondent argued that the General Division did not err when it placed little or no weight on these reports. It argued that the General Division set out specific, sound reasons for disregarding each of the health care practitioners' reports, including that the practitioner did not set out his or her qualifications clearly.

[11] I am satisfied, on a balance of probabilities, that the General Division made erroneous findings of fact without regard to the material before it. While Ms. Kingston, who wrote one report in support of the Appellant, may not have had any medical qualifications, the other health care practitioners were qualified in their fields, with their qualifications set out. The General Division Member dismissed this. In addition, the General Division concluded that

Dr. Wong's qualifications were dubious despite it being clear that she was qualified as a medical doctor in China.

[12] The General Division decision also did not indicate that it took any steps to verify the status of the practitioners' qualifications. I accept that it is incumbent on a claimant to prove her case. However, the General Division placed weight on the apparent lack of qualifications of the practitioners without giving the Appellant the opportunity to respond to this at the hearing.

[13] In addition, the General Division concluded that the written evidence of Dr. Pop was to be given no weight. The reason given was Dr. Pop did not see the Appellant until after the Minimum Qualifying Period, and because he relied on a report from Dr. Boyd that did not reach a definite diagnosis for the Appellant. Although Dr. Pop did not examine the Appellant until after the MQP, he relied on the findings of Dr. Boyd to inform his opinion. Dr. Boyd did not diagnose the Appellant with a specific medical condition, however, it is not the diagnosis of a condition that is to be considered, but the impact of the disability on the claimant's ability to work (*Klabouch v. Canada (Social Development)* 2008 FCA 33). On balance, I am satisfied that the General Division erred when it ignored his evidence.

[14] The General Division disregarded Dr. Harth's evidence because he was seen after the Minimum Qualifying Period, and was consulted in conjunction with the Appellant's claim. The Appellant argued vigorously that there was no attempt to influence Dr. Harth in his diagnosis or evidence. From a reading of Dr. Harth's report, I am satisfied that he did not advocate for the Appellant, and that his comments were not influenced by her application for a disability pension. I am also satisfied that the General Division made an erroneous finding of fact without regard to the material before it when it disregarded this evidence.

[15] Further, the Appellant also relied on the decision of the Pension Appeals Board in *Curnew v. Minister of Human Resources Development* (June 25, 2001 CP12886) to support her argument that her disability arose prior to its diagnosis. The case also involved a disability pension claimant who suffered from chronic pain. The Pension Appeals Board concluded that chronic pain is a progressive condition, and cannot be said to have arisen only when a doctor diagnosed it. The Respondent argued that this case did not apply to the one

before me as the issue before the Pension Appeals Board was with respect to when a disabling condition had its onset, and the case before me was one in which there was an absence of medical evidence to support the claim.

[16] I am not persuaded by the Respondent's argument. Although the *Curnew* decision is not binding on me I find it to be persuasive in this case. In both cases the disability pension claimant suffered from chronic pain. The pain persisted despite treatment, and in both cases, diagnosis of the condition took a significant period of time. I accept the reasoning of the Board that chronic pain is a progressive condition and may exist before it is formally diagnosed. I am satisfied that the General Division made erroneous findings of fact without regard to the material before it when it ignored or dismissed evidence of long-standing pain as reported by her medical doctors and health care practitioners.

[17] The Respondent referred to the Federal Court of Appeal decision in *Villani v. Canada (Attorney General)* 2001 FCA 248 to support its contention that objective medical evidence is required to substantiate that a claimant is disabled under the *Canada Pension Plan*. This was not in dispute in this case. The issue before me was whether the General Division made an erroneous finding of fact in a perverse or capricious manner or without regard to the material before it when it disregarded all of the medical evidence presented by the Appellant. The Appellant did produce objective medical evidence of her condition and its impact on her ability to function. The evidence was disregarded by the General Division in error. Therefore, this argument is not persuasive.

[18] Finally on this issue, I was reminded in argument that it is not the diagnosis of a condition, but its effect on a claimant's ability to work that is to be considered to determine whether she is disabled under the *Canada Pension Plan* (see *Klabouch*). The General Division relied on the fact that there was no diagnosis until after the MQP. This was also an error of mixed law and fact.

[19] In summary, I am satisfied, on a balance of probabilities that the General Division decision contained a number of erroneous finding s of fact made without regard to the material before it. I am also satisfied that the General Division erred in relying on the fact

that the Appellant's condition was not diagnosed prior to the Minimum Qualifying Period. As a result, the decision is unreasonable, and not defensible on the law and the facts.

Bias

[20] The Appellant also alleged that the General Division was biased. The legal test for bias is that of a "reasonable likelihood or suspicion of bias", the emphasis being not on the court's perception of what bias is, but rather on the opinion of the reasonable person. This test was stated by the Supreme Court of Canada in *Committee for Justice & Liberty v. National Energy Board* (1978), 68 D.L.R. (3d) 716 at p. 735 as "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly? *Ahumada v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9165 (FC).

[21] The Appellant argued that the General Division was biased because it dismissed the evidence of her health care providers, ignored their credentials and disregarded the evidence of Dr. Pop and Dr. Harth because they were consulted after the MQP. The Respondent contended that the General Division decision set out sound reasons to dismiss the evidence of each health care provider, and that of Dr. Pop and Dr. Harth. The General Division was the trier of fact, and as such should be given deference for the findings of fact that it made.

[22] I accept that the General Division was the trier of fact in this proceeding. It was to hear the evidence of the parties, weigh it, and reach a decision based on the evidence and the law. The principles of natural justice require that this be done in an impartial and unbiased manner. I am persuaded by the Appellant's arguments that this did not occur in this case. The General Division dismissed every report of a non-traditional medical practitioner, and dismissed their qualifications without giving the Appellant the opportunity to respond to this concern. It stated that each practitioner's observations were not "objective medical evidence". In addition, the General Division discounted Dr. Pop's opinion, at least in part, on the basis the he relied on Dr. Boyd who did not diagnose any specific medical condition. It disregarded Dr. Harth's evidence because he was consulted in conjunction with the disability pension application. I am satisfied that a reasonable person would conclude that

the decision maker in this case did not decide this case fairly as it dismissed all of the medical evidence for the reasons set out above, and then concluded that the Appellant was not disabled because there was insufficient evidence of a disability.

CONCLUSION

[23] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 the Supreme Court of Canada concluded that in determining whether a decision is reasonable the reasons for the decision must be examined together with the outcome to determine if it is within the range of possible acceptable outcomes. In this case, the Appellant has persuaded me that the General Division made erroneous findings of fact without regard to the material before it, and appeared to have been biased. As a result, the decision is unreasonable and cannot stand. The matter is referred to the General Division for a new hearing before a different Member. The General Division decision is to be removed from the record.

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.