Citation: ***B. K. v. Minister of Employment and Social Development,*** **2015 SSTAD 761**

Date: June 19, 2015

File number: AD-15-58

APPEAL DIVISION

Between:

B. K.

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 17, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	B. K.
Representative for the Respondent	Bradley Roote, student-at-law
Observer	A. M. K.
Observer	Michael Stevenson
Observer	Marie-Eve Morel
Observer	Audrey Levesque

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension. He claimed that he was disabled by knee and back pain, obesity, sleep apnea and depression. He also suffers from diabetes. The Respondent denied his 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 videoconference hearing and dismissed the appeal.

[2] On February 23, 2015 the Appellant was granted leave to appeal on two grounds: that the General Division may have erred by not considering all of the Appellant's medical conditions individually and cumulatively, and by applying the wrong legal test to determine whether the Appellant's disability was severe under the *Canada Pension Plan*. I was also prepared to hear further submissions on the issue of whether the General Division properly considered the factors set out in the *Villani v. Canada (Attorney General)* 2001 FCA 248 decision in this case.

[3] This appeal was heard by videoconference after considering the following:

a) The nature of the arguments presented on appeal by both parties;

b) The fact that credibility was not anticipated to be a significant issue at the hearing; and

c) The availability of videoconferencing in the area where the Appellant resided.

ANALYSIS

[4] In written submissions, both parties submitted that the standard of review to be applied to errors of law is that of correctness, while the standard of review for errors of mixed law and fact is reasonableness. The leading case on this 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. Other errors of law, jurisdiction and natural justice are to be reviewed on a standard of correctness. This reasoning was adopted by the Federal court of Appeal in *Atkinson v. Canada (Attorney General)* 2014 FCA 187 which was a case dealing with a *Canada Pension Plan* disability pension claim.

[5] I am satisfied that one issue in this appeal was whether the General Division made error of mixed fact and law regarding its consideration of all of the Appellant's disabling conditions. Therefore, the standard of review is that of reasonableness. The issue of whether the correct test for severity was used is a question of law. Although both parties argued that the standard of review should be correctness, upon a review of the case law, it is not clear to me whether that is the case. As the definition of severe is in the *Canada Pension Plan*, which is the "home statute" for this Tribunal, the standard of review may be reasonableness. For the reasons set out below, however, this is not crucial to my decision in this case.

Whether All Conditions Were Considered

[6] The first ground of appeal to be examined is whether the General Division erred by not considering all of the Appellant's disabling conditions individually or cumulatively. The Appellant argued, in his written submissions, that the General Division was obliged to

consider all of his medical conditions and their cumulative impact on his capacity to pursue any substantially gainful employment. The Respondent did not disagree. The Respondent argued, however, that the General Division did so, and referred to specific paragraphs in the General Division decision where evidence was given regarding each of the Appellant's conditions.

[7] The mere fact that the General Division decision summarized the evidence before it regarding each of the medical conditions is not necessarily sufficient. This evidence must be weighed and the cumulative impact of all the conditions considered in reaching a conclusion. In this case the Appellant's counsel advised the General Division Member at the hearing that the Appellant's case would emphasize his back and knee pain, and depression. The General Division decision contains a summary of the written and oral evidence regarding each of these medical conditions, and how they were being treated. The decision analyzed this evidence, and concluded that despite a plethora of medical issues, the Appellant retained functional capacity.

[8] In addition, it is the General Division is obliged to receive the evidence of the parties, weigh it and render an impartial decision based on this evidence and the law. It is not for the Appeal Division of the Tribunal to reweigh the evidence to reach a different conclusion (see *Simpson v. Canada (Attorney General)* 2012 FCA 82). For the reasons set out above, I am satisfied that the General Division decision was reasonable insofar as it considered and weighed the evidence regarding the Appellant's conditions in reaching its decision.

The Correct Test for Severe

[9] Leave to appeal was also granted on the basis that the General Division may have erred in applying the incorrect legal test to determine whether the Appellant's disability was severe under the *Canada Pension Plan*. In the decision, when considering the Appellant's depression, the General Division concluded that there was insufficient evidence to support a "severe" psychological condition. In argument, both parties relied on decisions of the Federal Court of Appeal which concluded that it is not the diagnosis of a condition, but its effect on a claimant's ability to pursue a substantially gainful occupation that is to be considered to

determine whether he is disabled (*Klabouch v. Canada (Social Development)* 2008 FCA 33). This is a correct statement of the law.

[10] The Appellant argued that the General Division erred in relying on the lack of severe diagnosis to determine that the depression was not severe. The Respondent argued that the General Division decision contained the correct definition of "severe". In its' analysis, the General Division examined all of the evidence and concluded that the Appellant retained some functionality and was therefore did not suffer from a severe disability under the *Canada Pension Plan*.

[11] I accept that the General Division decision contained the correct definition of severe in paragraph 7, although it was stated differently in the analysis section of the decision. I also note that the decision refers to the Appellant's depression not being severe, and that the General Division placed some weight on this in making its decision. However, upon a review of the entire General Division decision, I am satisfied that the decision was not based only on the fact that the Appellant's depression was not diagnosed as severe, but on a review of all of the evidence regarding the Appellant, his limitations and remaining functional abilities. The decision refers to the limitations set out by the Appellant in the documents he submitted with his application for a disability pension, his activities, his educational achievements and work and life experience. I am therefore satisfied that the General Division decision is reasonable in this regard, and that the General Division did not apply the incorrect test for severe under the legislation in making its decision.

Application of Real World Factors

[12] When granting leave to appeal in this case, I was prepared to hear further argument regarding whether the General Division had erred with respect to the application of the *Villani* decision in this case, despite leave to appeal not being granted on this basis. The Appellant put forward arguments in this regard in his written submissions. In contrast, the Respondent argued that as leave to appeal was not granted on this ground of appeal, no arguments regarding this issue could be heard.

[13] The Appellant made no submissions at the hearing of the appeal with respect to this issue. I therefore find that he abandoned any claim with respect to this ground of appeal, and so I need not make any decision regarding it.

[14] If I am wrong on this, I also find that the General Division reasonably considered the Appellant's personal circumstances in making its decision. The decision clearly set out the Appellant's age, educational achievements, work and life experience. This evidence was considered by the General Division in making the decision that the Appellant retained some functional capacity. The General Division decision is reasonable in this regard.

CONCLUSION

[15] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 the Supreme Court of Canada also decided that the 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. For the reasons set out above, I am satisfied, on a balance of probabilities, that the General Division made no reviewable error. The decision falls within the range of possible outcomes that are defensible on the facts and the law. Although I am sympathetic to the Appellant, the appeal must be dismissed for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division