Citation: ***R. D. v. Minister of Employment and Social Development,*** **2015 SSTAD 922**

Date: July 27, 2015

File number: AD-15-86

APPEAL DIVISION

Between:

R. D.

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 In-person on July 21, 2015, Windsor, Ontario

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	R. D.
Counsel for the Appellant	Eric Katzman
Counsel for the Respondent	Renée Darisse

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension. He claimed that he was disabled by osteoarthritis, diverticulitis, colitis, irritable bowel syndrome, sleep apnea and depression. The Respondent refused his application initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. On April 1, 2013 the appeal was transferred to the General Division of the Social Security Tribunal of Canada (Tribunal). On December 29, 2014 it determined that a disability pension under the *Canada Pension Plan* was not payable.

[2] The Appellant filed an application for leave to appeal the General Division decision with the Appeal Division of the Tribunal, and leave to appeal was granted on March 9, 2015. Leave to appeal was granted on the basis that the General Division may have erred by not properly considering evidence regarding the Appellant's functional abilities, and that it may have erred in failing to consider the Appellant's explanation for not seeking alternate employment.

[3] This appeal was heard in-person after considering the following:

a) The complexity of the issues under appeal.

b) The fact that the credibility of the parties was not a prevailing issue.

c) The fact that the appellant or other parties were represented.

d) The non-availability of videoconference in the area where the Appellant resides.

e) The nature of the arguments and submissions made by both parties in this matter.

The parties raised a number of preliminary issues, which are dealt with first below.

PRELIMINARY ISSUES

Introduction of New Evidence on Appeal

[4] Counsel for the Appellant filed ten medical reports with the Tribunal after the General Division decision was made. The Respondent submitted that as these documents were not relevant to the grounds of appeal upon which leave to appeal was granted, they were inadmissible on appeal. She relied on the wording of sections 58, 59 and 66 of the *Department of Employment and Social Development Act* to support her argument. In addition she argued that the Federal Court, in *Alves v. Canada (Attorney General)* 2014 FC 1100, concluded that the presentation of new evidence is no longer a ground of appeal, and therefore unless the evidence supports a ground of appeal set out in the *Department of Employment and Social Development Act* (DESD Act) it is inadmissible.

[5] In contrast, counsel for the Appellant argued that new evidence should be admitted because this matter was an appeal. He also contended that the *Alves* decision should be distinguished from the case before me as that decision concerned an application for judicial review, not an appeal within a Tribunal as in this case. In addition, he argued that the facts of the *Alves* case were completely different from those before me.

[6] I am satisfied that the *Alves* case is correct insofar as it states that the presentation of new evidence is not a ground of appeal under the DESD Act. The DESD Act governs the operation of the Tribunal. Section 58 of the DESD Act sets out the only grounds of appeal that can be considered. Appeals to the Appeal Division of the Tribunal are not *de novo* hearings on the merits of the disability claim as an appeal can only consider the grounds of appeal set out in section 58 of the DESD Act (see *F.D. v. Minister of Employment and Social Development* AD-13-200; *M.C. v. Minister of Employment and Social Development* AD-13-47). The DESD Act also provides, in section 66, a procedure by which a decision made by the Tribunal could be rescinded or amended based on new material facts. Accordingly, new evidence is not

permitted on an appeal, unless it goes to one of the grounds of appeal set out in section 58 of the Act (for example, evidence of a breach of natural justice, or bias by the decision maker).

[7] In this case, the Appellant has filed further medical reports to support his claim that he is disabled under the *Canada Pension Plan*. This evidence does not point to any of the grounds of appeal set out in the DESD Act. Consequently, they are not relevant to the proceeding before me. They are inadmissible, and were not considered in reaching the decision in this matter.

Testimony at the Appeal Hearing

[8] Counsel for the Appellant also planned to have the Appellant testify at the appeal hearing. He argued that the legislation does not specifically place any limitations on the Appeal Division's ability to hear evidence. He argued that the Appeal Division was in a better position to assess the evidence than the General Division as the hearing of the appeal was conducted in-person while the General Division hearing was conducted by telephone, the Appeal Division set aside a longer time to hear the appeal, and the Appeal Division Members are senior to the General Division Members. He also argued that it made little sense to keep information away from the Appeal Division as it would fetter their ability to make the decision.

[9] Counsel for the Respondent relied on her arguments related to the introduction of new documentary evidence on this issue.

[10] The Appeal Division of the Tribunal dealt with the issue of having a claimant testify at an appeal hearing recently in the *F.D.* and *M.C.* decisions. My colleague conducted a thorough review of the relevant law on this issue. While these decisions are not binding on me, I find them very persuasive in this case as they deal squarely with the issue before me. These decisions concluded that new evidence, both oral and written, was not admissible at the hearing of an appeal as the legislation restricts the grounds of appeal that can be considered and therefore also circumscribes the nature of the appeal. In addition, the remedies that can be granted on an appeal are restricted to those set out in section 59 of the DESD Act, which also illustrates the more restricted nature of this appeal.

[11] Further, aside from his statements that Appeal Division Members have more expertise and are senior to General Division Members, counsel for the Appellant provided no basis upon

which I can conclude that this is so. The statutory qualifications for Members of both Divisions of the Tribunal are the same. Members of both Divisions of the Tribunal were appointed when the Tribunal began its work in April 2013 or thereafter. The most senior Members have just over two years' experience with this Tribunal. I fail to understand how Members of one Division could be considered senior to those of another Division for the purposes of their expertise under these circumstances.

[12] The Tribunal Member decides the form that each hearing will take, and the length of time that is to be allotted for the hearing. This is a discretionary decision, based on the circumstances of each case. The Appellant did not allege that this discretion was exercised improperly, that the telephone hearing interfered with his ability to present his case, or that he had insufficient time to do so.

[13] For these reasons, I am satisfied that the proposed oral testimony was new evidence, the same as new documents. Therefore, for the reasons set out above, I did not permit the Appellant to testify at the hearing of the appeal.

Type of Hearing

[14] Counsel for the Appellant also submitted that this appeal should be a *de novo* hearing. He contended that the purpose of the CPP and the DESD Act is to provide benefits to those who are unable to work. This purpose is not furthered if restrictions or ambiguity to an appeal are "read into" the text of the legislation which would impose limitations on an appeal. Any such limitations should have been set out in the legislation.

[15] Counsel relied on the *Rizzo v. Rizzo Shoes Ltd. (Re)* [1998] 1S.C.R. 27decision of the Supreme Court of Canada, which stated that benefits conferring legislation is to be given a large and liberal interpretation, with any ambiguity in the language to be resolved in favour of the claimant. He further submitted that the case before me was more important than that before the Court in *Rizzo*. The *Rizzo* case dealt with whether employees were entitled to notice of their termination when their employer declared bankruptcy. The case at hand involved a claimant who worked for over 30 years and had CPP contributions deducted from his pay for all this

time. Setting limitations on his ability to now collect the benefits for which contributed would be contrary to a large and liberal interpretation of the statute.

[16] Counsel for the Respondent submitted that this appeal is governed by sections 58 and 59 of the DESD Act. Section 58 limits the grounds of appeal that can be considered. This frames the form of the appeal, such that it is in the nature of a judicial review, not a hearing *de novo*. She relied on the Federal Court decision in *Alves* to support her argument.

[17] In addition, counsel for the Respondent argued that the appeal provisions of the DESD Act mirrors the structure for appeals to the Office of the Umpire under the *Employment Insurance Act* prior to the launch of the Tribunal. She submitted that there were numerous decisions under these provisions of the *Employment Insurance Act* that clearly established that an appeal was in the nature of judicial review, and not a hearing *de novo*.

[18] Respondent's counsel contended further that even if the DESD Act was without specific language to establish that an appeal to the Appeal Division was not a *de novo* hearing, the decision granting leave to appeal circumscribed the appeal as it clearly outlined the basis upon which leave to appeal was granted, and the basis on which leave to appeal was not granted as those grounds of appeal did not have a reasonable chance of success on appeal.

[19] Finally, counsel for the Respondent argued that it would be prejudiced if the matter proceeded as a *de novo* hearing, as she would want to call an expert witness to support her position on appeal.

[20] The *Rizzo* decision considered how legislation was to be interpreted when there was ambiguity in the language of that statute. Counsel for the Appellant was correct that it concluded where there is ambiguity in a statute, it is to be resolved in favour of a benefit claimant. In this case, however, counsel did not point to any ambiguity in the language of the CPP or the DESD Act.

[21] In fact, I am satisfied that sections 58 and 59 of the DESD Act are clear. Only certain grounds of appeal are to be considered on appeal, and no appeal is to be granted unless a ground of appeal has a reasonable chance of success. Neither party suggested that there was any ambiguity about what remedies the Appeal Division can grant after hearing an appeal.

[22] This Tribunal thoroughly dealt with whether an appeal hearing under the DESD Act was a *de novo* appeal in the *F.D.* and *M.C.* decisions referred to above. After this review, the decisions clearly set out that a hearing before the Appeal Division is not to be a *de novo* hearing. Again, I find these decisions persuasive. In addition, I agree with submissions by counsel for the Respondent that the wording of the legislation and the *Alves* decision support this conclusion.

STANDARD OF REVIEW

[23] Counsel for the Appellant suggested that the standard of review that was to be applied to the General Division decision was correctness for questions of fact, mixed fact and law, and law. He argued that this was a question of statutory interpretation, and again relied on the *Rizzo* decision. He contended that there was nothing in the plain reading of the words in the relevant statute that authorized the Appeal Division to accept the General Division decision when it was made with less evidence before it. He also argued that as the correctness standard of review would benefit a claimant, it ought to be applied to General Division decisions.

[24] Finally, counsel for the Appellant argued that, based on the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 the application of a reasonableness standard would not withstand a challenge at the Federal Court, based on the fairness principle.

[25] Counsel for the Respondent acknowledged that as of the date of hearing of this matter, there were no Federal Court or Federal Court of Appeal decisions that have considered what standard of review is to be applied to a review of a General Division decision. She submitted, however, that the application of a correctness standard of review to questions of fact or mixed fact and law would be contrary to the nature of this appeal. She also submitted that the General Division is the trier of fact. As such, its decisions are not made with less information than the Appeal Division.

[26] Counsel for the Respondent referred specifically to the wording of section 58 of the DESD Act, which permits the Appeal Division to intervene on questions of law whether or not they appear on the record, but only to intervene on questions of fact if errors were made in a

perverse or capricious manner, or without regard to the material before it. She contended that this wording clearly indicates that a different standard of review is to be applied to questions of law (correctness) than to those of fact (reasonableness).

[27] 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. The correctness standard of review is to be applied to questions of jurisdiction and other questions of law.

[28] It is true that no court has yet specifically considered what standard of review is to be applied on an appeal from the General Division to the Appeal Division of this Tribunal. However, in *Atkinson v. Canada (Attorney General)* 2104 FCA 187 and *Kiraly v. Canada (Attorney General)* 2015 FCA 66 the Federal Court of Appeal considered applications for judicial review of decisions of the Appeal Division on an appeal from a Review Tribunal which was replaced by the General Division. In both *Atkinson* and *Kiraly* the Court accepted the standards of review as set out in *Dunsmuir*.

[29] When asked, counsel for the Appellant was not able to produce any authority for his contention that the correctness standard of review should be applied, except *Rizzo*. The *Rizzo* decision considered the interpretation of benefits conferring legislation. It did not consider what standard of review should be applied on an appeal. Therefore, this argument fails.

[30] I accept the argument of the Respondent's counsel that what standard of review is to be applied is intertwined with the nature of the appeal before me based on the language of s. 58 of the DESD Act. On a plain reading of the words of s. 58, the Appeal Division is to intervene when there is an error of law, whether that error appears on the face of the record or not. This indicates that less deference is to be owed to the General Division regarding errors of law. In contrast, the Appeal Division is to intervene on errors of fact only when they are made in a perverse or capricious manner, or without regard to the material before it. This suggests that more deference is owed to matters involving questions of fact, which indicates that the reasonableness standard should apply.

[31] I was also not persuaded by the Appellant's argument that principles of fairness require that a correctness standard be applied to all grounds of appeal. In fact, the *Dunsmuir* decision suggests that not even all errors of law attract the correctness standard of review. As no errors of law were before me in this case, I need not decide this issue.

[32] In this case, leave to appeal was granted on two grounds – that the General Division may have erred by not considering evidence of the Appellant's functionality, and that it may have erred by not considering an explanation for the Appellant not seeking alternate work. These grounds of appeal are questions of fact. Therefore the standard of review to be applied is that of reasonableness.

ANALYSIS OF THE MERITS OF THE APPEAL

[33] In submissions regarding the merits of this appeal, counsel for the Appellant summarized the medical evidence that was before the General Division. This established that the Appellant suffered from a number of physical limitations prior to the Minimum Qualifying Period (the date by which a claimant must be found to be disabled in order to receive a CPP disability pension), and that he suffered from depression. These conditions did not resolve despite medication, weight loss and other treatment. Counsel submitted that there was no medical evidence that Appellant could work at the MQP. He further argued that the Appellant could not be a reliable or predictable worker, and that even if he could work a few hours on a scattered basis, it would not amount to any substantially gainful occupation.

[34] While these arguments may be compelling, they do not point to any of the grounds of appeal. They do not assist the Appellant to persuade me that the General Division erred in its consideration of the Appellant's functional abilities or any explanation for not seeking alternate employment. The appeal cannot succeed on the basis of these arguments.

[35] Counsel for the Appellant also argued that the General Division erred as it assumed that the Appellant would be able to complete another sedentary job when there was no evidence to suggest this. This error was compounded, he submitted, by the General Division's failure to consider any explanation for his not seeking alternate work. I listened to the recording of the General Division hearing. The Appellant offered no explanation for not seeking alternate

employment in his testimony at the General Division hearing. Therefore the General Division did not err by not considering this. The General Division listened to the oral evidence and considered it along with the written evidence. It weighed this evidence and reached a decision based on the law and the evidence.

[36] In written submissions, counsel for the Appellant relied on the Pension Appeals Board decision in *M.C. v. MHRSD* (October 10, 2010, CP 26420) which stated that CPP disability pension applicants are expected to show meaningful effort to obtain other employment to suit their skills and limitations, failing which they are obliged to provide a reasonable explanation or be disentitled. In oral argument, however, counsel submitted that this decision should not be relied on as it could be distinguished from the case before me. Counsel argued before me that the Appellant struggled with his last job for a long time, and it would be unfair to expect him to seek another sedentary job or be disentitled to a CPP disability pension.

[37] The obligation to seek out alternate employment arises only if the Tribunal is satisfied that there is evidence of capacity to work. So, if a CPP disability pension claimant is found not to have the capacity to work at any substantially gainful occupation, he or she is not obliged to establish that he or she could not obtain or maintain any other employment because of the disability. In this case, the General Division considered the evidence and decided that the Appellant had some residual capacity to work. It then considered whether he presented any evidence that he could not obtain or maintain work because of his disability, and concluded that he did not. The General Division did not err in this regard.

[38] I acknowledge that the Appellant last worked in a sedentary position. It does not necessarily flow from this, however, that if he could not successfully complete this job he would not be able to complete any other sedentary job or retrain. There are a wide variety of jobs that are considered sedentary despite them having very different physical and mental requirements. Without any evidence of attempts to complete any other job, it was not unreasonable for the General Division to conclude that the Appellant had not met his legal obligation to establish that he could not obtain or maintain employment because of his disability.

[39] Counsel for the Respondent argued that the General Division did not unreasonably fail to consider evidence regarding the Appellant's functional abilities, as the decision refers to the Appellant's evidence of working with irritable bowel syndrome and diverticulitis, and referred to medical reports that commented on his functional abilities in 2014. Counsel for the Appellant did not address this argument. The General Division referred to this testimony by the Appellant. It is not necessary for a written decision to mention each and every piece of evidence that was presented, as the decision maker is presumed to have considered all of the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). There was no suggestion that this presumption was rebutted in this case.

[40] Finally, the Respondent submitted that the Appellant did not establish that the General Division decision was unreasonable, and that the decision was reasonable and defensible on the facts and the law.

[41] I have considered the oral and written arguments of the parties. The Appellant bears the burden of proof on this appeal. His arguments have not persuaded me that the General Division decision is unreasonable. The General Division considered the medical evidence that was presented to it. It considered the Appellant's testimony. It considered his age, education and other personal circumstances. It considered the evidence regarding his functional abilities.

CONCLUSION

[42] For these reasons, I find that the General Division decision was reasonable, and defensible on the facts and the law. The appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division