Citation: ***B. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 1049**

Date: September 4, 2015

File number: AD-15-36

APPEAL DIVISION

Between:

B. M.

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 September 1, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	Ms. B. M.
Counsel for the Appellant	Mr. Groleau
Counsel for the Respondent	Ms. Ahmed-Hassan

INTRODUCTION

[1] The Appellant claimed that she was disabled as a result of injuries she sustained in a motor vehicle accident in 2006 when she applied for 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. On April 1, 2013 the appeal was transferred to the General Division of the Social Security Tribunal of Canada pursuant to the *Jobs, Growth and Long-Term Prosperity Act*. The General Division held a hearing and dismissed the appeal.

[2] The Appellant requested leave to appeal to the Appeal Division of the Tribunal. This was granted on January 30, 2015. On appeal, the Appellant contended that the General Division erred as it did not consider evidence regarding her functional limitations and activities of daily living, and that the decision did not reasonably consider and weigh conflicting medical evidence. The Respondent argued that the General Division decision was reasonable and the appeal should be dismissed.

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

a) The nature of the appeal, including the positions taken by the parties and the material filed;

b) The fact that credibility was not a prevailing issue;

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.

[4] In written submissions, the Respondent contended that evidence was presented on certain issues during the General Division hearing. It did not provide a transcription of this hearing or point to where such discussion could be found on the audio recording. At no time prior to the hearing of the appeal did the Respondent request that I listen to the audio recording of this hearing. At the hearing of the appeal, counsel requested this. Counsel for the Appellant objected to the Respondent's request that I listen to the audio recording of the hearing after the hearing of the appeal as he would not have any opportunity to make submissions on anything revealed by my doing so. The Respondent then withdrew its request that I listen to the audio recording. The decision in this matter was made after considering the written and oral arguments of the parties, without having listened to the audio recording of the General Division hearing.

STANDARD OF REVIEW

[5] To determine whether the appeal should succeed I must first decide what standard of review should be applied to the General Division decision. In oral submissions, counsel for the Appellant agreed with the Respondent's written submissions on this issue. The Respondent submitted that for questions of mixed law and fact, the proper standard of review to be applied was that of reasonableness, and that questions of law should be reviewed on the standard of correctness. 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 issues of jurisdiction, and questions of law that are of importance to the legal system as a whole. This was accepted by the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, a case involving a *Canada Pension Plan*

disability pension claim. The issues in this appeal involve questions of mixed law and fact, so the reasonableness standard of review will be applied.

ANALYSIS

[6] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered on appeal (see the Appendix to this decision). Leave to appeal was granted on three grounds, being that the General Division may have erred in not considering the Appellant's testimony or written evidence regarding her functional abilities, that it may have erred by not considering her personal characteristics or abilities with respect to daily living, and that it may have erred by not weighing the conflicting medical evidence and providing reasons for relying on some medical reports and not others in making its decision. The first two grounds of appeal are dealt with together, and my decision is set out below.

The Appellant's Functional Abilities and Activities of Daily Living

[7] Counsel for the Appellant submitted and I agree that there is no decision from the Federal Court or the Federal Court of Appeal that has yet decided specifically what standard of review is to be applied to decisions of the General Division of this Tribunal. He argued that in light of this, the reasonableness standard of review should be applied in the matter before me using a broad and general approach, as the *Canada Pension Plan* (CPP) is benefit-conferring legislation and is to be so interpreted. He relied on the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 and urged that the Appeal Division pay respectful attention to the General Division decision, and show some deference to their decision.

[8] At the same time, however, he argued that the General Division should have analysed the evidence before it regarding the Appellant's ability to function, and not simply listed her symptoms. As the General Division decision contained no analysis of her symptoms, he contended that the reasons for decision were inadequate in this case. Counsel also contended that as the decision did not set out what impact the Appellant's various symptoms had on her capacity to work, and one is left to speculate about what the General Division concluded regarding this.

[9] Counsel for the Respondent also relied on the principles set out in the *Newfoundland Nurses* decision. She submitted that the General Division decision was reasonable, even if it did not contain references to all of the evidence and arguments that might have been preferable for it to contain.

[10] It is not necessary for me to decide whether a broad and general approach is to be applied to the standard of review in this case. For the reasons set out below, I am satisfied that the reasons for the decision are insufficient and would be so if a different approach to the reasonableness standard were applied.

[11] The General Division decision contained scant reference to the Appellant's functional limitations, any limitations in her daily activities or her personal circumstances. Section 68 of the CPP Regulations requires that a CPP disability pension claimant provide this information when making a claim. Court decisions have confirmed that these matters must be considered.

[12] In argument, counsel for the Respondent submitted that the General Division contained reference to this evidence, and pointed to medical reports that contained some of this information. With respect, a summary of a doctor's report that sets out symptoms and limitations is not evidence from the Appellant. I am also not persuaded by the Respondent's argument that as the decision referred to the *Butler v. Minister of Social Development* (April 27, 2007, CP21630) and *Watson v. Minister of Human Resources Development* (September 29, 1999, CP8040) decisions, which considered specific physical symptoms, the General Division in this case considered the Appellant's functional limitations. I fail to find any logical connection between the application of legal principles from case law and evidence that may or may not have been presented at this hearing.

[13] I agree that a decision need not set out each and every piece of evidence that was presented at the hearing. However, the decision in this case had very minimal reference to any of the Appellant's activities of daily living. It did not analyse this evidence at all. This is different than leaving out some details of some evidence in a decision. Further, in *Whitelaw v. Canada (Attorney General)*, 2005 FCA 412 the Federal Court of Appeal stated very clearly that it is insufficient to merely set out the evidence and then the conclusion reached; the decision should include some reasons to explain the basis for the decision. Without some analysis of the

Applicant's functional limitations and abilities, I am not satisfied that the General Division considered this evidence in making the decision. This was an error.

[14] Counsel for the Appellant also submitted that it was not reasonable for the General Division to conclude that her disability was not severe because there was no ongoing treatment at the Minimum Qualifying Period (the date by which a claimant must be found to be disabled in order to receive a CPP disability pension). He argued that the Appellant underwent a number of assessments and treatment historically. There were none ongoing at the Minimum Qualifying Period because there was nothing more that could be offered to the Appellant, not because she was not severely disabled. In contrast, counsel for the Respondent argued that it was reasonable for the General Division to conclude that the Appellant's disability was not severe because there was no ongoing treatment. She disagreed that there were no further treatment options for the Appellant. After reviewing the General Division decision, I am persuaded that the conclusion that the Appellant's disability was not severe because there was no ongoing treatment was not reasonable. The decision did not set out the evidentiary basis for this conclusion. Counsel did not point to any evidence that established that there were further treatment options that the Appellant had not tried. From a reading of the decision, it is unclear why this conclusion was reached.

Conflicting Medical Reports

[15] Counsel for both parties agreed that the written evidence before the General Division contained medical reports prepared by opposing parties to litigation. They also agreed that it was not surprising that these reports conflicted. Counsel for the Appellant argued that the General Division decision contained an error as it only acknowledged that these reports existed, but did not address the reports and set out why some were preferred and others were not in reaching the decision. Counsel argued that this was an error of law, and attracted the correctness standard of review.

[16] In contrast, counsel for the Respondent argued that it was reasonable for the General Division to state that it could not reconcile these conflicting reports. As the General Division was the trier of fact in this matter, it was appropriate that it weigh these reports and reach a decision in this case, which it did. Counsel also urged that it is not for the Appeal Division to reweigh the evidence that was presented to the General Division to reach a different conclusion.

[17] I agree that it is not for the Appeal Division of this Tribunal to reweigh the evidence presented to reach a different conclusion. However, the decision should include some reasons for the conclusion reached. I am satisfied that the General Division decision did not do this regarding the conflicting medical reports.

[18] The Supreme Court of Canada, in *R. v. Sheppard*, (2002 SCC 26) set out the purposes for giving reasons for a decision. They include allowing the parties to know the decision that was made, and why it was made. Counsel for the Respondent argued that this decision should be distinguished from the matter before me as it involved a judicial review of a criminal matter, while the matter at hand was an administrative tribunal decision. With respect, I do not find this argument persuasive. The *Sheppard* decision sets out general principles for reasons for decision, which are applicable to any decision made in a litigious proceeding. These principles were also set out in the *Newfoundland Nurses* decision, which both counsel relied on to support their positions.

[19] Applying the *Sheppard* principles to the matter before me, I am satisfied that the General Division decision did not adequately consider and weigh the conflicting medical reports that were before it. It is insufficient to simply set out what each report stated. The General Division decision should have contained some explanation of which reports it preferred and why. Without this the parties may not know why the General Division reached the decision that it did. Hence, the General Division erred in this regard.

[20] I do not accept that the failure to adequately weigh this medical evidence was an error of law. The law is clear that the decision should give reasons for findings of fact made on disputed or contradicted evidence, and upon which the outcome of the case is largely dependent (see *Sheppard*). The error was made in the application of the law to the medical evidence presented at the General Division hearing. This is an error of mixed fact and law. As such, it is to be reviewed on the reasonableness standard.

[21] I must decide if the General Division decision was reasonable in light of the errors noted above. I am satisfied that the decision contained insufficient reasons regarding the Appellant's functional abilities. This, alone, does not render the decision unreasonable (*Newfoundland Nurses*). However, the decision also contained errors of mixed fact and law as it did not set out

the evidentiary basis for its conclusion that the disability was not severe because there was no ongoing treatment, and it did not weigh the conflicting medical evidence and explain why some medical evidence was preferred or given greater weight than others. When the reasons and the result of the decision are considered together, I am satisfied that the decision was unreasonable. It is not defensible on the facts and the law as it is not clear why the General Division reached the conclusions it did.

CONCLUSION

[22] For the reasons set out above, the appeal is allowed.

[23] Section 59 of the *Department of Employment and Social Development Act* sets out what remedies may be granted by the Appeal Division. Counsel for the Appellant urged me to give the decision that the General Division should have given in this matter. I am unable to do so in this case. I did not hear the oral evidence presented at the General Division hearing, there is conflicting medical evidence, and the parties may have submissions on how that is to be weighed. The matter is referred to the General Division for reconsideration. To avoid any appearance of bias or pre-determination of the merits of the claim, it should be considered by a different General Division Member, and the General Division decision should 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.

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.