Citation: *M. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1285

Appeal No. AD-15-263

BETWEEN:

M. K.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER:	Janet Lew
DATE OF HEARING:	October 20, 2015
LOCATION OF HEARING:	Vancouver, British Columbia
TYPE OF HEARING:	In-person
DATE OF DECISION:	November 4, 2015

REASONS AND DECISION

IN ATTENDANCE

Appellant	M. K.
Counsel for the Respondent	Luc Bélanger

INTRODUCTION

[1] This is an appeal of the decision of the General Division issued on February 5, 2015, which dismissed the Appellant's application for a disability pension, on the basis that the Appellant did not prove that her disability was severe for the purposes of the *Canada Pension Plan*, by her minimum qualifying period of December 31, 2011. Leave to appeal was granted on June 23, 2015, on the grounds that the General Division may have erred, in that it may have overlooked one of the central issues or grounds of appeal before it, where the Appellant's concussion and concussive syndrome are concerned.

FACTUAL OVERVIEW & HISTORY OF PROCEEDINGS

[2] The Appellant applied for a Canada Pension Plan disability pension in or about March 2009. In her Questionnaire, the Appellant pointed to a number of illnesses or impairments which prevent her from working. She indicated that she suffers from post-concussion syndrome (she has had five concussions in seven years), amongst other things (GT1-44 to GT1-50).

[3] In the accompanying medical report, Dr. J. Lorne, a locum for the Appellant's family physician, diagnosed the Appellant with post-concussive syndrome, lower back pain, spinal stenosis, a meniscal injury to her right knee and possible rotator cuff injury involving her right shoulder. The relevant medical history as it pertained to the post-concussive syndrome included headaches, confusion, poor memory and concentration and fatigue. Dr. Lorne was of the opinion that the Appellant was "severely limited by back condition and post-concussive syndrome" (GT1-54).

[4] The Respondent denied the Appellant's application initially and upon reconsideration. In a letter dated January 4, 2010, in which the Appellant appealed the initial denial of the Minister's decision, she indicated that one of the bases for her appeal was that she was still suffering from post-concussion syndrome (GT1-27).

[5] The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals on October 8, 2010 (GT1-07 to GT1-08). She appealed the reconsideration decision, in part, because "nowhere in the original decision or in the appeal decision has any mention been made of the post concussion [sic] syndrome that also prevents [her] form working".

[6] Under section 257 of the *Jobs, Growth and Long-term Prosperity Act,* any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[7] The Appellant filed additional information with the Social Security Tribunal on April 3, 2014 (GT3-02 to GT3-05). In an undated letter, the Appellant addressed how her post-concussion syndrome affected her. The Appellant's spouse also prepared a brief letter, outlining his observations (GT3-06). The Appellant also included a Disability Tax Credit Certificate; her physician Dr. Eadie completed Part B of the Certificate, presumably in early 2014. The handwritten portion is largely illegible, but appears to read that the Appellant "needs supervision and constant re direction … is not independent". Dr. Eadie also mentioned the Appellant's memory and diagnosed her with brain damage (GT3-14).

[8] On July 6, 2014, the Appellant filed additional information with the Social Security Tribunal where she discussed the status of her concussion (GT5-04). She wrote:

> I did have some improvement (not much though) from my concussion. The improvement was taken back after my surgery. My husband and family advised me I seemed as confused with fine detail, memory and time loss as I was after the accident. There has been some improvement but I still do not pay our bills, don't

> cook very much at all, and don't watch my grandchildren alone. My daughter only lets them visit if there is some other adult there as well as I get easily distracted.

[9] The appeal was heard by the General Division by teleconference on January 6, 2015.

DECISION OF THE GENERAL DIVISION

[10] In assessing the severe criterion for a disability under the *Canada Pension Plan*, the General Division found that there was a "troubling lack of medical evidence" with respect to the treatments that the Appellant may have undertaken. The most recent report was dated November 24, 2009 from a neurosurgeon, wherein he reported that the Appellant was not totally incapacitated and was capable of performing sedentary activities, including a sedentary job. The neurosurgeon noted that the Appellant was limited in lifting and walking, but she could participate in sitting activities. There were no further or updated reports from the neurosurgeon.

[11] The General Division acknowledged that the Appellant had been involved in a serious motor vehicle accident, however noted that the Appellant testified that after her back surgery, there was improvement with her knees and that she was now a candidate for bilateral knee replacement.

[12] The General Division also noted the Appellant's testimony that she would be seeing a specialist in regards to left shoulder surgery, but apart from the Appellant's own subjective evidence, noted that there were no medical reports from the specialist.

[13] The General Division also found that the Appellant had not exhausted all treatment options, as the Appellant had yet to take a home program involving a range of motion and strengthening exercises. The General Division found it could not establish a severe disabling condition without any reports regarding the continued treatment.

[14] The General Division found that without these reports, it could not properly assess critical matters such as treatments actually undertaken by the Appellant, medication trials, recommendations that may have been made, the Appellant's compliance with

recommendations and the benefits, if any, from the treatments. The General Division noted that it did not have the opinions of any specialists regarding the Appellant's work capacity.

[15] The General Division acknowledged the Appellant's frustration that it takes a long time to get medical appointments and that she feels that she is in limbo, however held that it has a duty and responsibility to act only on credible and supporting evidence and not on speculation. The General Division relied on *Minister of Human Resources Development v. S.S.* (December 3, 2007) CP 25013 (PAB).

[16] The General Division also found the Appellant to be relatively young; she was 57 years old at her minimum qualifying date. The General Division also noted that the Appellant had post-secondary education and found that she had invaluable work experience which gave her many transferable skills. The General Division found that although the Appellant has limitations and she might not be able to return to her previous demanding employment, that she had however made no efforts to retrain for and or pursue alternate less demanding employment, even on a part-time basis.

[17] The General Division also noted that the Appellant stated that "her in the moment memory" was good. The General Division found that the medical evidence did not establish that the Appellant lacked the residual capacity to pursue alternative work, and it found that the Appellant had failed to satisfy the test set out in *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[18] Finally, the General Division wrote that it had carefully considered the "totality of the oral and medical evidence" and determined that the Appellant had failed to establish, on the balance of probabilities, a severe disability in accordance with the *Canada Pension Plan* criteria.

[19] As the General Division determined that the Appellant's disability was not severe, it did not make any determination on the prolonged criterion.

ISSUES

[20] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

Grounds of Appeal

2. Did the General Division commit any errors of law, or did it base its decision on an erroneous finding of fact made without regard for the material before it?

3. If the standard of review is reasonableness, is the decision of the General Division reasonable? If the standard of review is correctness, what outcome should the General Division have reached?

Remedies

4. If the General Division committed any errors, what is/are the appropriate remedy(ies), if any?

ISSUE 1: STANDARD OF REVIEW

[21] In submissions filed on August 7, 2015, the Appellant submitted that the "applicable standard of review should be an examination of [her] post-concussion syndrome issues". These submissions do not appropriately address the standard of review issues.

[22] Counsel for the Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. He submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard. Counsel for the Respondent submits that as this appeal involves questions of mixed fact and law, the Appeal Division should review the decision of the General Division on a reasonableness standard.

[23] Counsel for the Respondent submits that as this is an appeal before the Appeal Division and not an application for judicial review, the Appeal Division should undertake what he characterizes as a "modified standard of review analysis". Counsel submits that this approach entails considering the respective roles between the Appeal Division and the

General Division, Parliament's intent with respect to the nature of the appeal to the Appeal Division outlined in the *Department of Employment and Social Development* (DESDA), and the nature of the question at hand. Counsel for the Respondent submits that once this analysis is undertaken, one can determine the standard of review. Ultimately, counsel for the Respondent determined that, based on this modified standard of review analysis, the Appeal Division should apply a correctness standard to General Division decisions on a questions of law, and a reasonableness standard on questions of fact and mixed questions of law and fact.

[24] With respect, the "modified standard of review analysis" proposed by the Respondent seems to largely address the issue as to the nature of the hearing before the Appeal Division. It seems to be well settled within the Appeal Division that the hearings before it be a "circumscribed review" (*Canada (Attorney General) v. Merrigan,* 2004 FCA 253 at para. 9) and that the hearings should be in the nature of a judicial review. Otherwise, the only applicable portion of the "modified standard of review analysis" in determining the appropriate standard of review is the nature of the questions at issue.

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. The correctness standard is generally reserved for jurisdictional or constitutional questions, or questions of law which are of broad central importance to the legal system as a whole and outside the specialized expertise of the tribunal. Questions of law that fall within this categorization are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. When applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[26] The Supreme Court of Canada set out the reasonableness approach in *Dunsmuir* at paragraph 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the

> qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[27] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

> (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.

[28] The applicable standard of review will depend upon the nature of the alleged errors involved.

[29] The Appellant alleges that the General Division failed to consider her post-concussion syndrome -- what she has described as her main disabling condition. Counsel for the Respondent submits that amounts to an error of mixed fact and law, which calls for a review on a reasonableness standard. I concur with these submissions that the applicable standard of review is one of reasonableness.

ISSUE 2: GENERAL DIVISION DECISION

[30] Did the General Division err in coming to its decision?

[31] In her submissions of August 7, 2015, the Appellant submits that the General Division erred in overlooking her post-concussion syndrome, what she considers to be a central issue to her ongoing health problems. She wrote:

> The problems associated with my brain injury affect my daily life on a constant and ongoing basis. As I have written before, I have ongoing short term memory loss issues. I confuse numbers and at times words, I have lost the ability to read a book or follow SIMPLE directions. I cannot multitask, so I no longer cook suppers. I can not coordinate cooking the various foods so as to have them arrive at the table cooked and still hot, at the same time. I have left the gas burners lit on far too many occasions so my husband feels we are safer if he cooks suppers.
>
> He drives me everywhere as I have taken the wrong bus or got off at the wrong stops too many times.
>
> [*sic*]

[32] The Appellant made similar verbal submissions, alleging that both the Respondent and the General Division have never addressed her "brain function". The Appellant also proceeded to provide an update regarding her current medical status, but as they do not speak to any of the grounds of appeal under subsection 58(1) of the DESDA, those submissions are not germane to this present appeal.

[33] Counsel for the Respondent submits that the decision of the General Division is overall reasonable, as the General Division appropriately considered the totality of the evidence, including the testimony of the Appellant and the medical evidence, relating to the Appellant's concussion and concussive syndrome. Counsel points to paragraphs 15, 16, 23 and 32 of the decision, which sets out the Appellant's testimony regarding her concussion-related symptoms. Apparently, Dr. Stockburger advised the Appellant against returning to the concussion clinic, as she had to learn to cope. Counsel also points to paragraph 48 of the decision, which indicates that the Appellant was assessed at the Fraser Health Concussion Clinic. The occupational therapist referred to the post-concussion symptoms as symptoms of mild-traumatic brain injury. A follow-up CT scan had been recommended and her progress was to be reviewed on December 1, 2008. At paragraph 79 of its analysis, the General Division referred to the Appellant's evidence that "her in the moment memory" is good.

[34] Counsel submits that the Appellant has not provided any basis upon which the Appeal Division could conclude that the General Division did not turn its mind to the question of concussion and concussive syndromes. Counsel submits that the General

Division made a "thorough analysis of both the oral and medical evidence associated with the concussion history of the Appellant" (my emphasis).

[35] On the face of it, the General Division appears to have conducted a thorough examination of the medical and oral evidence before it. It referred to the Appellant's testimony regarding her post-concussion syndrome and its impact upon her. The Appellant's long-term memory was noted to be good, although her short-term memory was less reliable. The Appellant had lost some cognitive abilities which impaired her ability to multi-task. The General Division noted that there has been some improvement over time, although noted that the Appellant purports she still is unable to read, and that neither her spouse nor daughter trust her to perform activities of daily living or assist with child-rearing duties.

[36] The General Division also noted the diagnostic examinations and the medical reports and records, although the focus appears to have been on the Appellant's other multiple complaints involving her knees, bilateral carpal tunnel syndrome and back pain, particularly in her lumbar area.

[37] The General Division was also cognizant of the letters of support from the Appellant's spouse, as well as the Appellant's own letter documenting her post-concussion syndrome and symptoms. The General Division also noted the fact that the Appellant had applied for a disability tax credit and that Dr. Eadie, a family practitioner, had noted marked restrictions and cognitive activities, secondary to poor memory, and that she had stated the Appellant was unable to function independently.

[38] The Appellant has consistently been of the position that her post-concussion syndrome is one of her primary disabling features. She stated as much in the Notice of Appeal filed with the General Division, and even then, submitted that no mention had ever been made of the post-concussion syndrome. This surely served as a signal to the General Division that it should focus on this particular issue (along with any other medical issues which the Appellant submitted were of particular significance and relevance to her disability).

[39] Unlike the Respondent, at the initial and reconsideration stages, the General Division mentioned the post-concussion syndrome, in its evidence section. Yet, despite the evidence before it, the Appellant's submissions regarding her post-concussion syndrome, and its own discussion of the Appellant's post-concussion syndrome in its evidence section at paragraphs 15, 16, 23, 32, 47, 48 and 63, the General Division however does not appear to have analyzed the effects of the Appellant's concussions on her functionality or capacity regularly of pursuing any substantially gainful occupation anywhere in its analysis section at paragraphs 67 to 83 – whether alone or cumulatively with the remainder of her disabilities, other than to state at paragraph 79 in its analysis that the Appellant stated that her "in the moment memory" is good.

[40] Counsel submits that, given the lack of evidence before it, the General Division cannot be faulted for not having undertaken a more comprehensive analysis on the post-concussion syndrome and its effects on the Appellant. That might have been so, had there been some analysis regarding the post-concussion syndrome. The General Division critically reviewed the evidence regarding the Appellant's knees and back, but did not subject the evidence regarding the post-concussion syndrome to the same degree of analysis. For instance, the General Division could have addressed the opinions and recommendations in the Fraser Health Concussion Clinic Report (GT1-101 to GT1-106), in determining whether the Appellant could be found disabled as a result of her post-concussion syndrome, but it did not do so.

[41] It is unclear from the analysis what findings or conclusions the General Division drew regarding the Appellant's post-concussion syndrome and its impact upon her capacity regularly of pursuing any substantially gainful occupation. For instance, it is unclear whether the General Division accepted or dismissed the Appellant's evidence that she continues to experience any post-concussion syndrome and if so, to what extent she might have any cognitive deficits, and how that impacts her capacity. While the Appellant may have received advice from one of her medical caregivers that she would need to accept and learn how to cope with her post-concussion syndrome, this advice does not say anything or contribute to any considerations about the Appellant's capacity to regularly pursue any substantially gainful occupation.

[42] The General Division ought to have subjected the evidence regarding the Appellant's post-concussion syndrome to greater scrutiny and some analysis. Summarizing the evidence regarding the Appellant's post-concussion syndrome fell short of this standard. Given these shortcomings, the General Division erred.

REMEDIES

[43] Counsel for the Respondent concedes that although the General Division did not actually refer to the post-concussion syndrome in its analysis section, it nevertheless properly assessed the medical evidence and the testimony in its analysis. Counsel points to the General Division's finding at paragraph 74 of its decision that there was a "troubling lack of medical evidence" and at paragraph 77 that it is difficult to assess disability without any reports regarding any continued treatment.

[44] Notwithstanding any shortcomings in the analysis undertaken by the General Division, which is not conceded by counsel, he submits that the overall decision remains reasonable. He submits that the General Division correctly stated the law and reasonably assessed the facts. Counsel submits that when the reasons of the General Division and the result are read together, the result falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, and that as such, the decision of the General Division can stand. He submits that as such, it would be an error for me to substitute my own decision in the place of the decision of the General Division.

[45] Notwithstanding the deferential standard of review involved, I find that it was unreasonable that the General Division did not analyze nor seemingly consider the evidence regarding the Appellant's post-concussion syndrome. Without having analyzed the evidence regarding the post-concussion syndrome, particularly when the Appellant has consistently stated that it is her primary disabling condition, it cannot be said that the decision is defensible on the facts.

CONCLUSION

[46] For the reasons stated above, the Appeal is allowed and the matter referred to the General Division for a full reconsideration as to whether the Appellant can be found

disabled for the purposes of the *Canada Pension Plan* by her minimum qualifying period, and continuously disabled since then. This by no means determines the outcome of any hearing which the General Division may conduct.

[47] The Appellant is granted leave to file any additional medical opinions, along with updated submissions, subject to any directions or orders made by the General Division.

[48] To avoid any potential for an apprehension of bias, the matter should be assigned to a different Member of the General Division and the decision of the General Division should be removed from the record.

Janet Lew
Member, Appeal Division