Citation: ***V. E. v. Minister of Employment and Social Development,*** **2015 SSTAD 1443**

Date: December 15, 2015

File number: AD-15-259

APPEAL DIVISION

Between:

V. E.

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 Teleconference on December 11, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	V. E.
Counsel for the Appellant	Kathleen Cullin
Counsel for the Respondent	Duane Schippers

INTRODUCTION

[1] The Appellant claimed that she was disabled by injuries from a motor vehicle accident, which included chronic pain, physical limitations, and mental illness. The Respondent denied her claim initially and after reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held an in person hearing and on March 24, 2015 dismissed the appeal. The Appellant requested leave to appeal this decision to the Appeal Division of the Tribunal. Leave to appeal was granted on May 25, 2015. The *Social Security Tribunal Regulations* provide that once leave to appeal to the Appeal Division is granted the parties may file written submissions. The Respondent filed written submissions; the Appellant did not. I considered the written material in the appeal file and oral submissions of the parties in making my decision.

[2] The Appellant argued that the General Division decision should be set aside because it erred in its findings regarding her decision not to undergo specific surgery or take certain medications, and her accessing of community based counselling. The Respondent argued that the General Division decision was reasonable and that there was no reason for the Appeal Division to intervene.

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

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

b) The fact that the Appellant or other parties was represented;

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit; and

d) The fact that the Appellant and her counsel were located in different cities some distance from one another.

STANDARD OF REVIEW

[4] The Respondent made lengthy written submissions regarding what standard of review should be applied to the General Division decision. It argued that for questions of fact and mixed law and fact the standard of review should be reasonableness, and that for questions of law it should be 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 questions of jurisdiction, and questions of law that are of importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

[5] Recently, in *Canada (Attorney General) v. Jean*, 2014 FCA 242 the Federal Court of Appeal stated that the Appeal Division should not conduct a detailed analysis of what standard of review is to be applied to the decisions of the General Division of this Tribunal, but should determine whether any ground of appeal set out in section 58 of the *Department of Employment and Social Development Act* should succeed. In this case, both counsel agreed that the Appeal Division need not show deference to the General Division on questions of law.

[6] Therefore, I must decide if the General Division erred in law or in fact such that its decision cannot stand.

ANALYSIS

[7] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered. Section 59 sets out what remedies the Appeal Division may give in the event an appeal succeeds (these provisions are set out in the Appendix to this decision). The parties' submissions on appeal addressed only the grounds of appeal upon which leave to appeal was granted. I did not consider the other grounds of appeal that were raised in the application requesting leave to appeal but were found not have a reasonable chance of success on appeal.

[8] Leave to appeal was granted on the basis that the General Division may have erred by not applying the legal principles set out in *A.P. v. Minister of Human Resources Development*, December 15, 1999 CP 26308 (PAB) which it referred to in its decision to the facts of the case before it. Counsel for both parties agreed that this decision was relevant to the matter at hand, and that it stands for the legal principle that a disability pension claimant has an obligation to aggressively seek out treatment and make reasonable and realistic efforts to obtain work within her limitations. The General Division concluded that the Appellant did not comply with this legal obligation. The Appellant argued that she had made every genuine effort to help and rehabilitate herself. She could not afford to pay for treatment. She elected not to pursue one surgery that was discussed with her doctor as there was no guarantee that it would reduce her pain (her main complaint). Also, the Appellant contended that she took prescribed narcotic medication but it did not improve her condition such that she would be able to return to work, and it resulted in her "being not present" for her children. She therefore terminated this treatment. The Appellant contended that these were reasonable decisions based on all of the circumstances.

[9] Counsel for the Respondent argued that it was clear from reading the decision that the General Division was not satisfied that the Appellant was disabled under the *Canada Pension Plan*. He submitted that the General Division did not err in referring to the *A.P.* decision, and that it applied the principles of the decision to the facts of the matter before it. The decision set out that the Appellant had not aggressively pursued treatment options as she declined to undergo surgery, provided inconsistent evidence regarding her use of narcotic medication and did not follow other treatment recommendations. He also submitted that although the Appellant might

not agree, it was within the purview of the General Division to accept the written evidence regarding the Appellant's ability to work with appropriate pain management over her oral testimony on this issue, and that the decision set out clearly why it preferred this written evidence.

[10] I am not persuaded that the General Division decision contained an error as set out in section 58 of the Act regarding the application of the *A.P.* decision to the facts of this matter. The General Division correctly and clearly set out the legal principles from this decision. It applied them when it considered the Appellant's compliance with treatment recommendations including her decline of surgery and continuation of chiropractic treatment, her follow up with various treatments including medication trials, and that she made no further attempts to work. Although the decision may not have contained all of the evidence and arguments presented in this regard, and perhaps could have been clearer in how it applied the legal principles to the facts at hand and the conclusion reached as a result, the decision is intelligible and can be justified on the facts and the law.

[11] Leave to appeal was also granted on the basis that the General Division may have erred when it stated that "there is no indication that the Appellant attempted to access community based resources." The Appellant argued strenuously that the General Division acted beyond its jurisdiction in making this statement, and relying on it to make its decision in this matter. She argued that there was no evidence before the General Division of any community based resources that the Appellant could have accessed. She further argued that a Tribunal is without any authority to take judicial notice of facts because it has no inherent jurisdiction to do so. In addition, the Appellant resides in Northeastern Ontario where there are limited community and medical resources that the Appellant could access. She contended that the General Division, having evidence of the scarcity of community resources and the Appellant's inability to afford treatment before it, improperly made an adverse inference against the Appellant for not accessing and paying for such treatments.

[12] Counsel for the Respondent argued that this ground of appeal was not properly characterized as a jurisdictional error; it was more correctly characterized as one of fact. He submitted that the statement in the General Division decision regarding community resources

was a further comment on the Appellant's lack of effort to follow up on treatment or to aggressively rehabilitate herself as required under the law. He further argued that it was "well known" that community resources for counselling existed, and that the Appellant could have accessed them if she wished to.

[13] I concur with the Respondent's characterization of this ground of appeal as an error of fact and not one of jurisdiction. The General Division considered that the Appellant had not accessed community based treatment in making its decision. The General Division decision implied that there were community resources available that the Appellant could have accessed. No evidentiary basis for this conclusion was set out, and the Appellant gave no evidence on this issue. In fact, there was evidence before the General Division that such resources were scarce where the Appellant lives. I do not agree that it is "well known" that these resources exist as they do not in many communities. I am satisfied that the General Division erred in fact when it implied that the Appellant had not accessed community based resources that were available to her for treatment. I am satisfied that the General Division based its decision, in part, on this erroneous finding of fact which was made in a capricious manner or without regard to the evidence before it. The General Division erred in this regard.

[14] The Respondent argued that the standard of review to be applied to this appeal was that of reasonableness. He contended, based on the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 that the proper approach was to consider the reasons for decision as a whole, not to examine the decision "line by line", and determine if it is intelligible, logical, if the reasons permit one to understand the evidentiary basis for the decision and why the decision was made. He contended that although the General Division decision may not refer to each and every piece of evidence and argument raised, this was not necessary if it was intelligible and the reader could understand the decision that was made and why. I agree.

[15] In this case, aside from the fact that there was no evidence regarding the availability of community resources, the facts of the matter were not in dispute. It was not contested that the Appellant suffered injuries in a motor vehicle accident, or that her condition did not resolve completely with various treatments. It was also not disputed that the Appellant did not continue

with all of the treatment that was recommended, including medication and surgery. The Appellant disagreed with the conclusion that the General Division drew from this. However, the Appellant's disagreement with the decision is not a legal basis upon which the decision may be overturned.

[16] The General Division decision summarized the oral and written evidence that was before it. It weighed the evidence, and set out why it preferred some evidence over other evidence. The decision, when read as a whole, is logical, transparent and intelligible. The conclusion is within the range of possible outcomes that are defensible on the facts and the law.

[17] I am not satisfied that the error made in the decision regarding the Appellant's failure to access community resources casts doubt on the decision as a whole. This was but one factor that was considered, along with the Appellant's functional abilities, the inconsistent evidence regarding medication use, the follow up on various treatments and the other evidence that was presented.

[18] For these reasons, the appeal is dismissed.

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.