**Citation:** ***J. R. v. Minister of Employment and Social Development,*** **2015 SSTAD 1461**

**Date: December 21, 2015**

**File number: AD-15-225**

**APPEAL DIVISION**

**Between:**

**J. R.**

**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 December 16, 2015**

## REASONS AND DECISION

## PERSONS IN ATTENDANCE

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|---|---|
| The Appellant | J. R. |
| Counsel for the Appellant | Steven Yormak |
| Counsel for the Respondent | Hasan Junaid |
| Observer | Laura Penney |

## INTRODUCTION

[1] The Appellant claimed that she was disabled by chronic pain that began in one shoulder and physical limitations when she applied for a *Canada Pension Plan* disability pension. 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 a hearing by teleconference and dismissed the appeal.

[2] On May 11, 2015 the Appellant was granted leave to appeal this decision to the Appeal Division of the Tribunal. Leave to appeal was granted on the basis that the General Division may have erred as it did not consider that the basis of the Appellant's claim was that she suffered from chronic pain disability although that was argued before it, that it may have taken some of the evidence presented out of context, and that the General Division may not have considered all of her physical limitations in reaching its decision.

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

a) The complexity of the issues under appeal;

b) The fact that the appellant or other parties were represented; and

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

d) The nature of the issues on appeal and the submissions made by the parties.

**PRELIMINARY MATTER**

[4] Counsel for the Appellant filed medical reports in support of this appeal, which were marked as AD4, AD5 and AD6. These reports were not before the General Division when it made its decision. Counsel for the Respondent argued that these reports should not be considered on the appeal as they were not before the General Division, and this appeal was not a new hearing of the disability claim. In addition, counsel argued that the presentation of new evidence is not a ground of appeal that can be considered on an appeal from a General Division decision.

[5] Counsel for the Appellant suggested that the content of these medical reports was, essentially, already before the Tribunal as the information contained in them was simply to update the Tribunal on the Appellant's medical condition. He suggested that as the matter was before an administrative tribunal, there was more "leeway" regarding the admission of evidence on appeals.

[6] I acknowledge that rules of evidence and rules of procedure may not be as strictly applied in matters before administrative tribunals as in the court. However, this Tribunal is bound by the legislation that governs it. The *Department of Employment and Social Development Act* sets out clearly in section 58 the only grounds of appeal that can be considered. The presentation and evaluation of new evidence is not a ground of appeal. Therefore the additional medical evidence presented by the Appellant and marked as AD4, AD5 and AD6 were not considered in making the decision in this matter. I considered the written submissions in the appeal file and the oral submissions of the parties in making my decision.

**STANDARD OF REVIEW**

[7] The Respondent filed lengthy submissions regarding the standard of review that ought to be applied in this case. The leading case on this is *Dunsmuir v. New Brunswick* 2008 SCC 9 where 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.

[8] Recently, the Federal Court of Appeal, in *Canada (Attorney General) v. Jean*, 2015 FCA 242 stated that a standard of review analysis may not be appropriate and instead the Appeal Division of this Tribunal should determine whether any grounds of appeal as set out in section 58 of the Act should succeed. Counsel for the Appellant was not aware of this decision prior to the hearing. Upon being made aware of it, he argued that this was the correct approach to be taken. Counsel for the Respondent submitted that the comments made in the *Jean* decision were made in *obiter*, and not binding on the Tribunal. The Federal Court of Appeal has not decided what standard of review should be applied by the Appeal Division when reviewing a decision of the General Division of the Tribunal. On examining the wording of the Act, however, it is clear that some deference is to be shown to the General Division on questions of fact, and no deference is to be shown on questions of law.

[9] I must decide if the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it, or if it erred in law in its decision.

**ANALYSIS**

[10] First, the Appellant submitted that the basis of her disability claim was chronic pain. This was referred to in numerous medical reports, described both as myofacial pain and as chronic pain. On appeal, the Appellant contended that the General Division erred in law because it did not consider her chronic pain condition, and as a result misdirected itself as to the law on this issue. The Appellant referred to the Supreme Court of Canada Decision of *Nova Scotia (Worker's Compensation Board) v. Martin*, [2003] S.C.R. 504 which recognized chronic pain as a medical condition, and that it could be disabling. In addition, she referred to the Pension Appeals Board decision in *Minister of National Health and Welfare v. Densmore* (1993, CP 2389) which decided that a decision maker must refer to a claimant's credibility to

decide whether to accept or reject her claim of the level of her disability caused by pain. The Appellant claimed that as the General Division decision did not assess her chronic pain, it erred and the decision should not stand.

[11] In contrast, counsel for the Respondent submitted that the General Division did consider her pain, and referred to specific paragraphs in the decision which summarized her evidence regarding her pain and how it affected her. Counsel contended that this demonstrated that the General Division was alive to this issue and considered it appropriately.

[12] I am persuaded by the Appellant that the General Division erred in this regard. While I accept that the decision summarized the Appellant's evidence regarding the effects of pain on her activities, I also am satisfied that the General Division did not turn its mind to her chronic pain condition. Chronic pain is a condition that is difficult to measure or to treat. It is not the same as having a sore shoulder from an injury. It can affect all aspects of a claimant's life. The General Division decision did not contain any consideration or analysis of this, and made only scant reference to any medical evidence in this regard.

[13] In addition the Federal Court of Appeal, in *Bungay v. Canada (Attorney General)*, 2011 FCA 47 stated clearly that when deciding if a claimant is disabled, all of her conditions, together, are to be considered. The General Division erred by not doing so in this case.

[14] Counsel for the Appellant argued that the General Division also erred as it did not assess the Appellant's credibility and that this was necessary to a proper weighing of her evidence regarding chronic pain and its impact on her. Counsel for the Respondent argued that because leave to appeal was not granted on the basis of this ground of appeal, it was not open to be argued on appeal. The leave to appeal decision on this issue was final.

[15] I am not persuaded by the Respondent's argument. The decision that granted leave to appeal did just that, and did not limit what grounds of appeal could be argued on the hearing of the appeal.

[16] For the reasons set out above, I am persuaded that the General Division did not consider or weigh the evidence regarding the Appellant's chronic pain. It made no finding of credibility, which is not an error in itself. However, as the Appellant's disability claim in this

case was based on a condition that cannot be empirically measured, the Appellant's testimony formed the evidentiary basis for the decision to be made on this issue. Therefore, the decision should set out whether it accepted or rejected the Appellant's evidence and how that evidence was weighed. The General Division did not do so in this case.

[17] Counsel for the Respondent also argued that the General Division focused not on the diagnosis of the condition, but on its impact on the Appellant's capacity to work, which is the proper legal test to be considered (see *Klabouch v. Canada (Social Development)*, 2008 FCA 33). He pointed to medical reports that stated that the Appellant had physical limitations (e.g. lifting, overhead work, etc.), but did not say that the Appellant was unable to work. He also referred to reports from the Appellant's family doctor and nurse practitioner that stated that she may be able to return to sedentary work.

[18] In response to this, counsel for the Appellant argued that these letters did not say that the Appellant had the capacity to pursue substantially gainful employment, only that she might be able to do so. Accordingly, it was not appropriate for the General Division to rely on this as evidence that the Appellant's treating practitioners concluded that she had capacity to complete sedentary work.

[19] The General Division correctly focused on whether the Appellant had any capacity to pursue substantially gainful work rather than on the diagnosis of her condition. I am not persuaded that the General Division decision contained a reviewable error regarding how it weighed the medical evidence of her capacity to return to sedentary work. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 the Federal Court of Appeal stated that it is for the trier of fact, the General Division in this case, to hear the evidence and weigh it; not for the decision maker to do so on appeal. The General Division decision set out the basis for its weighing of the evidence regarding the Appellant's potential to return to work. It is logical and transparent. It made no error in doing so.

[20] The Appellant also contended that the General Division erred as it did not consider her neck and elbow pain. I agree with the Respondent's contention that it did so. The General Division referred to these conditions and considered their impact on the Appellant's capacity to work.

[21] Finally, leave to appeal was granted on the basis that the General Division may have erred as it did not refer to the fact that an employment agency concluded that she was unemployable after she finished a work trial at Home Depot. The decision set out that in this position, the Appellant was not able to complete all the tasks assigned to her due to her physical limitations. However, the Appellant also testified that if she had been offered employment at the end of the work trial she would have accepted it. The Appellant argued that because the decision did not also set out that the Appellant was found to be unemployable after this work trial, the evidence regarding the work trial was considered outside of its proper context. The Respondent contended that the evidence further demonstrated that the Appellant had some capacity to work. It also argued that even if the General Division had considered that the employment agency found that she was unemployable it would not have changed the conclusion reached in this case, as that would be weighed against the medical evidence that stated that she may return to sedentary work.

[22] The law is clear that written reasons for a decision need not mention each and every piece of evidence that was before the decision maker (*Simpson*). However, the decision should allow the parties to understand what the decision was and why it was made. If the parties are to understand why the decision in question was reached it is important that the summary of the evidence be presented in context. It is not clear to me that the General Division did so in this case. The Appellant's participation in the work trial and her willingness to have accepted further employment at Home Depot was properly reported and considered by the General Division. However, the fact that the employment agency determined that she was unemployable was crucial to an understanding of the entire context of the work trial and its outcome. This was not considered. I do not agree with the Respondent's submission that if the General Division had considered this, there would have been no change to the decision made. That is pure speculation. On an examination of the written decision and the material before me, it appears that the Appellant being found to be unemployable was not considered or weighed by the General Division in making its decision. This resulted in a finding of fact, that the Appellant had capacity to return to sedentary employment, being made without regard to all of the material that was before the General Division. The decision was based at least in part on this finding of fact. This is a reviewable error.

[23] In *Newfoundland and Labrador Nurses' Association v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 the Supreme Court of Canada decided that the reasons for decision are to be examined together with the outcome to determine if the decision falls within the range of possible outcomes. In this case, I am satisfied, on balance that the General Division did not consider the Appellant's chronic pain condition as the basis of her disability claim, and as a result erred in law and the application of the law to the facts before it. I am also persuaded that the General Division based its decision regarding her capacity to return to sedentary employment on an erroneous finding of fact made without regard to all of the material before it. The appeal must be allowed.

**REMEDY**

[24] Section 59 of the *Department of Employment and Social Development Act* sets out the remedies that the Appeal Division can grant on an appeal. In this case, counsel for the Appellant requested that I give the decision that the General Division should have given and find that the Appellant was disabled under the *Canada Pension Plan*. I am not persuaded that this is the appropriate remedy. In order to properly decide if the Appellant is disabled it is necessary that all relevant evidence be presented and weighed. The General Division of the Tribunal is charged with hearing and weighing evidence, not the Appeal Division. The matter is referred back to the General Division for reconsideration. In order to avoid any potential apprehension of bias it should be assigned to a different General Division Member, and the decision dated February 12, 2015 is to 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.