Citation: ***L. T. v. Minister of Employment and Social Development*, 2015 SSTAD 1462**

Date: December 21, 2015

File number: AD-15-181

APPEAL DIVISION

Between:

L. T.

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 November 25, 2015, Windsor, Ontario and by teleconference on December 18, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	L. T.
Counsel for the Appellant	Patrick Castagna
Counsel for the Respondent	Stéphanie Yung-Hing

INTRODUCTION

[1] The Appellant claimed that she was disabled by anxiety and abdominal pain 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* in April 2013. The General Division held a teleconference hearing and on January 30, 2015 dismissed the appeal.

[2] The Appellant was granted leave to appeal by the Appeal Division of the Tribunal on April 24, 2015, on two grounds: that the General Division may have erred when it stated that the Appellant had not received any treatment including medication for abdominal pain after her surgery in 2011, and that it may have erred when it relied on the Appellant's testimony that her family physician recommended that she return to work part time when medical reports from this doctor stated that she was unable to work.

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

The complexity of the issues under appeal;

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

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

STANDARD OF REVIEW

[4] The leading case regarding what standard of review is to be applied to decisions by a court on judicial review 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] 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 to grant leave to appeal a decision of the General Division and section 59 sets out the remedies that the Appeal Division may grant if an appeal is successful (see the Appendix to this decision).

[6] In *Canada (Attorney General) v. Jean*, 2015 FCA 242 the Federal Court of Appeal stated that the Appeal Division of the Social Security Tribunal should not subject appeals before it to a standard of review analysis, but should determine whether any grounds of appeal as set out in section 58 of the *Department of Employment and Social Development Act* should succeed.

[7] Counsel for the Respondent argued that the wording of sections 58 and 59 of the Act indicate that the Appeal Division should show deference to the General Division on questions of fact and questions of mixed fact and law, but show no deference to the General Division on questions of law. Counsel for both parties agreed that in this case the General Division decision should be reviewed on a deferential basis because the appeal involves questions of mixed fact and law. I concur. Hence, I must decide if the General Division decision contained an error of mixed fact and law such that it cannot stand.

ANALYSIS

[8] The Appellant was granted leave to appeal; first, on the basis that the General Division may have erred when it stated that the Appellant had not received any treatment including medication since shortly after her surgery in 2011. The Appellant argued that this was incorrect.

He listed, from the medical reports filed with the Tribunal, a number of medications that were prescribed to the Appellant for abdominal pain. These provided no relief. He referred to Dr. Correia's reports dated January 2012, which summarized the Appellant's treatment history including numerous colonoscopies, endoscopies, laparoscopies, medications and other diagnostic testing. He also referred to the prescription history that was filed as evidence that in May 2012, almost one year after the surgery, another abdominal pain medication was prescribed.

[9] Counsel for the Appellant argued further that in January 2012 Dr. Correia stated that if the treatment recommended at that time did not provide relief, the only option was to concentrate on treating the Appellant's mental health symptoms. The Appellant did so as she continued to see her psychiatrist until 2013.

[10] In contrast, counsel for the Respondent argued that the General Division did not err in this regard as it relied on the Appellant's testimony at the hearing. She testified that she only took medication for a short time after the surgery. Further, Dr. Sherman's report of July 30, 2013 prescribed various medications to be taken "as needed", which indicated that they were not taken regularly. She contended that when this evidence is examined as a whole, it was reasonable for the General Division to conclude that the Appellant did not have treatment or medication since shortly after her surgery.

[11] Counsel for the Respondent also argued that if this was an error, it did not warrant intervention by the Appeal Division because this was only one factor that the General Division considered in reaching the decision that the Appellant was not disabled. It also considered her minimal use of medication for anxiety, the absence of specialists seen after January 2012, the absence of evidence of serious mental illness and evidence of work capacity with no attempt to work or retrain.

[12] I accept that the Appellant testified that she did not take medication except shortly after her 2011 surgery. However, a review of the medical reports indicates that a number of medications were tried without success, even one year after the surgery. The Appellant consulted with Dr. Correia in January 2012 and was prescribed further medication by him some months after that. Hence I am satisfied that the General Division made an erroneous finding of fact in this regard.

[13] In order for this erroneous finding of fact to be a ground of appeal under section 58 of the Act, however, it must have been made in a perverse or capricious manner or without regard to the material before the General Division. I am not satisfied that it was. The General Division finding of fact was based on the Appellant's testimony. It was not a perverse or a capricious finding of fact. The General Division decision also contained a summary of the medical evidence, including Dr. Correia's report. The General Division is presumed to have considered all of the evidence that was before it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). This presumption was not rebutted. I am therefore satisfied that this finding of fact was not made without regard to the material that was before the General Division. The appeal cannot succeed on this basis.

[14] Leave to appeal was also granted on the basis that the General Division may not have given sufficient reasons regarding why it discounted the family physician's report in July 2012 that stated that the Appellant was unable to work in light of contradictory testimony that this doctor recommended that the Appellant try to return to work for four hours each day. Counsel for the Appellant contended that while the doctor may have said that the Appellant could try working, it was not a recommendation, and there was no follow up on it. The General Division should not have placed weight on this, but should have placed weight on the written reports.

[15] Counsel for the Appellant submitted that the General Division also should not have discounted Dr. Sherman's report of July 2012 that stated that the Appellant was unable to work. The General Division decision stated that it did so as the report did not set out any basis for reaching this conclusion. However, the Appellant argued, this report was consistent with the comments that Dr. Sherman made in all of the prior reports that she had written and were filed with the Tribunal. If the report were to be examined in context of the entire medical file the basis for the conclusion was clear. Weight should therefore have been given to this report in reaching the decision in this matter.

[16] Counsel for the Respondent argued that Dr. Sherman's 2012 report did not refer to the Appellant's capacity to work at the relevant time (being December 31, 2011), so this report was properly discounted by the General Division.

[17] I accept that the Appellant disagreed with the General Division decision to not give weight to Dr. Sherman's 2012 report. However, her argument asks this Tribunal to reweigh the evidence to reach a different conclusion. In *Gaudet v. Attorney General of Canada*, 2013 FCA 254 the Federal Court of Appeal held that a reviewing tribunal is not to retry the issues, but to assess whether the outcome was acceptable and defensible on the facts and the law. The General Division considered this report and provided logical reasons based on the evidence for discounting it. It made no reviewable error in this regard.

[18] Counsel for the Appellant also submitted that that he did not understand the basis for the General Division conclusion that the Appellant did not try to return to work because she did not wish to jeopardize receipt of long term disability payments from her employer. Counsel for the Respondent referred to the recording of the hearing where the Appellant testified to this. The General Division did not err in referring to this testimony in its decision.

[19] The Appellant also disagreed with the statements in the General Division decision that the Appellant had not consulted with specialists after 2012 and that her treatment was conservative. Counsel argued that the Appellant consulted with numerous specialists in various cities in Ontario and one in the United States, and after the surgery consulted with two further specialists. In addition, the numerous diagnostic procedures she underwent should not be described as conservative. Again with this argument the Appellant has asked the Appeal Division to reweigh the evidence that was presented to the General Division. For the reasons set out above, I am not persuaded that the Appeal Division should intervene on this issue.

[20] The Appellant relied on the decision of the Pension Appeals Board in *Mainville v. Canada (Minister of Human Resources Development)*, July 4, 1997 CP04873 to support her claim. In that case the Claimant complained of various abdominal maladies and underwent a number of surgeries and other treatments without resolution of her symptoms. The Pension Appeals Board concluded that the Appellant was disabled based on reports from the urologist and family physician that stated that she was not likely to be gainfully employed. While Ms. Mainville suffered from similar symptoms as the Appellant, the decision can be distinguished on the facts from the matter at hand. Ms. Mainville underwent a number of surgeries, and her urologist and family physician stated that she was unable to work. In the case before me, the

Appellant underwent one surgery (which did not resolve her symptoms), and there was no medical opinion at the relevant time that stated that she could not work. Therefore I do not find this decision persuasive.

[21] Finally, the Appellant argued that the General Division erred when it stated that she did not suffer from a severe mental health condition. Her counsel relied on the fact that the Appellant continued to see her psychiatrist for three years, and her family physician took over prescribing mental health medication after he became ill then passed away. Counsel for the Respondent countered this argument by pointing to the time reference in the recording of the General Division hearing where the General Division Member advised the Appellant that the psychiatrist had passed away as she was unaware of this. She also argued that the General Division decision reviewed the oral and medical evidence when it decided that her mental illness was not severe. It made no error in so doing.

[22] I agree with the Respondent's argument in this regard. The General Division decision considered and weighed the oral testimony and the documentary evidence regarding her mental illness. It logically concluded that this condition was not severe and the evidentiary basis for this conclusion was set out. I cannot find that it made any error in so doing.

[23] The Respondent also argued that the General Division also properly considered that the Appellant had made no effort to find alternate work or retrain after she left her job due to pain and mental illness. The decision correctly stated and applied the law on this issue.

[24] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 the Supreme Court of Canada decided that when reviewing a decision, the reasons and the result must be examined together to decide if the result falls within the range of possible outcomes. In this case, when the outcome of the decision is viewed together with the reasons given by the General Division, and for the reasons set out above I am satisfied that the decision falls within the range of outcomes that is defensible on the facts and the law. The General Division decision contained no errors that warrant intervention by the Appeal Division.

CONCLUSION

[25] For the reasons set out above, 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.