Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 344

Tribunal File Number: AD-15-1139

BETWEEN:

D. D.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: March 31, 2016

DATE OF DECISION: September 1, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Appellant	D. D.
Appellant's Representative	Robert Coulombe (counsel)
Respondent	Jennifer Hockey (counsel)

OVERVIEW

[1] This is an appeal of the decision of the General Division dated July 21, 2015. The General Division determined that the Appellant did not have a severe disability by the end of her minimum qualifying period of December 31, 2007 and that she therefore was not eligible for a Canada Pension Plan disability pension.

[2] The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division on October 29, 2015. An Appeal Division member granted leave to appeal on November 4, 2015, on two grounds:

(1) the General Division may have erred in relying on an external agency's decision to enroll the Appellant in a vocational rehabilitation program as a basis to find that she had the capacity regularly of pursuing a substantially gainful occupation, and

(2) the General Division may have erred when it found that the Appellant had the capacity to work as a cashier, despite conflicting evidence which it may not have considered. The Appeal Division also alluded to the possibility that the reasons of the General Division may have been inadequate.

[3] At the hearing of this appeal, the Appellant raised a third ground of appeal. He submitted that the reasons of the General Division were insufficient.

[4] After the hearing of this appeal, both parties filed written submissions. The Respondent filed submissions on April 8, 2016, while the Appellant filed a response on April 27, 2016

[5] To succeed on this appeal, the Appellant must establish that the General Division erred in law or that it based its findings on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUES

[6] The issues before me are as follows:

1. What is the nature of the appeal of decisions of the General Division to the Appeal Division?

2. Can an appellant raise any new grounds at the hearing of the appeal, including any which the Appeal Division had not previously granted leave to appeal?

3. Did the General Division do any of the following:

    a. rely on an external agency's decision to enroll the Appellant in a vocational rehabilitation program as a basis to find that she had the capacity regularly of pursuing a substantially gainful occupation;

    b. base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it, namely, that it found that the Appellant had the capacity to work as a cashier when there was evidence that stated otherwise; and

    c. if the answer to question 2 above is "yes", were the reasons of the General Division insufficient?

4. What is the appropriate disposition of this appeal?

GENERAL DIVISION DECISION

[7] The Appellant applied for a Canada Pension Plan disability pension on August 2, 2011. The Respondent denied her application initially and upon reconsideration. The Appellant appealed the reconsideration decision and the appeal was heard by the General Division.

[8] The General Division accepted that the Appellant has experienced pain and limitations involving her right wrist, hand and elbow since 2005, and that she continues to experiences limitations, despite having undergone various treatment modalities, including carpal tunnel surgery. The General Division also found that the Appellant's condition has deteriorated over time and that she has been unable to return to work as a hot-press operator.

[9] The General Division noted the Appellant's testimony that she had missed work prior to the end of her minimum qualifying period because of her back condition, but the General Division found that the medical evidence did not indicate to what extent her back and, for that matter, her depression, might have featured in her functionality and capacity.

[10] The General Division determined that the Appellant also experienced migraines, headaches and asthma but that these were managed with medication. The General Division also noted that the Appellant was affected by other medical ailments, but that these had either resolved with treatment, or did not interfere with her capacity regularly of pursuing any substantially gainful employment by December 31, 2007.

[11] The General Division found that there was little documentary medical evidence that the Appellant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2007. In particular, the General Division found that the Appellant's various health caregivers did not suggest that the Appellant was precluded from other forms of work activity. The General Division noted that the Workplace Safety and Insurance Board (WSIB) had assessed the Appellant as demonstrating some work capacity and that it thereby enrolled her in a vocational rehabilitation program. Initially the Appellant had been enrolled in a general office clerk program, but this was unsuitable, so she was enrolled in a cashier program. The General Division noted the evidence which indicated that the Appellant could not work as a cashier, but

concluded that she had been unable to complete a work placement for reasons unrelated to her health condition.

[12] The General Division also undertook a *Villani* analysis (*Villani v. Canada (Attorney General)*, 2001 FCA 248) when considering whether the Appellant's disability could be found severe in a "real world context", by looking at her personal characteristics.

[13] The General Division dismissed the appeal. The Appellant sought leave to appeal on several grounds. Leave to appeal was granted on the two grounds cited above.

ISSUE ONE: FORM OF HEARING

[14] The parties agree that the nature of the appeal before the Appeal Division does not allow for a re-hearing of the evidence and of any issues that were before the General Division. They also agree that it is not appropriate for the Appeal Division to conduct a judicial review analysis or standard of review analysis of decisions of the General Division: *Canada (Attorney General) v. Jean*, 2015 FCA 242. Rather, the Appeal Division should concern itself with the grounds of appeal and, from there, determine the appropriate degree of deference to accord to the General Division, before determining the appropriate disposition of the appeal.

ISSUE TWO: NEW GROUNDS OF APPEAL

[15] The Appellant argues that the General Division failed to provide sufficient reasons. However, the Respondent submits that the Appellant is precluded from raising any new grounds of appeal at the hearing of this matter, on which it had not previously sought and been granted leave to appeal. The Respondent argues that an appellant should not be entitled to raise new grounds at the hearing of the appeal, as this amounts to being ambushed. There would be no opportunity for the Respondent to either prepare or properly respond to any new grounds of appeal and this could therefore cause prejudice.

[16] While an adjournment of the hearing would address the Respondent's concerns about having a sufficient opportunity to respond to any new grounds, the hearing of this appeal proceeded without the need for an adjournment, as I provided the parties with an opportunity to file written submissions following the hearing of the appeal. This addressed the Respondent's

concerns that it would be prejudiced by the lateness at which this new ground is alleged to have arisen.

[17] The Appellant points to paragraph 11 of the leave decision, which reads that the "Application is granted as the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal". He claims that this shows that the Appeal Division did not specifically restrict leave to appeal to the grounds that were found to have a reasonable chance of success, and that this left it open for him to raise any new grounds.

[18] The Appellant submits that the Appeal Division has established that an appellant can raise new grounds of appeal, after leave to appeal has been granted. He relies on *P. M. v. Minister of Employment and Social Development,* 2016 SSTAD 12 at para. 16 for this proposition. There, the Appeal Division wrote that the "granting of leave to appeal was not specifically restricted to the grounds that were found that may have a reasonable chance of success". (As an aside, although the appellant P.M. argued that he should be permitted to raise new grounds of appeal, he did not actually raise any new grounds under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appellant P.M. filed a further medical report and argued that the medical opinions should be accepted as there was no issue concerning the credibility of his treating medical health caregivers, but these did not give rise to new grounds of appeal.)

[19] The Appellant notes that in the leave decision, the Appeal Division member specifically considered *Canada (Minister of Human Resources Development) v. Ash,* 2002 FCA 462. In *Ash,* the Pension Appeals Board accepted the Review Tribunal's conclusion that the respondent in that case was disabled by a stroke in 1989. Ash's disability therefore was not the subject of the appeal. The applicant sought an order setting aside the PAB's decision on the basis that it had erred in its interpretation of the Review Tribunal's conclusion that the respondent was disabled. The applicant was of the position that the PAB ought not to have restricted the issues before it and as it was rehearing the matter, ought to have determined whether Ash was disabled.

[20] Leave to appeal in *Ash* had been granted "in respect only of the following issues…" After quoting the decision granting leave, the PAB wrote, "The appeal therefore is restricted to the issue of whether … [the applicant] is entitled to a disability pension by reason of her June

1989 stroke (as acknowledged by the Tribunal)". The Federal Court of Appeal recognized that the PAB could have read the words "as acknowledged by the Tribunal" as referring only to the applicant's stroke and not to the fact that the disability itself had been acknowledged by the Review Tribunal, but it concluded that the PAB's interpretation or understanding of the leave decision was reasonable, and that its restriction of the issues before it therefore was appropriate.

[21] The Appellant claims that the same principles set out in *Ash* apply and that as the decision granting leave to appeal did not restrict the grounds upon which leave to appeal was granted, the Appeal Division should hear the additional ground.

[22] The Respondent, on the other hand, argues that the adequacy of reasons is "not a stand-alone ground of appeal" and "does not rise to the level of an error of law or procedural fairness", nor is a ground explicitly specified under subsection 58(1) of the DESDA, so ought not to be considered, irrespective of when the Appellant might have raised the ground. The Respondent argues the appeals process under the DESDA provides the parameters of the arguments to be made on appeal and that after leave to appeal has been granted, there is no mechanism to allow additional grounds of appeal to be raised. The Respondent contends that, otherwise, this defeats the purposes of a leave requirement as an appellant will be free to advance any arguments at the appeal, even those where leave to appeal was not granted or which were already raised before and rejected by the General Division. The Respondent argues that this could lead it to seek an adjournment and that it would be inconsistent with the Social Security Tribunal's general principle set out in section 2 of its *Regulations* that they are to be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.

[23] In *Ash*, the applicant was not required to set out any grounds of appeal before the PAB, as appeals before it were heard on a *de novo* basis. A distinguishing feature from appeals before the PAB and appeals that come before the Appeal Division is that, unlike appeals before the PAB, there is no entitlement to a *de novo* hearing. Rather, there must be grounds of appeal under subsection 58(1) of the DESDA which have a reasonable chance of success. (A leave application to the PAB also required grounds, but they were not restricted to those under subsection 58(1) of the DESDA.)

[24] In considering whether to grant what is essentially an application to add a new ground of appeal at this juncture, I must be mindful about balancing the Appellant's right to a fair opportunity to be heard against any potential prejudice to the Respondent and the parties' right to procedural fairness. I have to consider whether the Appellant has been dilatory, whether the Respondent received adequate notice of the newly asserted ground, and whether adding a new ground of appeal would unduly lengthen or delay the appeal proceedings.

[25] In determining whether to add a new ground, I must also consider whether that new ground can possibly succeed: *McKesson Canada Corp. v. R.*, 2014 FCA 290, which was an appeal from the Tax Court of Canada. The Federal Court of Appeal wrote:

> [8] As in the case of amendments to trial pleadings, the Court, faced with a motion to amend a notice of appeal, must ask whether the amendment is directed to the real merits at stake in the case. In considering this, the Court must understand the nature of the parties' case, assess whether the amendment is relevant to the determination of that case, and, where a new ground of appeal is being asserted, ask whether that ground can possibly succeed.
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> [9] In asking whether a new ground of appeal can possibly succeed, a motions judge should keep front of mind the demarcation of tasks between a motions judge and an appeal panel. The line drawn between the motions judge's task and the appeal panel's task depends on the certainty of the matter. Where it is clear cut or obvious that the new ground will fail, the motions judge should not allow it to enter the appeal. If, on the other hand, reasonable minds could differ on the merits of the new ground, the motions judge should allow the new ground to enter the appeal, leaving its ultimate resolution to the panel hearing the appeal.
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> By way of analogy on evidentiary points, see *Collins v. Canada*, 2014 FCA 240 (CanLII) at paragraph 6.

[26] The Federal Court of Appeal indicated that it would have been better had the appellant brought the motion to amend the pleadings sooner, but the appellant had not been dilatory and there was nothing unfair about introducing the new ground into the appeal at that time. In that case, fairness supported an amendment. Introduction of the additional ground into the appeal and the resulting need for memoranda was seen as not appreciably delaying the appeal. The respondent had not alleged any other sort of prejudice. On this basis, the Federal Court of Appeal permitted the appellant to amend its notice of appeal to introduce the new ground of appeal.

[27] It is unclear when the Appellant became aware of the alleged new ground or why it could not have been raised in the application requesting leave to appeal. It appears however that the new ground arose following the decision granting leave to appeal. The Appeal Division member referred to the ground in her reasons, at paragraph 9, where she wrote:

> Finally, if the Applicant submitted that the General Division erred in concluding that the Applicant would be able to work as a cashier in the face of the report by Dr. Young that specifically stated that she could not do this, and the Applicant's testimony that she could not do so. The General Division decision referred to the Applicant's testimony in this regard. It is not clear, however, if it considered Dr. Young's opinion on this issue. In *R. v. Sheppard* , 2002 SCC 26, the Supreme Court of Canada stated that a decision must give reasons for findings of fact made upon disputed evidence and upon which the outcome of the case is largely dependent. In this case, the General Division decision may not have done so adequately. The decision was dependent, at least in part, on its finding that the Applicant could work as a cashier in the face of conflicting evidence on this. (My emphasis)

[28] The Appeal Division queried whether the General Division had provided adequate reasons. While the Appellant may not have raised the issue of the adequacy of reasons in the leave application, the Appeal Division clearly granted leave to appeal on this ground, and on this basis, the Respondent ought not to have been caught by surprise.

[29] The Respondent argues that the adequacy of reasons is not a stand-alone ground of appeal. I do not accept this argument, as there is a large body of jurisprudence in which the courts have classified the failure to deliver meaningful reasons either an error of law or a breach of the principles of natural justice. For instance, although a criminal matter, the Supreme Court of Canada in *R. v. R.E.M.*, [2008] 3 SCR 3 at para. 10, quoted *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, at para. 43 (in the administrative law context), that "it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision".

[30] As the Appeal Division member raised the issue of the sufficiency of reasons in her leave decision, I accept that this issue raises a reasonable chance of success on appeal and am prepared to consider it as a ground of appeal.

ISSUE THREE: GROUNDS OF APPEAL

(a) WSIB decision

[31] At paragraph 94 of its decision, the General Division wrote:

> [94] . . . The decision of the WSIB to enroll the Appellant in a vocational rehabilitation program is indicative of the Appellant having some work capacity.

[32] The Appellant submits that the General Division erred in relying on WSIB's decision to enroll the Appellant in a vocational rehabilitation program as a measure of capacity. The Appellant argues that WSIB's enrollment of the Appellant in a vocational rehabilitation program should not be viewed as any measure or indication of capacity.

For one, WSIB's decision has not been independently tested and two, WSIB's decision is in the process of being appealed by the Appellant.

[33] The Respondent on the other hand concedes that the statement by the General Division suggests that it tied the Appellant's enrollment in a program to capacity, but submits that the statement ought not to be viewed in isolation without considering the context and background. The Respondent notes that after making the statement, the General Division then proceeded to examine the Appellant's work placement, the hours of work, and how her health condition might have impacted the placement.

[34] Leave to appeal had been granted on the basis that it did not appear that the General Division had considered that the Appellant was appealing the WSIB decision. The Appeal Division member indicated that this may have resulted in an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Irrespective of that consideration, the primary issue is whether enrollment in a vocational rehabilitation program alone measures capacity regularly of pursuing any substantially gainful occupation. Besides, the WSIB decision stands, pending the outcome of any appeal or stay of proceedings.

[35] While it is true, as the Respondent suggests, that the General Division proceeded to examine the Appellant's work placement, her hours of work and how her health condition might have impacted the placement, the Respondent's submissions that the General Division was

addressing the incapacity issue seem to be undercut by the sentence which immediately precedes and follows the impugned statement. The passage in its entirety reads:

> . . . In this regard, the Court has stated that where evidence of work capacity exists, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The decision of the WSIB to enroll the Appellant in a vocational rehabilitation program is indicative of the Appellant having some work capacity. The Tribunal then considered whether the Appellant had shown that effort at obtaining and maintaining employment has been unsuccessful by reason of her health condition and the Tribunal found that the Appellant did not meet this test.

[36] It appears, for the most part, that the General Division focused on whether the Appellant met the requirements under *Inclima*, rather than on whether she had any work capacity or was incapable regularly of pursuing any substantially gainful occupation. It is instructive that, after finding WSIB's decision indicative of some work capacity, the General Division stated that it was "then consider[ing] whether the Appellant had shown that effort at obtaining and maintaining employment has been unsuccessful …"

[37] And, in the following paragraph, the General Division indicated that it had not been provided with any evidence to indicate that the reason the Appellant did not get any of the jobs she applied for was related to her health condition. Paragraph 95 suggests that the General Division was examining whether the Appellant had shown that efforts at obtaining and maintaining employment had been unsuccessful by reason of her health condition rather than examining whether she had work capacity.

[38] Paragraphs 94 and 95 of the decision, when read together, suggest that the General Division determined that the Appellant had some work capacity by reason of the WSIB's decision alone. There is no doubt that the General Division acknowledged that WSIB had assessed as having exhibited some work capacity because she was enrolled in a vocational rehabilitation program, however, these two paragraphs, along with paragraph 89, should not be viewed in isolation.

[39] A review of the analysis section indicates that the General Division had addressed the issue of the Appellant's capacity in its review of the medical evidence. For instance, at

paragraph 86, the General Division wrote, "… there was no indication in the medical evidence as to how much of a contributing factor [her back] condition was to her overall capacity to function". At paragraph 87, the General Division wrote, "The difficulty with the documentary evidence on file is that there is very little evidence from the Appellant's healthcare practitioners indicating that the Appellant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2007". At paragraph 88, the General Division noted that it had reviewed the reports from the other doctors whom the Appellant had consulted. The member found it significant that the reports did not appear to preclude other forms of work activity. In fact, one medical practitioner thought it would be wise for the Appellant to undergo a functional capacity evaluation and vocational assessment. From this, the General Division inferred that the Appellant must have exhibited some work capacity, for the practitioner to recommend she undergo further evaluation and assessment.

[40] Had the General Division relied solely on WSIB's enrollment of the Appellant in a vocational rehabilitation program to find that she had work capacity, I would have deemed that an error, but clearly, the General Division analyzed the medical evidence to come to this determination.

(b) Cashier

[41] The Appellant submits that the General Division's finding that the Appellant could work as a cashier constituted an erroneous finding of fact made without regard for the material before it, upon which it based its decision, in light of the family physician's opinion of November 20, 2012 (at GT1-94) otherwise.

[42] Leave to appeal was granted on the basis that it was unclear whether the General Division had considered the family physician's opinion that the Applicant could not work as a cashier. In this regard, the Appeal Division determined that the decision "may not have … adequately [given reasons]".

[43] At paragraph 9, the Appeal Division member wrote:

> [9] Finally, the Applicant submitted that the General Division erred in concluding that the Applicant would be able to work as a cashier in the face of a report by Dr. Young that specifically stated that she could not do this, and the Applicant's testimony that she could not do so. The General Division referred to the Applicant's testimony in this regard. It is not clear, however, if it considered Dr. Young's opinion on this issue. In *R. v. Sheppard*, 2002 SCC 26 the Supreme Court of Canada stated that a decision must give reasons for findings of fact made upon disputed evidence and upon which the outcome of the case is largely dependent.

[44] The family physician's memorandum dated November 20, 2012 (GT1-94) reads:

> I would say it would be impossible for her to work as a cashier, [sic] in fact it is hard to imagine a job that would be more difficult for her to manage. In my opinion she is disabled from any work, and will not improve.

[45] The family physician also prepared a similar opinion in his CPP Medical Report dated February 13, 2011 (at GT1-43 / GT2-70). Under the heading "prognosis", the family physician wrote, "Patient is unable to work at any job and her condition will worsen with time". Presumably the Appellant suggests that the General Division also failed to consider this report.

[46] There is a general presumption in law that a decision-maker considers all of the evidence before it, although this can be rebutted, if the evidence is of such probative value that it ought to have been specifically analyzed.

[47] The Appellant relied on several authorities, primarily on *B.P. v. Canada (Minister of Human Resources and Skills Development)* (January 17, 2013), CP28593 (PAB) and *Hunter v. Canada (Minister of Social Development)* (February 6, 2007), CP23431 (PAB), in which the Pension Appeals Board held that family physicians' reports are important and should be afforded significant weight. The Pension Appeals Board acted as the trier of fact, following hearings *de novo*, and was in the best position in which to determine the weight to assign to the evidence before it. I do not view these authorities as determinative of the issue as to whether the General Division failed to consider some of the evidence before it. In any event, decisions of the Pension Appeals Board have no precedential value and are not binding upon me.

[48] A review of the General Division's decision indicates however that it did specifically mention and consider the family physician's report of November 20, 2012. At paragraph 87, the General Division noted that the family physician had noted that it would be impossible for the Appellant to work as a cashier and that she was disabled from any work and would not improve. The General Division clearly rejected this opinion, as the member did not consider it relevant to her enquiry as to whether the Appellant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2007.

[49] I am also mindful of the pronouncement of the Supreme Court of Canada that some measure of deference must be afforded to the decision-maker as the trier of fact, given their "advantageous position when it comes to assessing and weighing vast quantities of evidence": *Housen v. Nikolaisen,* (2002) SCC 33 at para. 22. The Supreme Court of Canada also wrote:

> In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[50] The General Division member acknowledged the Appellant's testimony that she cannot work as a cashier. The member explained why she was unprepared to accept either the Appellant's testimony or the opinion of the family physician in this regard. She sifted through the salient facts, decided on their weight and then drew a factual conclusion. Given that the member specifically referred to the family physician's two medical reports (and for that matter, the Appellant's testimony), and explained why she was unprepared to accept them, I see no basis upon which I can find that she failed to consider the family physician's opinion. Moreover, I see no basis upon which it could be said that the reasons of the General Division were at all deficient in this regard.

(c) Adequacy of reasons

[51] It is obvious from the leave decision that the Appeal Division contemplated that the reasons of the General Division might have been deficient on the issue of whether the Appellant was capable of working as a cashier. However, the Appellant argues that the deficiency of the General Division's decision goes much farther. She submits that the General Division failed to

undertake any meaningful analysis where the psychological assessment report dated October 31, 2012 (GT1-90 to GT1-93) is concerned, and that had it done so, it would have been unreasonable to conclude that the Appellant had the ability to work as a cashier.

[52] Dr. Scott wrote that the Appellant is functioning in the extremely low range of intelligence and meets the criterial of mental retardation according to the DSM-IV (Diagnostic and Statistical Manual–IV). The Appellant argues that this diagnosis is critical as it indicates the level of her disability and speaks to her symptoms and their impact on her. The Appellant claims that apart from mentioning the report, the General Division should have given reasons or some indication as to whether the report was given any weight, and how it came to weigh that report, in the face of a purported conflicting opinion, dated October 6, 2006, from Dr. C. Cooper, another psychologist (GT7-46 to GT7-52). The Appellant claims that there is a "considerable disparity" between the two reports, with Dr. Scott "placing the Appellant's functioning at a significantly lower level (extremely low range)".

[53] The Appellant argues that her ability to work as a cashier is a key element of the General Division's analysis and that her intellectual and functionality ability to work as a cashier is therefore a relevant consideration that merited meaningful analysis. The Appellant maintains that it is impossible to determine why the General Division preferred Dr. Cooper's opinion over the assessment of Dr. Scott.

[54] One must accord some deference to decision-makers in their determination of the relevance and the weight of evidence to assign. There is no requirement for a decision-maker to write exhaustive or detailed reasons addressing all of the evidence or facts before it, particularly when there are numerous medical records before it, unless they are of some probative value. Here, it might have been necessary for the General Division to address Dr. Scott's report if, as the Appellant alleges, it addressed the same issues raised by Dr. Cooper's report and if the General Division relied upon them in forming its conclusions. While the General Division did not undertake any analysis of Dr. Scott's report, its findings concerning Dr. Cooper's report are not necessarily inconsistent with Dr. Scott's psychological assessment.

[55] There are three areas where the General Division referred to Dr. Cooper's report:

i. paragraph 90 – this related to the Appellant's mathematical abilities. Dr. Cooper reported that although the Appellant had difficulty with multiplication and division, she was able to successfully complete the majority of addition and subtraction exercises.

ii. paragraph 92 – this related to the Appellant's reading abilities. Dr. Cooper reported that the Appellant's reading was estimated to be at a Grade 8 level. The General Division also referred to other evidence that addressed her reading abilities.

iii. paragraph 93 – the General Division wrote that it accepted that the Appellant's global intellectual ability or functioning is estimated to fall below the Low Average range, as reported by Dr. Cooper.

[56] Since Dr. Scott's report did not specifically address the Appellant's mathematical or reading abilities, there was no reason for the General Division to draw upon her report and derive any findings, at least insofar as these first two issues are concerned.

[57] Dr. Scott characterized the Appellant's functioning as being "in the extremely low range of intelligence". She described that she came to this assessment by administering a standardized measure of intellectual ability (WAIS-IV), one of the same tests administered by Dr. Cooper, who conducted an earlier version of the test. While the classification scheme between the two tests may have remained unchanged, it is possible that there may be differences between the two versions of the test, which would account for any seeming discrepancies in results.

[58] Dr. Scott also conducted a standardized measure of adaptive or independent behavior [SIB-R]. Dr. Cooper did not conduct this latter test, but tested for Wide Range Achievement [WRAT-3] as well as a Holland Self-Directed Search. A General Aptitude Test Battery [GATB] was discontinued. Dr. Cooper did not examine the Appellant's adaptive or independent skills, or her social interaction, communication or community living skills, but he was able to comment on other aptitudes, as he had conducted other testing.

[59] Unlike Dr. Scott, Dr. Cooper did not set out percentile rank ranges, range descriptors, or a breakdown of results under the WAIS-III. The bottom end range descriptors listed by Dr. Scott include “low average”, “borderline” and “extremely low”, in descending order. Dr. Cooper estimated that verbal functioning fell beneath the low average range whereas nonverbal functioning fell at the lower extreme of this same range, or “at the bottom aspect of the low Average range”. Overall, Dr. Cooper found that the results revealed an estimate of global intellectual ability or functioning that fell beneath the low average range. It is not inaccurate to describe the Appellant’s intellectual ability or functioning in this manner, as they are clearly at a much lower level than, say, “average” or “superior”.

[60] However, does being “beneath the low average” leave a false impression that the Appellant’s intellectual ability or functioning is significantly higher than that described by Dr. Scott? In other words, does Dr. Cooper’s opinion imply that the Appellant is able to function at a much greater level, such that the General Division should have specifically considered and analyzed Dr. Scott’s report? I am left without any guidance on this matter, as there was no expert opinion before the General Division to address the question of whether there is a “considerable disparity” between the range of descriptors provided by Dr. Scott and the characterization of this range by Dr. Cooper. A review of the description of the Appellant’s capacity and skills by each of the psychologists, to determine whether there are any stark differences or similarities, is of no assistance either.

[61] As the General Division member noted, Dr. Scott appeared to have had the report of Dr. Cooper, because she indicated that he had assessed the Appellant as having global intellectual functioning at the fifth percentile in October 2006. She however did not comment on whether the results of her own testing revealed a “significant disparity” or were consistent with the results of Dr. Cooper’s testing, nor explain what might account for any disparities, if any. Assuming that intelligence and functioning remain fairly static within a timeframe of six years, surely if there had been gross differences between the two reports, Dr. Scott would have addressed them, or the Appellant’s counsel (who arranged for the most recent psychological assessment) would have at least sought some clarification.

[62] Overall, it does not appear to me that the General Division's findings were at all inconsistent with the report of Dr. Scott. While Dr. Scott tested the Appellant's overall intelligence to be "extremely low", this is not altogether inconsistent with Dr. Cooper's description of the Appellant's intellectual ability or functioning as falling "beneath the Low Average range", given that he had, after all, described her as having particular difficulty with respect to tasks related to general knowledge, mental arithmetic, auditory memory/attention and visual-spatial ability.

[63] Given the General Division's obvious focus on the reports prepared before December 31, 2007 and the generally consistent conclusions by both authors, I am unable to find that the General Division's reasons were deficient on the issue of the Appellant's overall intellectual ability and functioning.

CONCLUSION

[64] For the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division