Citation: ***S. M. and V. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 984**

Date: August 18, 2015

File number: AD-15-385 and AD-15-384

APPEAL DIVISION

Between:

S. M. and V. M.

Appellants

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

Decided on the record on August 18, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellants are spouses of one another. They each applied for an *Old Age Security Act* pension in 2012. They were granted this pension, with payments to begin eleven months prior to the date they applied for it which was March 2011. They each requested that this pension be paid beginning when they turned 65 years of age in 2006. They also claimed that they were incapable of forming or expressing an intention to apply for this pension prior to when they did.

[2] The Respondent denied Appellants' requests for further retroactive payment of their pensions initially and after reconsideration. The Appellants each appealed this decision to the Office of the Commissioner of Review Tribunals. On April 1, 2013 the appeals were transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long- term Prosperity Act*. The General Division summarily dismissed the appeals on March 28, 2015 in separate decisions.

[3] The Appellants appealed from the General Division decisions. They argued that the incapacity provisions of the *Old Age Security Act* (OASA) were inequitable, that no claimant was capable of forming or expressing an intention to apply for the pension if they didn't know of it, that Mr. S. M. was incapacitated by illness and that Mrs. V. M. was incapacitated because she relied on Mr. S. M. for information regarding the pension and that he was incapacitated, that Service Canada did not meet its acknowledged obligation to inform them of this pension, and that it was unconscionable and a denial of natural justice that they were denied this pension at a time where they were required to apply for it when the legislation was later changed to eliminate the application requirement.

[4] The Respondent submitted that the standard of review to be applied to the General Division decision in these appeals was that of reasonableness, that the decisions were reasonable, and contained no errors of law. As such the appeals should be dismissed.

[5] The appeals were decided on the basis of the written material filed with the Tribunal after considering the following:

a) The complexity of the issue under appeal;

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

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

d) There were no facts in dispute.

APPEALS JOINED

[6] Section 13 of the *Social Security Tribunal Regulations* provides for the joinder of appeals. It states that the Tribunal may, on its own initiative, deal with two appeals jointly if a common question of fact or law arises in the appeals, and no injustice is likely to be caused to any party to the appeals. In this case, the parties are spouses, and submitted a joint argument on their appeals. Both Appellants made the same arguments on appeal and the undisputed facts in each case were the same. I know of no injustice that would be caused by joining the appeals. Hence, the appeals were decided jointly.

STANDARD OF REVIEW

[7] The Appellant made no submissions regarding what standard of review should be applied to the General Division decisions in this matter. The Respondent submitted that the standard of review to be applied is that of reasonableness. 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. Questions of jurisdiction, constitutional questions, and questions of law that are important to the legal system as a whole are to be reviewed on the

correctness standard. These appeals involve a question of mixed fact and law so the standard of review is reasonableness.

THE APPEALS

[8] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states that 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.

[9] Therefore, in order to succeed on this appeal, the Appellants must have presented a ground of appeal under this section of the DESD Act that rendered the General Division decisions unreasonable.

[10] The Appellants presented a number of arguments to support their appeals. First, they contended that the incapacity provisions of the OASA were inequitable, and that it was virtually impossible for a claimant to receive any further retroactive payment of the OAS pension by relying on this. While this may be so, this argument does not point to any error made by the General Division. The General Division decision correctly set out the legal test for incapacity in the OASA and applied it to the undisputed facts in these cases. The General Division decision also correctly stated that any claimed incapacity must relate to a claimant, so Mrs. V. M. could not rely on Mr. S. M.'s claimed incapacity in this matter (see *Statton v. Canada (Attorney General)* 2006 FCA 370).

[11] In addition, the General Division decision stated correctly that the Social Security Tribunal is a statutory tribunal. It only has the authority granted to it by the statute that created

it. This authority does not include the ability to make decisions based on compassionate grounds or extenuating circumstances. The General Division did not err in this regard.

[12] The Appellants also argued that they could not have been capable of forming or expressing an intention to apply for the pension as they were not aware that it was available. The Federal Court has stated clearly that not being aware of the availability of the pension is not a reason to extend payment retroactively. The General Division made no error in its consideration of this.

[13] The OASA does provide for some redress to claimants if someone has been deprived of a benefit due to the actions of Service Canada. The General Division decision correctly stated that the authority to grant such redress does not lie with this Tribunal. Therefore it was reasonable for the General Division not to grant any relief on this basis.

[14] The General Division also did not err when it concluded that Service Canada had no legal obligation to inform individuals of their entitlement to benefits. Again, this Tribunal was created by statute, and has no ability to correct any deficiencies with regard to the conduct of Service Canada, nor to impose any penalty for any lack of information provided to a claimant. While this may seem harsh, this ground of appeal does not fall under section 58 of the DESD Act, and therefore cannot be considered by the Appeal Division of the Tribunal.

[15] Finally, the Appellants argued that it was unconscionable and a breach of natural justice that they were denied further retroactivity because they applied for the pension at a time when this was required when the legislation was later changed to remove this requirement. The General Division decision made no reviewable error in its consideration of this argument.

[16] The principles of natural justice are concerned with ensuring that parties to a claim have the opportunity to fully present their case, know and answer the case against them, and have the decision made by an impartial decision maker based on the facts and the law. The Appellants did not suggest that they did not have an adequate opportunity to present their case, know and meet the case against them, or that the General Division was not impartial or made

its decision improperly. The decision does not reveal any breach of natural justice. Accordingly, the appeal cannot succeed on the basis of this argument.

[17] The Respondent argued that the first step in reviewing the General Division decision was to determine if the General Division identified and applied the correct legal test when it summarily dismissed the Appellant's claims. On a review of the decision, I am satisfied that it did so. Section 53of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss a claim if it is satisfied that it has no reasonable chance of success. In these appeals, the facts are not in dispute. The OASA is also clear about what amount of retroactivity can be paid to a claimant for such a pension. The General Division reasonably concluded that the Appellants applied for an OASA pension long after they were eligible to receive it, that it was paid to them with the maximum retroactivity possible under the OASA and that the Appellants' claims had no reasonable chance of success.

[18] After considering the arguments of the parties and the General Division decisions, I satisfied that the General Division decisions were reasonable.

CONCLUSION

[19] The appeals are dismissed for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division