Citation: *S. H. v. Minister of Employment and Social Development,* 2015 SSTAD 108

Appeal No: AD-13-24

BETWEEN:

S. H.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF DECISION: January 30, 2015

TYPE OF HEARING: On the Written Record

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan* disability pension and claimed that she was disabled by a serious laceration to her right forearm which only partially recovered after numerous surgeries and therapies over a long period of time. She did not regain complete use or strength of her hand and forearm. Her claim was dismissed by the Respondent initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. On May 14, 2013 a Review Tribunal dismissed the claim. The Appellant appealed to the Appeal Division of this Tribunal on July 29, 2013.

[3] Prior to granting leave to appeal, I requested that both parties file submissions with the Tribunal. The Appellant filed no submissions. The Respondent filed submissions within the time permitted to do so.

[4] On December 10, 2014 I concluded that the Appellant had been properly notified of the request to file submissions by sending it to the email address she had provided to the Tribunal. I granted leave to appeal on two grounds:

a) The Review Tribunal may have erred by not considering whether the work that the Appellant was capable of was substantially gainful; and

b) The Review Tribunal may have erred by making contradictory statements regarding whether it found that the Appellant's disability was prolonged.

[5] The decision granting leave to appeal was sent to the Appellant at the email address she provided, and confirmation was received that the transmission was completed. For the same reasons set out in the decision granting leave to appeal I am satisfied that the decision was properly communicated to her.

[6] The *Social Security Tribunal Regulations* provide that parties have 45 days from the date that leave to appeal is granted to make submissions on the appeal. The Appellant filed

no submissions. The Respondent filed lengthy submissions within the time permitted to do so. I have considered all of the material filed with the Tribunal in support of the leave to appeal application, the appeal and the medical evidence presented to the Review Tribunal in making this decision.

STANDARD OF REVIEW

[7] The Respondent submitted that the proper standard of review for the decision made by the Review Tribunal in this case 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. The Appellant made no submissions about what standard of review should be applied to the Review Tribunal decision. The Respondent correctly stated the law on this issue. I am satisfied that the standard of reasonableness is to be applied in this case. Therefore I must decide whether the Review Tribunal decision was reasonable.

ANALYSIS

[8] The *Department of Employment and Social Development Act* (DESD Act) governs the operation of this Tribunal. It provides for a limited number of grounds of appeal that can be considered on appeal. It also provides that on appeal, the Appeal Division may dismiss the appeal, confirm the decision made by the Review Tribunal, refer the matter to the General Division for a further hearing, rescind, confirm or vary the decision of the Review Tribunal (see Appendix of this decision). Neither party specified what remedy they sought on this appeal.

[9] Each ground of appeal will be examined separately below.

Substantially Gainful Occupation

[10] The first ground of appeal upon which leave to appeal was granted was whether the Review Tribunal had erred by not considering if the work that the Appellant was capable of doing was substantially gainful. The Appellant argued that the only work she had done since her serious right forearm injury in November 2008 was part-time and of limited term. She had completed only four days of work since her injury. In addition, this work was outdoors and due to her injury she would not be able to do it in the cold or other weather conditions. She was also not able to obtain other work because she was a foreign female national living in Switzerland without skill in all of Switzerland's languages. As a result, she was very limited in her ability to obtain work.

[11] The Respondent argued that the fact that the Appellant was not working did not lead to the conclusion that she was disabled. In addition, it argued that the Review Tribunal considered whether the Appellant's work was substantially gainful as the decision quoted these words from *the Canada Pension Plan* (CPP) to describe the work she did, that the Appellant testified and her doctors wrote that she could work as an teacher of English, and that the Appellant testified that she would be able to work at a call centre.

[12] The Review Tribunal decision stated that an examination of market conditions, or the Appellant's ability to obtain work was not a relevant consideration in this case. This is a correct statement of the law. The Review Tribunal correctly applied it to the facts of this case when it did not take into account the difficulties that a foreign female national without fluency in all of Switzerland's might have in obtaining a job in making its decision.

[13] Regarding the part-time limited-term work that the Appellant did perform, the Review Tribunal found that it was substantially gainful work. It did not, however, provide any reasons for reaching this conclusion. Although there are invoices for this work in the documentary evidence that was presented to the Review Tribunal, it was not analyzed by the Review Tribunal. In the leave to appeal application, the Appellant argued that she earned "pennies compared to a reasonable wage". Unfortunately there was nothing in the material before me from which I could conclude whether the Appellant could earn a "reasonable wage" doing this work. In *Poole v. Minister of Human Resources Development* (2003,

CP20748) the Pension Appeals Board concluded that the term substantially gainful refers to not merely nominal, token or illusory compensation but rather the compensation which reflects the appropriate award for the work performed There is no consideration of this in the decision. On this basis, I find that the Review Tribunal erred.

[14] However, despite this error, The Review Tribunal also considered the Appellant's testimony that she could work as a teacher or in a call centre (which it mistakenly referred to as telemarketing). Neither party suggested that such work would not be substantially gainful. The medical report by Dr. Eyer, which both parties referred to in their arguments, also stated that the Appellant would be able to work as a teacher of English. The Appellant testified that she had been tutoring, and that she would like the CPP disability pension to help pay for retraining in this field. Thus, the decision of the Review Tribunal that the Appellant was capable of performing a substantially gainful occupation was within the acceptable range of outcomes and was defensible on the fact and the law.

Prolonged Disability

[15] The second ground of appeal upon which leave to appeal was granted was that the Review Tribunal may have erred in its conclusion regarding the prolonged nature of the Appellant's disability. The Appellant contended that her disability was prolonged as that term is defined in the CPP as she has permanent restrictions from her injury. In addition, she argued that at the hearing, the Review Tribunal verbally told her that it was satisfied that her disability was prolonged. In spite of this, the Review Tribunal decision stated that it need not determine whether the Appellant's disability was prolonged. It also stated that the disability was not prolonged.

[16] The Respondent contended that the Review Tribunal did not err in this regard. In order for a claimant to be found disabled under the CPP she must have a disability that is both severe and prolonged. Since the Review Tribunal found that the Appellant's disability was not severe, a finding of whether it was prolonged was unnecessary.

[17] In the alternative, the Respondent argued that the Appellant's disability was not prolonged. It pointed to the medical report which stated that the Appellant was disabled

from working from November 2008 until 2010. Since this was a definite period of time, she could not be found to have a prolonged disability, which must be of an indefinite nature. Finally the Respondent submitted that because the Appellant had recovered to some degree her condition could not be found to be prolonged.

[18] On a review of the evidence and submissions, I am satisfied that the Appellant suffers from a prolonged disability. The evidence was undisputed that she was seriously injured in November 2008, and continues to have limitations as a result of that injury. These limitations will likely continue indefinitely. Therefore, the Review Tribunal erred in its conclusions on this issue.

[19] However, the Respondent is also correct that in order to be found disabled under the CPP, a claimant must suffer from a disability that is both severe and prolonged. There is no reason to change the Review Tribunal's conclusion that the disability was not severe. Therefore, the Review Tribunal conclusion that the Appellant was not disabled under the *Canada Pension Plan* is reasonable, and defensible on the law and the facts.

[20] For these reasons, the appeal is dismissed and the decision of the Review Tribunal is confirmed.

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.

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.