Citation: *B. C. v. Minister of Employment and Social Development,* 2015 SSTAD 301

Appeal No: AD-15-9

BETWEEN:

B. C.

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: March 4, 2015

TYPE OF HEARING: On the Written Record

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for reconsideration.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan* disability pension, and claimed that she was disabled by diabetes mellitus, hyperlipidemia, undifferentiated connective tissue disorder and osteoporosis. The Respondent denied her application initially and after reconsideration. She appealed to the Office of the Commissioner of Review Tribunals. The matter was transferred to the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division of this Tribunal held an in person hearing on October 27, 2014 and dismissed her disability claim.

[3] The Appellant sought leave to appeal from this decision, which was granted on January 15, 2015. Leave to appeal was granted on the basis that the General Division decision did not consider whether the Appellant's work after the Minimum Qualifying Period was substantially gainful (see definition of disabled in the Appendix to this decision).

[4] The Appellant argued that although she worked after the Minimum Qualifying Period (MQP), her work could not be considered "regular" as it was only for three hours for three days each week. In addition, given her low income, the work was not substantially gainful. She relied on decisions of the Pension Appeals Board and the Respondent's policy document regarding what income it considered to be substantially gainful to support her argument. The Appellant did not set out what remedy she sought on the appeal.

[5] The Respondent argued that the General Division decision should be reviewed on a standard of reasonableness, and that the decision was reasonable. It submitted that the General Division identified the proper legal test for disability in the *Canada Pension Plan* (CPP). It also relied on decisions of the Federal Court of Appeal which concluded that where there is evidence of work capacity, a claimant must demonstrate that effort at obtaining and maintaining employment was unsuccessful because of the disability. It argued that the General Division

reasonably concluded that the Appellant did not meet this legal test. Further, the Respondent argued that the General Division decision reasonably explained why it reached the conclusions it did. On this basis, the appeal should be dismissed.

STANDARD OF REVIEW

[6] The Appellant made no submissions regarding what standard of review should be applied to the General Division decision in this case. The Respondent made lengthy submissions. It submitted that the proper standard of review of the decision made by the General Division 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. I accept this as the correct statement of the law, and find that I must determine whether the General Division decision was reasonable.

[7] Although the Respondent also submitted that the standard of review on questions of law was correctness, the law does not state this conclusively. I need not decide this as the issue in this case is whether the General Division made an error of mixed fact and law, which is reviewed on the reasonableness standard.

ANALYSIS

[8] Leave to appeal was granted on the basis that the General Division decision did not consider whether the Applicant's employment after the MQP was substantially gainful. The decision clearly set out that the Appellant based her case, at least in part, on the allegation that any work she could do was not substantially gainful. In submissions on appeal, she argued that her earnings were too low to be considered substantially gainful based on the decision of the Pension Appeals Board in *Alexander v. Minister of Human Resources Development* (CP09448 June 2000 PAB). While the decision of the Pension Appeals Board is not binding on this Tribunal, I find the reasoning in it persuasive. In that case, the Pension Appeals Board considered the amount that the claimant earned as well as the conditions of his work to determine

whether it was substantially gainful. Similarly, in *K.A. v. Minister of Human Resources and Skills Development* (2013 SSTAD 6) I conducted a lengthy review of decisions on this issue. The Pension Appeals Board has consistently concluded that this term includes occupations where the remuneration for the services rendered is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate award for the nature of the work performed *(Poole v. The Minister of Human Resources Development* CP20748, 2003). While the amount earned is not determinative of whether employment is substantially gainful, it is one factor to be considered. Each case turns on its own facts. In this case, the General Division did not analyze the Appellant's income or the other circumstances of her employment.

[9] In addition, the Appellant argued that her work schedule, being three hours per day for three days per week was not regular. It is the disability, not the work that must be regular (see *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34). Part-time work may be substantially gainful in some cases. While the General Division decision noted this, it did not consider this in making its decision.

[10] Further, the General Division did not comment on whether the Appellant worked on a specific schedule. The decision contained no discussion of whether the work was predictable. Predictability is a factor to be considered in determining whether the Applicant's work after the MQP was substantially gainful. The decision came to no conclusion regarding whether the Appellant's employment was substantially gainful.

[11] The Respondent contended that the General Division decision was reasonable because it correctly identified the legal test for disability under the CPP. It also correctly stated the law regarding the requirement that a claimant's disability, not employment, must be regular. While I agree that the General Division decision stated these legal principles correctly, I am not satisfied, in this case, that this was sufficient. The issue on appeal was not whether the General Division correctly identified the legal test for disability as a whole, but whether it considered if the Appellant was capable of pursuing a substantially gainful occupation. For the reasons set out above, I find that it did not.

[12] The Appellant also referred to the Respondent's policy document regarding what income it considered substantially gainful each year. This document is not binding on the

Tribunal. Although it may bolster the Appellant's argument in this case, I am not persuaded that the General Division decision was unreasonable because it did not refer to or rely on this document.

[13] Finally, I accept the Respondent's argument that the General Division made no error in how it weighed the medical evidence before it. The Appellant made no submissions on this issue, and in light of my conclusion I need make no finding on this.

CONCLUSION

[14] I find that the General Division decision was not reasonable. It is not defensible on the facts and the law. It reached no conclusion about whether the Appellant's work was substantially gainful. This issue was clearly before it. The Appeal is therefore allowed and the matter is referred back to the General Division for reconsideration.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Canada Pension Plan

42.(2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death

Department of Employment and Social Development Act

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.