Citation: ***Minister of Employment and Social Development v. K. O.,*** **2015 SSTAD 534**

Date: April 29, 2015

File number: AD-14-511

APPEAL DIVISION

Between:

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

Appellant

and

K. O.

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Videoconference on April 24, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Counsel for the Appellant	Laura Dalloo
The Respondent	K. O.
Counsel for the Respondent	Michael Laplante

INTRODUCTION

[1] The Respondent applied for a *Canada Pension Plan* disability pension. He claimed that he was disabled by mechanical low back pain and mental illness. The back pain was brought on by a work injury, and the depression and anxiety were secondary to this. The Appellant denied his claim initially and after reconsideration. The Respondent appealed to the Office of the Commissioner of Review Tribunals. The matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing, and on June 23, 2014 allowed the Respondent's appeal, finding him disabled under the *Canada Pension Plan* (CPP).

[2] The Appellant sought leave to appeal from the General Division decision. Leave to appeal was granted by the Appeal Division of the Social Security Tribunal on December 18, 2014.

[3] The Appellant argued that this appeal should be allowed on three grounds: that the General Division erred in its calculation of the Minimum Qualifying Period (the date by which a claimant must be found to be disabled to receive a CPP disability pension), that it applied the wrong legal test to find the Respondent disabled, and that it provided insufficient reasons for its decision. The Respondent conceded that the Minimum Qualifying Period (MQP) in the General Division decision was wrong, but argued that this should not affect the decision. He also submitted that the General Division identified and applied the correct legal test and that the reasons for decision were sufficient.

ANALYSIS

Standard of Review

[4] The Appellant submitted that questions of mixed fact and law should be reviewed on the standard of reasonableness, and that errors in law and natural justice should be reviewed on the standard of correctness. The Respondent did not disagree with these submissions.

[5] 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 natural justice and law that are of general importance to the legal system should be reviewed on a standard of correctness. This reasoning was followed by the Federal Court of Appeal with respect to a Canada Pension Plan disability claim in *Atkinson v. Canada (Attorney General)* 2014 FCA 187.

[6] The Appellant submitted that the assessment of the Respondent's MQP and whether the correct legal test for disability was applied are questions of mixed fact and law, and should be reviewed on a standard of reasonableness. Counsel also argued that whether the General Division decision contained sufficient reasons is a question of natural justice that is important in the context of disability claims, but not of importance to the legal system as a whole. It should be reviewed on a correctness standard. The Respondent did not disagree with this.

Application of the Standard of Review

a) Incorrect MQP

[7] The Appellant first argued that the General Division erred in its calculation of the MQP in this case. It appears that just before the General Division hearing was held, a third Record of Earnings was filed with the Tribunal. The parties agreed that this was properly before the General Division at its hearing. As a result of this, the MQP was December 31, 2014, not December 31, 2012 as set out in the General Division decision. The Appellant argued that

because the General Division considered the wrong MQP date, it did not properly assess evidence regarding the Respondent's work capacity after 2012 and this resulted in a decision that was unreasonable, not being within the range of acceptable possible outcomes. It also argued that the General Division erred in finding that the Respondent was disabled in 2009 when his reported earnings show an increased capacity to work after that. The Respondent reported earnings of approximately $5,000 in 2012 and approximately $15,000 in 2013. In addition, counsel for the Appellant submitted that if the General Division had considered the correct MQP, it would have also considered that there was no medical evidence regarding the Respondent's conditions after 2012, which could also demonstrate that he was not disabled. Finally on this issue, the Appellant argued that the evidence was clear that the Respondent was able to obtain and maintain employment that was within his restrictions at the correct MQP, and thus he was not disabled under the CPP.

[8] The Respondent agreed that the correct MQP was December 31, 2014. He argued that although this error was made in the General Division decision, it was not "fatal" to the Respondent's claim and did not render the decision unreasonable as the Respondent was disabled from the injury at work in 2006, which was long before the MQP.

[9] I accept that if the Respondent became disabled at work in 2006, whether the General Division considered the correct MQP date of December 2014 or the incorrect one of December 2012 would not necessarily render the General Division decision unreasonable. In this case, however, the Record of Earnings also demonstrated that the Respondent had capacity to work in 2012 and thereafter. I accept that he had an increasing capacity to work, as shown by the increased earnings at the same job in 2012 and 2013 and the Respondent's testimony that he increased his work hours. Therefore, this error made by the General Division was significant.

[10] I am satisfied that the General Division considered whether there was any medical evidence after 2012 in making its decision. A review of the decision demonstrated that the General Division Member was aware of who treated the Respondent and when he received treatment. The mere fact that there were no additional medical reports written after 2012 does not necessarily mean that the Respondent no longer suffered from pain. The Respondent testified that he was not receiving mental health treatment at that time, so no reports on this

would be expected. The fact that the General Division decision did not specifically refer to the absence of medical reports after 2012 is not an error in this case.

b) Incorrect Legal Test

[11] The Appellant also argued that the General Division erred as it applied the wrong legal test for disability in this case. Paragraph 42(2) (a) of the CPP defines what a severe and prolonged disability is. It is a severe and prolonged disability that renders a claimant unable to pursue any substantially gainful occupation (this is set out in the Appendix to this decision). The Appellant argued that the part-time job that the Respondent obtained after he moved to Alberta and continues to hold was substantially gainful. The Appellant contended that what is considered substantially gainful under the CPP is somewhat "elastic" in that it depends on the circumstances of each case. The Respondent asserted that this work was not substantially gainful.

[12] The term "substantially gainful" is not defined in the CPP. 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 reward for the nature of the work performed (*Poole v. The Minister of Human Resources Development* CP20748, 2003; *Atkinson v. Canada (Attorney General)* 2014 FCA 187).

[13] The General Division erred in this regard. It did not properly consider whether the Respondent's work was substantially gainful. The decision is not clear whether there was any evidentiary basis for the conclusion that the Respondent's work did not meet this legal standard.

[14] In addition, the General Division concluded that the Respondent was not able to work full-time, and that "casual part-time employment when he can handle it with his medical condition does not constitute a 'gainful occupation'". This is the wrong legal test to be considered. In *Boles v. MEI* (June 30, 1994 CP2794) the Pension Appeals Board concluded, based on the wording of paragraph 42(2)(a) of the CPP, that "substantially gainful occupation" was different than "gainful occupation". I am persuaded by its reasoning. The General

Division erred when it referred to the Respondent being unable to complete a gainful occupation and applied this incorrect legal test to the facts before it.

[15] It has also been established that a claimant may not be disabled if he is able to complete light duty work. In *Micelli-Riggins v. Canada (Attorney General)* 2013 FCA 158, the Federal Court of Appeal concluded that substantially gainful work could include part-time work or modified duties. The General Division decision acknowledged that the Respondent in this case was able to work on a part-time basis, approximately fifteen hours each week. He testified that his work was regular. The General Division decision did not explain how it concluded that the Respondent was unable to pursue a substantially gainful occupation in light of this evidence. This was also an error.

[16] The Appellant also relied on the decision of the Federal Court of Appeal in *Inclima v. Canada (Attorney General) 2003 FCA 117*. That decision stated that in order to be found disabled under the CPP a claimant must demonstrate that his efforts at obtaining and maintaining work have been unsuccessful because of his disability. Counsel argued that the Respondent's continued performance of part-time work demonstrated that he could maintain this work and therefore was not disabled under the CPP. In contrast the Respondent argued that he continued with this work to maintain his emotional well-being, and that it was not substantially gainful work because his earnings were insufficient income to support him. In addition, he contended that the fact that he has obtained and continued to work light duties at the gas bar, doing mainly cash register duties, demonstrated that he had complied with the requirement to try to obtain and maintain work set out in the *Inclima* decision.

[17] While I accept that the Respondent works for mental health reasons, whether work is substantially gainful does not depend on the reason that it is completed. It also does not depend solely on the amount earned, although that is one factor to consider. As set out in the *Poole* decision, a substantially gainful occupation is one where remuneration is not nominal, token or illusory. The Respondent worked at the gas bar, and was paid accordingly. There was no evidence that his income was adjusted because his duties were restricted, or that he was paid only a nominal amount. Consequently I am satisfied that the General Division erred as it did not properly consider whether the Respondent's work was a substantially gainful occupation.

[18] The General Division also did not address the fact that the Respondent is able to maintain this work with his limitations. As the *Inclima* decision requires that a claimant prove that he is unable to maintain work because of his disability this was an important factor, which should have been addressed in the General Division decision.

[19] Further, the General Division relied on a Pension Appeals Board decision, *A.K. v. Minister of Human Resources and Skills Development* (June 10, 2009, CP25905). Counsel for the Appellant argued that the facts of this case were different than the one before me and that it should not have been persuasive to the General Division. In that case, the CPP disability pension claimant's physician had restricted the A.K. from working for more than four hours, three days each week. The Respondent had no such restrictions. Each case is dependent on its own facts. While the facts of the A.K. matter were different from the one before me I am not persuaded that the General Division erred by referring to this decision and relying on the general legal principles set out in it.

c) Insufficient Reasons

[20] Finally, the Appellant contended that the General Division erred as it provided insufficient reasons for its decision. Counsel for the Appellant argued that the reasons were inadequate as they did not address the contradictory evidence that was before the General Division regarding the Respondent's ability to work, that the conclusion that the Respondent was disabled as of July 2009 was not supported by the evidence, and this was not explained, that the decision contained a summary of various medical reports without analyzing them, and it contained no comment on the Respondent's credibility.

[21] In contrast, the Respondent contended that the General Division decision contained sufficient reasons, and that it simply preferred the evidence that supported the Respondent's claim over the evidence that did not. In particular, the Respondent argued that the Appellant chose not to attend the hearing and cross-examine the Respondent; it was too late at the appeal hearing to contest the weight the General Division gave to the evidence that was before it. The Respondent argued, further, that the General Division decision also contained a lengthy quotation from a report by Dr. Delaney, which did not conclude that the Respondent was disabled. This demonstrated that the General Division was aware of and weighed evidence that

both supported the Respondent and did not. The General Division was persuaded by both the written evidence before it and the oral testimony at the hearing, and accordingly made no error in its decision.

[22] The General Division decision contained a summary of the medical reports that were presented at the General Division hearing. These reports were contradictory. The General Division decision contained little analysis of these reports. In *R. v. Sheppard* (2002 SCC 26) The Supreme Court of Canada concluded that a decision maker is obliged to set out reasons for findings of fact made on contradictory evidence and upon which the outcome of the case is largely dependent. In this case, there were reports from the family doctor that concluded that the Respondent was disabled by severe back pain. There were also reports of orthopedic specialists that he had capacity to work, and the Respondent's testimony that he was able to work on a part- time basis each week. Although this evidence was summarized in the General Division decision, the decision did not contain any explanation as to why some evidence was preferred or why some evidence was given greater weight. I am not persuaded by the Respondent's argument that the fact that a medical report that was contrary to his position was quoted in the General Division decision demonstrated that all of the evidence had been properly considered and weighed.

[23] Clearly, the outcome of this case was dependent, at least in part, on the medical evidence and how it was weighed to reach the decision. Without any explanation of how the General Division weighed this contradictory evidence it is difficult to understand the basis for the General Division's decision. This is one of the purposes of written reasons. Hence, I am persuaded that the General Division reasons were insufficient.

[24] Counsel for the Appellant argued that such an error was an error in law, and a breach of the principles of natural justice. Accordingly, she submitted that it should be reviewed on a correctness standard. Counsel for the Respondent did not disagree with this argument. While I understand it, I am not convinced that this is a correct statement of the law in light of the decisions of the Supreme Court of Canada in *Dunsmuir*, and the Federal Court of Appeal in *Atkinson*. In this case, however, I need not decide which standard of review should be applied to this error. On the materials before me I am satisfied that the provision of insufficient reasons

is an error made by the General Division. It rendered the decision both incorrect and unreasonable.

[25] I am not persuaded that the General Division made an error by not substantiating the date upon which it found the Respondent to have become disabled. The decision clearly concluded that the Respondent became disabled in 2006 when he had the sudden onset of back pain. However, he did not apply for a CPP disability pension until December 2010 and due to the terms of the CPP he could not be deemed to be disabled more than fifteen months prior to the application date. This resulted in the deemed disabled date in 2009. This was set out clearly in the decision.

[26] The Appellant also argued that the General Division decision contained an error because it made no comment on the Respondent's credibility. Counsel argued that this was necessary as the evidence was "mixed" regarding his capacity to work. I am not satisfied that the General Division decision contained an error in this regard. The Respondent's testimony was consistent with the medical reports that supported his claim. The fact that no finding of credibility, or lack of credibility was made did not impair the ability to understand the decision or the reason for the conclusions reached by the General Division.

[27] Finally, in written submissions, counsel for the Appellant contended that the General Division decision contained insufficient reasons because it did not deal with the issue of symptom magnification by the Respondent. The decision did consider this issue. It summarized the medical report that raised this and the Respondent's testimony with regard to this report. I can find no error in the General Division decision in this regard.

Conclusion

[28] In *Dunsmuir* the Supreme Court of Canada concluded that

> reasons must be sufficient to allow the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.

I have found that the General Division erred in its calculation of the MQP, applied the incorrect test for disability under the CPP and provided insufficient reasons for its decision. Each of these errors would render the decision unreasonable. The written reasons do not allow the reader to understand why the General Division made the decision it did. When viewed as a whole, the decision is unreasonable. Therefore the appeal must be allowed.

Remedy

[29] Section 59 of the *Department of Employment and Social Development Act* sets out the remedies that can be granted by the Appeal Division of the Tribunal (see Appendix). I have reviewed all of the parties' submissions made in support of leave to appeal and appeal, the written evidence that was before the General Division at its hearing, and the audio recording of General Division hearing. I am satisfied that there is sufficient evidence before me that was not disputed , and under the circumstances of this case it is appropriate that the Appeal Division give the decision that the General Division should have given. This is also the least expensive and most expeditious manner in which this appeal can be determined.

[30] The undisputed facts are as follows: The Respondent completed high school, and then worked full-time in physically demanding jobs. In 2006 he worked driving a forklift. He suffered from significant back pain, and sought treatment through physiotherapy and medical consultations. He attended for therapy as directed, except for those treatments that he could not afford to pay for himself. His condition was aggravated in February 2008 when he was involved in a car accident. The Respondent did not return to work in Ontario after the car accident, and his family physician supported the decision to remain off work. The Respondent consulted with various orthopedic specialists who opined that he should be able to work with specific restrictions.

[31] In 2010 the Respondent began to suffer from depression secondary to his pain and circumstances. He attended at hospital, and was treated by a psychiatrist and prescribed anti-depressants. At the end of 2011 he moved to Alberta to reside with a former common-law partner and her children, who have provided emotional support. This move was supported by the Respondent's psychiatrist. Since moving to Alberta, the Respondent obtained a part-time job at a gas bar, working mostly at the cash register where he can sit when required. He is

scheduled for 20 – 22 hours each week, but normally works approximately 15 hours each week. He works Monday, Tuesday, Thursday and Friday. The Respondent testified that he works mainly to maintain his well-being and his self-esteem. The Respondent currently is treated by a family physician and no longer takes prescribed medication for pain. He manages his pain with over- the-counter medications, Epsom salts, and cream. He receives no ongoing treatment for mental health.

[32] This evidence is clear that the Respondent suffers from ongoing back pain that has not subsided. Despite this, he has managed to wean himself from prescribed narcotic pain medication. He has obtained work within his limitations (which limitations were set out in the medical reports) and has maintained this work. He regularly works approximately 15 hours each week. He is paid for this work. There was no evidence that his pay was modified because of his work restrictions.

[33] Counsel for the Respondent was correct that this case hinges on whether the Respondent's work is substantially gainful. The decisions referred to above confirm that for work to be substantially gainful, it need not be very lucrative. It need not be full-time or unmodified duties. On the undisputed facts, I am satisfied that the Respondent completes meaningful work on a regular basis and is paid appropriately for it. This is a substantially gainful occupation under the CPP. The Respondent is congratulated for taking on this work, and persevering despite his pain.

[34] In addition, the Records of Earnings filed with the Tribunal demonstrate that the Respondent has been able to increase his earnings over time while at the same job. I accept that this demonstrates an increase in his capacity to work at the gas bar.

[35] Because I am satisfied that the Respondent has obtained and maintained a substantially gainful occupation at the time of the MQP, he does not suffer from a severe disability under the CPP.

CONCLUSION

[36] The appeal is allowed for these reasons.

[37] For the same reasons, the Respondent's disability is not severe under the CPP and his claim is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

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.

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

EXHIBITS

1. Application for Leave to Appeal dated September 22, 2014, Decision Granting Leave to Appeal dated December 18, 2014, Submissions filed by the Appellant dated December 12, 2014 and February 2, 2015, Submissions filed by the Respondent dated November 28, 2014 and April 23, 2015.

2. Decision of the General Division dated June 23, 2014

3. Recording of the General Division hearing dated June 4, 2014