Citation: *R. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1190

Appeal No. AD-15-403

BETWEEN:

R. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 2, 2015

REASONS AND DECISION

INTRODUCTION

[1] This is an appeal from a decision dated March 27, 2015 of the General Division, summarily dismissing the Appellant's appeal for retroactive entitlement to payment of a Canada Pension Plan (CPP) disability pension to October 2000. The General Division summarily dismissed the appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal of the summary dismissal decision on June 26, 2015. No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division.

[3] The parties have filed written submissions. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[4] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

2. Did the General Division err in choosing to summarily dismiss the Appellant's claim for retroactive entitlement to payment of a Canada Pension Plan disability pension?

3. If the appeal before the General Division ought not to have been summarily dismissed, can the decision of the General Division still stand?

FACTUAL OVERVIEW

[5] The Appellant alleges that he applied for a Canada Pension Plan disability pension sometime in 2005. He did not receive any formal response to his application and the Respondent has no record that it had ever received this application. The Appellant did not make any enquiries about this alleged first application with the Respondent. The Appellant assumed that his application had been denied.

[6] The Appellant applied for a Canada Pension Plan disability pension on April 16, 2012, following a stroke on December 30, 2011 (GT1-73). The Respondent approved the application for a disability pension. The Respondent awarded the maximum allowable retroactivity of 15 months and, based on the Applicant's date of application in April 2012, awarded a disability pension as of January 2011, with payment commencing four months later in May 2011.

[7] On November 16, 2012, the Appellant requested reconsideration of the effective date of his disability pension. In December 2012, the Respondent denied the reconsideration request that retroactive payments be made to 2005 (GT1-10). The Respondent wrote:

> CPP legislation states that we cannot pay a Disability benefit any earlier than 15 months prior to the date we received your application. We received your application in April 2012. The earliest date you were considered disabled was January 2011. Please note that there is a four-month waiting period during which no benefits are payable; therefore, the effective date of your benefit was May 2011.

[8] In March 2013, the Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) (GT1-06). He advised that he had had his first stroke in October 2000 and that he has been unable to work since then. He advised that he was in a re-training program under the auspices of the Workers' Compensation Board (WCB) until 2005, but was unsuccessful due to his medical condition. He advised that he receives pension benefits from WCB.

[9] Under section 257 of the *Jobs, Growth and Long-Term Prosperity Act* (JGLPA), any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229 of the JGLPA, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On

April 1, 2013, the OCRT transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[10] Each of the parties filed a Notice of Readiness in 2014. In early January 2015, the Social Security Tribunal determined the appeal ready to proceed.

[11] On January 13, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> Paragraph 42(2)(b) of the *Canada Pension Plan* states that in no case shall a person be deemed to have become disabled earlier than fifteen months before the Respondent received the application for a disability pension.
>
> In your case the application for a CPP disability benefit was received in April 2012. The earliest date you could be considered disabled was January 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. The earliest effective date of your benefit is therefore May 2011.

[12] The General Division invited the Appellant to provide detailed written submissions by no later than February 13, 2015, if he believed that the appeal should not be summarily dismissed, explaining why the appeal had a reasonable chance of success.

[13] By letter dated February 13, 2015, counsel for the Appellant responded to the notice of intention to summarily dismiss his appeal (GT4). Counsel submitted that the appeal ought not to be dismissed, on the grounds that the Appellant did not have the capacity to form or express an intention to make or submit an application for a Canada Pension Plan disability pension since his initial brain hemorrhage in 2000. Counsel submitted that the Appellant did not have the requisite capacity to form or express an intention to make an application at the time of his 2012 application. Indeed, the Appellant remained an in-patient at GF Strong Rehabilitation Centre, dependent on others for activities of daily living. The Applicant's family completed the application for a Canada Pension Plan disability pension on his behalf in 2012.

[14] Counsel referred to and relied upon subsection 60(8) of the *Canada Pension Plan*, which she submitted allows the General Division to deem an application for benefits to have been received on the date the incapacity arose, where a person was incapable of forming or expressing an intention to make an application. Counsel submitted that as such, the General

Division ought to find that the Appellant's deemed disability is much earlier than the January 2011 date set out in the letter dated January 13, 2015 from the Social Security Tribunal.

[15] Counsel wrote that the Appellant wanted an opportunity to argue his case based on the capacity provisions under section 60 of the *Canada Pension Plan* and on decisions of the Canada Pension Plan Review Tribunals, Pension Appeals Board and the Federal Courts.

[16] On March 27, 2015, the General Division rendered its decision. The General Division relied upon and referred to the following provisions and facts, in coming to its decision:

i. Subsection 53(1) of the DESDA, which states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success;

ii. Section 22 of the *Social Security Tribunal Regulations*, which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions;

iii. Subsection 60(8) of the *Canada Pension Plan*, the "incapacity provisions" of the *Canada Pension Plan*, which state that an application can be deemed by the Minister to have been made earlier than it was, if the person had been incapable of forming or expressing an intention to make an application on the day on which the application was actually made; and

iv. *Canada (Attorney General) v. Danielson*, 2008 FCA 78, which states, in part, that the activities of a claimant during the period between the claimed date of commencement of disability and the date of application may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered.

[17] On June 26, 2015, counsel for the Appellant filed an appeal from the decision of the General Division. On August 7, 2015, counsel for the Respondent filed submissions.

SUBMISSIONS

[18] Counsel for the Appellant submits that the General Division made a number of errors. She submits that the fact that an application has been filed is not determinative of capacity on

the part of an applicant, when there is evidence that the applicant had very little to no involvement with the application process and was having significant medical difficulties, including even basic communication or speech. Counsel submits that although the General Division may have considered whether the Appellant had capacity "prior to his 2011 stroke / at the time of the 2005 application, the General Division failed to consider whether he had capacity during the December through April 2012, time period".

[19] Counsel for the Appellant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, as it did not provide him with the opportunity to make full and substantive submissions.

[20] Counsel submits also that the General Division erred in law in making its decision "by equating the creation of an application by family members and the signing of one's name to an application with one's capacity or one's expressing an intention to apply".

[21] Counsel further submits that 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, as it failed to fully consider the seriousness of the Appellant's injuries and care, and as there was confusion as to what may have been performed by the Appellant directly or on his behalf by family members. Counsel submits that there was no evidence upon which the General Division could find that it was the Appellant who again decided to apply for a Canada Pension Plan disability pension.

[22] Counsel for the Respondent submits that the General Division correctly stated the test for a summary dismissal under section 53 of the DESDA, as well as the law governing incapacity, and that it reasonably considered the relevant evidence when determining that the Appellant was not eligible for any further period of retroactivity and that the appeal had no reasonable chance of success. Counsel for the Respondent submits that the decision of the General Division to summarily dismiss the Appellant's appeal contains no reviewable error which would permit the intervention of the Appeal Division and that the appeal should therefore be dismissed.

ISSUE 1: STANDARD OF REVIEW

[23] Counsel for the Appellant did not address the issue of the standard of review.

[24] Counsel for the Respondent provided brief submissions on this issue. Counsel for the Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. Counsel for the Respondent submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard. Counsel for the Respondent submits that the Appeal Division should review the summary dismissal decision of the General Division on a reasonableness standard.

[25] I concur with Respondent's counsel's restatement of the law on the standard of review. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. And, when applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[26] The applicable standard of review will depend upon the nature of the alleged errors involved.

[27] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

> (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
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> (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.

[28] However, I do not accept the submissions of counsel for the Respondent that I should review the summary dismissal decision of the General Division on a reasonableness standard.

[29] I must firstly determine whether the General Division correctly identified when a summary disposition is appropriate. This involves examining whether the General Division identified the proper legal test and properly applied the legal test. This is a question of law which requires a review on the correctness standard.

[30] And, if I should accept the submissions of counsel for the Appellant, that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, this too demands a review on the correctness standard.

[31] The jurisprudence is less definitive on whether a question of law necessarily demands a correctness standard, as it will depend upon the nature of the question of law. In *Dunsmuir,* the Supreme Court of Canada also held that the correctness standard is generally reserved for jurisdictional or constitutional questions, or questions which are of central importance to the legal system as a whole and outside the expertise of the tribunal.

[32] The Supreme Court of Canada in *Smith v. Alliance Pipeline*, [2011] SCC 7, [2011] S.C.R. 160, at para. 26, also set out the scope of the standard of reasonableness to include issues that (1) relate to the interpretation of the administrative tribunal's "home statute" or statutes closely connected to its function with which it has familiarity and expertise; (2) raise matters of fact, discretion or policy; or (3) involve inextricably intertwined legal and factual issues.

[33] Thus, the applicable standard of review depends on the nature of the alleged errors involved.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S APPEAL?

[34] Although the Appellant did not question the appropriateness of the summary dismissal procedure, I will address that issue before I assess the decision of the General Division.

[35] Counsel for the Respondent submits that the first task for the General Division was to identify the law with respect to summary dismissals under section 53 of the DESDA, which it did at paragraph 4 of its decision. Counsel for the Respondent submits that the General Division did not err in this regard, as it correctly stated that under section 53 of the DESDA it must summarily dismiss the appeal if it is satisfied that it has no reasonable chance of success.

[36] Counsel for the Respondent submits that the decision of the General Division to summarily dismiss the appeal contains no reviewable error to permit the intervention of the Appeal Division. Counsel for the Respondent submits that the General Division accurately referred to the law and reasonably applied it to the facts.

[37] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require me to conduct my own analysis and substitute my own view as to the correct outcome: *Dunsmuir* and *Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[38] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 4 and 18 of its decision.

[39] It is insufficient to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law to the facts. If the correct law is applied, the decision to summarily dismiss must be reasonable. This requires an assessment on a reasonableness standard, as it involves a question of mixed fact and law. However, one does

not undergo an assessment of the reasonableness of the decision, if the correct law was not applied.

[40] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. In *A.P. v. Minister of Employment and Social Development and P.P.*, (August 12, 2015), SSTAD-15-297 (currently unreported), I used the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. I determined that a weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it. Assessing the evidence and the merits of the case signals that the matter is not appropriate for a summary dismissal.

[41] Here, the General Division clearly considered the evidence before it. The General Division wrote:

> [15] The Appellant's representative has stated that the Appellant's brain hemorrhage in October 2000 prevented the Appellant from forming the intention to apply for a CPP – disability benefit. However, this argument is in conflict with the evidence on file. As detailed by the Appellant in his March 7, 2013 correspondence he applied for a CPP – disability benefit in 2005. He presumed it was denied and made no further steps at that time. This strongly rebuts the argument put forward by the Appellant's representative that the Appellant lacked the capacity to form an intention to file a claim.
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> [16] Again in the March 7, 2013 correspondence the Appellant detailed that it was only when he had a second stroke which in turn had a further negative impact on his function that he again applied for a CPP – disability benefit. Again this fact supports a conclusion that it was only when he had a worsened condition in December 2011 that he decided to again apply for a CPP – disability benefit.
>
> [17] These facts strongly weigh in favour of the Appellant having been able to form an intention to apply for a CPP – disability benefit and therefore support a finding that the Appellant was not incapacitated. As a result the

> Tribunal is satisfied that section 60(8) of the CPP does not apply to the present matter. As a result the retroactive benefit applied to the Appellant is the maximum allowed under the CPP and therefore there is no arguable case.

[42] The fact that the General Division was required to assess and weigh the evidence indicated that there were triable issues. While the General Division was entitled to make findings of fact as to whether the Appellant was incapacitated, this went beyond applying the test for a summary dismissal. If the General Division had to analyze the evidence, assign weight and decide upon whether the evidence could support a finding of incapacity, it cannot be said that there was no reasonable chance of success, no triable issue, or no merit to the appeal. While the General Division correctly recited the test for a summary dismissal, that does not signal that the correct law was *de facto* applied. It is irrelevant in assessing whether the matter was appropriate for a summary disposition as to whether, overall, the decision itself could be considered reasonable, as the overriding consideration in this second step must be whether the correct test was applied.

[43] Here, the General Division muddied the distinction between a manifestly clear, "utterly hopeless" case without merit and in this case, a possibly weak or very weak case, and thereby improperly characterized the dismissal of the appeal as a summary dismissal. The General Division ought not to have summarily dismissed the appeal on the issue of the date of separation.

ISSUE 3: IF THE APPEAL BEFORE THE GENERAL DIVISION OUGHT NOT TO HAVE BEEN SUMMARILY DISMISSED, CAN THE DECISION OF THE GENERAL DIVISION STILL STAND?

[44] The General Division improperly characterized the disposition of this matter as a summary disposal, but in fact it assessed the appeal on its merits based on the documents and submissions, which it was permitted to do under section 28 of the *Regulations.* That section permits the General Division to make a decision on the basis of the documents and submissions filed. Even so, and even if the conclusion falls within the range of acceptable outcomes, the decision of the General Division cannot be saved as the Appellant may have been denied any measures available to him under the DESDA or the *Regulations*. Counsel for the Appellant

clearly indicated in her letter dated February 13, 2015 that she intended to fully address the incapacity issue. The Appellant may have been deprived of the opportunity to do so when the General Division summarily dismissed the appeal.

[45] Counsel for the Appellant raised a number of grounds of appeal. As I have found that the appeal ought not to have been summarily dismissed and am referring the matter to the General Division for reconsideration, that effectively renders these grounds moot as I expect that the Appellant will have an opportunity to address the issues raised by these grounds, upon reconsideration by the General Division.

CONCLUSION

[46] For the reasons set out above, the Appeal is allowed and the matter referred to the General Division for reconsideration as to whether the Appellant falls within the provisions of subsection 60(8) of the *Canada Pension Plan*, from "2000 onwards" or from such other date as may be advanced by the Appellant.

[47] To avoid any potential for an apprehension of bias, the matter should be assigned to a different Member of the General Division and the decision of the General Division should be removed from the record.

Janet Lew
Member, Appeal Division