Citation: *I. D. v. Minister of Employment and Social Development*, 2015 SSTAD 1243

Appeal No. AD-15-844

BETWEEN:

I. D.

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 22, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated June 5, 2015 of the General Division, whereby it summarily dismissed his application for a Canada Pension Plan disability pension, on the basis that it was not satisfied that he had a severe and prolonged disability by his minimum qualifying period of December 31, 2009.

[2] The Appellant's representative, his spouse, filed an appeal on July 23, 2015 (the "Notice of Appeal"). 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. 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

[3] 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 appeal for a disability pension under the Canada Pension Plan?

   Did the General Division violate the Appellant's human rights in refusing his claim to a Canada Pension Plan disability pension?

FACTUAL OVERVIEW

[4] The Appellant applied for a Canada Pension Plan disability pension on May 30, 2012. The Respondent denied the application initially and upon consideration. The Appellant appealed the reconsideration decision to the General Division on May 10, 2013.

[5] On May 15, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> The Appellant's Record of Earnings (ROE) indicates sufficient earnings from 1991 to 2007, and no earnings thereafter. Accordingly, the Appellant's Minimum Qualifying Period (MQP) extends to December 31, 2009. In order to qualify for CPP disability the Appellant must establish a severe and prolonged disability on or before the MQP date of December 31, 2009.
>
> Although the evidence establishes that the Appellant has had significant health issues since his mini-stroke in late 2010 and that he likely has been severely disabled since his stroke on September 18, 2011, there is no evidence to suggest that he was incapable of working as of December 2009.

[6] The General Division invited the Appellant to provide detailed written submissions by no later than June 15, 2015, explaining why the appeal had a reasonable chance of success.

[7] The Appellant's representative submitted a letter dated May 17, 2015 to the Social Security Tribunal, advising that the Appellant had been deteriorating since his stroke in September 2011 (Documents GD6 and GD7).

[8] The Appellant's representative wrote again on May 27, 2015 to the Social Security Tribunal, in response to the letter from the Social Security Tribunal that the General Division was considering summarily dismissing the appeal. The representative wrote as follows:

> [The letter dated May 15, 2015] stated that the appellant's Minimum Qualifying Period extends to December 31, 2009. When we had originally submitted the application and spoken to Service Canada, we were informed that an individual could appeal up to four years after stopping his or her earning period, which is December 2011.
>
> Also established in your letter is the fact that we all are in agreement after [the Appellant's] stroke in September 2011, there has been significant deterioration in every which way with his well being, affecting both his physical and mental health.
>
> Once [the Appellant] stopped working in 2007, he became self-employed, managing his finances and exploring the possibility of starting up something for himself. Unfortunately, his health kept deteriorating, but he was self-sufficient,

> managing his own investments, etc. and a good provider for the family until his stroke in September 2011.
>
> Keeping the above facts in perspective, we are requesting his disability claim to be processed from September 2011 onwards. We are not requesting a claim from 2009.
>
> (Document GD8)

[9] The Appellant's representative also submitted a letter dated May 28, 2015 to the Social Security Tribunal (Documents GD9 and GD10). The letter of May 28, 2015 is similar to the representative's letter dated May 27, 2015.

[10] The Appellant's representative requests that Canada Pension Plan disability pension payments commence in September 2011, when the Appellant had his stroke. These requests are consistent with the Appellant's requests dating to May 5, 2013 (Document GD1).

[11] The General Division rendered its decision on June 5, 2015. The General Division relied upon the following provisions, in coming to its decision:

i. Subsection 53(1) of the *Department of Employment and Social Development Act,* 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. Paragraph 44(1)(b) of the *Canada Pension Plan,* which sets out the eligibility requirements for the CPP disability pension. To qualify for a disability pension under the *Canada Pension Plan,* an applicant must be under 65 years of age, not be in receipt of a Canada Pension Plan retirement pension, be disabled, and have made valid contributions to the Canada Pension Plan for not less than the minimum qualifying period; and

iv. Paragraph 44(2)(a) of the *Canada Pension Plan,* which defines disability as a physical or mental disability that is severe and prolonged.

[12] The General Division found that the Appellant had suffered a mini-stroke in late 2010. This was however almost one year after the minimum qualifying period of December 31, 2009. The General Division found that there was no medical evidence to suggest that

the Appellant was disabled at the minimum qualifying period of December 31, 2009. The General Division pointed to the medical reports of Dr. Bercuson which confirmed that the Appellant's disability resulted from the sequelae of his stroke in September 2011, which was close to two years after the minimum qualifying period.

[13] The General Division recognized the Appellant's request that it process his claim for a disability pension as of September 2011, but rejected any notion that it had the jurisdiction to do so.

[14] In dismissing the appeal, the General Division determined that the Appellant had no reasonable chance of establishing a severe and prolonged disability on or before his minimum qualifying period of December 31, 2009.

[15] On July 23, 2015, the Appellant filed an appeal from the decision of the General Division.

[16] On September 5, 2015, the Appellant's representative filed a letter dated September 3, 2015 from Dr. J. Bercuson, the Appellant's family physician. She wrote that the Appellant has suffered significant impairment since his stroke and that his condition continues to deteriorate. She is of the opinion that the Appellant is markedly cognitively impaired and that he is not and never will be employable due to the sequelae of his health conditions.

SUBMISSIONS

[17] In the Notice of Appeal, the Appellant's representative wrote:

- The case was summarily dismissed on the grounds that [the Appellant] was not disabled during the [minimum qualifying period]
- Disability does not come or happen during a required period, and cannot be predicted.
- [The Appellant] has been unemployable since his stroke.
- He was self-employed at the time, but during the time that he worked, he contributed to [the Canada Pension Plan], and his contributions were substantial.
- Now when he is in need, on the basis of one regulation his disability is being refused.

- In [paragraph 15a) of the decision of the General Division], it has been acknowledged that he has a significant issue, so HOW can his disability be refused?
- There has to be other grounds, where people like him, who have worked hard, contributed during their work years, need to be helped when they need it.

[18] The Representative requested an in-person meeting with a member of the General Division, on the basis that the Appellant's human rights had been violated, and his claim for a disability pension refused, although everyone had established that the Appellant is greatly impaired and unemployable.

[19] The Respondent filed submissions on September 8, 2015.

ISSUE 1: STANDARD OF REVIEW

[20] The Appellant did not address the issue of the standard of review.

[21] The Respondent's legal representative, an articling student, provided submissions on this issue. He submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. He 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.

[22] The articling student submits that the main issue in this appeal, whether the decision to summarily dismiss the appeal on the basis that it has no reasonable chance of success, involves a question of mixed fact and law. He submits that the Appeal Division should review the General Division's decision on a reasonableness standard.

[23] I largely concur with these submissions. 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.

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

[25] 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
>
> (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.

[26] The Appellant does not allege that the General Division either failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or that it erred in law or 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. From what I can determine, the Appellant does not dispute any of the factual findings made by the General Division, or its restatement of the applicable legal principles. Rather, his representative alleges that the General Division violated the Appellant's human rights, though does not specify how this might have been done, other than to say that the disability pension was refused. Assuming that this represents an appropriate ground of appeal under subsection 58(1) of the DESDA, I find that a correctness standard applies where the General Division is alleged to have violated an appellant's human rights.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S CLAIM TO A DISABILITY PENSION?

[27] 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.

[28] The articled student 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. He 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 an appeal if it is satisfied that it has no reasonable chance of success. He 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 and that it is reasonable.

[29] 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.

[30] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 3 and 20 of its decision.

[31] 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.

[32] 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 is an adequate factual foundation to support the appeal and the outcome is not "manifestly clear", then the matter is not 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. In reviewing the jurisprudence, it seems that "no reasonable chance of success" has been interpreted to essentially mean "no chance of success whatsoever".

[33] The General Division understood this distinction and recognized when a summary dismissal is appropriate. It found that there was no medical evidence to suggest that the Appellant was disabled by the minimum qualifying period of December 31, 2009. It would have been a different matter altogether had there been competing medical evidence as to whether the Appellant could be found disabled by that date. The Appellant indicated in a letter dated November 11, 2012 that he stopped working in 2007 as his health began deteriorating (Document GD3-24), but there is no suggestion anywhere – either in his or his representative's submissions or in any of the medical opinions – that he was unable to work or did not have the capacity regularly of pursuing any substantially gainful occupation until sometime after the minimum qualifying period had passed.

[34] The General Division considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA. The General Division clearly indicated that the Appellant would only be eligible for a disability pension under the *Canada Pension Plan* if he was disabled by his minimum qualifying period of December 31, 2009. The General Division noted that the law does not allow for any flexibility to this date and that it was irrelevant that the Appellant might have become disabled after December 31, 2009.

[35] The General Division found that not only was there no evidentiary basis to support a finding that the Appellant could be found disabled on or before his minimum qualifying period, but that neither the Appellant nor his representative made any submissions that the

Appellant was disabled by his minimum qualifying period. Indeed, the General Division noted that the Appellant sought to have the claim to a disability pension commence in 2011. Overall, the General Division was unable to find an adequate or factual foundation to support the appeal.

[36] Having found that there was no factual basis to support a finding that he was disabled on or before his minimum qualifying period and that it was therefore without any merit, the General Division rightly concluded that the appeal had no reasonable chance of success and properly summarily dismissed it on that basis.

ISSUE 3: DID THE GENERAL DIVISION VIOLATE THE APPELLANT'S HUMAN RIGHTS IN REFUSING HIS CLAIM TO A CANADA PENSION PLAN DISABILITY PENSION?

[37] Setting aside the issue of the appropriateness of a summary disposition of this matter, there must be at least one valid ground of appeal under subsection 58(1) of the DESDA, to succeed on an appeal. Here, the Appellant submits that the General Division violated his human rights in refusing his claim to a Canada Pension Plan disability pension, despite the fact that everyone accepts that he is currently "greatly impaired and unemployable".

[38] The Respondent's legal representative submits that the General Division is created by legislation and, as such, it has only the powers granted to it by the governing statute. He submits that the General Division is required to interpret and apply the provisions as they are set out in the *Canada Pension Plan,* irrespective of how it might impact upon the Appellant. He submits that given the uncontested facts – that the Appellant was not disabled on or before his minimum qualifying period of December 31, 2009 -- and the applicable law, there was only one possible outcome. As the Appellant became disabled after his minimum qualifying period, the appeal was therefore bereft of any chance of success and was properly summarily dismissed by the General Division.

[39] The Appellant's representative relies in part on paragraph 15a) of the decision of the General Division. Paragraph 15a) reads:

> The Minister acknowledges that the Appellant has had significant health issues since his hospitalization in October 2010 and especially since his stroke in September 2011.

[40] Paragraph 15a) of the decision represents the submissions of the Respondent, though the General Division does not appear to have rejected these particular submissions. The fact that the Appellant has had significant health issues does not establish disability for the purposes of entitlement to a Canada Pension Plan disability pension, as one must also be found to have been disabled on or before his minimum qualifying period. It is the *Canada Pension Plan* which governs how benefits under the *Canada Pension Plan* are to be conferred. It is the *Canada Pension Plan* which confers the disability pension, so one must meet the requirements under the *Canada Pension Plan* to qualify for the pension. There is no entitlement as of right to a Canada Pension Plan disability pension, and the fact that one might be disabled is alone insufficient, as one must also be found disabled on or before his minimum qualifying period. If an appellant cannot be found to have been disabled on or before his minimum qualifying period, he has not met all of the requirements under the *Canada Pension Plan* and is therefore not entitled to a disability pension. It is irrelevant that the Appellant offers to have his disability claim "processed from September 2011", i.e. that he be found disabled as of September 2011, as this still does not enable him to forego the requirements under the *Canada Pension Plan* that he had to have been found disabled by no later than his minimum qualifying period of December 31, 2009.

[41] The General Division identified the applicable provisions of the *Canada Pension Plan* and appropriately applied them to the facts. There is no evidence before me that the General Division failed to follow the *Canada Pension Plan*.

CONCLUSION

[42] Given the considerations above, the Appeal is dismissed.

Janet Lew
Member, Appeal Division