Citation: *L. C. v. Minister of Employment and Social Development*, 2015 SSTAD 1287

Appeal No. AD-15-994

BETWEEN:

L. C.

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: November 4, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated May 31, 2015 of the General Division, whereby it summarily dismissed her appeal of the reconsideration decision of the Respondent, as it was satisfied that the appeal did not have a reasonable chance of success.

[2] The Appellant received the decision of the General Division on July 2, 2015. She filed an appeal on September 3, 2015 to the Appeal Division (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. Counsel for the Respondent sought a teleconference, given the complexities of this case, but 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 claim?

3. Did the General Division err in law or did it base its decision on an erroneous finding of fact without regard for the material before it?

4. If so, what remedies, if any, are appropriate and available to the Appellant if the General Division erred, or can the decision of the General Division stand?

FACTUAL OVERVIEW

[4] The Appellant applied for a Canada Pension Plan disability pension on December 6, 2011 (GD3-95 to GD3-98). The Respondent denied the application initially, on January 12, 2012 (GD3-88 to GD3-89) and upon reconsideration, on May 3, 2012 (GD3-69 to GD3-70), on the basis that she had made insufficient valid contributions to the Canada Pension Plan. The Appellant did not appeal the May 3, 2012 reconsideration decision to the Office of the Commissioner of Review Tribunals.

[5] The Appellant applied for a Canada Pension Plan disability pension a second time, on December 28, 2012 (GD3-65 to GD3-68). The Respondent denied the application initially on January 28, 2013 (GD3-62 to GD3-63). On February 20, 2013, the Appellant sought a reconsideration (GD3-12/43). She advised that she had made sufficient earnings to make contributions to the Canada Pension Plan for the years 2006, 2007, 2008 and 2009. She submitted that she had made "sufficient contributions to qualify for disability benefits up to December 31, 2011". The Respondent maintained its position that the Appellant had not made sufficient valid contributions to the Canada Pension Plan (GD3-4). The Respondent wrote in its letter dated May 6, 2013 that:

> In your case, you needed to contribute in at least four of the **last** six years to be eligible for a Disability benefit.
>
> In your case, from 2006 to 2011, you contributed only in three years, which were 2006, 2008 and 2009. Therefore, you cannot receive a Canada Pension Plan Disability benefit because you did not make enough contributions. As indicated in letters from Service Canada in May 2012 and Canada Revenue Agency in January 2013, you did not request an adjustment to your 2007 earnings and contributions within the four year legislated time limit.

[6] The Appellant appealed the reconsideration to the Social Security Tribunal on May 28, 2013. She enclosed copies of the readjustment of her 2007 taxes which showed that she had made contributions to the Canada Pension Plan for the year 2007. The enclosures also included a letter dated January 21, 2013 from Canada Revenue Agency, which reads:

> We cannot make an adjustment to the CPP contributions on self-employment earnings for the following reason:

> Subsection 30(5) of the "Canada Pension Plan" stipulates that contributions on self-employed earnings for a particular year are deemed to be zero when an individual did not file a return of self-employed income within four years after the due date of the return.
>
> Since you did not file a return of self-employed earnings within the required timeframe, we have not assessed an amount payable for CPP on self-employment.

[7] On July 26, 2013, the Social Security Tribunal wrote to the Appellant, advising her that the Notice of Appeal was incomplete. On August 21, 2013, the Appellant re-filed her Notice of Appeal; she alleged that she had sufficient earnings and contributions to the Canada Pension Plan (GD1B). A representative for the Appellant re-filed the Notice of Appeal again, on September 11, 2013 (GD1A).

[8] On September 19, 2013, the Social Security Tribunal acknowledged receipt of the Notice of Appeal. The Social Security Tribunal also advised that the parties had a maximum of 365 days from the date the appeal was filed to sign a Notice of Readiness, which would signal to the Social Security Tribunal that the parties were ready to proceed. The Social Security Tribunal calculated this date to be August 21, 2014. The Respondent filed a Notice of Readiness on November 29, 2013.

[9] On March 24, 2015, the Social Security Tribunal advised the parties that it considered the appeal ready to proceed. The Social Security Tribunal advised the parties that if they wished to file any additional documents or written submissions that had not already been sent to the Social Security Tribunal, to file them without delay.

[10] On April 21, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal from the reconsideration decision of the Respondent because:

> The Appellant has not made a sufficient number of contributions to the Canada Pension Plan (CPP) to satisfy the minimum qualifying period as required by subparagraph 44(1)(b)(i) of the CPP legislation.
>
> Subsection 44(2) of the CPP states that the minimum qualifying period for a disability pension will be satisfied where a contributor makes valid contributions to the CPP in 4 of the last 6 calendar years, included wholly or partly in the contributor’s contributory period, or where the contributor has at least 25 years of

> valid contributions to the CPP, in 3 of the last 6 calendar years included wholly or partly in the contributor's contributory period.
>
> The Appellant's contributory period began in May 1968, the month after her 18th birthday (subparagraph 44(2)(b)(i) and subsection 2(2) of the CPP), and the earliest her contributory [*sic*] could end is September 2011, being 15 months before her application was received (subparagraph 44(2)(b)(ii) and paragraph 42(2)(b)). During her contributory period, the Appellant made valid contributions to the CPP in 1987, 1988, 2000, 2001, 2006, 2008, and 2009. The Appellant does not have 4 years of valid contributions in a 6 year period nor does she have at least 25 years of valid contributions in order to avail herself of the 3 out of 6 year contributory rule.
>
> The Tribunal is aware that the Appellant filed an adjustment request with the Canada Revenue Agency (CRA) regarding the taxation year 2007; however, as indicated in the January 21, 2013 letter from the CRA, subsection 30(5) of the CPP precluded an adjustment to the CPP contributions on self-employment earnings because the Appellant's income tax return was not filed within 4 years of the due date of the return.
>
> The Tribunal does not have the discretion to disregard the provisions of the CPP, nor can it render decisions on the basis of compassion, fairness or extenuating circumstances.
>
> Based on the foregoing, there is no reasonable chance of this appeal succeeding.

[11] The General Division invited the Appellant to provide detailed written submissions by no later than May 27, 2015, explaining why her appeal had a reasonable chance of success.

[12] On May 25, 2015, the Appellant contacted the Social Security Tribunal by telephone. She advised that she would be sending submissions by facsimile. The Appellant filed her submissions on June 10, 2015, but by then, the General Division had already rendered its decision, on May 31, 2015. The Social Security Tribunal sent a copy of the decision, along with a covering letter, to the parties on June 2, 2015.

[13] In coming to its decision on May 31, 2015, the General Division relied upon the following provisions:

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 Canada Pension Plan disability pension;

iv. Subsection 44(2) of the *Canada Pension Plan* which states that the Minimum Qualifying Period for a disability benefit will be satisfied where a contributor makes valid contributions to the Canada Pension Plan in 4 of the last 6 years, including wholly or partly in the contributor's contributory period, or where the contributor has at least 25 years of valid contributions to the Canada Pension Plan, in 3 of the last 6 years included wholly or partly in the contributor's contributory period*;*

v. Paragraph 44(2)(b) and section 2(2) of the *Canada Pension Plan,* which states that the earliest a person can be deemed to be disabled, for payment purposes, is 15 months before the date of the disability benefit application;

vi. Subsection 30(5) of the *Canada Pension Plan,* which states that the amount of any contribution required by the Canada Pension Plan to be made by a person for a year in respect of their self-employed earnings for the year is deemed to be zero where the return of those earnings is not filed with the Minister before the day that is four years after the day on which the return is required by subsection (1) to be filed and where the Minister does not assess the contribution before the end of those four years; and,

vii. Section 97 of the *Canada Pension Plan,* which states that any entry in the Record of Earnings relating to the earnings or a contribution of a contributor shall be conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made.

[14] The General Division found that the Appellant had not made sufficient contributions to the Canada Pension Plan to qualify for the Canada Pension Plan disability pension and that it did not have the authority or any discretion to amend the Appellant's Record of Earnings. The General Division concluded that the appeal did not have a reasonable chance of success.

[15] The Social Security Tribunal wrote to the Appellant on June 12, 2015, advising that as the General Division had already rendered its decision, her recourse was to appeal the decision to the Appeal Division.

[16] On September 3, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division, by re-filing a copy of the letter which she had previously filed with the Social Security Tribunal on June 10, 2015.

[17] On October 19, 2015, the Appellant filed additional records, including tax returns for 2006, 2008 and 2009 as well as a 2007 Notice of Assessment and pay cheque stubs for 2007. These records had been before the General Division.

[18] On October 23 and 26, 2015, counsel for the Respondent filed submissions.

SUBMISSIONS

[19] In the Notice of Appeal filed on September 3, 2015, the Appellant alleged that the General Division failed to observe a principle of natural justice or refused to exercise its jurisdiction. She also alleged that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In particular, she alleged that the General Division failed to consider the fact that she had made valid contributions to the Canada Pension Plan and the fact that she has been disabled since December 2008.

[20] In her accompanying letter of May 26, 2008, the Appellant had requested additional time to collect medical records from her eye specialist, an otolaryngologist and psychiatrist. She had also explained that she required more time to search for her marriage records. She had also advised that she had "sufficient growth accumulated" to prove her entitlement to a Canada Pension Plan disability pension.

[21] On October 20, 2015, counsel for the Respondent filed written submissions. Counsel for the Respondent acknowledges that the General Division erred in rendering its decision, but that ultimately it reached the correct conclusion in determining that the Appellant does not qualify for a Canada Pension Plan disability pension.

[22] Counsel for the Respondent submits that the General Division correctly determined that the Appellant did not satisfy the minimum contributory requirements for a Canada Pension Plan disability pension when she applied in December 2012. Counsel further

submits that the General Division also correctly determined that the Canada Revenue Agency (CRA) could not revise her Record of Earnings (ROE) for the year 2007 because the revision requested was based on self-employment earnings made more than four years earlier and it was obligated to apply subsection 30(5) of the *Canada Pension Plan* (Plan or CPP).

[23] Counsel for the Respondent acknowledges however that the General Division erred by failing to consider the "late applicant" provisions set out in subparagraph 44(1)(b)(ii) of the *Canada Pension Plan* and in failing to assess whether the Appellant met the minimum contributory requirements for a Canada Pension Plan disability pension at any time during her contributory period. Counsel submits that had the General Division fully considered the facts and law it would have concluded the Appellant satisfied the minimum contributory requirements for a disability pension until December 31, 1989 pursuant to the rules in effect between 1987 and 1997, which required valid contributions in 2 out of the last 3 years of her contributory period.

[24] Counsel for the Respondent submits that the General Division's error in this regard is irrelevant to the outcome of the appeal because there is no medical evidence in the General Division record to establish that the Appellant was disabled pursuant to paragraph 42(2)(a) when she last qualified in December 1989. Counsel submits that should the Appeal Division determine that this appeal should be allowed because the decision of the General Division contains reviewable errors, the Respondent would consent to the Appeal Division granting the appeal and exercising its jurisdiction, pursuant to subsection 59(1) of the DESDA, to issue the decision that the General Division should have given, which counsel submits is as follows, that:

> The Appellant is not disabled on or before her minimum qualifying period of December 1989 pursuant to paragraph 42(2)(b) of the *Plan.*

[25] Counsel for the Respondent submits that proceeding in this manner is the most cost effective and just adjudication of this appeal in the circumstances.

ISSUE 1: STANDARD OF REVIEW

[26] The Appellant did not address the issue of the standard of review, whereas counsel for the Respondent provided comprehensive submissions on this issue, from reviewing the respective roles and expertise of the General Division vis-à-vis the Appeal Division, to examining Parliament's intent regarding the nature of the appeal before the Appeal Division, determining the degree of deference which the Appeal Division ought to accord to the General Division, assessing the nature of the questions at issue and to applying the standards of correctness and reasonableness in practice.

[27] Counsel for the Respondent submits that, with respect to the deference the Appeal Division should accord to the General Division, the wording of sections 58 and 59 of the DESDA indicates that Parliament intended that the Appeal Division would show deference to the General Division's findings of fact and mixed fact and law and that no deference should be shown to the General Division with respect to questions of law. I concur with these submissions.

[28] Counsel for the Respondent submits that the Appeal Division should apply a correctness standard to General Division decisions on questions of law and a reasonableness standard to General Division decisions on questions of mixed fact and law, and as the main issue before me is whether the General Division applied the law to the facts before it, counsel further submits that the Appeal Division should review the General Division's decision for "reasonableness".

[29] I 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.

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

[31] 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.

[32] From what I can determine, the Appellant disputes the factual conclusions drawn by the General Division, regarding the sufficiency of contributions made by her to the Canada Pension Plan for the year 2007. This involves determining how section 30(5) of the *Canada Pension Plan* applies to any earnings for 2007, which would involve an assessment on the correctness standard.

[33] However, that does not conclude the matter, as counsel for the Respondent acknowledges that the General Division erred (in law) by failing to apply the late applicant provisions, where the Appellant did not otherwise meet the contributory requirements under subsection 44(2) of the *Canada Pension Plan.* A correctness standard applies when an error of law of this nature is made. This would then require me to conduct my own analysis, which could result in substituting my own views as to the correct outcome. This would involve examining the facts, to determine whether the Appellant can be found disabled under the *Canada Pension Plan,* under the late applicant provisions.

[34] Although this process involves examining the facts and the law, the decision of the General Division at this juncture is not subjected to a reasonableness standard, as a correctness review is well underway.

[35] Counsel for the Respondent submits that the General Division's decision to summarily dismiss the Appellant's appeal is "reasonable", given the General Division record and the applicable law. This view is unsustainable. If an error of law has been made, the decision cannot stand on the analysis by which it was given.

[36] I note finally that the fact that the late applicant provisions might apply does not necessarily close the door to a summary dismissal of the appeal.

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

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

[38] 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 paragraphs 3 and 4 of its decision.

[39] I agree with this approach. 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.

[40] 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.

[41] Counsel submits that although the term "reasonable chance of success" has not been defined by the courts for the purposes of the DESDA, the common law has explained the

term in other contexts. Counsel submits that in the context of a motion to strike a third party claim, the Supreme Court of Canada in *R v. Imperial Tobacco Ltd.*, 2011 SCC 42 at paras. 17 and 19 to 20 held that a claim will only be struck if it is "plain and obvious" assuming the facts pleaded to be true, that the pleadings disclose no cause of action and more recently, the Federal Court of Appeal has held that a case will have no reasonable chance of success if it is "clearly bound to fail" (*Fotinov et al. v. Royal Bank of Canada,* [2014] F.C.J. No. 355 (C.A.) at paras 4 to 5).

[42] I have previously reviewed the jurisprudence as it relates to the appropriateness of the summary dismissal procedure set out in the respective rules of court in the federal and provincial realms, and in determining whether an appeal has a reasonable chance of success (see *A.P. v. Minister of Employment and Social Development and P.P.*, 2015 SSTAD 973). In those contexts, the courts have used the expressions "triable issue" and "manifestly clear" (which seems to be akin to "plain and obvious"), and determined whether there is any merit to the claim. From this, I derived the distinction between an "utterly hopeless" and "weak" case; 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. 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 have concluded that in essence, "no reasonable chance of success" has been more or less interpreted to mean "no chance of success at all".

[43] Counsel for the Respondent submits that the Appellant's circumstances and the applicable law indicate that the General Division was correct to summarily dismiss the appeal because it had "no reasonable chance of success".

[44] Before I can determine whether the General Division properly summarily dismissed the appeal, a review of some of the legal issues is necessary in this case. I will return to the issue of the appropriateness of the summary dismissal following this review.

ISSUE 3: DID THE GENERAL DIVISION ERR?

i. The Appellant's earnings history

[45] Counsel submits that the General Division did not err in considering the Appellant's 2007 self-employment earnings and in concluding that she did not have valid contributions to the Canada Pension Plan for that year.

[46] There is no dispute that the Appellant had made valid contributions to the Canada Pension Plan for the years 2006, 2008 and 2009. However, the parties disputed whether earnings for the year 2007 qualified as valid contributions to the Canada Pension Plan.

[47] The Appellant requested Canada Revenue Agency to adjust her earnings for 2007. Notwithstanding the Appellant's request to Canada Revenue Agency for an adjustment for 2007, Canada Revenue Agency advised that it was unable to do so, due to subsection 30(5) of the *Canada Pension Plan.* And, under section 97 of the *Canada Pension Plan,* the General Division was bound to accept the Record of Earnings as conclusive evidence of the Appellant's contributions to the Canada Pension Plan after four years had elapsed from the end of the year in which the entry was made. Counsel notes that the Federal Court of Canada has held that there is no discretion in subsection 30(5) of the *Canada Pension Plan: Torrance v. Canada,* 2008 FC 1083.

[48] I accept the Respondent's submissions that the Appellant did not have valid contributions to the Canada Pension Plan for 2007 and that she therefore does not meet the contributory requirements under subparagraph 44(2)(a)(i) of the *Canada Pension Plan.*

[49] If this issue involving the Appellant's contributions to the Canada Pension Plan in 2007 alone was determinative of the outcome, then the matter would have been properly summarily dismissed. However, the Appellant had made other contributions to the Canada Pension Plan. The Record of Earnings indicates that the Appellant had made valid contributions for the years 1987, 1988, 2000, 2001, 2006, 2008 and 2009 (GD3-102).

[50] While the matter might yet still be determined to be appropriate for a summary dismissal, further review is warranted.

ii. Late applicant provisions

[51] Counsel submits that although the Appellant was unable to avail herself of subparagraph 44(2)(a)(i) of the *Canada Pension Plan*, she nonetheless might have been able to rely on subparagraph 44(1)(b)(ii) which provides that applicants who do not meet the contributory requirements at the time of the application may qualify for a disability pension if they can establish they were disabled at an earlier time when they last met the contributory requirements and continue to be so disabled. Counsel submits that it is unclear whether the General Division considered these provisions and the child rearing provisions, or considered whether the Appellant could establish that she was disabled when she last met the contributory requirements and has been continuously disabled since then. That being so, the General Division may have erred in law if it did not consider these provisions.

[52] If the General Division erred in law by not considering the late applicant provisions, does that necessarily render the overall decision incorrect?

iii. The Appellant's minimum qualifying period

[53] As I have stated above, when questions of law are involved, a correctness standard applies. When applying this 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. I should therefore apply subparagraph 44(1)(b)(ii) of the *Canada Pension Plan* and determine whether the Appellant might have an earlier minimum qualifying period by which she is required to have been found disabled.

[54] Counsel submits that, based on the Appellant's record of earnings, subparagraph 44(1)(b)(ii) of the *Canada Pension Plan* and the previous qualifying rules, the Appellant has a minimum qualifying period of December 31, 1989. I agree with this calculation of the Appellant's minimum qualifying period and accept that the Appellant has a minimum qualifying period of December 31, 1989.

ISSUE 4: REMEDIES

[55] The appropriate provisions of the *Canada Pension Plan* having been applied, I turn next to a determination on the facts as to whether the Appellant could be found disabled by her minimum qualifying period of December 31, 1989.

[56] Counsel submits that, given the evidence, the Appellant cannot be determined to be disabled by her minimum qualifying period of December 31, 1989. Counsel points to the Appellant's Questionnaire which accompanied her application for a disability pension. The Appellant disclosed in the Questionnaire that she stopped working and felt disabled as of April 30, 2009. Counsel submits that the Record of Earnings show that the Appellant had worked and had substantially gainful occupation in 2008 and 2009 – more than 19 years after the minimum qualifying period – when she had self-employment earnings of $32,261 and $19,712, respectively.

[57] By any definition, these earnings levels qualify as substantially gainful occupation. Apart from that, I note that the Appellant relies on these earnings in 2008 and 2009 in an effort to extend her minimum qualifying period. It would be somewhat inconsistent for her to rely on them in an effort to extend her minimum qualifying period, and then on the other hand, to try to downplay that she was involved in a substantially gainful occupation, but for the fact that these earnings are derived from self-employment.

[58] Determining whether the Appellant can be found disabled by her minimum qualifying period of December 31, 1989 involves assessing the evidence and making findings of fact. Some facts are indisputable and seemingly would be dispositive the outcome. For instance, I do not see any suggestions from the Appellant anywhere that she should be found disabled by December 31, 1989. The Appellant's earnings after December 31, 1989, particularly in the years 2008 and 2009, suggest that she held the capacity regularly of pursuing any substantially gainful occupation. By these measures, there is every temptation to summarily dismiss the appeal.

[59] However, having to undergo such an exercise – the very act of assessing the evidence and making findings of fact – renders the appeal unsuitable for a summary disposition.

[60] Ultimately, the Appellant may have little, if anything, to contribute in the way of submissions or evidence, on the issue as to whether she might be found disabled by her minimum qualifying period of December 31, 1989, in an appeal before the General Division. Under such circumstances, a dismissal on the record would seem to be the appropriate route. But, on the other hand, the Appellant may well have medical evidence to establish that she was disabled by the minimum qualifying period, and may be able to explain why her earnings after the minimum qualifying period may not in fact represent a substantially gainful occupation.

[61] If I were to now dismiss this appeal, I would be depriving the Appellant a full consideration on the merits of her claim, and the opportunity to respond to the issue as to whether she could be found disabled by her minimum qualifying period, and whether earnings in 2008 and 2009 should represent a substantially gainful occupation.

[62] Counsel for the Respondent urges me to render the decision which the General Division ought to have given, but I cannot assume that the General Division would have dismissed the appeal after a hearing, given that it did not fully air the evidence or undertake any assessment as to whether the Appellant could be found disabled by her minimum qualifying period of December 31, 1989. I decline to make any findings on the issue as to whether the Appellant could be found disabled on or before her minimum qualifying period of December 31, 1989, pursuant to paragraph 42(2)(b) of the *Canada Pension Plan*, as this would usurp the role of the General Division to serve as the trier of fact firsthand.

CONCLUSION

[63] For the reasons set out above, the Appeal is allowed and the matter referred to the General Division for a full reconsideration as to whether the Appellant can be found disabled for the purposes of the *Canada Pension Plan* by her minimum qualifying period, and continuously disabled since then.

[64] The Appellant is granted leave to file any additional medical or business records pertaining to her self-employment, along with updated submissions, subject to any directions or orders made by the General Division.

[65] 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