

**Citation: *S. C. v. Minister of Employment and Social Development*, 2015 SSTAD 1317**

**Date: November 10, 2015**

**File number: AD-15-211**

**APPEAL DIVISION**

**Between:**

**S. C.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(Formerly Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Hazelyn Ross, Member, Appeal Division**

## **PERSONS IN ATTENDANCE**

Appellant - S. C.  
Appellant's Representative - Sherry Miller  
Respondent's Representative - Luc Bélanger

## **DECISION**

[1] The appeal is dismissed.

## **INTRODUCTION**

[2] This is an appeal from a decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued on February 6, 2015, that denied the appeal of a reconsideration decision upholding the denial of a *Canada Pension Plan*, (CPP), disability pension. The General Division held that, on or before the end of his minimum qualifying period, (MQP), of December 31, 2009 the Appellant did not meet the CPP definition of “severe and prolonged” disability.

## **GROUND OF THE APPEAL**

[3] Leave to appeal was granted on the narrow ground that General Division may have applied the wrong test when it stated the burden of proof required.

## **ISSUE**

[4] The Appeal Division must decide the following question:

Did the General Division apply the correct test when it determined that the Appellant did not have a severe and prolonged disability?

## **THE LAW**

[5] The *Department of Employment and Social Development*, (DESD), Act provides for three grounds of appeal only, namely, breaches of natural justice; errors of law; and errors of fact on which an appellant may bring an appeal. The governing statutory provisions are set out at section 58 of the Act and are:

- 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.

## **STANDARD OF REVIEW**

[6] Before deciding whether or not the appeal should succeed, the Appeal Division must determine the standard of review that applies to the General Division decision. While the Appellant made no submissions on the standard of review, Counsel for the Respondent submitted that Appeal Division should apply a standard of “reasonableness” because the appeal involves a question of mixed fact and law. Counsel for the Respondent also proposed, what he termed, a modified standard of review analysis that would consider the following elements:

- i. The respective roles and expertise of the Tribunal’s two divisions;
- ii. Parliament’s intent concerning the nature of the appeal at the Appeal Division;
- iii. The degree of deference to be accorded to the General Division; and
- iv. The nature of the question at issue.

[7] Counsel for the Respondent submitted that based on the modified standard of review analysis he put forward and jurisprudence from the Supreme Court of Canada and the Federal Court of Appeal, the Appeal Division should apply a correctness standard to General Division decisions on questions of law. On questions of fact and questions of mixed fact and law, the Appeal Division should review General Division decisions on a standard of “reasonableness.” (AD3-16)<sup>1</sup>

---

<sup>1</sup> Exhibit R-1, AD3-16.

## **The Case Law**

[8] “Any review begins with identifying whether the question is one of law, fact or mixed fact and law.”<sup>2</sup> In the adjudicative context, decisions on questions of fact, whether undergoing appellate review, or administrative law review, always attract deference.<sup>3</sup>

[9] The Appeal Division finds that the issue on appeal is one of mixed fact and law. It requires the Appeal Division to determine the actual test used as well as the appropriateness of the test used. Therefore, “reasonableness” is the applicable standard of review.

## **SUBMISSIONS**

[10] Counsel for the Respondent submitted that on the ground on which leave to appeal was granted the General Division did not err. Counsel for the Respondent submitted that the General Division correctly applied the burden of proof required in determining that the Appellant was not disabled within the meaning of the CPP. Counsel for the Respondent submitted that at paragraph 34 of the decision the General Division set out the appropriate burden of proof, namely “a balance of probabilities”. Further, in detailed submissions that examined various aspects of the evidence presented at the hearing, Counsel for the Respondent argued that the General Division properly applied the burden of proof with regards to the Appellant’s credibility, the medical evidence, and the Appellant’s ability to pursue regularly any substantially gainful occupation.

[11] The Appellant filed a Notice indicating he did not have any submissions to file. (AD3)

## **ANALYSIS**

[12] The Tribunal granted Leave to Appeal with respect to the question of whether or not the General Division used the correct legal test when it stated that the Appellant had failed to convince the Tribunal that he suffered from a severe disability as the CPP defines disability.

---

<sup>2</sup> <sup>2</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 51, para. 158

<sup>3</sup> *Dunsmuir*, *supra* para. 51 Bastarache and Lebel, JJ., stated:

“As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.”

[13] At the hearing, the Appellant's representative advanced the position that, by virtue of his alcoholism, the Appellant suffers from a severe and prolonged disability that prevents or renders him incapable regularly of pursuing any substantially gainful occupation. She submitted that while the Appellant is able to manage his alcohol issues, he has other health issues, and she argued that the Appellant was being discriminated against because of his alcoholism. She did not speak to the issue on which leave had been granted; she stated she had not been asked to submit documents, an assertion that is contrary to the Notice filed on June 8, 2015. The Notice, which is on the letterhead of the Simcoe-Haliburton-Kawartha Lakes Community Legal Clinic, is short and signed by the Appellant. It states "I acknowledge receipt of your correspondence dated May 20, 2015. This is my notice to you that I have no submissions to file."

[14] Counsel for the Respondent maintained his position, set out in written submissions, that the General Division did not err. He argued that in the decision the General Division Member reviewed and considered eight elements, among which were - credibility; the Appellant's level of independence; his work capacity; treatment recommendation; medical evidence; as well as the Appellant's speech impediment.

[15] Counsel for the Respondent argued that the General Division had properly stated the test in several paragraphs of the decision and he argued that in examining the evidence before it the General Division had applied the correct test, namely, balance of probabilities. He submitted that the offending words "failed to convince" had little overall impact on the outcome of the decision because the General Division had conducted its analysis using the correct test. In Counsel's submissions the General Division decision was reasonable.

[16] As stated earlier, the Appellant's representative did not make any submissions on the issue of whether the General Division had applied the correct test. She concentrated on the Appellant's medical conditions and argued that he had a severe and prolonged disability. Given the statutory mandate provided by the section 58 of the DESD Act the nature of the appeal before the Appeal Division has been described as an appeal in the nature of judicial review. Thus, the role of the Appeal Division is not to reweigh the evidence already assessed by the General Division but to examine if the General Division made a reviewable error in light of the evidence that was before it.

[17] On an Application for Leave to Appeal the hurdle that an Applicant must meet is lower than the hurdle he must meet at the actual hearing of the appeal. The Appellant had the onus of establishing that an error had been made. The Appeal Division finds that he has not met his onus. His continuing conviction that he is disabled is not sufficient to establish that the General Division committed a reviewable error. On this basis alone, the Appeal Division finds that the appeal can be dismissed. The Appeal Division chooses not to end the enquiry at this point.

[18] The Appeal Division granted leave to appeal on the basis that the General Division may have applied the wrong test. Counsel for the Respondent has urged the view that but for the misstatement at paragraph 45, namely, the words “failed to convince,” the General Division applied the correct test throughout the decision. The Appeal Division concurs. On examining the whole of the decision, the Appeal Division finds,

- 1) the misstatement occurred in the final paragraph of the discussion on “severe disability.” The General Division had already stated and applied the proper test to the evidence;
- 2) the decision, read as a whole, does not reveal that the Appellant was held to a higher standard than “a balance of probabilities.

## CONCLUSION

[19] The Appellant sought and obtained leave to appeal the decision of the General Division to dismiss his appeal of the reconsideration decision. Leave to appeal was granted on the basis that the General Division may have applied the wrong test to determine the Appellant’s eligibility for a CPP disability pension. On the basis of the submissions, law and the Tribunal Record, including the General Division decision, the Appeal Division finds that the General Division did not err. Further, the General Division decision meets the *Dunsmuir*<sup>4</sup> test for reasonableness in that it demonstrates the existence of justification, transparency and intelligibility within the decision-making process and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and the requirements of the CPP.

---

<sup>4</sup> *Dunsmuir, supra.*

[20] The appeal is dismissed.

*Hazelyn Ross*  
Member, Appeal Division