Citation: *B. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1367

Appeal No. AD-15-850

BETWEEN:

B. K.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: November 27, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated July 15, 2015 of the General Division, whereby it summarily dismissed her appeal for a Canada Pension Plan disability, on the basis that it did not find her disability to be prolonged by her minimum qualifying period of December 31, 2014, for the purposes of the *Canada Pension Plan.* 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 on July 22, 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 claim?

3. Did the General Division err in finding that the Appellant's disability is not prolonged within the meaning of the *Canada Pension Plan?*

FACTUAL OVERVIEW

[4] The Appellant applied for a Canada Pension Plan disability pension in April 2013. The Respondent denied the application initially and upon reconsideration, the latter on January 7, 2014 (GD1A-3 to GD1A-5).

[5] In its denial letter dated January 7, 2014, the Respondent advised the Appellant that it did not consider her to have a disability that is both severe and prolonged as defined under the *Canada Pension Plan.* One of the factors it considered was that, according to medical reports and a letter received in December 2013, she had been diagnosed with lymphoma, and was still waiting to hear from the BC Cancer Agency. The Respondent concluded that it was too soon at that time to determine if her medical condition would continue to prevent her from all work in the future, as she was still waiting for assessment and treatment options from the cancer agency. The Respondent also determined that the Appellant's overall treatment plan and prognosis would depend on the results of additional investigations.

[6] The Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal. She mistakenly sent the Notice of Appeal to the Respondent in or about February 2014 but upon discovering her error, promptly re-directed it to the Social Security Tribunal. By then, the Notice of Appeal was filed late. As the Appellant provided a reasonable explanation for the delay and demonstrated a continuing intention to pursue the appeal, and as no prejudice would befall the Respondent, on May 28, 2015, the General Division granted an extension of time to file the Notice of Appeal.

[7] On June 10, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> The Appellant has a recurrent case of deep vein thrombosis secondary to lymphoma. However, in a July 31, 2013 medical letter from the worker's treating physician, Dr. Podavin, it is detailed that the expectation was that this would not be a permanent disability but rather that the Appellant would struggle with the condition for the next 6 to 9 months.
>
> In order for an Appellant to be found disabled within the meaning of the CPP their medical condition must be both severe and prolonged. Prolonged is defined as either of indefinite duration or likely to result in death.

> In the Appellant's case her physician has opined that the condition will likely resolve in 6 to 9 months. As such it would not be considered prolonged within the meaning of the CPP. As such the Tribunal finds that there is not an arguable case.

[8] The General Division invited the Appellant to provide detailed written submissions by no later than July 9, 2015 if she believed that the appeal should not be summarily dismissed, explaining why her appeal had a reasonable chance of success. The Appellant did not provide submissions in response to the letter of June 10, 2015 from the General Division.

[9] On July 15, 2015, the General Division rendered its decision. 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; and

iii. Paragraph 42(2)(a) of the *Canada Pension Plan,* which defines disability. The paragraph reads that a person is considered disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of the paragraph,

   (a) 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;

   (b) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be longed continued and of indefinite duration or is likely to result in death.

[10] The General Division found that the Appellant's treating physician provided an opinion in July 2013 that the Appellant's recurrent case of deep secondary to lymphoma was not permanent but was expected to persist for the next six to nine months. The General Division therefore concluded that Appellant's disability could not be found to be prolonged

under the *Canada Pension Plan* and that the appeal did not have a reasonable chance of success.

[11] On July 22, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division. The Appellant filed additional submissions on August 14, 2015 and October 1, 2015, along with some medical records, including a letter from her physiotherapist.

[12] Counsel for the Respondent filed written submissions on September 29, 2015.

SUBMISSIONS

[13] In the Notice of Appeal filed on July 22, 2015, the Appellant submitted that she had mentioned that she could provide additional information, but did not, as no one had requested it from her. She advises that she has now seen a new doctor and has obtained some reports that may have been previously missing regarding the original diagnosis in October 2011. She advised that she had been waiting to send them after she saw her oncologist in August 2015. She advised that she would try to get more reports from her physiotherapist. The Appellant submits that she has had deep vein thrombosis since October 2011 and now has lymphedema, and submits that the General Division was clearly wrong in finding that the deep vein thrombosis would resolve within six to nine months after July 2013.

[14] The Appellant filed the following in support of her appeal:

(a) consultation report dated May 30, 2013 of Dr. Michael Delorme, clinical hematologist (AD1A-10 to AD1A-11);

(b) consultation report dated November 13, 2013 of Dr. Jeremy Harris (AD1A-19);

(c) ultrasound examinations dated October 19, 2011, April 26, 2012, February 7, August 9 and October 28, 2013 (AD1A-12 to AD1A-AD1A-18 and AD1A-20 to AD1A-21); and,

(d) clinical records of Sun City Physiotherapy (AD1A-21 to AD1A-27) and opinion of physiotherapist dated September 22, 2015 (AD3).

[15] Counsel submits that the General Division correctly stated the test as to when it must summarily dismiss an appeal. Counsel further submits that as the evidence before it showed that the Appellant's deep vein thrombosis was not permanent but that the Appellant would struggle with the condition for the next six to nine months and that the medical condition did not fit the within the definition of prolonged in paragraph 42(2)(a) of the *Canada Pension Plan*, the General Division had no choice but to summarily dismiss the appeal as it had no reasonable chance of success. Counsel submits that the decision of the General Division contains no reviewable error to permit the intervention of the Appeal Division and is reasonable. Counsel submits that the General Division correctly stated the law and reasonably applied it to the facts.

ISSUE 1: STANDARD OF REVIEW

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

[17] Counsel for the Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. 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.

[18] Counsel submits that the Appeal Division should show no deference to the General Division's statement of the test for summary dismissal and to its statement of the law with respect to applying paragraph 42(2)(a)of the *Canada Pension Plan*.

[19] The Respondent submits however 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, and that as such, the Appeal Division should review the decision of the General Division on a reasonableness standard.

[20] 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.

[21] The Supreme Court of Canada set out the reasonableness approach in *Dunsmuir* at paragraph 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

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

[23] 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.

[24] The Appellant disputes the factual findings made by the General Division, as her condition has been ongoing for the past four years, and certainly beyond the anticipated six to nine months within which her deep vein thrombosis had been expected to resolve. She

submits that she continues to be disabled from lymphedema. She submits that she had made submissions in the past, but did not obtain supporting records, as no one had requested them. She relies on various medical records which had not been placed before the General Division, to support her submissions. These submissions amount to an alleged erroneous finding of fact on the part of the General Division, made without regard for the material before it. For an erroneous finding of fact, a reasonableness standard applies.

[25] However, before I proceed with a determination as to whether the General Division might have based its decision on any erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it, I must determine whether the General Division was correct to have summarily dismissed the appeal in the first instance. This calls for a review on the correctness standard, as it involves a question of law.

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

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

[27] 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 3 of its decision. 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 an appeal if it is satisfied that it has no reasonable chance of success.

[28] Counsel submits that the next task for the General Division was to apply the relevant section of the *Canada Pension Plan* to the facts of the Appellant’s case and determine whether there was a reasonable chance of success of the Appellant’s appeal. Counsel 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. The Respondent submits that the decision is reasonable.

[29] Counsel submits that the General Division did not err in its application of the law to the facts. In reviewing the medical evidence before it, the General Division determined that the Appellant medical condition was temporary and only expected to last six to nine months. Counsel submits that it was reasonable for the General Division to conclude that the Appellant did not meet the prolonged branch of the criteria for receiving a disability pension. Counsel submits that as the Appellant did not meet the test to receive a disability pension, the General Division was correct in concluding that that the appeal has no reasonable chance of success and that it therefore made the correct decision to summarily dismiss the appeal.

[30] 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.

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

[32] 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.

[33] 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".

[34] The Appellant would have been wise to have responded to the letter dated June 10, 2015 from the Social Security Tribunal advising her that the General Division intended to summarily dismiss the matter. The General Division found that as the Appellant had not availed herself of the opportunity to rebut her physician's July 2013 opinion that her deep vein thrombosis was likely to resolve within six to nine months, that her condition could not be considered prolonged within the meaning of the *Canada Pension Plan.*

[35] 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 was unable to find an adequate or factual foundation to support the appeal. However, the General Division appears to have failed to consider the Appellant's submissions, as set out in her Notice of Appeal filed with the Social Security Tribunal on April 23 2014. The Appellant indicated that she had been experiencing "excruciating pain" for three years and that she continued to face a number of limitations. She wrote, "3 years of this should be considered long-term. I would say that 3 years is prolonged". Had these submissions or statements been taken into account, the Appellant's position that her disability was ongoing and had not resolved within the six to nine month timeframe should have become obvious. In other words, it should have been clear that the evidence remained very much in dispute.

[36] Counsel submits that it was reasonable for the General Division to have concluded, based on the evidence before it, that the Appellant's medical condition was temporary, rather than prolonged. Had the Appellant accepted the treating physician's opinion that her disability would resolve within six to nine months, and had that actually materialized, then the General Division might have been in a position to summarily dismiss the appeal. Notwithstanding the Appellant's statements set out in the Notice of Appeal that she

continued to be symptomatic, the General Division proceeded to assess the evidence and ultimately rejected the Appellant's statements that she continued to be symptomatic. Having to undergo such an exercise -- assessing the evidence (in the form of statements made in her Notice of Appeal) and making findings of fact -- rendered the appeal unsuitable for a summary disposition. It is irrelevant whether the decision of the General Division was reasonable based on the evidence before it. Provided that there were some triable issues, which in this case there were, meant that the matter was not appropriate for a summary dismissal.

[37] The Appellant has filed additional medical records in support of her appeal. The Appellant relies on these records for the purposes of proving the prolonged nature of her disability, but if the records are to be used exclusively for that purpose, I would render them inadmissible, as the records should address one of the grounds of appeal under subsection 58(1) of the DESDA.

[38] Ordinarily I would not consider any new evidence on appeal if they did not specifically address one of the grounds of appeal under subsection 58(1) of the DESDA, but in this particular case, I find that they are admissible for the sole purpose of showing that the General Division erred in summarily dismissing the appeal without considering that the evidence remained in dispute. (I am by no means suggesting that the records filed in August and October 2015 actually prove the prolonged nature of the Appellant's disability; indeed, I note that the bulk of the records pre-date the July 31, 2013 opinion of the Appellant's treating physician that her disability would resolve within six to nine months. I do not see how these older records would at all assist the Appellant in proving the prolonged nature of her disability, but the Appellant can of course address these issues.)

[39] Ultimately, if this matter proceeds to a hearing, 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, 2014, 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 or might give evidence to establish that she was disabled by the minimum qualifying period and has been continuously disabled since then.

[40] 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 her disability can be considered severe and prolonged for the purposes of the *Canada Pension Plan.*

ISSUE 3: DID THE GENERAL DIVISION ERR IN FINDING THAT THE APPELLANT'S DISABILITY IS NOT PROLONGED WITHIN THE MEANING OF THE *CANADA PENSION PLAN?*

[41] The Appellant suggests that I should render the decision which the General Division ought to have given, but I cannot assume that the General Division would have found the Appellant to have a severe and prolonged disability had there been a full hearing, given that it did not fully air the evidence. 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, as this would usurp the role of the General Division to serve as the trier of fact firsthand.

[42] Having determined that the matter ought not to have been summarily dismissed renders the issue of the prolonged nature of the Appellant's disability moot. While ultimately the General Division may or may not have come to the same determination, it would be premature, if not altogether inappropriate, to consider the issue of the prolonged nature of the Appellant's disability without a full consideration on the merits.

CONCLUSION

[43] 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.

[44] The Appellant is granted leave to file any additional medical or other records pertaining to disability, along with updated submissions, subject to any directions or orders made by the General Division.

[45] 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