Citation: ***M. M. v. Minister of Employment and Social Development*****, 2015 SSTAD 1441**

Date: December 15, 2015

File number: AD-15-322

APPEAL DIVISION

Between:

M. M.

Appellant

and

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

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Videoconference on December 9, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Counsel for the Appellant	Kristen Walker
Representative for the Respondent	Julia Betts
Observer	Michael Stevenson

INTRODUCTION

[1] The Appellant claimed that she was disabled by a number of physical injuries, headaches, sleep disturbance and other conditions that were caused by a motor vehicle accident. She applied for a *Canada Pension Plan* disability pension. The Respondent denied the application initially and after reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal in April 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing in person and on February 23, 2015 dismissed the appeal.

[2] On June 19, 2015 the Appellant was granted leave to appeal the General Division decision to the Appeal Division of the Tribunal. She contended that the General Division erred as it did not consider the test for "severe" as set out in the *Canada Pension Plan*, and did not consider whether she could regularly pursue any substantially gainful employment. The Respondent argued that the General Division applied the correct legal test, that the General Division decision was reasonable, and that it should stand.

[3] This appeal was heard by Videoconference after considering the following:

a) The complexity of the issue under appeal;

b) The fact that the parties were represented;

c) The availability of videoconference in the area where the appellant resides; and

d) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

STANDARD OF REVIEW

[4] Both parties submitted that the standard of review to be applied in this appeal is that of correctness. Counsel for the Respondent refined this by stating that the standard of review regarding whether the General Division set out the legal requirements for “severe” under the *Canada Pension Plan* (CPP) was correctness, and that the question of whether this test was properly applied to the facts before the General Division should be assessed on the reasonableness standard of review.

[5] The leading case on this is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal’s own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. The correctness standard of review is to be applied to questions of jurisdiction, and questions of law that are of importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise. This was adopted by the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA187 which was a judicial review of a decision of the Appeal Division of this Tribunal.

[6] In *Attorney General of Canada v. Jean*, 2015 FCA 242 the Federal Court of Appeal stated that the Appeal Division of the Social Security Tribunal should not subject appeals before it to a standard of review analysis, but should determine whether any grounds of appeal as set out in section 58 of the *Department of Employment and Social Development Act* should succeed. Hence, I must decide if the General Division erred in law by applying the wrong legal test for severe under the CPP.

ANALYSIS

[7] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered on an appeal from a decision of the General Division. Section 59 sets out the remedies that the Appeal Division may grant on an appeal (these are reproduced in the Appendix to this decision).

[8] Both parties agreed that the General Division correctly set out the definition of "severe" in the CPP in paragraph 8 of its decision. It stated:

> Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death

[9] However, in paragraph 44 of the decision, the General Division concluded:

> At the time of the Appellant's MQP in 2008, however, the Tribunal does not find that the Appellant had exhausted all treatment options or that she suffered from a complete inability to participate in any gainful employment working within her functional limitations.

Counsel for the Appellant argued that this statement in paragraph 44 demonstrated that the General Division, despite having set out the correct definition of severe, applied a different, incorrect legal test of severe when it decided this claim. In particular, she argued that because the General Division did not consider the correct definition of severe in the CPP, it did not assess whether the Appellant was incapable regularly of pursuing substantially gainful occupation (emphasis mine). This resulted in a decision that cannot stand. Further, she argued that citing a "boilerplate" definition of severe in the introductory part of the decision could not save the error of applying the wrong definition to reach the decision in the matter at hand.

[10] In *Villani v. Canada (Attorney General)*, 2001 FCA 248 the Federal Court of Appeal decided that each word in the CPP definition of severe must be given meaning, and that Parliament viewed as severe any disability which renders an applicant incapable regularly of pursuing any substantially gainful occupation. This is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Counsel also relied on the decision of the Pension Appeals Board in *Barlow v. Canada (Minister of Human*

Resources Development), (November 22, 1999), CP 07017 (PAB) which considered the dictionary definition of “regular” and “regularly”, and the decision of the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, which stated that predictability is the essence of regularity to support her argument. Counsel referred to the evidence summarized in the decision that the Appellant had to rest in bed because of headaches. She argued that the General Division did not, in reaching its decision in this matter, consider if the Appellant was able to work regularly or predictably because she was bedridden by headaches two to three different days each week. If this had been considered, counsel argued, the General Division would have reached a different decision in this case.

[11] In contrast, the Respondent’s representative argued that the General Division correctly set out an applied the definition of severe in this case. She agreed that this definition was correctly cited from the CPP in paragraph 8 of the decision. Further, she contended that although different wording was used in paragraph 44of the decision, it was substantively the same. She submitted that the General Division should not always be expected to use the exact working of the CPP.

[12] Further, the Respondent’s representative submitted that the General Division was alive to the Appellant’s functional limitations and their impact on her capacity to work. Thus, it was alive to the issue of regularity. She pointed to paragraphs 37 to 43 of the General Division decision, where it considered the Appellant’s limitations and applied the principles from relevant case law in assessing them against the standard set out in the CPP. Therefore, she argued, the General Division decision was reasonable and there was no reason for the Appeal Division to interfere with it.

[13] This issue can be analysed in three steps: 1, whether the correct legal test for severe was identified by the General Division; 2, whether it was properly applied to the facts of the case by the General Division; and 3, whether the General Division decision, as a whole, was defensible on the facts and the law.

[14] First, it is clear that the General Division, in paragraph 8 of its decision, correctly repeated the definition of “severe” as set out in the CPP. That was not disputed. However, simply stating the law is not enough if it is not applied to the facts before the decision maker.

[15] It is also clear that the General Division, in paragraph 44 of the decision, referred to something different than the wording of paragraph 42(2) (a) of the CPP. It is not necessary to always repeat the exact wording of the CPP in each and every instance, although not doing so may be unwise (see *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92). I must decide, however, whether the statement made in paragraph 44 of the decision is substantively the same as the definition of severe in the CPP. I am persuaded that on balance it is not. The statement in paragraph 44 includes some reference to the Appellant's functional capacity to work. It does not, however, consider whether the Appellant's disability was regular. There was evidence before the General Division that the Appellant had to rest in bed due to headaches on a frequent basis (two to three days each week). This evidence was not analysed, or considered by the General Division in reaching its decision. It could result in the Appellant being incapable regularly of pursuing any substantially gainful occupation.

[16] In paragraphs 37 to 43 of the decision, the General Division considered the Appellant's medical conditions apart from her headaches, and applied relevant law on issues of mitigation, following treatment recommendations, etc. It did not consider the issue of regularity.

[17] Counsel for the Appellant argued that the General Division should have considered if she was able to work on a regular basis in determining if the disability was severe. With respect, this is also the incorrect test to be applied. It is the incapacity that must be regular, not the work (see *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34).

[18] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 the Supreme Court of Canada stated that the reasons and the decision must be looked at as a whole to determine if the decision is defensible on the facts and the law. I acknowledge that the General Division decision contained a detailed and thorough summary of the evidence that was before it. It stated the law correctly in the introductory paragraphs, and referred generally to the Appellant's functionality and its impact on her capacity to work. However, it did not consider the issue of regularity, which was before it. In order for a disability pension claimant to be found to be disabled, she must be incapable regularly of pursuing any substantially gainful occupation. The General Division should be alive to this issue

when deciding if a claimant is disabled under the CPP. The General Division was not in this case and erred in law. The decision cannot stand.

REMEDY

[19] Section 59 of the *Department of Employment and Social Development Act* sets out the remedies that the Appeal Division can grant on an appeal. Both counsel suggested that if the appeal was successful it was appropriate that this matter be referred back to the General Division for reconsideration. I concur.

[20] For these reasons the decision of the General Division in this matter is set aside, and the matter is referred back to the General Division for reconsideration. To avoid any potential apprehension of bias it should be assigned to a different General Division Member and the decision of February 23, 2015 should be removed from the record.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.