Citation: *R. B. v. Minister of Employment and Social Development*, 2015 SSTAD 1459

Appeal No. AD-15-1085

BETWEEN:

R. B.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 21, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 5, 2015. The General Division conducted an in-person hearing on June 12, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" at his minimum qualifying period of December 31, 1999 or, as a result of proration, that he had become disabled by the prorated date. Counsel filed an application requesting leave to appeal on October 5, 2015 on behalf of the Applicant. Counsel alleges that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, and that it also erred in law in making its decision. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

HISTORY OF PROCEEDINGS

[3] On May 14, 2015, the Social Security Tribunal issued a Notice of Hearing (document GT0). The Social Security Tribunal had scheduled an in-person for June 12, 2015. The Social Security Tribunal advised the parties that if they had any additional documents or submissions to file, they were to be received by the Social Security Tribunal by no later than May 30, 2015. The letter also indicated that "a copy of any new documents received by the Tribunal will be provided to the other parties and they will be given an opportunity to respond".

[4] The letter also indicated that if a party wished to respond to any documents filed by May 30, 2015, the response was to be received by the Social Security Tribunal by no

later than June 10, 2015. The letter also indicated that it would be left to the discretion of the General Division Member whether to admit any documents that were filed late.

[5] On May 29, 2015, the representative for the Applicant, an advocate, filed submissions (GT7). She also notified the Social Security Tribunal that there would be one witness on behalf of the Applicant.

[6] On June 9, 2015, the Respondent filed an Addendum (GT8). The Respondent noted that it would be relying upon its submissions dated February 12, 2015, and was adding submissions regarding the additional information filed on behalf of the Applicant.

[7] The Social Security Tribunal mailed a copy of the Respondent's Addendum to the Applicant's advocate on June 11, 2015 – the day prior to the hearing before the General Division. The hearing proceeded on June 12, 2015. Counsel submits that the General Division Member did not verify that the Applicant or advocate had received all of the hearing file materials, including the Addendum.

[8] Counsel submits that the advocate did not receive a copy of the Addendum until June 16, 2015, by mail.

[9] There is a note in the hearing file documenting a telephone call from the advocate to the Social Security Tribunal on June 25, 2015, enquiring as to whether she could now submit responses to the documents submitted to the Social Security Tribunal after the hearing had taken place. Presumably this refers to the Addendum, as I can see no other documents which might have been filed by or on behalf of the Respondent.

[10] There is another note in the hearing file documenting a second telephone call between the advocate and the Social Security Tribunal on June 26, 2015. The Social Security Tribunal confirmed the advice which had been set out in the Notice of Hearing that any documents submitted after the hearing would only be considered at the discretion of the General Division.

[11] On June 26, 2015, the advocate wrote to the Social Security Tribunal requesting that the General Division not consider the Respondent's Addendum, or alternatively, if the

General Division were to consider the Addendum, that it also consider her letter in response. She explained that as the hearing had taken place on June 12, 2015 and as neither the Applicant nor she had access to the Addendum, they were unable to address the Respondent's submissions. She submitted that "procedural fairness and natural justice dictate that the appellant has the right to know the evidence against him and to correct or contradict that evidence". She submits that had the Social Security Tribunal delivered the Addendum to her or to the Applicant in a timely manner, they would have had sufficient opportunity to respond. The advocate cited subsection 5(2) of the *Social Security Tribunal Regulations,* which reads, "The Tribunal must provide a copy of any document filed by a party to the other parties to the proceeding without delay". The advocate then proceeded to provide a response to the Addendum.

[12] On July 7, 2015, the Social Security Tribunal issued the decision of the General Division.

[13] On July 10, 2015, the Social Security Tribunal wrote to the advocate, acknowledging her letter of June 26, 2015. The Social Security Tribunal wrote:

> The Tribunal Member of the General Division assigned to this appeal issued a decision on **July 5, 2015.** Unfortunately, the Tribunal was not able to provide the correspondence to the Tribunal Member before the decision was issued. This means that the Tribunal Member did not consider the correspondence when making the decision. As this decision is considered final, the Tribunal Member does not have the authority to revisit your appeal.

DECISION OF THE GENERAL DIVISION

[14] The General Division set out the evidence pertaining to the Applicant's employment in 2002 at paragraphs 20, 22, 30 to 37 and 42 to 47. The General Division also set out the evidence pertaining to the Applicant's employment between 2008 and 2009, at paragraphs 38 to 41, inclusive. Paragraph 21 sets out the Applicant's earnings for the years 2002, 2008 and 2009.

[15] The General Division summarized the Applicant's submissions at paragraph 48 as follows:

> [48] The Appellant's representative submitted that the Appellant qualifies for a disability pension because he has had a severe and prolonged disability since at least 1998 and during this time he has been unable to obtain gainful employment.

and the Respondent's submissions at paragraph 49 as follows:

> [49] The Respondent submitted that the Appellant does not qualify for a disability pension because although he has limitations due to his medical condition which has worsened over time; however, the evidence does not show impairment which prevented him from doing work within his capacity in and continuously since his MQP. It is the Minister's position that Mr. R. B. has not established severe and prolonged disability within the meaning of CPP.

[16] In determining whether the Applicant's disability could be found severe for the purposes of the *Canada Pension Plan,* the General Division considered whether the Applicant exhibited any residual work capacity beyond the minimum qualifying period. The General Division wrote:

> [54] However, in assessing whether an Appellant has a severe condition within the meaning of the CPP consideration must be given to whether the person has any residual work capacity beyond the MQP. In this case the Appellant was able to maintain employment from October 2008 to July 2009. During his testimony the Appellant detailed that he was not provided with any accommodations that would suggest this employer was a benevolent employer. Further the Appellant confirmed he was able to do all of the core work activities at the retirement home. The Appellant detailed that the job requirements were light. However, this is not evidence of a benevolent employer. Rather it is evidence of employment that was within the Appellant's physical capacity.
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> [55] The Tribunal places significant weight on the fact that the Appellant continued in this position for approximately 9 months and that his employment ceased only when the retirement home was closed.
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> [56] The Appellant detailed that he was in pain while working at the retirement home and that he would miss shifts because of this. However, the evidence also demonstrates that he was able to continue on in this position for a lengthy period of time and did not terminate his employment due to these medical conditions.
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> [57] For these reasons the Tribunal finds on a balance of probabilities that the Appellant maintained a residual work capacity for employment beyond his MQP

in December 1999 and prorated MQP in February 2000 and as such he was not severely disabled within the meaning of the CPP.

SUBMISSIONS

[17] Counsel for the Applicant submits that the General Division erred as follows:

(a) it failed to provide him with an opportunity to know and meet the case against him by holding an oral hearing without providing him with a copy of evidence and submissions filed by the Minister, by relying on the undisclosed evidence and submissions in its decision, and failing to provide the Applicant with an opportunity to respond;

(b) further, or in the alternative, erred in its interpretation of the legal test for a "severe" disability within the meaning of section 42 of the *Canada Pension Plan*, by concluding that the Applicant was capable regularly of pursuing a substantially gainful occupation based solely on his intermittent, part-time work as a housekeeper.

[18] The Respondent has not filed any written submissions in respect of this leave application.

THE LAW

[19] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out that the only grounds of appeal are the following:

(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.

[20] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

ANALYSIS

(a) Natural justice

[21] The Applicant submits that the General Division failed to observe principles of natural justice when it did not disclose the Addendum to him or his counsel prior to the oral hearing and subsequently, did not provide him with an opportunity to respond after he received the Addendum following the hearing. Counsel submits that the Addendum set out new evidence and submissions on issues –whether he was capable of regularly pursuing a substantially gainful occupation and whether his employer was benevolent – were central to the decision of the General Division to deny the Applicant's appeal. Counsel submits that as the Social Security Tribunal did not provide the Addendum to the Applicant prior to the hearing and did not provide him with a subsequent opportunity to respond to the Addendum after the hearing, he was unable to know and meet the case against him and he therefore did not get a full and fair hearing before the General Division.

[22] Counsel submits that the right to know and meet the case, which requires disclosure of information relied on by a decision-maker, is a basic principle of natural justice. Counsel submits that the Supreme Court of Canada has made it clear that "the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet". Counsel cites *May v Ferndale Institution*, 2005 SCC 82.

Lebel and Fish JJ. on behalf of the majority, referred to *Ruby v. Canada (Solicitor General*), [2002], 4 S.C.R. 3, where Arbour J. held at para. 40:

> As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position …

[23] Counsel submits that the importance of the principle of timely and full disclose is reflected in the rules that govern the processes of the Social Security Tribunal. Counsel submits that subsection 5(2) of the *Social Security Tribunal Regulations* requires that the Social Security Tribunal provide a copy of any documents filed with the Social Security Tribunal by a party to other parties "without delay".

[24] Counsel submits that the Social Security Tribunal has observed that a failure to provide an Applicant with an opportunity to review a portion of the documentary evidence would give rise, prima facie, to the appearance that the Applicant was not afforded a full and fair hearing. Counsel referred to *D.T.v. Minister of Human Resources and Skills Development*, 2014 SST AD 75 at para 13, although ultimately in that decision the documentation which had not been produced was case law rather than evidence per se and it was determined that no breach had occurred.

[25] Counsel submits that the hearing proceeded without the Applicant being aware of the full extent of the case against him. Counsel submits that had the Applicant been provided with a copy of the Addendum prior to the hearing, he could have responded by offering further, focused testimony and submissions regarding why his employment in 2008 and 2009 was not indicative of capacity to regularly pursue any substantially gainful occupation, within his limitations.

[26] Counsel submits that the Social Security Tribunal failed in its ongoing duty to ensure that all relevant information (i.e. the Applicant's letter of June 26, 2015) was placed before the General Division before its decision was issued. Counsel relies on *Murray v Canada (Attorney General),* 2011 FC 542 *[Murray]*, where Zinn J. wrote at para 20:

> [20] The duty of a board to provide procedural fairness does not end with the conclusion of a hearing. If, prior to the issuance of the decision, a registrar receives a communication from a party to a concluded hearing offering what is stated to be relevant evidence, that request must be placed before the decision-maker for his or her consideration. If it is not, then the party making the request has been denied an opportunity to present what he or she views, perhaps incorrectly, to be additional relevant evidence. Unless a board is prevented by its legislation from re-opening a hearing prior to rendering a decision, it must deal with such requests. The PSST has held that it has the authority to consider post-hearing evidence; see, for example, *Rajotte v Canada (Border Services Agency)*, 2009 PSST 25 (CanLII), where the PSST held, at para. 22, that "the Tribunal is master of procedural post-hearing matters and should proceed as informally and expeditiously as possible, while respecting the duty of fairness."

[27] I have listened to the introductory remarks of the General Member from the recording of the hearing of June 12, 2015. The General Division Member fully explained the process and format of the hearing. The General Division Member however did not canvas which documents had been received by the Social Security Tribunal. Neither the Applicant nor his advocate (and a summer law student who accompanied the advocate as an observer) could have necessarily been aware that the Respondent had filed an Addendum.

[28] Counsel submits that the Applicant was unaware of the case to meet and suggests that he was unaware of the evidence or arguments which the Respondent raised in the Addendum.

[29] The Addendum did not contain any new evidence which the parties did not already have. The Addendum was simply responsive to the additional information which had been filed on behalf of the Applicant on May 29, 2015.

[30] On May 29, 2015, the advocate for the Applicant filed submissions. The submissions set out a chronology and also addressed the Applicant's work history. The advocate wrote:

> 20. The period of employment of about 6 months in 2002 needs to be disregarded as "gainful employment" due to a benevolent employer. Client was on and off long term disability benefits from his employer from 1992 until becoming unemployed in 2008.

[31] In the Addendum, the representative for the Respondent identified the additional information and summarized the submissions of the Applicant. The representative for the Respondent wrote:

> 5. In the Appellant Submission to the Minister, [the advocate] indicated that [the Applicant's] earnings in 2002 should be disregarded and considered work activity from a benevolent employer. However, [the Applicant] reported in his Questionnaire for Disability benefits in January 2003 that he worked full time as a janitor, five days a week, for 7.5 hours a day from 1987 until he stopped in June 2002, due to heart problems and dizziness. The date when he was no longer able to work was July 2002.
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> Questionnaire for Disability benefits, dated January 15, 2003
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> 6. In his Questionnaire for Disability benefits dated August 20, 2007, [the Applicant] reported that he worked from 1987 to July 2002, the date he could no longer work due to his condition. There was no information in regard to benevolent work activity provided in his questionnaires. Benevolent employment is work usually conducted under significant supervision or a sheltered environment, where the client is unable to regularly pursue work in a competitive workforce. A third party is often involved to advocate on the workers' behalf, and work is often conducted for therapeutic purposes.
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> Questionnaire for Disability benefits, dated August 20, 2007
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> . . .
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> 8. In a letter, Ms. [S.D.], [the Applicant's] previous supervisor, explained that she had been his supervisor from 1989 to 2004, when he was often on sick leave and had to be reassigned to lighter work duties. She indicated that his sick leave increased to the point that he applied for long term disability. This information suggests that [the Applicant's] employment was accommodated. Accommodated work is such that it would allow an individual the flexibility in scheduling or assistance in the performance of their job; it is not work within a sheltered environment. All employers have a legal obligation to make reasonable accommodations to provide an individual with what is needed to enable them in the performance of their work. Attached record of employment statements shows work activity from March 2001 to September 2002 and October 2008 to July 2009.
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> Letter from Ms. [D.], dated April 17, 2014
> Record of Employment Statements, July 7, 2009 and undated

[32] The Applicant's proposed rebuttal to the Addendum consisted of the following submissions (GT9):

> 1 The appellant, …, was disabled within the meaning of the *Canada Pension* Plan at his minimum qualifying date of December 1999. Therefore, he is entitled to a disability pension.
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> 2. The Minister states on page GTB-2 of the addendum that "[the Applicant] reported in his Questionnaire for Disability benefits in January 2003 that he worked full time as a janitor, five days a week, for 7.5 hours a day from 1987 until he stopped in June 2002" however, as indicated during the hearing before the [General Division] on June 12th, 2015 [the Applicant] did have a benevolent employer who provided lighter duties, frequent breaks and shorter days. [The Applicant] was indicating on the Questionnaire the hours he was supposed to work as opposed to the reality of his employment circumstance.
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> 3. [The Applicant] was unable to work due to his medical condition prior to December 1999 and he was forced back to work by his employer long term disability benefits. [The Applicant] was placed on a back to work program and was unsuccessful as noted during his Tribunal by both [the Applicant] and his supervisor, [S.D.].
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> 4. [The applicant's] employer varied the work environment and modified their expectations of the appellant as testified by the appellant's immediate supervisor, [S.D.] during the hearing on June 12, 2015. The performance output by [the Applicant] during his return to work period was considerably less than what was expected from other employees. This is indicative of a benevolent employer and he would not be able to pursue gainful employment in the regular workforce given his health conditions.

[33] Certainly the Applicant and his advocate were alive to the issues of whether the Applicant's employment could be considered substantially gainful and whether he had a benevolent and accommodating employer. The advocate specifically addressed these issues in her submissions of May 29, 2015, which prompted the Respondent to provide an Addendum on June 9, 2015. And, at the hearing on June 12, 2015, it is apparent that the advocate (or the General Division) elicited evidence from the Applicant and the witness regarding the nature of his employment and any accommodations which the employer might have provided to the Applicant.

[34] Counsel submits that these issues were central to the determination by the General Division as to whether the Applicant could be found disabled. Indeed, the General Division stated that in assessing whether the Applicant had a severe condition for the purposes of the *Canada Pension Plan*, consideration had to be given to whether the person had any residual work capacity beyond the minimum qualifying period. However, the General Division looked to the fact that the Applicant maintained employment from October 2008 to July 2009. Nowhere in its analysis did the General Division focus or even refer to the Applicant's employment during 2002. The distinction is crucial, as the Addendum submissions filed on June 9, 2015 and counsel's rebuttal submissions filed after the hearing addressed only the employment in 2002, although there were records of employment statements for 2009. In other words, it appears that the Addendum was not determinative of the final result or had any direct influence on the outcome of the proceedings, so any rebuttal evidence or submissions may well have been moot.

[35] I cannot presume however that simply because the General Division did not address the 2002 employment in its analysis that the Addendum could not have had some influence on the outcome of the proceedings. Had the Applicant been aware of and been provided with a copy of the Addendum prior to or at the hearing of the appeal, this could have influenced his preparation and conduct of the matter. He had already arranged for one witness to give evidence on his behalf, but after seeing the record of employment statements from October 2008 to July 2009, he may well have come to appreciate that he should have addressed his employment for this later timeframe, and that whatever evidence he had already arranged might not have been sufficient after all. The Applicant may have sought an adjournment to collect more evidence or to arrange for more witnesses. Had the Applicant had the Addendum prior to or at the hearing, the prosecution of his claim could have taken a different path. I am satisfied that the appeal has a reasonable chance of success on the ground that there may have been a breach of procedural fairness and that the Applicant may have been denied a full and fair hearing.

[36] As an aside, given the very quickly approaching hearing date in this case, the Respondent could have, out of an abundance of caution, directly provided the Applicant's advocate with a copy of the Addendum. As a matter of good practice, I would encourage

parties to exchange documents (including legal authorities) or at least a list of documents directly between themselves, particularly when any documents are filed close to the hearing date.

[37] It would also be a good practice for General Division Members to mark any documentary or digital evidence as exhibits, and to identify any submissions that have been filed and any legal authorities upon which parties might rely or refer during the course of oral submissions. This would ensure that the General Division and the parties each have complete hearing files.

(b) Substantially gainful occupation

[38] Counsel submits further or in the alternative that the General Division erred in law in finding that the Applicant's part-time employment as a housekeeper for nine months indicated that he was capable regularly of pursuing any substantially gainful occupation. Counsel submits in particular that the General Division erred in its interpretation of the legal test for a disability, under the "severe" criterion. Counsel referred to a number of authorities, including *Villani v. Canada (Attorney General),* 2001 FCA 248 at para. 38 and some authorities from the Pension Appeals Board. Counsel submits that had the General Division applied the correct legal test, it could not have concluded from the material before it that the Applicant was capable regularly of pursuing any substantially gainful occupation.

[39] Counsel notes that the General Division found that the Applicant worked part-time in housekeeping at a retirement home for nine months, and that his duties were "light." However, the General Division also accepted that the Applicant was in pain while performing these duties and missed shifts because of his pain.

[40] Counsel further submits that the General Division also accepted that the Applicant's part-time employment yielded earnings of only $3,708 (2008) and $7,797 (2009). Counsel submits that these earnings are well below the amount considered by the Minister to be "substantially gainful." Counsel submits that such a finding would also be "out of keeping with the jurisprudence surrounding the meaning of this term".

[41] Counsel submits that the General Division failed to “undertake any analysis of whether these earnings could be seen as evidence of capacity to pursue employment that is "substantially gainful" as that term has been interpreted by the Federal Court of Appeal and by the Pension Appeals Board”. Counsel submits that, moreover, as the evidence established that the Applicant was prevented from attending work regularly due to his disability, it cannot be said that he was regularly capable of pursuing a substantially gainful occupation and on that basis, counsel submits that the General Division erred in finding that the Applicant did not have a “severe” disability.

[42] For the most part, these submissions call for a reassessment. As the Federal Court held in Tracey, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. From this perspective, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[43] Counsel suggests that the General Division erred as it did not determine whether the Applicant’s employment from October 2008 to July 2009 constituted substantially gainful employment as described under the *Canada Pension Plan Regulations* or by any definition under the applicable jurisprudence. Counsel suggests that substantially gainful is necessarily or in part measured by one's earnings and that the General Division therefore ought to have examined the Applicant’s earnings for 2008 and 2009. Had it done so, counsel submits that the General Division would have determined that the Applicant was not engaged in a substantially gainful occupation.

[44] While an applicant’s earnings prior to May 29, 2014 could have been a measure of whether one is engaged or has the capacity regularly of pursuing substantially gainful occupation, earnings alone have not been conclusive of this issue.

[45] Section 68.1(1) of the *Canada Pension Plan Regulations* came into force and effect on May 29, 2014. Using this formula, earnings equal to or greater than $14,836 for 2014 would qualify as “substantially gainful employment”, as it would show that that occupation provides a salary or wages equal to or greater than the maximum annual amount

a person could receive as a disability pension. While the Applicant's earnings levels might provide some guidance in determining whether the Applicant was engaged in substantially gainful occupation, his capacity of pursuing with consistent frequency any truly remunerative occupation must also be taken into account. *Villani* is instructive in this regard, at paragraph 38:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[46] The evidence before the General Division was that the Applicant had been last employed from October 2008 to July 2009, when he was laid off. The General Division wrote that the Applicant detailed that he worked 5.5 hours a day and up to 4 to 5 days a week while earning $14.40 hourly. Counsel has not pointed me to any other evidence to suggest that this did not accurately summarize the Applicant's general number of days worked per week and his hours of work from October 2008 to July 2009. It would seem that the regularity at which the Applicant worked during this timeframe indicates that he held the requisite capacity, hence providing the General Division with an evidentiary basis upon which it could base its findings that the Applicant had the capacity regularly of pursuing substantially gainful occupation.

[47] Finally, even if the General Division did not have this evidence of the Applicant's work hours, had the earnings of $3,708 and $7,797 been annualized, they could have been seen as representing substantially gainful employment for the years in which they were earned.

[48] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Proration

[49] Irrespective of whether an Applicant has raised any legal issues, subsection 58(1) of the DESDA enables the Appeal Division to determine if there are any errors of law, whether or not the error appears on the face of the record.

[50] At paragraph 7 of its decision, the General Division wrote the following:

> [7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December, 1999 with a **prorated date of February 2000**. Section 19 of the CPP allows for a prorated MQP for the year the contributory period ends by reason of disability. Therefore the Appellant can benefit from a prorated MQP **if he establishes he was disabled in January 2000**. (My emphasis)

[51] At paragraph 50, the General Division wrote:

> [50] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability **on or before the prorated date of February 2000. If the Tribunal finds that the Appellant was not disabled as of February 2000**, then it will determine whether the Appellant was disabled by the end of December 1999 which is the MQP calculated without the benefit of the proration. (My emphasis)

[52] Neither the Applicant nor his counsel raised this issue, but it appears that the General Division might have created a mistaken impression that the Applicant was required to establish that he was disabled in January 2000, although if the Applicant had a prorated date of February 2000, then the Applicant could have had until February 2000 to prove that he was disabled. While the General Division appears to have rectified this impression in paragraph 50, if the Applicant had already led evidence and given submissions based on the earlier incorrect date, the appeal could have had a reasonable chance of success on this ground too.

CONCLUSION

[53] The Application is granted.

[54] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division