Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 232

Tribunal File Number: AD-15-1245

BETWEEN:

J. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 27, 2016

Canada

DECISION AND REASONS

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), dismisses the appeal.

INTRODUCTION

[2] The Appellant was granted leave to appeal the decision of the General Division of the Tribunal issued August 6, 2015. In its decision the General Division determined that he was not eligible for a *Canada Pension Plan* disability pension. The Appeal Division granted leave to appeal in respect of the following: -

a) the General Division may have based its decision on an erroneous finding of fact that the Appellant was capable of working 20 hours per week throughout the year; and
b) the General Division may have failed to analyse other considerations set out in court decision when determining that the Appellant was capable of pursuing a substantially gainful occupation.

ISSUE

[3] The following are the issues that are before the Appeal Division.

1. Did the General Division base its decision on an erroneous finding of fact, made in a perverse or capricious manner and without regard for the material before it when it concluded that the Appellant was not incapable regularly of pursuing any substantially gainful employment?
2. Did the General Division err in law in determining that the Appellant was not incapable regularly of pursuing any substantially gainful employment?

FACTS

[4] The facts of the case have been set out succinctly by both parties in their submissions. Briefly, the Appellant applied for disability benefits under the *Canada Pension Plan*, (CPP). The Respondent denied his application, both initially and upon reconsideration. He appealed the

reconsideration decision to the General Division, which dismissed his appeal. In dismissing the appeal, the General Division employed the mathematical calculation for "substantially gainful occupation" set out in the May 29, 2014 amendment to the *Social Security Tribunal Regulations,* SOR/2013-60, *(the Regulations).* Using this calculation as a reference point, the General Division concluded that the Appellant had capacity regularly to pursue any substantially gainful employment and specifically, that he could work for at least twenty-hours per week. (decision at paragraph 43).

[5] Ultimately, the General Division decided that the Appellant did not meet the threshold for a finding that he had a severe and prolonged disability

THE LAW

[6] Subsection 58(1) of the DESD Act sets out the grounds of appeal of which there are only three. The statutory provision is worded as follows:-

> **58.** *Grounds of Appeal*- 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.

ANALYSIS

The General Division did not consider other factors.

[7] The Appellant's representative submitted that while, in determining what constitutes a substantially gainful occupation, the General Division may use helpful tools, including the mathematical calculation provided in the Regulations, this provision was not available to the General Division when it made its decision. Thus, the General Division erred in law by relying on the Appellant's substantive earnings and by failing to consider other factors.

[8] Counsel for the Respondent counters that the General Division did not base its decision solely on the mathematical calculations. Citing *Atkinson v. Canada (Attorney General),* 2014

FCA 187, Counsel for the Respondent argued that the General Division complied with its mandate to examine whether or not the Appellant's incapacity to work was regular. He submitted that the General Division had analysed other factors as required by the case law, namely the medical and employment evidence as well as the Appellant's daily activities.

[9] The Appellant's representative submitted that the General Division should have taken into account the Appellant's anxiety and his schizoid personality traits in coming to its decision as these factors militate against the Appellant's engaging in any substantially gainful occupation. These particular arguments had been made before the General Division and were also raised in the application for leave. The Appeal Division specifically denied leave to appeal on this basis limiting the scope of the appeal to whether or not the General Division had actually analysed other factors.

[10] Nonetheless, the Appeal Division reiterates that at paragraphs 43 through 53 of its decision, the General Division goes through an extensive analysis of the Appellant's personal circumstances, including this anxiety and personality traits/disorders. At paragraphs 43 and 45, the General Division specifically notes that its projections of the Appellant's capacity to work do not end with its mathematical calculations. It noted at paragraph 44 of the decision that "it would be useful to analyze other factors surrounding the Appellant's work and earnings potential." The General Division then went on to consider the Appellant's testimony regarding his employment and his ability to cope with the stress of his work at paragraph 45, stating:-

> [45] The Appellant submits that he is currently working at his functional maximum and could not work more hours than he is now. However, the Appellant also indicated that the meal service aspect of the job is more stressful for him because he is dealing directly with a large number of people in a very short period of time and in a time sensitive manner.

[11] At paragraph 46 of the decision, the General Division noted that the Appellant had not sought other work that might obviate the need for him to be in direct contact with the public or to retrain. The General Division went on to examine the available medical evidence at paragraphs 47 to 48. The Appeal Division finds that this further analysis constituted an examination of other factors.

[12] In its examination of the medical evidence the General Division gave little weight to most of it and set out its rationale at paragraph 47. In paragraphs 48 and 49 the General Division enlarged on its consideration of the medical evidence in relation to the treatment the Appellant receives or participates in. The General Division discussed the Appellant's educational background in the context of his ability to pursue any substantially gainful occupation at paragraph 50 of the decision.

[13] Accordingly, the Appeal Division finds that, as required by case law, the General Division did consider other factors, in making its assessment of whether or not the Appellant met the criteria for severe disability as set out in paragraph 42(2)(a) of the CPP. The Appeal Division finds there was no error of law. Accordingly, this aspect of the appeal fails.

The General Division based its decision on erroneous findings of fact.

[14] The General Division found that the Appellant was capable of working 20 hours each week throughout the year. The Appellant's representative submitted that the determination by the General Division that the Appellant was able to work 20 hours each week, year round was perverse because it flew in the face of his testimony that the availability of work declined during the summer months; and that he did not work overtime as he was unable to work for more than five hours at a time.

[15] The Respondent's representative relied on the prior Appeal Division decision of *D.R. v. Canada (Minister of Employment and Social Development)* AD-15-53. for guidance as to when a decision is perverse or capricious. The Respondent's representative submitted that for a decision to be perverse and capricious there must be insufficient evidence to support findings and conclusions. In *Robert Gravel v. Telus Communications Inc.*, 2011 FCA 1, the Federal Court of Appeal offered the following definition of perverse and capricious:

> [4] Discretion is exercised unlawfully or in a perverse or capricious manner when it is contrary to statutory requirements, has regard to irrelevant considerations or fails to have regard to relevant considerations, or does not place sufficient importance or weight on relevant considerations. It goes without saying that these must be considerations that would have influenced or did influence the decision if, depending on the case, they had or had not been taken into account.

[16] In *Gravel* the Federal Court of Appeal was discussing the exercise of a discretionary decision nonetheless the Appeal Division finds the definition apt because it accords with the determination of the Appeal Division in *D.R. v. MESD* on which the Respondent relies. Thus, the Appeal Division must look to see whether the General Division based its findings irrelevant considerations.

[17] On examining the decision, the Appeal Division finds that at paragraphs 38 through 44, the General Division did factor into its decision making both the fact that the Appellant's hours of work were reduced during the summer months as well as his oral testimony that he could not work for more than five hours at a time. (paragraphs 39and 45). Furthermore, it was the Appellant's testimony that on occasion, he did work overtime; that he worked 8 hour shifts 2-3 times per month (General Division hearing at 2:15-2:45). When asked, the Appellant testified that it all depended on how he was doing on the particular day" (General Division hearing at 3:23-26). He testified that he did not always accept overtime as he tires easily. All of which is qualitatively different from saying he never works overtime.

[18] The Appellant also testified that during the academic year (September to April) he worked an average of 18-20 hours a week. (General Division hearing at 3:40) His shifts declined drastically during the summer. However, the General Division did factor in and consider this alteration when it found at paragraph 52 that the Appellant's consistent employment since September 2014 has established that he was "capable regularly of pursuing an occupation." Furthermore, the Appeal Division is of the view that the decline in work during the summer months is a socio-economic factor that *MHRD v. Rice,* 2002 FCA 47 instructs is not a relevant consideration in the determination of whether the Appellant is disabled.

[19] The Appeal Division finds that there was some a basis for the General Division's finding that the Appellant was not incapable regularly of pursuing any substantially gainful occupation. Thus, the decision does not meet the threshold set out in *Gravel* or in *D.R. v. MESD* and is neither perverse nor capricious nor was it made without regard for the material before it.

[20] In the view of the Appeal Division the Appellant's representative is really arguing that the General Division placed insufficient weight on the fact that the Appellant had a reduced

schedule during the summer hours and also failed to place sufficient weight on his testimony concerning his mental health conditions and is essentially asking the Appeal Division to reweigh the evidence. This, per *Tracey v. Canada (Attorney General),* 2015 FC 1300, is not the role of the Appeal Division. The Appeal Division finds that the General Division did not base its decision on an erroneous finding of fact without regard for the material before it.

CONCLUSION

[21] In light of the above discussion the Appeal Division dismisses the appeal.

Hazelyn Ross
Member, Appeal Division