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

Citation: *Minister of Employment and Social Development v. T. H.,* 2016 SSTADIS 338

Tribunal File Number: AD-16-168

BETWEEN:

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

Appellant

and

T. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 31, 2016

REASONS AND DECISION

DECISION

The appeal is dismissed.

INTRODUCTION

[1] The Appellant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated October 21, 2015. The GD conducted a hearing by videoconference on September 1, 2015 and determined that the Appellant was not justified in cancelling the Respondent's disability pension under the *Canada Pension Plan* (CPP). Leave to appeal was granted on May 24, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Respondent was approved for a CPP disability pension with payments commencing February 1994. In February 2013, the Appellant initiated a reassessment of the Respondent's reported earnings after receiving information from the Canada Revenue Agency (CRA) indicating that he had unreported gross business earnings of $6,907, $29,799, $89,984, $81,846, $76,249, $79,802 and $106,865 for the years 2005 to 2011, respectively. In May 2013, the Appellant notified that the Respondent that it had decided to terminate his benefits as of April 2007, citing evidence he had recovered from his disability and again had capacity to work. At the same time, it demanded repayment in the amount of $65,418. The Respondent then requested a reconsideration, which the Appellant denied.

[3] On July 22, 2013, the Respondent appealed this denial to the GD. In a decision dated October 21, 2015, the GD allowed the appeal and found the Appellant had failed to establish that the medical conditions upon which the Respondent's disability benefits were initially granted had undergone such improvement as of April 2007 that he no longer qualified for a disability pension. The GD ordered the Respondent's disability pension restored.

[4] On January 19, 2016, the Appellant filed an application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On May 24, 2016, the AD granted leave on the grounds that the GD may have based its decision on an erroneous finding of fact in failing to appreciate and analyse the significant gross revenues generated by Respondent during the years 2007-11.

[5] I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] The Appellant's submissions were set out in its application for leave to appeal. On June 29, 2016, in response to the AD's request, the Respondent's representative filed submissions. On July 7, 2016, the Appellant made further submissions on the degree of deference owed to decisions of the GD.

THE LAW

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are as follows:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[8] According to subsection 59(1) of the DESDA, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration

inaccordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the AD in whole or in part.

[9] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[10] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[11] 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.

ISSUES

[12] The issues before me are as follows:

(a) What standard of review applies when reviewing decisions of the GD?

(b) Did the GD base its decision on an error mixed fact and law, by focusing on evidence of the Respondent’s net losses, rather than the significant gross revenues from his trucking business?

SUBMISSIONS

(a) What is the appropriate standard of review?

[13] The Appellant submits that the appropriate standard of review for this appeal should be that of correctness because no deference is due to the GD. The AD is a superior arm of the same tribunal—there is no special expertise or experience which privileges a determination of the GD. The Appellant also notes that the member who decided this case at the GD is regularly a member of the AD, although it acknowledges that training may differ between the two divisions.

[14] On the granted grounds for appeal, the relevant issue is not the weighing of evidence but rather the GD having exceeded its jurisdiction by either failing to consider highly relevant evidence or by making statements of fact with no evidentiary support. Where jurisdiction is concerned, the standard of review is correctness.

[15] The Appellant's submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard of correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

[16] The Appellant noted that the Federal Court of Appeal had not yet settled on a fixed approach for the AD in considering appeals from the GD. The Respondent acknowledged the recent Federal Court of Appeal case, *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, which it said confirmed that the AD's analysis should be influenced by factors such as the wording of the enabling legislation, the intent of the legislature when creating the tribunal and the fact that the legislature is empowered to set a standard of review if it so chooses. It was the Respondent's view that *Huruglica* did not appreciably change the standard to be applied to alleged factual errors; the language of paragraph 58(1)(c) of the DESDA continued to permit a wide range of acceptable outcomes.

[17] The Respondent submits that the AD should not engage in a redetermination of matters in which the GD has a significant advantage as trier of fact (*Housen v. Nikolaisen*, [2002] S.C.R.

235 S.C.C. 33) The wording of sections 58 and 59 of the DESDA indicate that Parliament intended that the AD show deference to the GD's finding of fact and mixed fact and law. The Respondent notes that the Appellant did not appear at the hearing before the GD, and thus was not in a position to hear the oral evidence. The Respondent, on the other hand, went to the expense of retaining counsel. The GD had before it all of the information that the Appellant claims it failed to appreciate

[18] The Respondent notes that the Appellant has conceded it carries the burden of proof in demonstrating that he is not entitled to disability benefits. As a general principal, interpretation of the *CPP* should be given a generous construction: *Villani v. Canada (Attorney General),* 2001 FCA 248.

(b) Did the GD err in focusing on net losses rather than gross revenues?

[19] The Appellant submits that the GD based its decision on an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. Specifically, the Appellant alleges the GD erred by failing to appreciate and explicitly analyse the significant revenue generated, and the activities undertaken to earn those revenues, in the years 2007-11. Rather, it submits that his gross income and his business activities indicate that he was no longer disabled within the meaning of subparagraph 42(2)(a)(i) of the CPP, as they demonstrated that he was capable of regularly engaging in a substantially gainful occupation.

[20] The Appellant notes that the GD took into account the Respondent's testimony that driving a truck gave him purpose, and his self-employment never generated enough profit to take a salary; however, the GD did not explicitly address the evidence before it that showed the Respondent's business activities produced significant self-employment business revenue. While the GD referred to revenue, expenses and net profit, the Pension Appeals Board (PAB) has repeatedly held that the profitability of the business venture is not relevant to determining whether a claimant has the ability to work. Although the decisions of the PAB are not binding on the AD, it is submitted that their decisions nevertheless have persuasive value.

[21] The Appellant argues that the very fact the Respondent was generating significant revenues from his trucking business was sufficient to justify a determination of work capacity

without further inquiry into his medical condition or functional capacities. In *Gill v. Canada (AG)*, 2011 FCA 195, the Federal Court of Appeal dismissed an application for judicial review in light of income tax returns showing self-employment income earned for babysitting, upholding the PAB's decision that her disability was not severe, as she was not incapable regularly of pursuing any substantially gainful occupation. The Court also found that, in reaching that conclusion, it was unnecessary to conduct a detailed review of the medical evidence.

[22] The Respondent submits that the GD's conclusions were reasonable and sound in law given the available evidence. At the hearing before the GD, the Respondent gave evidence that he carried on a business as an independent trucker but did not make any money from his enterprise after expenses. He performed the work as a therapeutic exercise, but it was never "substantially gainful." The GD found the Respondent and his witnesses to be credible.

[23] The Appellant's attempt to equate the Respondent's gross business income with a capacity to pursue regularly a "substantially gainful occupation" is unsupported by law and is, moreover, an "apples to oranges" comparison. The Respondent submits that the GD agreed with the him at paragraph 37 of its decision, concluding that the Appellant gave "no authority and no argument as to how gross business earnings relate to 'an occupation that provides a salary or wages' in reaching the conclusion that the gross business earnings are 'substantially gainful' such that his capacity regularly to pursue substantially gainful occupation had been established by the end of April 2007."

[24] The Respondent submits that, whether or not the GD adequately expressed its full reasons for finding in his favour, there was more than enough evidence to justify its decision. The law does not require complete reasons of a decision maker. While *R. v. Sheppard*, [2002] 1 S.C.R. 869 confirmed that courts have a duty to give reasons, the case of *R. v. Morrissey*, 1995 3498 (ON CA) confirms that it is wrong to analyse a trial judge's reasons by dissecting them into small pieces, as the reasons for judgment must be read as a whole. Reasons for judgment "are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict." Reasons must be adequate enough to permit proper

appellate review and do not have to be perfect. They merely have to identify the issue and rule upon it, citing the considerations for the decision, as was done here by the GD.

[25] While the Appellant may argue that evidence of significant 2005 to 2011 self-employment income was not explicitly addressed in the reasons, it is clear that the GD was alive this issue, as it explicitly rejected the Appellant's submissions in paragraph 40. Instead, the GD accepted the evidence of the Respondent's witness, a certified general accountant, whose analysis was provided to the Appellant before the hearing and who available for cross-examination, had the Appellant chosen to attend.

[26] The Respondent submits that in focusing on the profitability of his trucking business, the GD did no more than take into account the evidence, which indicated his various disabilities prevented him from working consistently at the business, despite its gross revenue. He drove when he could and administration of the business was done completely by his wife. The evidence before the GD was that the business was personally funded and tuned to the very specific inability of the Respondent to work predictably. During the very large tracts of time in which he could not work it was "hit and miss." On some days, he would be well enough. On other days, he was too ill. In *MHRD v. Bennett* (July 9, 1997), CP 4757, the PAB held that severity is predicated upon the claimant being capable of coming to work whenever and as often as necessary: "Predictably is the essence of regularity." The evidence before the GD was that the Respondent was never possessed of the ability of being capable of coming to work whenever and as often as necessary.

ANALYSIS

[27] The Appellant alleges that the GD erred in focusing on evidence of the Respondent's net losses, rather than the significant gross revenues from his trucking business in the years 2007-11. It also alleges that the GD failed to appreciate and explicitly analyse activities undertaken to earn those revenues.

[28] As mentioned in my leave to appeal decision, I find that the Appellant's claimed grounds for appeal are better characterized as an error of mixed fact and law. The Appellant alleges the GD essentially ignored (or "failed to appreciate") the magnitude of the Respondent's

revenues, which in several years approached six figures, but it also relies on case law that deems the profitability of a business venture is irrelevant to determining whether a claimant has the ability to work. The Appellant correctly notes that the precedents cited are PAB decisions and therefore not binding on the AD, but the legal issue brought forward must inform any inquiry into whether the GD was right to disregard the Respondent's gross income.

[29] It should be noted at the outset that the Appellant likely would not have cancelled the Respondent's disability pension had the CRA not informed it of his business activities and, specifically, the gross revenues derived from them. It is fair to say that, in its pursuit of the Respondent, the Appellant has been fixated on gross revenues to the exclusion of all other factors. The Appellant has consistently argued that the very fact the Respondent was generating significant revenues from his trucking business was sufficient to justify a determination of work capacity without further inquiry into his medical condition or functional capacities. The Appellant alleges that the GD erred in failing to appreciate and analyse the significant revenues generated by the Respondent in the years 2007-11.

[30] I disagree. Once the Appellant terminated the Respondent's benefits, the burden of proof then shifted to the Appellant to show that the Respondent had sufficiently recovered from his disability. In its decision, the GD found the Appellant failed to discharge that burden by not offering "any analysis of how the gross business revenue would relate to income or what level of income they might assume would flow from the gross business revenue."

[31] Ultimately, the outcome of this appeal depends on how independent contractors are to be treated under the rules governing CPP disability. In my view, the Appellant has not presented a convincing argument that the GD erred in law by looking beyond the Respondent's gross revenues from business. As has been noted many times, every word in subparagraph 42(2)(a)(i) of the CPP carries meaning: "A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation." The fact that Parliament chose to use the word "occupation" rather than "employment" indicates that it intended the CPP disability regime to encompass that segment of the population who are self-employed and who contribute the CPP. It is entirely consistent with this that Parliament also chose to use the word "gainful," a variant of "gain," which in many contexts is a synonym for "profit." As any

businessperson knows, gross revenue tells only half the story; a venture will not be profitable or "gainful" if expenses exceed revenues. Nowhere in its submissions does the Appellant acknowledge the reality that those who are engaged in business face the risk that their net earnings may be negligent or nonexistent, irrespective of the amount of revenue they take in. The fact that they either (i) fail to generate sufficient income to cover costs or (ii) incur additional expenses may be related to a medical disability, and it is not unreasonable for a trier of fact to initiate an inquiry along these lines.

[32] The Appellant cited two cases of the PAB (*T.C. v. MHRSD* (June 1, 2011), CP 26949; *M.D. v. MHRSD* (May 5, 2010), CP 26312) in support of its argument that the profitability of a business venture is irrelevant to determining whether a claimant has the ability to work. The Appellant rightly conceded that PAB decisions are not binding on the AD, but I am not even sure whether they carry any persuasive value. I note that, contrary to the Appellant's submissions, neither of the two decisions suggested that profitability is irrelevant; in fact both *T.C.* and *M.D.* considered not just the gross revenues, but also the net earnings, of the ventures at issue in each case (respectively, a seasonal cottage resort and a taxicab driving business) in conjunction with other factors such as the claimants' medical histories and evidence of their functional abilities. It should be remembered that the two cases involved hearings *de novo* in which the PAB considered the evidence afresh and made findings of fact. In both, the PAB was influenced by factors that were not present in this appeal. In *T.C.*, the claimant testified that he embarked on his venture to earn income and that it failed not just because of his impairments but because of poor economic conditions. In *M.D.*, the claimant was found to have carried on driving her cab several years after her benefits were cut off, grossing and earning greater amounts than when she was still in receipt of disability benefits. In both cases, unlike the subject of the present appeal, the claimants were found to have actively managed their businesses. In the end, it is telling that the Appellant was unable to adduce binding authority directing the GD to consider gross revenues to the exclusion of all other factors.

[33] The Appellant also cited a decision of the AD, *K.A. v. MHRSD*, 2013 SSTAD 6 in support of its submission that income over a certain threshold effectively disqualifies a recipient from continued receipt of CPP disability benefits. Again, while I am not bound by this decision, I agree that, in principle, high earnings are an overriding factor against a finding of disability.

However, as conceded by the Appellant, *K.A.* involved a claimant who returned to *employment* (as opposed to self-employment) and registered earnings exceeding $40,000 annually over three consecutive years. I might add that, despite these high earnings, the AD did not dismiss the appeal out of hand but still found it appropriate to consider other factors, such as the claimant's medical history and her capacity to attend a place of work on a regular schedule.

[34] The Appellant also cited *Gill v. Canada*, 2011 FCA 195, in support of the proposition that it is unnecessary to conduct a detailed review of the medical evidence where there is evidence of significant self-employment income. That may be so, but *Gill* does not rule out such a review either, particularly if, as is the case here, the reported self-employment income is marginal at best.

[35] My review of the GD's decision indicates that it correctly considered a variety of factors in determining that the Respondent had not recovered from his disability. In paragraph 41, it discussed the Appellant's recent medical history and found that the combined symptoms of his various medical conditions—among them bipolarity and ulcerative colitis—meant that he continued to be incapable regularly of pursuing a substantially gainful occupation. Contrary to the suggestion of the Appellant, the GD meaningfully analysed the implications of the Respondent's gross revenues and found (at paragraph 37) little guidance in the recently enacted section 68.1 of the CPP regulations. It also declined to divorce consideration of gross revenues from the expenses necessary to generate those revenues, placing considerable weight on the written and oral evidence of the Respondent's accountant. In the end, it accepted her analysis that the Respondent sustained losses, after deducting valid cash and non-cash expenses, in every year but one from 2007 to 2012, and even in 2011, the one year he reported positive net income, there was doubt, in the absence of a meaningful benchmark, about whether it approached "substantially gainful."

[36] It was open to the GD to review and weigh the available evidence, making inferences about the extent, if any, of the Appellant's recovery. The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence or placed inappropriate weight on selected items of evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the appellant's counsel identified a number of

medical reports which she said that the PAB ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> …assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact….

[37] In the absence of a compelling reason in either logic or law to disregard all factors from its consideration all other than the Respondent's gross business income, the GD arrived at a defensible conclusion. In this context, the GD did what the law required of it: Assess the Respondent's functional capacity against his ability not just to generate revenue from driving his truck but also his ability to profit from that activity.

CONCLUSION

[38] The appeal is dismissed.

Member, Appeal Division