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

Citation: *M. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 281

Tribunal File Number: AD-16-1326

BETWEEN:

M. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 16, 2017

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated October 24, 2016. The General Division summarily dismissed the Appellant's appeal for disability benefits under the *Canada Pension Plan* (CPP), because it concluded that her case had no reasonable chance of success.

[3] No leave for appeal 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.

[4] As I have determined that no further hearing is required, this appeal is proceeding pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SST Regulations).

OVERVIEW

[5] The Appellant applied for CPP disability benefits on June 16, 2015. The Respondent refused her application, initially and on reconsideration, because there was insufficient medical evidence to show that her disability was severe and prolonged during her minimum qualifying period (MQP), which it determined had ended on December 31, 1997.

[6] The Appellant appealed the reconsideration decision to the General Division on June 7, 2016. In her submissions, the Appellant claimed that she could not work due to a 2012 motor vehicle accident, which had left her with widespread joint pain.

[7] In compliance with section 22 of the SST Regulations, the General Division notified the Appellant in writing of its intention to summarily dismiss the appeal. The letter said:

> The Appellant's minimum qualifying period in this case is December 31, 1997. The Appellant must establish on a balance of probabilities that she was incapable regularly of pursuing any substantially gainful occupation on December 31, 1997 and continuously thereafter. The Appellant's questionnaire in support of her application records that she worked 4.5 hours a day for six days a week as a cleaner from 2006 to 2012. The record also shows the Appellant had pensionable earnings in 2000 and 2003.

[8] In her response to the General Division dated October 14, 2015, the Appellant acknowledged that she had not "deducted for CPP contributions" but maintained that she had sufficient reasons to appeal. She stated that she had seen a doctor multiple times in the last month due to knee and back pain.

[9] On October 24, 2016, the General Division issued its decision. It noted that the Appellant's Record of Earnings (ROE) indicated that she had made valid contributions to the CPP in 1990, 1992, 1993, 1994, 1995, 2000 and 2003. It determined that the Appellant's MQP ended on December 31, 1997, although there was also a possibility that it ended on December 31, 1999, by application of the Child Rearing Drop Out Provision (section 49 of the CPP), if it were confirmed that the Appellant had had custody and control of a child under the age of seven (there was an indication in the file that her youngest child was born in 1990). However, in either scenario, the General Division found no reasonable chance of success for the appeal, as the Appellant had pensionable earnings in 2000 and 2003, and she had indicated in previous correspondence that she worked between 2006 and 2012.

[10] On November 28, 2016, the Appellant filed an appeal of the summary dismissal decision with the Tribunal's Appeal Division, alleging error on the part of the General Division. I have decided that an oral hearing is unnecessary and that the appeal will proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file and there is no need for clarification;

(b) This form of hearing respects the requirement under the SST Regulations to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

Department of Employment and Social Development Act

[11] Subsection 53(1) of the DESDA states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Under subsection 56(2), no leave is required to appeal a summary dismissal to the Appeal Division.

[12] Section 22 of the SST Regulations states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[13] According to subsection 58(1) of the DESDA, 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 made in a perverse or capricious manner or without regard for the material before it.

[14] ***Canada Pension Plan***

[15] 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 MQP.

[16] Pursuant to paragraph 44(2)(*a*) of the CPP, an MQP is established when an applicant has made valid contributions to the CPP for at least four of the last six calendar years. This provision applies to contributors who are found, or deemed to have been, disabled after December 31, 1997.

[17] Subparagraph 44(1)(*b*)(ii) of the CPP provides that applicants who do not meet the contributory requirements at the time of their application may qualify for a disability pension if they can establish they were disabled at an earlier time when they last met the contributory requirements and continue to be disabled.

[18] Subsection 97(1) of the CPP provides that an entry in the contributor's ROE shall be conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made.

ISSUES

[19] The issues before me are as follows:

(a) How much deference should the Appeal Division extend to General Division decisions?

(b) Did the General Division err in summarily dismissing the Appellant's claim that her disability was severe and prolonged?

SUBMISSIONS

[20] In her notice of appeal dated November 28, 2016, the Appellant repeated her claim that she was unable to work because of body pain. She also stated that she had seen numerous doctors and enclosed an ultrasound report dated November 8, 2016.

[21] The Respondent made no submissions.

ANALYSIS

Degree of Deference Owed to the General Division

[22] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[1] In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[23] The Federal Court of Appeal decision *Canada v. Huruglica*[2] has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

[24] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law: "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[25] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> […] the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object […] The

[1] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[2] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

> textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[26] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations.

[27] The word "unreasonable" is nowhere to be found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Summary Dismissal

[28] Although the Appellant did not explicitly question the General Division's decision to proceed by way of summary dismissal, I have decided to address this question at length.

[29] 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. Had the General Division either failed to identify the test or misstated the test altogether, this would have qualified as an error of law—one that is held to a strict standard.

[30] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 4 and 24 of its decision. However, it is insufficient to simply recite the test for a summary dismissal without properly applying it. Having correctly identified the test, the General Division was then required to apply the law to the facts. The decision to summarily dismiss therefore involved a question of mixed fact and law and was subject to a degree of deference—within the parameters of subsection 58(1).

[31] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. Although I am not bound by decisions of my fellow Appeal Division members, I am influenced by the reasoning in *A.P. v. M.E.S.D. and P.P.*,[3] in which my colleague used the language of "utterly hopeless" to distinguish an arguable appeal from one that was appropriate for a summary dismissal. As long as there was some factual foundation to support the appeal and the outcome was not "manifestly clear," then the matter would not qualify for summary dismissal. A merely weak case would not be appropriate for a summary disposition, as it would necessarily involve assessing the merits of the case, examining the evidence and assigning weight to it. Assessing the evidence and the merits of the case signals that the matter is not appropriate for a summary.

[32] Here, the General Division clearly considered the evidence before it and assessed the case on its merits. In its analysis, the General Division wrote:

> [21] The Appellant must establish two things. If she cannot establish both she is not entitled to a disability pension. She must establish a severe and prolonged disability within the meaning of the CPP on or before December 31, 1997, the minimum qualifying period as stated in the file, or on or before December 31, 1999 if the Appellant was entitled to the maximum CRDO consideration. She must also establish that her severe and prolonged disability has prevented all types of work continuously since then.
>
> [22] On the Appellant's own evidence she is unable to establish that her medical condition has prevented all types of work since either 1997 or 1999 since she has acknowledged that she worked between 2006 and 2012.
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> [23] The Tribunal need not make a finding on the Appellant's actual MQP other than to say it is either December 31, 1997 or December 31, 1999 because regardless of which date it is the Appellant worked for at least five years after those dates.

[33] Without assessing the merits of the Appellant's disability claim, it is just conceivable that the Appellant might have been able to offer some plausible explanation for her self-employed earnings of $9,000 (in 2000) and $25,000 (in 2003), had she been permitted to do so in the context of a full hearing. Similarly, it appears that the General Division based its decision, in part, on the Appellant's admission, in prior correspondence, that she had "worked"

[3] *A.P. v. Minister of Employment and Social Development and P.P.*, (2015), SSTAD-15-297.

between 2006 and 2012, but it made no attempt to investigate what types of jobs she held during that period, how much she earned from them, or whether those earnings, if any, crossed the threshold to "substantially gainful."

[34] While the General Division correctly recited the test for a summary dismissal, that does not necessarily mean the correct law was applied. In this case, the General Division blurred the distinction between an "utterly hopeless" case without merit and a possibly weak or very weak case and, thereby improperly characterized the appeal's disposition as a summary dismissal. In so doing, the General Division not only misapplied the law, it potentially denied the Appellant a full opportunity to be heard; in choosing to summarily dismiss her appeal, the General Division closed itself off from considering the possibility that the Appellant's case, weak though it may be, might have benefitted from admission of oral evidence pertaining to the extent of her impairments as of the MQP and the nature of the work she had been performing since.

[35] I find that the General Division improperly employed the summary dismissal process to dispose of this case. It is irrelevant whether the General Division's decision was defensible on the merits, as the overriding consideration must be whether the correct procedure was followed under the DESDA.

CONCLUSION

[36] I find that the General Division mischaracterized the disposition of this matter as a summary disposal. For the reasons set out above, the appeal is allowed and the matter referred back to the General Division for a *de novo* hearing.

[37] To avoid any potential for an apprehension of bias, the matter should be assigned to a different General Division member, and the General Division decision should be removed from the record.

Member, Appeal Division