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

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 468

Tribunal File Number: AD-15-1173

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Meredith Porter

DATE OF DECISION: September 21, 2017

Canada

REASONS AND DECISION

BACKGROUND

[1] The Appellant had been in receipt of a disability pension since April 1995. In September 2010, the Respondent notified the Appellant by letter that, based on an assessment it had completed, that the Appellant ceased to be disabled as of September 1, 2006. The Respondent ceased further disability pension payments. The Respondent also assessed an overpayment for the period from September 2006 until November 2009. The Appellant appealed the Respondent's decision to the General Division of the Social Security Tribunal of Canada (Tribunal), which upheld the Respondent's determination that the Appellant ceased to be disabled as of September 1, 2006.

[2] The Appellant filed an application seeking leave to appeal the General Division decision, dated August 14, 2015. Initially, the application was incomplete, and the Appellant was provided the opportunity to file the missing information on or before December 7, 2015, and if he met this deadline, his application would be deemed received by October 20, 2015. The Appellant did not file the missing information by the required date, but he maintained communication with the Tribunal and the complete application requesting leave to appeal was filed on April 14, 2015. This date was beyond the 90-day timeframe allowed pursuant to paragraph 57(2)(*b*) of the *Department of Employment and Social Development Act* (DESD Act). The Appellant requested an extension of time to file the application pursuant to subsection 57(2) of the DESD Act.

[3] In requesting leave to appeal, the Appellant had alleged that:

i. The General Division erred in failing to properly consider that the Appellant was diagnosed with HIV/Aids and that this health condition is both severe and prolonged;

ii. The General Division erred in finding that the Appellant's part-time work was "substantially gainful"; and,

iii. The General Division discriminated against the Appellant in finding that his health condition did not render him disabled.

[4] The Appellant's request for an extension of time, and leave to appeal the General Division decision, was granted by the Appeal Division on March 31, 2017.

[5] In granting leave to appeal, the Appeal Division did not find that the General Division had erred in failing to properly consider the Appellant's health condition as severe based on the Appellant's argument that he should be found to be disabled because he is terminally ill. Relying on *Klabouch v. Canada (Social Development)*, 2008 FCA 33, I did not find that the Appellant's argument had a reasonable chance of success, as "severity" under the *Canada Pension Plan* (CPP) is determined based on the applicant's capacity to work and not on their diagnosed health condition. Leave to appeal was also denied on the Appellant's argument that the General Division had discriminated against him, as the Appellant had failed to provide any explanation of how he was discriminated against by the General Division and he had failed to provide any legal basis on which his claim that he was discriminated against could possibly succeed.

[6] Leave to appeal was granted, but it was limited to one issue. The Appellant had argued that his employment should not be found to be "substantially gainful," and that the General Division made an error of law pursuant to paragraph 58(1)(*b*) of the DESD Act in finding that the Appellant's disability was not severe based on its finding that the Appellant was capable regularly of pursuing any "substantially gainful" occupation based on his earnings and employment record between 2006 and 2009. This argument was found to have a reasonable chance of success as the General Division had failed to provide any analysis of existing jurisprudence on what constitutes "substantially gainful."

[7] Following the granting of leave to appeal, a decision cover letter, dated April 3, 2017, was sent with a copy of the leave to appeal decision rendered on March 31, 2017. The cover letter notified the Appellant that he had 45 days from the date of the decision to file additional submissions or file a notice indicating that no further submissions would be filed. The letter incorrectly informed the Appellant that he could seek judicial review of the leave to appeal decision to the Federal Court of Appeal. Decisions on leave to appeal must be judicially reviewed by the Federal Court, not the Federal Court of Appeal. A corrected letter was sent to the Appellant, dated April 5, 2017. The telephone call log shows that on April 19, 2017, the

Appellant called for clarification on the date for filing additional submissions. He was informed that he had 45 days from the date of the decision to file any further submissions, and he indicated that he may require additional time to file submissions due to the delay resulting from the incorrect decision letter he received. He was advised to submit a request for an extension to file submissions in writing. The Appellant submitted a request for an extension of time to file submissions to the Tribunal on April 28, 2017. The Respondent also requested an extension for filing submissions in writing, dated May 11, 2017. As a result, the deadline for filing additional submissions was extended from May 15, 2017, to May 31, 2017.

[8] This appeal proceeded on the basis of the documentary record for the following reasons:

a) Pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SSTR), the Member has determined that no further hearing is required.

b) The requirement under the SSTR to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[9] Did the General Division err in failing to consider whether the Appellant's employment between 2006 and 2009 constituted a substantially gainful occupation?

THE LAW

[10] According to subsection 58(1) of the DESD Act, 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.

[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.

SUBMISSIONS

[12] The Appellant did not file any additional submissions.

[13] The Respondent submits that the General Division correctly considered all the evidence in the record before it, including the Appellant's earnings during the relevant time period, the type of work he did, the length of his shifts, his regular attendance at work, and the fact that no accommodations were required from the employer. The General Division did not base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it, pursuant to paragraph 58(1)(*c*) of the DESD Act.

[14] The Respondent further submits that the General Division correctly applied the legal test for determining the cessation of disability pension payments under the CPP. In particular, the General Division correctly found that the Respondent had met its evidentiary burden in demonstrating that the Appellant ceased to be disabled on September 1, 2006.

STANDARD OF REVIEW

[15] It was previously accepted that the standard of review applicable to appeals before the Appeal Division were governed by the same standards of review as set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9. The applicable standards were, as set out by the Court in *Dunsmuir*, that where there is an alleged error of law or a failure to observe a principle of natural justice the applicable standard was that of correctness. The Appeal Division should demonstrate a lower threshold of deference to the findings of the General Division. Where there is an alleged erroneous finding of fact, the standard was held to be reasonableness, which meant that where the findings of the General Division fall within a range of possible, acceptable outcomes, the Appeal Division should be reluctant to interfere with the findings of the General Division.

[16] The application of the standards of review for administrative tribunals has changed since *Dunsmuir*. The Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, rejected the *Dunsmuir* approach and held that administrative tribunals should not use standards of review that were designed to be applied by appellate courts:

> [47] The principles which guided and shaped the role of courts on judicial review of decisions made by administrative decision-makers (as set out in *Dunsmuir* at paras. 27-33) have no application here. Indeed, the role and organization of various levels of administrative decision-makers do not put into play the tension between the legislative intent to confer jurisdiction on administrative decision-makers and the constitutional imperative of preserving the rule of law.

[17] Instead, the Court in *Huruglica* held that administrative tribunals should first look to their home statutes for guidance in determining the applicable scope of review. The Court in *Huruglica* also stated that "one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies." Alternatively, the Court stated that, when determining the scope of review for a decision of a lower level administrative tribunal, one should look first to the tribunal's governing legislation as "[o]ne must seek instead to give effect to the legislator's intent."

[18] I note that *Huruglica* deals with a decision of the Immigration and Refugee Board; however, it has implications for other administrative tribunals.

[19] Following *Huruglica*, the Tribunal's Appeal Division should confine its enquiry to a determination of whether the General Division has breached any of the provisions of subsection 58(1) of the DESD Act without engaging in a discussion or analysis of the principles or standards applied in the context of "judicial review." The standards of reasonableness or correctness will not apply unless those words are specifically contained in the founding legislation, and they are not found in subsection 58(1) of the DESD Act.

[20] On reading paragraphs 58(1)(*a*) and (*b*) of the DESD Act, these provisions permit the Appeal Division to intervene where the General Division has erred in law or has breached a principle of natural justice. There is no qualification restricting the Appeal Division from intervening when such errors are alleged. There is no indication that the Appeal Division should show any deference to the General Division's findings.

[21] Paragraph 58(1)(*c*) deals with erroneous findings of fact. According to this provision, the Appeal Division may only intervene where the erroneous finding of fact, or mixed fact and law, is "perverse or capricious" and "without regard for the material before it." Those words must be interpreted in light of their legislative intent, which reflects that the Appeal Division should only intervene when the General Division has based its decision on a flagrant error of fact or on a factual finding that is at odds with the evidentiary record.

ANALYSIS

[22] The Appellant, in seeking leave to appeal, had acknowledged that he had been working during the timeframe from 2006 until 2009, but he argued that he was not employed in a "substantially gainful" occupation. He argued that beneficiaries of disability pension payments are entitled to work and that the fact that he had worked part-time during the respective period between 2006 and 2009 should not disentitle him from receiving disability benefits. He argued that the Respondent was incorrect in determining that he was disentitled to a disability pension under the CPP.

[23] The Respondent has argued that, based on several factors including the Appellant's income and employment arrangements between 2006 and 2009, the Appellant's employment was "substantially gainful." The Respondent did acknowledge that during the respective time period, between 2006 and 2009, the Appellant's health condition remained the same but he was capable of working consistently and of earning a substantially gainful income during the four-year period nonetheless.

[24] In making submissions on the issue of what constitutes a "substantially gainful occupation" at law, the Respondent relied on existing jurisprudence and made the following arguments (in part):

I. When assessing whether a disability is severe, a "real world" approach should be employed by assessing an appellant's age, skill level, education or language proficiency, and work and life experience, when deciding whether he (or she) is capable regularly of pursuing any substantially gainful occupation (*Villani v. Canada (Attorney General)*, 2001 FCA 248).

II. Substantial has been defined as “having substance, actually existing, not illusory, of real importance or value, practical”; gainful has been defined as “lucrative, remunerative paid employment”; and, occupation has been defined as “temporary or regular employment, security of tenure” (*Villani*).

III. The Federal Court of Appeal has upheld decisions where the appellant was only capable of part-time work because the appellant was still “employable.” For example, the Court in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 held that a woman who was capable of working, even with certain accommodations by her employer, for a total of 30 hours per week was capable regularly to pursue a substantially gainful occupation (*Atkinson*).

[25] Turning to the General Division decision, the General Division failed to refer to any of the jurisprudence and limited its reasoning to a comparative analysis of some of the evidence in the written record and to the Appellant’s oral testimony, which in several instances revealed some contradictions. I note that the General Division’s decision does not thoroughly examine the existing contradictions in the written and oral evidence. Despite the lack of analysis, and recognizing that the parties are entitled to decisions that reflect a consideration of the evidence in the record and articulated reasons for how the issues were decided, I do not find that the General Division failed to consider the evidence. A lack of detail is not a ground of appeal under subsection 58(1) of the DESD Act. An administrative tribunal is also not required to refer to each and every piece of evidence before it, and it can be presumed to have considered all the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82).

[26] I am bound to assess the General Division’s decision pursuant to section 58 of the DESD Act. This means that I am to avoid fact-finding, re-assessing the evidence in the record, re-weighing the evidence, or interfering with the findings of the General Division on the basis that I would have decided the matter differently.

[27] Considering the legal framework for determining whether an occupation can be considered “substantially gainful,” it is the Respondent’s position that the General Division applied relevant factors as set out in statutes and case law to the particular facts of this case. More specifically, the Respondent argues that the General Division was correct to find that the

Appellant ceased to be disabled based on evidence that the Appellant had consistently worked an average of 20 hours per week during his employment from 2006 until 2009. Some weeks, the Appellant worked up to 40 hours. The evidence in the record shows that the Appellant only missed 31 hours of work time due to sickness over the respective four-year period. The Appellant's earnings increased from $9,547 in 2006 to $18,564 in 2009. During the respective timeframe, the Appellant was capable of working without special accommodation from his employer.

[28] The Appellant has consistently argued that his incapacity has remained regular as he is diagnosed with a terminal illness (HIV/Aids) and there is no possibility for recovery. He argues that his health condition is severe, is long continued, of indefinite duration and likely to result in death. Therefore, he argues, he continues to satisfy the requirements of paragraph 42(2)(*a*) of the CPP.

[29] The Respondent has cited the Federal Court of Appeal's reasoning in *Villani* to define what "substantially gainful occupation" means at law. From 2006 to 2009, there was no statutory definition for "substantially gainful." The Respondent has made submissions with respect to subsection 68.1(1) of the *Canada Pension Plan Regulations* (CCPR), which came into force on May 29, 2014.

[30] Subsection 68.1(1) of the CCPR reads as follows:

> For the purpose of subparagraph 42(2)(a)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

[31] The General Division upheld the Respondent's position that the Appellant ceased to be disabled as of September 2006. Had subsection 68.1(1) of the CCPR been in force in 2006 to 2009, the years for which the Appellant was found capable of working and for which an overpayment has been assessed, the maximum annual amount a person could have received as a disability pension each of those years under the formula set out in subsection 68.1(1) would have been $12,665 for 2006; $13,065 for 2007; $13,387 for 2008; and $13,774 for 2009. If earnings in any of those years equaled or exceeded these amounts, the Appellant would have been considered employed in a "substantially gainful" occupation. In fact, the Appellant's

earnings did exceed the maximum annual amount payable for a disability pension in 2009, only one of the four years for which an overpayment has been assessed.

[32] Subsection 68.1(1), as submitted by the Respondent, has no applicability in this case, as subsection 68.1(1) of the CCPR only applies to applications received after May 29, 2014. I agree, as the application for disability benefits, the assessment that resulted in the ceasing of benefits, and the reconsideration that resulted in the decision that was under appeal before the General Division all occurred before the coming into force of subsection 68.1(1), and the SSTR are not retroactive. However, the subsection's definition for what constitutes "substantially gainful" could provide some reasonable, common-sense guidance as to what should be considered "substantially gainful" when considering levels of earnings in cessation of benefits cases that predate the coming into force of subsection 68.1(1) and when determining the date on which an individual ceases to be disabled.

[33] The amount of income earned is not itself determinative of disability; it is their capacity regularly to pursue any substantially gainful occupation (see for example *M.D. v. Minister of Human Resources and Skills Development*, (July 13, 2010), CP26312 (PAB)). During the relevant timeframe from 2006 to 2009, jurisprudence regarding "substantially gainful" occupations consistently held that this term includes occupations where the remuneration for the services rendered is not merely nominal, token or illusory compensation. Substantially gainful was held to include occupations where the compensation reflected the appropriate award for the nature of the work performed (*Poole v. Minister of Human Resources Development*, (July 21, 2003), CP20748 (PAB)). However, the level of income earned can be an indicator of whether or not an occupation is substantially gainful. For example, the Pension Appeals Board (PAB), in *P.S. v. MHRSD* (January 28, 2011), CP 26937 (PAB), opined that an Appellant who had been working between 2004 and 2008 had increased both his hours of work and income over that time period, similar to the Appellant in this case, may not have been engaged in substantially gainful work in 2004 as his earnings were significantly lower than in the subsequent years. The PAB stated, at paragraph 14, "The evidence did not establish that Mr. S. worked regularly in 2004, and while he earned a fair amount of money during that part year, for him, it was not "substantial" as was shown by his earnings in later years. His efforts in 2004 appeared to be more of a "work trial" than regular employment."

[34] Citing Isaac, J.A.in *Villani*, who approved of the court's reasoning in *Barlow v. Minister of Human Resources Development* (CP 07017 - 1999), the PAB noted in *MSD v. Nicholson* (April 17, 2007), CP 24143 (PAB):

> Substantial – "having substance, actually existing, not illusory, of real importance or value, practical."
>
> Gainful – "lucrative, remunerative paid employment."
>
> Those comments are of some assistance in determining what amounts to a substantially gainful occupation, but it requires a judgmental assessment, which could involve considering local income levels and cost of living, as well as other factors specific to the circumstances of the claimant.

[35] The Respondent argues that the General Division correctly assessed the Appellant's employability and properly assessed "factors specific to the circumstances of the claimant."

[36] As argued by the Respondent, the General Division did consider the following:

- Starting in 2006, the Appellant consistently worked an average of 20 hours per week, and sometimes up to 40 hours, on four-hour shifts five days a week.
- The Appellant took only 31 hours of sick leave during the relevant period.
- The Appellant has earnings between $9,547 in 2006 and $18,564 in 2009.
- The Appellant worked unassisted, and without any special accommodations by his employer.

[37] The Respondent submits that the General Division was correct to find that the above evidence reflected the following:

- The Appellant had demonstrated work capacity.
- The Appellant was able to consistently perform his duties.
- The Appellant's medical conditions did not prove to be a hindrance.

- Based on the Appellant's work arrangements, his ability to consistently work shifts, and the increase in his earnings by way of working more hours, he was capable of regularly pursing a substantially gainful occupation and therefore not disabled as per paragraph 42(2)(*a*) of the CPP.

[38] While the Appellant's income is nominal, particularly from 2006 to 2008, his earnings reflect appropriate compensation for the half-time hours he worked. Evidence in the record and the Appellant's evidence before the General Division reflect that during the relevant time period, he was capable of performing all tasks required of him by his employer. Although he was placed on light duties during one brief period, this was in relation to a workplace injury as opposed to the health condition that he asserts renders him disabled under the CPP.

[39] While I do agree with the Respondent's arguments in favour of the General Division's findings, as set out above, I find that the most relevant evidence of both the Appellant's employability and the fact that his employment was "substantially gainful" is that the Appellant confirmed that he took as much work as he was offered. He started working four-hour day shifts, but did give evidence that when he was offered night shifts he took them. The night shifts were longer than the four-hour day shifts. His willingness to work when required by his employer and the fact that his earnings increased significantly as work became more readily available to him reflects both his employability and the fact that his work was "substantially gainful." It was the Appellant's evidence that he was available to work as much as his employer required him to. His hours per week doubled between 2006 and 2009, and his income doubled during that time period as well. This reflects that the compensation he received for the work he was capable of doing was not nominal, token or illusory.

[40] I can appreciate that the Appellant's income in 2006, 2007 and 2008 was not necessarily "substantially gainful" with respect to the level of income he realized during those years. However, in light of all of the circumstances, there is no basis to support the Appellant's claim that he was not employed in a substantially gainful occupation from 2006 to 2009. He has demonstrated capacity regularly to work and, had he been offered more work from 2006 to 2008 for example, his earnings would have been considerably higher, as they were in 2009.

CONCLUSION

[41] The appeal is dismissed.

Meredith Porter
Member, Appeal Division