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

Citation: *M. T. v. Minister of Employment and Social Development*, 2018 SST 386

Tribunal File Number: AD-16-949

BETWEEN:

M. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 6, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, M. T., was born in 1969 and has cystic fibrosis (CF). He was most recently employed as a call centre manager, a job he was forced to give up in 2004 because of diminishing lung capacity.

[3] In 2006, the Appellant applied for a disability pension under the *Canada Pension Plan* (CPP). In his application, he disclosed that, since 2003, he had operated a part-time hobby business selling Disney-themed watches over the Internet. The Respondent, the Minister of Employment and Social Development (Minister or ESDC), nevertheless approved the Appellant's application and started payment of a disability pension, effective May 2005.

[4] In 2013, the Minister received information from the Canada Revenue Agency (CRA) indicating that M. T. had been reporting increasing business income over the years. Following an investigation, the Minister suspended M. T.'s disability pension effective April 2013, and demanded repayment for the preceding four years. M. T. asked for reconsideration, but the Minister refused to alter its position.

[5] M. T. appealed the Minister's decision to the General Division of the Social Security Tribunal. In April 2016, the General Division held a hearing by videoconference and later issued a decision dismissing M. T.'s appeal. The General Division based its decision on (i) medical evidence that M. T.'s health had improved and (ii) a finding that his gross and net business income as of 2009 was above the "maximum allowable earnings" permitted under the CPP.

[6] In July 2016, M. T. requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division.

[7] In a decision dated July 14, 2017, my colleague in the Appeal Division, Janet Lew, granted leave to appeal because she saw an arguable case that the General Division had based its

decision on an erroneous finding that M. T.'s health had improved after he was granted CPP disability benefits in 2005. On March 2, 2018, I convened a hearing by teleconference. Since Ms. Lew had not placed any restrictions on the scope of the appeal, I heard oral submissions, with the consent of the Minister's representative, on all grounds raised by M. T..

PRELIMINARY MATTERS

[8] Following issuance of the leave to appeal decision, M. T. submitted correspondence and other documents from the Canada Revenue Agency's 2009 audit of his business's financial statements for income tax purposes. None of this material was before the General Division and, as such, I declined to consider it.

[9] According to the Federal Court's decision in *Belo-Alves v. Canada*,[1] the Appeal Division is not ordinarily a forum in which new evidence can be introduced, given the constraints of the *Department of Employment and Social Development Act* (DESDA), which do not give the Appeal Division authority to consider new evidence or entertain arguments on the substance of an appellant's claimed disability.

ISSUES

[10] Under s. 58(1) of the DESDA, the only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division extend to General Division?

Issue 2: Did the General Division base its decision on erroneous findings that M. T.'s

(i) business accounting methods were "questionable"?
(ii) post-2005 earnings were "substantially gainful"?
(iii) health improved after 2005?

[1] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100.

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[12] 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*.[2] Where errors of law or failures to observe principles of natural justice were alleged, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. 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.

[13] The Federal Court of Appeal decision *Canada v. Huruglica*[3] 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. This premise led the Court in *Huruglica* to determine that the appropriate test flows entirely from an administrative tribunal's governing legislation: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]."

[14] 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 tribunal's home statute. 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. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "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.

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

Issue 2: Did the General Division base its decision on erroneous findings of fact?

(i) "Questionable" business accounting methods

[15] The General Division found that M. T.'s business generated substantially gainful gross and net income. Moreover, the General Division questioned the business's accounting methods and how, "with not much overhead," its profits were comparatively low:

> [50] The Appellant worked out of his parent's house. He had minimal assets of a chair, a computer, and a printer and consistently around $35,000 worth of product annually. He did not employ anyone for administration, legal, accounting or sales. He was the only employee. He did have to purchase the packaging for shipping and pay for the shipping, though he charged for shipping in addition to the watches.
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> [51] The Tribunal questions the accounting methods of the business. The Appellant's testimony was vague when questioned how the net was so vastly lower than the gross, when he is the only employee and claimed he did not pay himself at all, and did not employ lawyers, accountants or administration all of which were line items in his tax form Statement of Business or Professional Activities.
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> [52] The Tribunal finds it would be reasonable that the Appellant would have paid himself something from his company with such substantially gross earnings, especially as there were no other employees.

[16] M. T. denies that his accounting methods understated net income and argues that his testimony appeared "vague" to the General Division only because he was not expecting close questioning about his business expenses from five to ten years earlier and he did not have such details at his fingertips. Had he known his business's financial statements would be subject to such scrutiny, he would have prepared accordingly. As it is, he believes the General Division should have offered him a post-hearing opportunity to address its concerns before rendering a decision.

[17] Having carefully reviewed M. T.'s submissions against the record, I have concluded that, on balance, neither the General Division's findings nor its conduct crossed the threshold of error, as defined by s. 58(1) of the DESDA.

[18] In paragraphs 50–52 of its decision, the General Division essentially found that M. T.'s financial statements were not credible and, by extension, neither was M. T. himself. This may have been a harsh assessment but, in my view, it was not perverse or capricious, and it was not wholly divorced from the material before the General Division. It had reasonable questions about the amount of work that M. T. put into his business to generate the levels of net income that he reported from 2005–11. His expenses during that period were a relevant area of inquiry because they offered some indication of what he did himself and what he paid others to do. However, those expenses were merely summarized under broad headings in the business tax returns that were made available to the General Division—hence its questions about what he paid to whom and why.

[19] M. T. admits that he struggled to recall such details from years ago and, after the General Division issued its decision, he provided answers to questions that he was unable to address at the hearing. Unfortunately, however genuine that information may be, I am unable to consider it in this forum, since it constitutes new evidence and is, in effect, a bid, on M. T.'s part, to reargue the substance of his disability claim. I concede that the General Division's suggestion that M. T. probably "paid himself something from the company" is puzzling since the financial statements clearly show that his business produced a profit, from which M. T. presumably paid himself a dividend. However, I will assume that this comment is part and parcel of the General Division's overarching finding that M. T., like many business owners, minimized reported net income.

[20] Whether this finding was fair or reasonable is not the issue; as noted above, the DESDA was drafted in such a way to afford the General Division considerable latitude when establishing fact. Based on the material before it at the time, and in view of M. T.'s unsatisfactory testimony in response to reasonable questions, it was defensible for the General Division to conclude that his net income figures could not be taken at face value.

[21] M. T. attempted to introduce post-hearing evidence that the CRA had audited his books and found no irregularities. As mentioned, I cannot hear new evidence but, in any case, M. T. had an opportunity to testify on this matter at the hearing. He claims that he did not expect the General Division to interrogate him about his financial statements, but he should have foreseen that this would be a potential area of discussion. After all, his benefits were suspended precisely

because his business activities were producing increasing profits, and he was cautioned from the beginning that disability was tied to a capacity to pursue, not just employment, but any substantially gainful *occupation*.

(ii) "Substantially gainful" post-2005 earnings

[22] At paragraph 49 of its decision, the General Division wrote: "Every year since 2005 the gross revenue has been substantially over the CPP allowable earnings. The Tribunal finds the gross income and the gross profit from 2005 until 2011 to be substantially gainful."

[23] M. T. explains that when he applied for a CPP disability pension, he disclosed the existence of his business and informed the Minister that he would continue to operate it until he was no longer able to do so. When the Minister subsequently approved his application, he assumed that he could continue operating his business without jeopardizing his entitlement to the disability pension, particularly since he considered his business as merely a hobby and was earning what he considered "little money from it."

[24] On balance, I think that the General Division's analysis of M. T.'s earnings qualifies as an error of law. Here, I apply a stricter standard. I acknowledge that M. T. has never contested the Minister's determination of his gross or net income for 2005–11. Furthermore, his belief that his business was a hobby is irrelevant if it generated earnings that were "substantially gainful." However, what is substantially gainful? Prior to the enactment of s. 68.1 of the *Canada Pension Plan Regulations*,[4] the term had no fixed dollar value and was explained only in jurisprudence, yet nowhere in its decision did the General Division cite any of that jurisprudence, and instead referred to another standard, "maximum allowable earnings."[5] The General Division did not define this term, and the Minister's representative was unable to explain its meaning at the hearing. At my request, he filed written post-hearing submissions on the matter, which stated in part:

> The Allowable Earnings amount is based upon Service Canada administrative policy and indicates the amount up to which a disability claimant may earn without being required to report their earnings to

[4] In effect since 2014, s. 68.1 of the *Canada Pension Plan Regulations* defines "substantially gainful" earnings as 12 times the maximum monthly disability pension.
[5] At paragraphs 45, 49, 56 and 61.

> Service Canada. The Allowable Earnings amount is calculated as 10% of the Year's Maximum Pensionable Earnings, rounded to the nearest $100.

[25] The submissions included a table indicating that the allowable earnings amount in the relevant years rose from $4,100 in 2005 to $4,800 in 2011. These figures, I admit, are relatively low, and well under the nearly $21,000 that M. T. reported in net income for 2009, but that is not the issue. In this case, the General Division repeatedly used an internal ESDC guideline as a benchmark to assess M. T.'s capacity to perform a "substantially gainful" occupation, rather than relying on case law. As the Federal Court held in *Gordon v. Canada*:[6] "Administrative guidelines … are not law. They are advisory only, and therefore cannot be relied on in a manner that limits the discretion conferred on the Minister by statute."

[26] The Minister suggests that, notwithstanding its use of allowable earnings, the General Division nevertheless arrived at a defensible conclusion. In support of this argument, the Minister cited numerous cases in which claimants with earnings comparable to M. T. were found not to have been disabled. In doing so, the Minister has asked me to go far along the path of adjudicating this disability claim on its merits. This I will not do, bearing in mind the constraints imposed by s. 58(1).

(iii) Improvement in health after 2005

[27] M. T. claims that the General Division based its decision on an erroneous finding, made without regard to the material before it, when it found that his health improved after he was granted a disability pension in 2005. He maintains that his condition has never improved and denies that there is any evidence on the record to show otherwise.

[28] My review of the file compels me to agree. At paragraph 57, the General Division noted that, when his pension was approved, M. T. was expected to undergo a lung transplant if his disease progression continued. M. T. explained to the General Division that, due to his efforts at maintaining his health, the lung transplant became unnecessary. The General Division also noted that drug advances had helped arrest M. T.'s decline. From this, the General Division concluded: "The fact that he has not required a lung transplant in over 10 years would indicate his disease

[6] *Gordon v. Canada (Attorney General)*, 2016 FC 643.

progression, while still a permanent disease, did reverse in its severity of 2005." At paragraph 60, the General Division added, "By 2009, the evidence shows the Appellant was better physically than he had been in 2005 and 2006. He was not in the same position of requiring a lung transplant. While he has a condition that is permanent, it had improved."

[29] The General Division based its findings largely on a medical opinion dated May 1, 2013 by Dr. Neil Brown, a respirologist. Dr. Brown wrote:

> Fortunately, due to continued advancement and access to drugs such as Pulmozyme, inhaled Tobramycin and inhaled Aztreonam M. T. has been able to maintain his health at a level comparable to 2005. This was somewhat surprising to us in that in [*sic*] 10 years ago we had anticipated that M. T. would show a decline as he is chronically infected with Burkholderia which normally infers a poor prognosis in Cystic Fibrosis and that he would likely progress to requiring lung transplantation. Fortunately that has not been the case.

[30] Dr. Brown did not suggest that there had been any actual improvement in M. T.'s health, only that he had "been able to maintain his health at a level comparable to 2005." The General Division somehow determined that the maintenance of M. T.'s health was equivalent to a reversal of the severity of his disease. However, there is a significant difference between maintenance and reversal of progression; the former suggests that the condition has plateaued, while the latter suggests that it has improved. I am satisfied that the General Division misconstrued the medical evidence in finding that the absence of any deterioration in M. T. condition after 2005 amounted to a "reversal of severity."

[31] The Minister listed instances in the decision where the General Division noted maintenance of M. T.'s health, but none supported a finding that his health had, in fact, improved. While M. T.'s voluminous medical record does appear to show fluctuations in his condition over the years, evidence of a positive trend was harder to see. The Minister compiled a

table displaying M. T.'s forced vital capacity (FVC) and forced expiratory volume (FEV1) readings from August 2004, to June 2016, which purported to show an overall improvement in lung function.[7] It is notable that almost none of this data was referred to in the decision, and the trend, if any, in M. T.'s lung capacity testing results appeared to play no part in the General Division's analysis. In compiling this clinical data for my review, the Minister is, in effect, asking me to ratify the General Division's conclusion by conducting the kind of in-depth examination of M. T.'s medical information that the General Division itself failed to do. I am unwilling to comply, since my mandate as a member of the Appeal Division does not allow me to assess the substance of M. T.'s disability claim.

CONCLUSION

[32] I find that the General Division erred in law by relying on departmental guidelines to benchmark M. T.'s business income as substantially gainful. In doing so, it also based its decision on an erroneous finding that the severity of M. T.'s disability reversed simply because his CF did not progress as his treatment providers had expected in 2005.

[7] M. T. disagreed that the data showed any improvement in his lung function and pointed to a graph at GD2-340 as evidence of decline, or at least stagnation, after 2005. He also noted that the FVC and FEV1 values for July 2012 and September 2012 appear to have been transposed. The Minister acknowledged this error in its submission of March 18, 2018.

[33] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different member.

Member, Appeal Division

HEARD ON:	March 2, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. T., Appellant Matthew Vens, representative for the Respondent