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

Citation: *G. S. v. Minister of Employment and Social Development*, 2018 SST 554

Tribunal File Number: AD-17-924

BETWEEN:

G. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 22, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the matter is referred back to the General Division for reconsideration.

OVERVIEW

[2] G. S. (Claimant) was granted a Canada Pension Plan disability pension starting in 1994 on the basis that she was disabled by bipolar affective disorder, fibromyalgia, back pain related to scoliosis, and asthma. In spite of her limitations, the Claimant began to work on a part-time basis in 2008. She earned approximately $16,000 to $20,000 from 2012 to 2014. The Minister of Employment and Social Development (Minister) reassessed the disability pension claim in 2015 and decided that the Claimant ceased to be disabled in April 2009. It ceased paying the disability pension to her and requested that she repay an overpayment. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division dismissed the appeal, concluding that the Claimant worked in a substantially gainful occupation and was no longer disabled in April 2009.

[3] The Claimant's appeal from this decision is allowed because the General Division erred in law when it failed to consider the conditions of her employment when deciding whether it was substantially gainful and it may have reversed the burden of proof.

ISSUES

[4] Did the General Division err in law by not considering the Claimant's work conditions, or by reversing the onus of proof?

[5] Did the General Division base its decision on an erroneous finding of fact regarding the Claimant's telephone call about tax withholding or her work trial?

[6] Does the Appeal Division have jurisdiction over overpayments?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider, namely that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[1] The parties' arguments on appeal must be considered in this context.

Issue 1: Did the General Division err in law?

[8] The *Canada Pension Plan* states that a disability pension is payable to a claimant who has a severe and prolonged disability. A disability is severe only if a claimant is incapable regularly of pursuing any substantially gainful occupation.[2] Also, a disability pension ceases to be payable when a claimant ceases to be disabled.[3]

[9] The term "substantially gainful occupation" is not defined in the *Canada Pension Plan*. The Pension Appeals Board stated that substantially gainful occupations include occupations where remuneration is not merely nominal, token or illusory, but reflects an appropriate reward for the nature of the work performed.[4] This is a persuasive statement. Earnings are one factor to be considered when deciding whether a claimant's work is a substantially gainful occupation.[5]

[10] The Claimant earned approximately $16,000 to $20,000 each year from 2012 to 2014. These were her highest earnings. There was no evidence concerning whether this was an appropriate reward for the work she did. The General Division failed to turn its mind to this.

[11] In addition, the courts have decided that a person who earns some income may still be disabled if they work for a benevolent employer.[6] The term "benevolent employer" is also not defined in the legislation. However, the Federal Court of Appeal sets out a number of factors to

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[1] DESD Act, s. 58(1)
[2] *Canada Pension Plan*, s. 42(2)(*a*)
[3] *Canada Pension Plan*, s. 70(1)(*a*)
[4] *Boles v. Minister of Employment Insurance*, CP02794
[5] *Minister of Human Resources Development v. Porter*, CP05616
[6] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

consider when deciding whether an employer is a benevolent employer.[7] They include whether the employee's hours or work conditions are different than other employees', whether their remuneration is different, and what accommodations have been made for the employee. The General Division failed to turn its mind to whether the Claimant was accommodated at work or whether her work conditions or productivity requirements were different than those of her colleagues. This failure to consider whether the Claimant's employers were benevolent employers is an error in law.

[12] In addition, s. 68.1 of the *Canada Pension Plan Regulations* came into force in May 2014. It sets out a mathematical calculation for determining what amount of earnings is "substantially gainful."[8] The General Division cited this section, applied this calculation to the Claimant's income and based its decision that the Claimant's income was substantially gainful on it. However, this regulation was not to be applied retroactively. This means that it applies only to income earned after it came into force in 2014. The General Division therefore erred in law when it applied this regulation to the income the Claimant earned prior to 2014 to determine that she ceased to be disabled in 2009.

[13] The appeal must be allowed on the basis of these errors in law.

[14] The Claimant also argues that the General Division erred in law because it required that she prove that she continued to be disabled when the onus should have been on the Minister to establish that the Claimant ceased to be disabled. The decision states that the onus is on the Minister to prove that the Claimant ceased to be disabled.[9] After examining the evidence, the General Division concludes in its decision that the Minister had met the onus of proof.[10]

[15] However, the decision also states that the Claimant's personal circumstances, including age, education, language skills and work and life experience, must be considered. The decision then states, "Given her age, education, language proficiency and ability to engage in substantially gainful occupations the Tribunal finds the [Claimant] failed to prove she suffered from a continued severe disability at the relevant time period as she was no longer suffering from a

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[7] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[8] *Canada Pension Plan Regulations*, s. 68.1
[9] General Division decision, paras. 31 and 35
[10] *Ibid.*, para. 43

severe disability as defined in the CPP as of 2009."[11] This statement seems to place the onus of proof on the Claimant, which is an error in law. I am satisfied that the appeal should be allowed on this basis as well.

[16] Finally, the Claimant argues that the General Division erred in law because it failed to consider whether her health had improved so that she gained capacity regularly to pursue substantially gainful work. This is based on Pensions Appeal Board decisions that stated that the decision maker must consider this.[12] However, Pension Appeals Board decisions are not binding on this Tribunal. While it may have been prudent for the General Division to consider whether the Claimant's health had improved, it made no error in law by failing to do so.

[17] In spite of this, I find it troubling that the Minister was satisfied that the Claimant was disabled in 2008, but not in 2009 when she continued to work at the same job under similar conditions. The Minister failed to explain why it changed its decision in these circumstances, absent evidence of any improvement in the Claimant's health.

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

[18] One ground of appeal in the DESD Act is that 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.[13] Three criteria must be met for an appeal to succeed on this basis: the finding of fact was erroneous; it was made perversely, capriciously or without regard for the material that was before the General Division; and the decision was based on this finding of fact.

[19] First, the Claimant submits that paragraphs 16 and 39 of the decision are contradictory. Paragraph 16 states that the Claimant worked for a number of employers from 2008 to 2014 and that her 2008 income was below the substantial earnings benchmark. Paragraph 39 refers to the Claimant's testimony that she believed that she was able to return to some work and remain eligible for the disability pension, and sets out what her hourly income was in 2008. These

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[11] General Division decision, para. 34
[12] *Alexander v. Minister of Human Resources Development*, CP09448; *Lummiss v. Minister of Human Resources Development*, CP08229
[13] DESD Act, s. 58(1)(*c*)

paragraphs are not contradictory. The General Division made no erroneous finding of fact in these paragraphs.

[20] Second, the Claimant argues that the General Division based its decision on an erroneous finding of fact regarding a telephone call she had with Service Canada when she asked for tax to be withheld from her pension payments. She argues that this conversation must have disclosed her income at that time. However, the written evidence about this conversation shows only that the topic of tax was discussed. Therefore, the General Division finding of fact that she did not disclose her income in the telephone call is not erroneous.

[21] Finally, the Claimant contends that the General Division erred when it found that she had a three-month work trial in 2009. The evidence before the General Division was that the Claimant worked in 2009. The General Division decision did not turn on how this work was characterized. Therefore, it was not an erroneous finding of fact.

Issue 3: Does the General Division have jurisdiction to consider overpayments?

[22] The Claimant urged the Appeal Division to remit the overpayment that the Minister decided had to be repaid. However, the Social Security Tribunal has no authority to decide this issue.[14] The Tribunal is a statutory tribunal and, as such, has only the jurisdiction given to it by statute. The *Canada Pension Plan* provides that a person may appeal some decisions to the Tribunal.[15] The DESD Act states that, for an application related to the *Canada Pension Plan*, the Tribunal may only decide questions of law and fact as to whether a benefit is payable or its amount, whether a person is entitled to a division of unadjusted pensionable earnings or its amount, whether a person is eligible for an assignment of a retirement pension or its amount or whether a penalty should be imposed.[16] There is no authority to decide issues related to the remission or reduction of an overpayment. Therefore the General Division did not err in failing to decide this issue.

[14] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278
[15] *Canada Pension Plan*, s. 82
[16] DESD Act, s. 64(2)

CONCLUSION

[23] The appeal is allowed, and the General Division decision is quashed.

[24] The DESD Act sets out the remedies that the Appeal Division can give.[17] The record is incomplete; there is no evidence regarding the Claimant's work conditions, productivity requirements or accommodations and the General Division did not turn its mind to these issues. Therefore the appeal is referred back to the General Division for reconsideration.

[25] To avoid any possibility of an apprehension of bias, the matter should be reconsidered by a different General Division member.

[26] The parties are strongly encouraged to consider whether this matter can be resolved through settlement negotiations.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	May 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. S., Appellant Brad Patterson, Representative for the Appellant Stephanie Pilon, Representative for the Respondent

[17] DESD Act, s. 59(1)