



Citation: *RS v Minister of Employment and Social Development*, 2021 SST 650

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: R. S.

Respondent: Minister of Employment and Social Development
Representative: Ian McRobbie and Jared Porter (counsel)

Decision under appeal: General Division decision dated June 28, 2021
(GP-21-537)

Tribunal member: Janet Lew

Type of hearing: On the Record

Decision date: November 4, 2021

File number: AD-21-271

Decision

[1] The appeal is allowed. The General Division made a legal error by failing to consider whether the employment of the Appellant R. S. (Claimant) between October 2016 and September 2017 was substantially gainful for the purposes of the *Canada Pension Plan*. I am returning this matter to the General Division for reconsideration, with directions.

Overview

[2] The Claimant applied for a Canada Pension Plan disability benefit in July 2019. He claimed that he could no longer work because of mental health issues. The Respondent, the Minister of Employment and Social Development Canada (Minister) refused the Claimant's application, initially and on reconsideration.

[3] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division dismissed the Claimant's appeal. It acknowledged that, while the Claimant was now disabled, there was insufficient evidence to show that he was regularly incapable of a substantially gainful occupation by either the end of his minimum qualifying period of December 31, 2015, or by the end of the prorated period of February 2016.

[4] The Claimant asked the Appeal Division for permission to appeal the General Division decision. He argued that the General Division decided his case without having all of the necessary documents. He had relied on his family doctor to produce all of the relevant medical records. However, the Claimant did not realize that his family doctor had not provided any records that pre-dated 2016, and the General Division did not review what records it had. The Claimant has provided the Appeal Division with medical records that the General Division did not have.

[5] A member of the Appeal Division granted permission to the Claimant to move ahead with his appeal. The member was satisfied that the Claimant had an arguable case that there might have been a breach of the rules of procedural fairness.

[6] At the Minister's request, I held a settlement conference. The parties reached an agreement and the terms were read into the record at the end of the settlement conference. The parties asked me to prepare a decision reflects that agreement.

The parties agree on the outcome of the appeal

[7] The parties agree with settlement of this matter, as follows:

The parties agree that this appeal should be allowed on the basis that the General Division erred in law, pursuant to section 58(1) of the *Department of Employment and Social Development Act*, in deciding that the Claimant did not have a severe disability by December 31, 2015.

The parties agree that this appeal should be allowed on the basis that the General Division erred in law in failing to consider whether R. S.'s employment after December 31, 2015 was substantially gainful in accordance with section 68.1(1) of the *Canada Pension Plan Regulations*.

Therefore, under section 18 of the *Social Security Tribunal Regulations* and section 59(1) of the *Department of Employment and Social Development Act*, the parties agree that the decision of the General Division dated June 28, 2021, should be set aside, and that the matter be referred back to the General Division.

The parties agree that the matter be referred to the General Division and request the Tribunal member seized of this matter convene a settlement conference. The parties further request that the Claimant's materials contained at AD1-7 to AD1-17 within the August 1, 2021 Application to Appeal be admitted into the evidentiary record before the General Division.

I accept the proposed outcome

[8] I accept the parties' agreement.

[9] I am satisfied that the General Division failed to consider whether the Claimant's employment between October 2016 and September 2017 was substantially gainful for the purposes of the Canada Pension Plan.

[10] The General Division found that the Claimant retained the capacity to work after these two dates. It found that he had worked as a server /dining room supervisor between October 2016 and September 2017. It noted that he had earnings of over \$8,000 in 2017. It also noted the Claimant's testimony that he worked between 4 to 8 hours per shift, 4 to 5 days per week. The General Division found that the Claimant's work efforts during that time demonstrated that he retained the capacity regularly for substantially gainful work, despite his limitations. Finally, the General Division noted that the Claimant stopped working in September 2017 because the restaurant closed.

[11] However, the General Division did not consider section 68.1(1) of the *Canada Pension Plan Regulations*. The section defines "substantially gainful" in respect of an occupation for the purposes of subparagraph 42(2)(a)(i) of the *Canada Pension Plan*. Under the section, "substantially gainful" 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.

[12] The General Division's failure to consider section 68.1(1) of the *Canada Pension Plan Regulations* represents a legal error.

Remedy

[13] When the General Division makes an error, the Appeal Division can fix that error in one of two ways: (i) it can send the matter back to the General Division for a reconsideration, with directions, or (ii) it can give the decision that the General Division should have given.

[14] Given the parties' agreement, I am setting aside the General Division decision and returning this matter to a different member of the General Division for reconsideration, with the following directions:

- i. The documents contained at pages AD1-7 to AD1-17 of the Application to the Appeal Division shall form part of the evidentiary record at the General Division, and
- ii. The General Division shall convene a settlement conference between the parties.

[15] For greater clarity, the parties may file additional records and submissions with the General Division. For instance, the Claimant may file any additional medical records that address his medical condition around the end of December 2015 and February 2016, along with any updated records.

Conclusion

[16] The appeal is allowed in accordance with the parties' agreement.

Janet Lew
Member, Appeal Division