Federal Court  Cour fédérale

Date: 20191204

Docket: T-492-19

Citation: 2019 FC 1552

Ottawa, Ontario, December 4, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

PATRICIA DION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In 2014, after receiving Canada Pension Plan (CPP) disability benefits for 10 years, Patricia Dion returned to the workforce. She continued to collect CPP while working, but her benefits ceased when it was determined that she was no longer disabled and therefore no longer qualified for benefits. Ms. Dion appealed this finding to the Social Security Tribunal General Division (GD) and to the Appeal Division (AD). She was unsuccessful at both levels. The finding was that she was not "disabled" within s. 42(2) of the *Canada Pension Plan Act* RSC 1985 c C-8 (*CPPA*) because she was engaged in a "substantially gainful occupation."

[2] Ms. Dion, who represented herself, seeks review of the AD decision. She argues that the AD failed to consider her personal circumstances, the nature of the work she was able to perform, her age, and her outdated educational credentials. Unfortunately for Ms. Dion, her arguments do not fall within any of the grounds of appeal that were open to the AD to consider under s. 58(1) of the *Department of Employment and Social Development Act* S.C. 2005, c. 34 (*DESDA*). Therefore, her judicial review is dismissed.

Background

[3] In January 2004, Ms. Dion qualified for a CPP disability pension when she was incapable of working due to back injuries, depression, and sleep apnea. Some ten years later in 2014, Ms. Dion returned to the workforce on "work trials" as a homecare worker. However, she also continued to collect her CPP disability pension while she was working. When this came to the attention of government authorities, CPP payments ceased and it was determined that she had been overpaid by over $25,000.00.

[4] Ms. Dion sought reconsideration from the GD. However, the GD determined that her return to work established that she was no longer disabled and therefore no longer entitled to benefits.

[5] Her appeal to the AD was dismissed. The AD found that the GD did not make any "erroneous findings of fact". Which, according to the AD, was the only possible ground of appeal upon which her arguments could be considered.

[6] In this judicial review, Ms. Dion argues that it was unreasonable for the AD (and the GD) to focus on how much she collected in earnings, rather than how difficult it was for her to work. She reports ongoing pain while working, necessitating frequent breaks.

Issue and Standard of Review

[7] The only issue is whether it was reasonable for the AD to find that Ms. Dion failed to raise a ground of appeal that had a reasonable chance of success.

[8] The standard of review for the AD's decision is reasonableness because it was applying its own legislation (*Atkinson v Canada (Attorney General),* 2014 FCA 187 at para 26 [*Atkinson*]).

[9] The reasonableness of a decision is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and whether the decision falls within the range of acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

[10] Ms. Dion argues that the AD (and the GD) failed to properly consider her personal circumstances. She explains that when she returned to work in 2014, it was not on a full-time basis and she was only able to work at jobs that were not physically demanding and where she could take frequent breaks. Ms. Dion admits that she did not report that she was working;

however, she believes she was not required to do so because, according to her, these were only "work trials". In other words, she was making a return to work on a trial basis to see if she was capable. She also argues that it is an error for the AD to rely upon her earnings rather than her limitations in assessing her ability to work. She argues that there should have been consideration of how difficult it is for her to work rather than whether she is making sufficient wages.

[11] Ms. Dion's positions, while understandable, are not in keeping with the legislative requirements. The CPP definition of disability is highly restrictive. As stated in A*tkinson a*t para 3: "individuals who experience significant and prolonged health challenges may nonetheless not qualify for disability pension if they are found to be capable regularly of pursuing a substantially gainful occupation". It is the capacity to work that needs to be "regular," not the work itself (*Atkinson* at para 37). In *Atkinson*, being able to work 70% of the time with no evidence of complaints or disciplinary action was sufficient to qualify as "regular" (*Atkinson* at para 38).

[12] In addition to the restrictive definition of disability, the AD has a restricted mandate. Under s. 58(1), an appeal must fall under one of the these three grounds: (1) the GD failed to observe a principle of natural justice or made a jurisdictional error; (2) the GD made an error of law; or (3) the GD based its decision on an erroneous finding of fact. In addition to having to meet one of the three grounds of appeal, an appeal will only be granted when the appeal itself has a reasonable chance of success (*Parchment v Canada (Attorney General),* 2017 FC 354 at para 23). This has been defined as "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General),* 2016 FC 115 at para 12).

[13] Here, the AD considered the GD decision and concluded that it did not misstate or overlook any relevant information. The AD noted that Ms. Dion changed jobs between 2014 to 2018 for reasons that were unrelated to her health, and, even though she received some assistance, she was capable of completing the tasks that were required of her jobs (para 6). Accordingly, the AD concluded that her evidence about needing to take frequent breaks did not engage any of the possible grounds of appeal (para 8).

[14] In assessing her ability to work on a regular basis, it is not the degree of discomfort that Ms. Dion may have suffered that is assessed, but rather, her ability to perform a substantially gainful occupation (*Kinsella v Canada (Attorney General),* 2019 FC 429 at para 36). Here the evidence was that Ms. Dion had been employed at various times since 2014 and that she was able to perform the tasks necessary to do her job. Although she reports challenges with pain, the evidence did not demonstrate that her pain made it impossible for her to work.

[15] In assessing earnings in the context of "substantially gainful" the test is "the remuneration for the services rendered is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate award for the nature of the work performed" (*T(G) v Minister of Human Resources and Skills Development*, (2013 Can. SST 5 at para 55). The evidence showed that while Ms. Dion was not always able to secure consistent employment, when she was employed, she worked full-time hours. Additionally, she did not present any evidence to suggest that she was paid below the market rate for an in-home care worker. Therefore, based upon her earnings, the finding that she was able to complete "substantially gainful employment" is reasonable.

[16] Additionally, although Ms. Dion raises issues about financial hardship, that is not a factor to be considered in determining whether a person has a severe and prolonged disability for the purposes of CPP (*Berger v Canada (Attorney General)*, 2019 FC 780 at para 43).

[17] Overall, the AD found that Ms. Dion did not put forward any ground of appeal that was capable of succeeding under s. 58(1) of the *DESDA*. The AD explained that the GD did not misstate or overlook evidence or important information. The AD noted that the GD relied upon the evidence of her work history from 2014 to 2018 as a personal support worker. The GD applied this evidence to the test for severe disability, being: whether a claimant is "regularly incapable of pursuing any substantially gainful occupation" (s. 42(2) of the *CPPA*). The AD found that the GD based its finding on the evidence and the legislation. In the circumstances, the AD undertook the proper analysis of the GD decision, and the AD decision is reasonable.

[18] Ms. Dion effectively re-argued the merits of her case as the basis for her disagreement with the decisions of the AD and the GD. However, it is not the role of this Court on judicial review to reconsider the merits of her claim.

[19] This application for judicial review is dismissed. In the circumstances, I decline to award costs.

JUDGMENT in T-492-19

THIS COURT'S JUDGMENT is that this judicial review is dismissed without costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-492-19
STYLE OF CAUSE:	PATRICIA DION v ATTORNEY GENERAL OF CANADA
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APPEARANCES:

Patricia Dion	APPLICANT (ON HER OWN BEHALF)
Tiffany Glover	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice Calgary, Alberta	FOR THE RESPONDENT