Federal Court of Appeal | Cour d'appel fédérale

Date: 20250218

Docket: A-70-23

Citation: 2025 FCA 38

CORAM: **STRATAS J.A.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

TARIQ AHSAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 6, 2025.

Judgment delivered at Ottawa, Ontario, on February 18, 2025.

REASONS FOR JUDGMENT BY: GOYETTE J.A.

CONCURRED IN BY: STRATAS J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] This application for judicial review concerns Mr. Ahsan's eligibility for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

I. Background

[2] Mr. Ahsan is a former journalist and university instructor who has been diagnosed with post-traumatic stress disorder, depression, and rheumatoid arthritis. In 1993 or 1994, he started receiving disability payments under the Ontario Disability Support Program. He received these payments until he reached the age of 65.

[3] Encouraged by his Ontario Disability Support Program manager, Mr. Ahsan applied for a disability pension under the *Canada Pension Plan* (CPP disability pension). Finding that Mr. Ahsan had a severe and prolonged disability, the Minister of Employment and Social Development approved the application effective June 1997.

[4] After he was accepted for a CPP disability pension, Mr. Ahsan continued receiving the same amount to which he was previously entitled under the Ontario program. Mr. Ahsan explains that rather than send the CPP pension payments to him, the Minister sent the payments to the province of Ontario which reduced its contribution by the amount of Canada's contribution. One may ask: why did Mr. Ahsan apply for a CPP disability pension if this pension did not improve his financial situation? I understand from Mr. Ahsan's submissions that his acceptance into the CPP disability regime enabled him to benefit from Canada's vocational rehabilitation program. It also made it possible for his daughter to receive financial assistance from Canada for her studies.

[5] Mr. Ahsan says that after he started receiving disability payments, he worked part time almost continuously to fend for his family and support his daughter's studies. Because he received disability payments from Ontario, and because Ontario and Canada communicated together regarding his situation, Mr. Ahsan understood that he had to report his employment income only to Ontario. That is what he did. He also reported his employment income in the returns that he filed with the Canada Revenue Agency.

[6] During the years 2009 to 2016, Mr. Ahsan worked as a parking attendant. The Minister was made aware of Mr. Ahsan's employment and reassessed Mr. Ahsan's eligibility for a CPP disability pension. The Minister determined that Mr. Ahsan was not eligible for a CPP disability pension from May 2009 to June 2016. According to the Minister, during that period, Mr. Ahsan no longer had a disability that was both "severe" and "prolonged" as required by paragraph 42(2)(a) of the *Canada Pension Plan*. As a result, the Minister asked Mr. Ahsan to reimburse the CPP disability payments received between May 2009 and June 2016.

[7] Subparagraph 42(2)(a)(i) of the *Canada Pension Plan* provides that a person's disability is severe "only if by reason [of the disability the person] is incapable regularly of pursuing any substantially gainful occupation". Until 2014, the *Canada Pension Plan* did not define "substantially gainful". On May 29, 2014, section 68.1 of the *Canada Pension Plan Regulations*, C.R.C., c. 385 came into force. Section 68.1 states that a "substantially gainful" occupation is 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". The maximum amount in question—the section 68.1 threshold—is determined using the formula in section 68.1.

[8] After the Minister denied Mr. Ahsan's request for a reconsideration of the cessation of his CPP disability pension, Mr. Ahsan appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division dismissed Mr. Ahsan's appeal: 2022 SST 1630. Mr. Ahsan appealed to the Appeal Division of the Social Security Tribunal.

[9] The Appeal Division found that the General Division committed an error of law by applying the section 68.1 threshold to assess Mr. Ahsan's earning for the years 2009 to 2013, because the threshold came into force only in 2014. To fix that error, the Appeal Division reviewed the evidence on record with a view to rendering the decision that the General Division should have rendered. This exercise led the Appeal Division to conclude that Mr. Ahsan's disability was neither severe nor prolonged during the years 2009 to 2016. On that basis, the Appeal Division dismissed Mr. Ahsan's appeal: 2023 SST 144.

II. Issues

[10] The standard of review for the Appeal Division's decision is reasonableness: *Milner v. Canada (Attorney General)*, 2024 FCA 4 at para. 23; *Canada (Attorney General) v. Ibrahim*, 2023 FCA 204 at para. 13. The question is not whether Mr. Ahsan is entitled to a disability pension under the *Canada Pension Plan*, but whether the Appeal Division's decision was reasonable: *Milner* at para. 23; *Ibrahim* at para. 13.

[11] Mr. Ahsan challenges the reasonableness of the Appeal Division's decision on three grounds. He claims that the Appeal Division (a) did not properly approach the meaning of

"severe" disability; (b) misapplied the concept of "substantially gainful" occupation; and (c) unreasonably refused to apply the Adjudication Framework.

[12] A very eloquent person, Mr. Ahsan presented his case as well as it could be presented. Nevertheless, for the following reasons, his application for judicial review cannot succeed.

III. Analysis

A. *The Appeal Division's approach to the meaning of "severe"*

[13] Mr. Ahsan says that in approaching the meaning of "severe" for the purposes of subparagraph 42(2)(a)(i), the Appeal Division failed to consider his co-existing medical conditions, his clinical disease activity index and his post-traumatic stress disorder. Further, the Appeal Division put too much emphasis on his capacity to work. Mr. Ahsan says that this approach is inconsistent with this Court's reasons in *Villani v. Canada (Attorney General),* 2001 FCA 248 and *Bungay v. Canada (Attorney General),* 2011 FCA 47.

[14] I disagree.

[15] The Appeal Division first acknowledged Mr. Ahsan's personal circumstances and the fact that he suffers from several medical conditions, including post-traumatic stress disorder: Appeal Division's decision at para. 3. The Appeal Division then focused on Mr. Ahsan's functional limitations. In so doing, the Appeal Division found that from 2009 to 2016, Mr. Ahsan worked as

a parking lot attendant where, despite his disability, he worked independently and had both a satisfactory work performance and good attendance: Appeal Division's decision at para. 29.

[16] The Appeal Division's approach is consistent with the jurisprudence. Both the Supreme Court of Canada and this Court have said that the measure of whether a disability is "severe" is not whether a person suffers from severe impairments, but whether this disability prevents the person from earning a living: *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at para. 14, citing *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paras. 28–29; *Ferreira v. Canada (Attorney General)*, 2013 FCA 81 at para. 7; *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 at para. 3. Under this law, which we cannot change, his level of suffering or his numerous impairments are only relevant to the analysis to the extent that they affect his employability: *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140 at para. 27; *Bungay* at para. 8(b).

[17] Thus, it was reasonable for the Appeal Division not to examine Mr. Ahsan's clinical disease activity index because this index does not account for Mr. Ahsan's functional limitations relating to his employment. For the same reason, it was reasonable for the Appeal Division not to discuss Mr. Ahsan's post-traumatic stress disorder, particularly where the medical evidence on record referring to this disorder made no mention of functional limitations.

B. *The Appeal Division's application of the "substantially gainful" concept*

(1) The 2009 to 2013 years

[18] Mr. Ahsan takes issue with how the Appeal Division applied the concept of "substantially gainful". He says that the Appeal Division should have applied the section 68.1 threshold retroactively to the years 2009 to 2013.

[19] Mr. Ahsan's argument fails for two reasons.

[20] First, the Appeal Division could not have done what Mr. Ahsan is seeking. This is because section 68.1 of the *Regulations* did not apply before May 29, 2014, and its use of the present tense does not allow for a retroactive application. Indeed, applying section 68.1 retroactively would run counter to section 10 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that where a matter is expressed in the present tense, it shall be applied to the circumstances as they arise.

[21] Second, the Appeal Division reasonably applied the "substantially gainful" concept for the years 2009 to 2013. The Appeal Division determined that Mr. Ahsan's occupation during those years was "substantially gainful" because the compensation he received those years was not merely nominal, token or illusory and reflected the appropriate reward for the nature of the work performed. Also, the Appeal Division found nothing on the record to suggest that Mr. Ahsan was providing anything less than market value to his employer, that he was

overcompensated, or that his employer was benevolent: Appeal Division's decision at paras. 30–32.

[22] The Appeal Division's approach described above was anchored in the jurisprudence from the Pension Appeals Board (*Poole v. Minister of Human Resources Development*, 2003 CarswellNat 5516, 2003 C.E.B. & P.G.R. 8816 at paras. 19–20, citing *Boles v. Minister of Employment and Immigration* (1994), C.E.B. & P.G.R. 8553 at 6036–38) on the meaning of "substantial". *Villani* seemingly approved this jurisprudence. There, this Court agreed with an earlier decision of the Pension Appeals Board which said that the word "substantial" means "having substance, actually existing, not illusory, of real importance or value, practical": see *Villani* at paras. 37–39, citing *Barlow v. Minister of Human Resources Development*, 1999 CarswellNat 3667, C.E.B. & P.G.R. 8846 at para. 27.

[23] The Appeal Division also sought guidance from the jurisprudence on what "substantially gainful" could mean in terms of earnings. The jurisprudence supported the Appeal Division's conclusion that Mr. Ahsan's employment during the years 2009 to 2013 was substantially gainful: Appeal Division's decision at para. 33.

(2) The years 2014 to 2016

[24] With respect to the years 2014 to 2016, when the section 68.1 threshold was in force, the Appeal Division declared itself satisfied that Mr. Ahsan's "reported earnings from 2014 onward were substantially gainful". The Appeal Division wrote that Mr. Ahsan's employment income in

2014 was above the section 68.1 threshold, and in the next two years, his income was below that threshold, which was "consistent with the pattern established in previous years": Appeal Division's decision at para. 35.

[25] This is problematic.

[26] Subparagraph 42(2)(a)(i) requires a determination of whether the person is capable regularly of pursuing any substantially gainful occupation, not a determination of whether the person "reported" substantially gainful earnings. Moreover, it is difficult to gather from the Appeal Division's reasons how the Appeal Division arrived at its conclusion. How can the section 68.1 threshold not being met in two of the three years result in "substantially gainful" earnings? And how is this consistent with the pattern established in previous years? This lack of justification is particularly troublesome given that subsection 68.1(2), by explaining how to calculate the threshold down to the nearest cent, suggests that the 68.1 threshold is a bright-line rule to determine what "substantially gainful" means.

[27] The Appeal Division's application of the "substantially gainful" concept for the years 2014 to 2016 tips the scale in favour of a conclusion that the Appeal Division's decision for these years is unreasonable in that it does not bear the hallmarks of reasonableness—justification, transparency, and intelligibility. Also, it is not based on an internally coherent reasoning and justified in relation to the legal and factual constraints bearing on it: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 99, 102–07.

[28] This conclusion of unreasonableness does not warrant granting the application for judicial review and remitting the matter to the Appeal Division for the years 2014 to 2016, because remitting here would serve no useful purpose: *Vavilov* at paras. 141–42. From the moment this Court confirms the reasonableness of the Appeal Division's determination that Mr. Ahsan ceased to be disabled from April 2009 to the end of 2013, subsection 70(1) of the *Canada Pension Plan* applies, with the consequence that the disability pension ceased to be payable to Mr. Ahsan starting May 2009. To have his disability pension reinstated for the years 2014 to 2016, Mr. Ahsan would have to file a new application with the Minister.

C. *The Appeal Division's refusal to consider the Adjudication Framework*

[29] The third ground on which Mr. Ahsan challenges the Appeal Division's decision is the latter's refusal to consider the Adjudication Framework. Mr. Ahsan argues that considering the framework would have led the Appeal Division to a different decision.

[30] The parties did not include the Adjudication Framework in their records. The Appeal Division describes the framework as a "document that the Minister's staff uses to assess disability applications": Appeal Division's decision at para. 36.

[31] The Supreme Court teaches us that it is appropriate for a decision maker like the Appeal Division to consider "publicly available policies or guidelines": *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 61, citing *Vavilov* at para. 94. But here, the Appeal Division wrote that it "cannot rely on a document that was internally generated within [*sic*]

Minister's department": Appeal Division's decision at para. 37. This statement is at odds not only with the Supreme Court's teachings, but also with the Appeal Division's reliance on the Adjudication Framework in another matter: see *Ibrahim* at para. 44.

[32] The Attorney General of Canada does not dispute that the Appeal Division could have considered the Adjudication Framework. The Attorney General says that the Appeal Division's statement that it cannot rely on the framework must be read in context, that is, in response to Mr. Ahsan's argument that the Appeal Division *had* to rely on the Adjudication Framework. In fact, before it made the statement, the Appeal Division wrote that Mr. Ahsan "repeatedly insisted" that his earnings were within the guidelines contained in the Adjudication Framework: Appeal Division's decision at para. 36.

[33] Viewed in its context, the statement that the Appeal Division cannot rely on the framework—although unfortunate—does not render the decision for the years 2009 to 2013 unreasonable.

[34] Two additional elements support this conclusion. First, the Adjudication Framework is not on record with the consequence that this Court cannot evaluate its relevance to the Appeal Division's analysis. Second, the Appeal Division otherwise reasonably approached the issue of whether Mr. Ahsan was disabled within the meaning of paragraph 42(2)(a) of the *Canada Pension Plan* for the years 2009 to 2013.

D. *The reimbursement of the CPP disability pension payments*

[35] Before concluding, I wish to address a point strongly emphasized by Mr. Ahsan in his submissions. Mr. Ahsan says that it is unfair for the Minister to ask him "to repay money that [he] never actually received". By money that he never received, Mr. Ahsan refers to the payments that Canada sent to Ontario described in paragraph [4] above, and that Canada is now asking Mr. Ahsan to reimburse. Mr. Ahsan wants Ontario, not him, to reimburse Canada. However, as Mr. Ahsan acknowledged in his submissions, he has received indications from Ontario and from a legal aid lawyer that he will receive the full payments that he should have received under the Ontario program during the years 2009 to 2016 if this Court's decision has the effect of confirming that he was not eligible to the CPP disability pension during those years. Mr. Ahsan will then be able to use the payments received from Ontario to reimburse Canada. Accordingly, there is no need for this Court to address this issue further.

IV. Conclusion

[36] I would dismiss Mr. Ahsan's application for judicial review without costs. As requested by the Attorney General, I would remove Employment and Social Development Canada as the

respondent and instead name the Attorney General of Canada as the respondent in accordance with Rule 303 of the *Federal Courts Rules*, S.O.R./98-106.

"Nathalie Goyette"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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