

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180516

Docket: A-241-17

Citation: 2018 FCA 95

**CORAM: DAWSON J.A.
GLEASON J.A.
WOODS J.A.**

BETWEEN:

ROBIN BURGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 16, 2018.
Judgment delivered from the Bench at Vancouver, British Columbia, on May 16, 2018.

REASONS FOR JUDGMENT OF THE COURT BY:

GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on May 16, 2018).

GLEASON J.A.

[1] In this application for judicial review, Ms. Burger seeks to set aside the July 21, 2017 decision of the Appeal Division of the Social Security Tribunal of Canada (the SST-AD) in *R. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 356. In that decision, the SST-AD dismissed Ms. Burger's appeal from an earlier decision of the General Division of the Social Security Tribunal of Canada (the SST-GD) in file no. GT-123886, which, in turn,

dismissed Ms. Burger's appeal of a decision terminating, as of March 2012, the disability benefits that Ms. Burger had been receiving under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The SST-AD concluded that in March of 2012 Ms. Burger no longer suffered from a severe disability within the meaning of section 42 of the *Canada Pension Plan* as she was not then regularly incapable of pursuing any substantially gainful occupation and accordingly dismissed her appeal.

[2] It is common ground between the parties that, as was decided by this Court in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, [2015] 3 F.C.R. 461 at para. 24, the standard applicable to review the SST-AD's decision is reasonableness.

[3] Ms. Burger submits that the SST-AD's decision was unreasonable as it failed to engage with the issue of whether her earnings in the part-time employment that she held in 2012 constituted substantially gainful employment as that term has been interpreted in the applicable jurisprudence because the SST-AD failed to consider the modest nature of the amounts she earned. Ms. Burger also submits that it was unreasonable for the SST-AD to have considered her ability to attend university on a part-time basis in assessing her capacity to hold substantially gainful employment and in failing to conduct the type of analysis mandated in *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C.R. 130 (*Villani*). She further says that it was unreasonable for the SST-AD to have limited its analysis to her situation as of March 2012 and that it instead ought to have considered that her disability led to her to resign from her part-time employment in February of 2013.

[4] Despite the able submissions of counsel for Ms. Burger, in light of the deferential nature of the reasonableness standard, we cannot conclude that the SST-AD's decision was unreasonable. The decision is transparent and intelligible as the reasons offered by the SST-AD are understandable. Moreover, the result reached is defensible and justifiable.

[5] More specifically, contrary to what Ms. Burger asserts, the SST-AD was aware of and did consider the modest amounts earned by Ms. Burger in her part-time employment. However, this was not the only fact before the SST-AD that was relevant to whether Ms. Burger was capable of pursuing any substantially gainful occupation at the relevant time. Other relevant facts that were open to the SST-AD to consider under a "real world" analysis mandated by *Villani* included the fact that Ms. Burger was paid the same amount as others performing similar work, did not seek accommodations from her employer and attended university on a part-time basis, commuting to do so.

[6] We also believe that it was open to the SST-AD to have focussed its analysis on Ms. Burger's capacity as of March 2012, as that is the date when she was determined to no longer meet the definition of disability set out in paragraph 42(2)(a) of the *Canada Pension Plan*. As the respondent correctly notes, paragraph 70(1)(a) of the *Canada Pension Plan* provides that disability benefits cease to be payable commencing in the month when a claimant ceases to be disabled. In any event, the medical evidence submitted by Ms. Burger's treating physician in 2014 did not support incapacity as her treating physician confirmed that she was then able to perform modified duties on a part-time basis and did not indicate that Ms. Burger's condition had improved since March of 2012.

[7] Thus, there were facts before the SST-AD capable of reasonably supporting its conclusion and we accordingly cannot intervene to set its decision aside.

[8] This application will therefore be dismissed. Neither party sought costs and none are awarded.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-241-17

STYLE OF CAUSE: ROBIN BURGER v. ATTORNEY
GENERAL OF CANADA

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DELIVERED FROM THE BENCH BY: GLEASON J.A.

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