

Citation: *I. G. v. Minister of Employment and Social Development*, 2015 SSTGDIS 107

Date: September 22, 2015

File number: GP-14-963

GENERAL DIVISION - Income Security Section

Between:

I. G.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

Heard by Questions and answers from June 5, 2015 until September 22, 2015.

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for the *Canada Pension Plan* (CPP) death benefit and a CPP survivor's pension in relation to the late M. G. (the contributor) who passed away on July 19, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on March 3, 2014.

[2] The hearing of this appeal was by Questions and answers for the following reasons:

- a) There are gaps in the information in the file and/or a need for clarification.
- b) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] Section 64 (1) of the *Department of Employment and Social Development Act* (DESD Act) provides that the Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under the Act.

[4] Section 64 (2) of the DESD Act provides that in the case of an application relating to the CPP, the Tribunal may only decide questions of law or fact as to

- a) whether any benefit is payable to a person or its amount;
- b) whether any person is eligible for a division of unadjusted pensionable earnings or its amount;
- c) whether any person is eligible for an assignment of a contributor's retirement pension or its amount; and
- d) whether a penalty should be imposed under Part 11 of that Act or its amount.

Applicable CPP Provisions

[5] Paragraph 44(1)(c) of the CPP provides that a death benefit shall be payable to the estate of a deceased contributor who has made contributions for not less than the minimum qualifying period.

[6] Paragraph 44(1)(d) of the CPP provides that subject to certain conditions a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period (MQP).

[7] Paragraph 44(3) of the CPP provides that for the purposes of paragraph 44 (1) (c) and (d) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions during the contributor's contributory period

- a) for at least one-third of the total number of years included either wholly or partly within his contributory period, excluding from the calculation of that contributory period any month in a year after the year in which he reaches sixty-five years of age and for which his unadjusted pensionable earnings were equal to or less than the basic exemption for that year, but in no case for less than three years; or
- b) for at least ten years

[8] Paragraph 49 of the CPP provides that a contributor's contributory period is the period commencing January 1, 1966 or when he reaches eighteen years of age, whichever is later, and ending in the month when the contributor dies, excluding any month that was excluded from the contributor's contributory period under the Act or under a provincial pension plan by reason of disability.

[9] Paragraph 52(3)(a) of the CPP provides that a contributor shall be deemed to have made a contribution for any year for which his unadjusted pensionable earnings exceed his basic exemption for the year, and shall be deemed to have made no contribution for any year for which his unadjusted pensionable earnings do not exceed his basic exemption for the year.

ISSUE

[10] Did the contributor make sufficient contributions to the CPP to meet the MQP in order for the Appellant to qualify for the CPP death and survivor's pension benefits?

BACKGROUND AND EVIDENCE

[11] The Appellant is the widow of the late M. G. who was born in the USSR in April 1949 and passed away in Israel on July 19, 2012. The contributor's Record of Earnings (ROE) indicates that he made sufficient contributions to the CPP from 1971 to 1979 (a total of nine years). The ROE also indicates that the Appellant made contributions of \$3.15 in 1970, which were never refunded.

[12] The parties dispute whether the unrefunded contributions in 1970 should be considered for the purposes of determining whether the contributor satisfied the MQP requirement of 10 years. If the 1970 contributions are considered, the contributor has made the required 10 years of contributions. If they are not considered, he has only made nine years of contributions.

THE QUESTIONS

[13] On June 5, 2015 the Tribunal sent questions to the Respondent as follows:

1. Were the contributions of \$3.15 made by the contributor in 1970 ever refunded?
2. If they were refunded, please provide the date of refund and supporting documentation?
3. If the contributions were not refunded, please advise why not?
4. In your submissions, you state the 1970 contributions must be "valid" contributions. S.44(3) only refers to contributions. What is your basis for the submission that the contributions must be "valid"? In addition, please advise why the contributions in 1970 should not be considered to be valid?

The Respondent's Response

[14] The Respondent responded to the Tribunal's questions on July 2, 2015 as follows:

1. The contributions for 1970 should have been refunded via the filing of an income tax return for the deceased contributor for the taxation year 1970; however, it would appear that he did not file a tax return for that year. Any refunds would have been made via the Income Tax Return process and the Canada Revenue Agency (CRA) would refund these to the contributor if they filed a tax return.
2. The response cautioned "We cannot fully substantiate this information and CRA would be the authority on this."
3. The response refers to S. 38 (1) of the CPP which sets out the requirement for the Minister to refund over contributions made by an employee if an application is made by the employee for a refund within four years of the contribution.
4. The Appellant's 1970 earnings of \$325 were below the Year's Basic Exemption (YBE) of \$600. The Respondent referred to Subsections 8 (1) (a) and (b) and states that in order for the contributions to be used in calculating CPP benefits the pensionable earnings must exceed the YBE.

The Appellant's Reply

[15] The Appellant replied to the Respondent's response to the questions on July 21, 2015 as follows:

- a) The Appellant noted that the Respondent admitted that the contributions should have been refunded via the filing of an income tax return for 1970 and that no income tax return was filed for that year.
- b) The Respondent's submissions are disingenuous. The earnings detail chart shows that the contributor's earnings in 1970 were \$325 and not only are income tax returns not filed by persons whose annual income is \$325 but there would have

been no possibility for the contributor to have claimed a refund of his CPP contribution for that year even if he had filed a return;

- c) The Respondent has provided no evidence to support its allegations that the CPP contribution would have been refunded if a 1970 tax return had been filed and has acknowledged that it cannot fully substantiate this information;
- d) The onus is on the Respondent to satisfy the Tribunal that the Respondent had, and continues to have, a valid excuse not to have refunded the deceased's 1970 contribution, given that it is the Respondent [who] is denying the contributor entitlement to a pension on the basis that the contributor was one year short of the number of years of contributions required to receive a pension. Such onus is not satisfied by a mere allegation that "the CPP contribution would have been refunded", with no evidence to support the allegation, and the Respondent stating that "We cannot fully substantiate this information." The Tribunal should not rely on unsubstantiated allegations by the Respondent;
- e) The Minister has never alleged that the 1970 contribution should not have been deducted and submitted by the contributor's employer at that time;
- f) The Minister's position in reliance on S. 38 (1) of the CPP that the Minister must refund an overpayment if an employee makes an application for a refund within four years of the contribution is disingenuous because the deceased contributor was never notified that the 1970 contribution was allegedly invalid. Significantly, on the October 2008 contribution statement issued by the CPP (GD8-6) there is no distinction between the 1970 contribution and the contributions made in the years 1971 through to 1979. *The Tribunal noted that there is a distinction since the amount of unadjusted pensionable earnings is not shown for 1970 although it is shown for the other years in which there were contributions.*
- g) The Minister has simply repeated that the 1970 contribution was not a valid contribution, even though, as the Appellant has previously submitted, subsection

44(3) of the CPP uses the word “contributions” without preceding it by the modifier “valid.”

- h) If a government authority wishes to use a legal document drafted by it to deny a benefit, the document must clearly deny the benefit.
- i) The Minister is estopped from raising the argument that the 1970 contribution is not valid since it accepted and retained the 1970 contribution for 45 years.

SUBMISSIONS

[16] The Appellant’s submissions are set out in her reply submissions dated March 9, 2015 (GD5), her reply dated July 21, 2015 to the Respondent’s response to questions (GD8 – see paragraph 15 , *supra*), and her response dated August 25, 2015 to the request that the appeal be dismissed (GD10). The Tribunal has carefully reviewed these submissions and the most salient arguments are as follows:

- a) Although the Respondent submits that the deceased contributor’s contributions in 1970 were not a “valid” contribution the modifier “valid” does not appear before “contributions” in s. 44 (3) of the CPP; when the Respondent relies on s. 44 (3) it introduces and inserts the word “valid” to modify the word “contributions.” The word “valid” does not appear in the section on which the Respondent relies.
- b) Having sent periodic statements for 43 years that did not characterize the 1970 contribution as "not valid," and having accepted and retained the 1970 contribution for 45 years, the Minister has been guilty of laches and is therefore estopped from raising the argument that the 1970 contribution does not count toward meeting the ten years contributions required by the CPP;
- c) It is a well-known principle of Canadian law that sections of a statute are to be read according to their plain meaning and that unless the statutory sections are ambiguous, words should neither be added nor subtracted from the sections to reach a conclusion different from the conclusion resulting from a plain reading of the section. The Appellant submits that the words of the Plan regarding contributions are plain, clear and

unambiguous and should not be amended by the addition of the words “valid” and “considered” where it is sought to do so in order to take rights away from, and deny rights to, a contributor to the Plan.

- d) The Respondent should have taken into account the 1970 contributions and, accordingly, the ten years MQP contribution requirement has been satisfied.

[17] The Respondent’s submissions are set out in its submissions dated January 21, 2015 (GD4), its response dated July 2, 2015 to the Tribunal’s questions (GD7- see paragraph 14, supra), and its request for dismissal dated July 22, 2015 (GD9). The Tribunal has carefully reviewed these submissions and the most salient arguments are as follows:

- a) The Appellant cannot receive the death and survivor’s benefits because the deceased contributor did not have sufficient contributions to the CPP;
- a) The deceased contributory period is from May 1967 to July 2012 which is 46 years. According to the applicable CPP provisions he was required to make valid CPP contributions for at least ten years in order to be eligible; unfortunately he only made valid contributions for nine years, from 1971 to 1979;
- b) The contributions in 1970 should not be considered because the earnings of \$325 for that year were less than the YBE of \$600. Contributions are determined by the amount of employment earnings reported and contributions on amounts under the YBE are not considered valid;

ANALYSIS

[18] Pursuant to the provisions of s. 44 and s. 49 of the CPP as set out above, the contributor’s contributory period for the purposes of calculating the MQP extends from May 1967 (the month after he turned eighteen) until July 2012 (the month during which he died). This is a period of 46 years since all years that are either wholly or partly within the contributory period are included. In order to qualify for the death benefit, he must he must have contributed for at least ten years.

[19] It is agreed by the parties that his contributions from 1971 to 1979, a total of nine year should be considered. The dispute is whether his contributions of \$3.15 in 1970 should also be considered.

[20] The Appellant takes the position that they should and that, accordingly, the contributor made the required ten years contribution to satisfy the MQP. The Respondent takes the position that they should not and that, accordingly, the contributor only made nine years of contributions and the MQP is not satisfied.

[21] For the reasons that follow, the Tribunal has determined that the 1970 contributions should not be considered and that, accordingly, the contributor did not make sufficient contributions to the CPP to meet the MQP.

[22] The Appellant argues that the Respondent is attempting to insert the term "valid" into ss. 44(1)(c) and (d) as well as s. 44(3), even though that term or any similar term does not appear in any of those provisions. The Appellant's argument fails to take into account s. 52(3)(a) of the CPP (see paragraph 9, *supra*) which expressly provides that a contributor shall be deemed to have made no contribution for any year for which his unadjusted pensionable earnings do not exceed his basic exemption for the year. The contributor's 1970 earnings of \$325 were below the YBE of \$600 and he is deemed to have made no contribution for that year.

[23] S. 52(3)(a) was considered by the Pension Appeals Board in *MNHW v Poland* (August 25, 1992), CP 2343(PAB). In that case the PAB determined that earnings by the Appellant in 1984 and 1985 that were below the YBE should not be considered in determining whether the Appellant had the required five out of ten years contributions to establish an MQP for a disability pension.

[24] After setting out the provisions of s. 52(3)(a) the PAB stated:

Consequently, inasmuch as the Respondent's unadjusted pensionable earnings did not exceed the basic exemption in 1984 and 1985, by virtue of the section cited, he is "deemed" to have made no contributions in either of those two years. However, the issue is somewhat clouded by the fact that during those two years, deductions were, in fact, made from his earnings and duly forwarded to the department, and which constitute a part of the record. Because those earnings were minimal, the contributions were, themselves, minuscule totalling, in all, no more than 50 cents. Normally, in such

cases, refunds are made at the request of the contributor. In this instance, no such application for refund was received, and the amounts remained on the record of the Respondent contributor...

That being the case, and the fact that any earnings will normally trigger a contribution, however small, if the annual earnings do not exceed the basic exemption, then there cannot, in law, have been a valid contribution which might create an eligibility for pension rights.

[25] S. 52(3)(a) was also considered in the Federal Court of Appeal decision in *Walters v MEI* (reasons delivered on February 8, 1996) in which the Federal Court of Appeal determined that the Appellant's below the YBE contribution in 1998 should not be considered for purposes of determining her MQP eligibility. The Federal Court of Appeal stated:

Nor is it possible to consider the year 1988 as having been one during which the applicant made valid contribution, even though her contribution in that year was only \$6.12, well below her basic exemption amount, on the basis that the contribution was registered in the applicant's Record for that year, and, four years having elapsed, it is deemed to be accurate pursuant to section 97. This section 97, one of the sections dealing with administration of the Plan, makes it indisputable that the amount shown in the Record prepared in accordance with the Plan is accurate, but it is paragraph 52(3) of the Plan, a basic eligibility provision that determines whether such a payment was sufficient to be a valid yearly contribution.

[26] The Tribunal also considered the estoppel issue raised by the Appellant. The Tribunal noted the decision of Justice R.E. Holland in *Rosenblood Estate v Law Society of Upper Canada* [1989] O.J. No. 240 at p. 10 which states "For estoppel to apply there must also be a course of conduct by the insurer upon which the insured relied to its detriment."

[27] There is no course of conduct by the Respondent that misled the Appellant into believing that the unfunded contributions would be considered in determining eligibility for benefits. On the October 2008 contribution statement issued by the CPP (GD8-6) there is a distinction between the 1970 contribution and the contributions made in the years 1971 through to 1979; no amount of unadjusted pensionable earnings is shown for 1970 although this is shown for the years in which there were sufficient contributions. This conforms with s. 52(3)(a) of the CPP since the Appellant did not have sufficient pensionable earnings for that year. Further, there is no evidence of any detrimental reliance by the contributor. The Appellant does not allege that any actions or steps were taken by the contributor in reliance on the statements.

[28] The Tribunal finds that the contributor's unrefunded contributions for 1970 should not be considered in determining the eligibility for death and survivor's benefits. The Tribunal also finds that the contributor only made nine years of contributions (when ten are required) and that, accordingly, the Appellant is not entitled to death and survivor's benefits.

CONCLUSION

[29] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security