



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 207

Tribunal File Number: AD-15-1186

BETWEEN:

H. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 15, 2016

REASONS AND DECISION

OVERVIEW

[1] At its core, this case is about whether the Appellant can rely on the incapacity provisions of the *Canada Pension Plan* to allow for a greater period of retroactivity of payment of a *Canada Pension Plan* survivor's pension and, if so, whether he had been incapacitated following the death of the contributor.

[2] The Appellant, though his power of attorney, appeals a decision dated August 10, 2015 of the General Division, whereby it summarily dismissed his appeal of a decision denying his request for a survivor's pension retroactive to May 2010, the month following the contributor's death in April 2010. The General Division was satisfied that the appeal did not have a reasonable chance of success.

[3] The Appellant filed an appeal of the decision of the General Division on October 20, 2015 (the "Notice of Appeal"). He also filed supporting medical records. No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

ISSUES

[4] The issues before me are as follows:

1. Can an appellant's incapacity allow for greater retroactivity of payment of a survivor's pension under the *Canada Pension Plan*?
2. If so, did the General Division fail to consider whether the Appellant was incapacitated for the purposes of the *Canada Pension Plan*?

3. Did the General Division err in choosing to summarily dismiss the Appellant's appeal?

FACTUAL BACKGROUND

[5] The relevant facts are as follows. The Appellant granted powers of attorney for property and for personal care to his spouse on July 25, 2003. His spouse passed away on April 20, 2010. The Appellant subsequently granted a power of attorney for property to his solicitor on May 26, 2010 (GD6-2 to GD6-10). The Appellant granted a power of attorney jointly to his two nieces and nephew (the "Joint Power of Attorneys") on September 22, 2011 (GD1-2 and GD1-3). There were no restrictions or conditions on any of the powers of attorney.

[6] The Appellant applied for a *Canada Pension Plan* survivor's pension on June 18, 2013, through his Joint Power of Attorneys. The Respondent approved the survivor's pension with effective payments as of July 2012. The Joint Power of Attorneys requested that the effective payment date be retroactive to April 20, 2010, when his spouse had passed away. The Joint Power of Attorneys explained that they had not applied for the survivor's pension previously, as they assumed that the previous power of attorney held by the solicitor would have applied on behalf of the Appellant.

GROUND OF APPEAL

[7] Subsection 58(1) of the DESDA sets out the only grounds of appeal. They are as follows:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

- (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] The Appellant, through his Joint Power of Attorneys, submits that the General Division failed to exercise its jurisdiction when it failed to consider the Appellant's incapacity following the death of his spouse. They note that the General Division had determined that there was no basis upon which the payments of a survivor's pension could be made from an earlier date.

[9] The Joint Power of Attorneys filed supporting medical documentation which they argue proves that the Appellant was incapacitated during the material time. They indicate that they provided a report from the Appellant's physician who was of the opinion that, at the time of the deceased contributor's death, the Appellant was showing signs of dementia and paranoia. They argue that the Appellant would have been unable to attend to his "economic affairs of this level" at age 90 and "in the aftermath of the crisis of bereavement".

[10] The Respondent argues that the General Division accurately stated the test for a summary dismissal and also "precisely" referred to the law governing the maximum retroactivity of a survivor's pension.

[11] The Respondent argues that the General Division did not fail to observe a principle of natural justice or otherwise refused to exercise its jurisdiction in considering the alleged incapacity of the Appellant at the time of the contributor's death. The Respondent further submits that the Appellant did not furnish evidence to satisfactorily support a finding of incapacity under subsections 60(8) to (11) of the *Canada Pension Plan* following the death of his spouse and for the period up to the date that the application for a survivor's pension was made.

[12] The Respondent submits that the Appellant is precluded from filing additional evidence in support of the incapacity argument, as any new evidence is inadmissible before the Appeal Division. The Respondent suggests that the Appeal Division therefore cannot

now assess whether the Appellant might have been incapacitated following the death of the contributor. The Respondent's counsel cites *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, where the Court at paragraph 73 held that "Adducing new evidence is no longer a ground of appeal".

[13] The Respondent argues that the appeal before the General Division was properly summarily dismissed as it had no reasonable chance of success.

ISSUE 1: ARE THE INCAPACITY PROVISIONS OF THE CPP RELEVANT TO APPLICATIONS FOR A SURVIVOR'S PENSION?

[14] Subsections 60(8) to 60(11) of the *Canada Pension Plan* contain the incapacity provisions. They provide that if an applicant had been incapable of forming or expressing an intention to make an application on his or her own behalf on the day on which the application was actually made, the application can be deemed to have been made in the month preceding the first month in which the relevant benefit could have been commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[15] It is clear that these subsections serve to provide some relief from the maximum retroactivity provisions of section 72 of the *Canada Pension Plan* for those who are incapacitated. However, the language of the subsections is restrictive, and it is clear that the relief is not intended to be widely available, as strict criteria must be met for an applicant to avail himself of these provisions.

ISSUE 2: DID THE GENERAL DIVISION CONSIDER WHETHER THE APPELLANT COULD BE FOUND INCAPACITATED?

[16] The decision of the General Division suggests that the incapacity issue was not raised, other than for noting the Appellant's submissions that a power of attorney had been granted on September 22, 2011, and that the Appellant was "showing signs of dementia and paranoia and was not able to look after his economic affairs at the age of 90, especially in the aftermath and emotion of the bereavement". As such, the General Division did not

conduct any analysis on whether the Appellant could be found incapacitated. Its findings and conclusion are found at paragraphs 17 and 18, which read:

[17] The Tribunal finds that Respondent correctly applied the applicable CPP provisions and deems the application to have been received by the Respondent on June 18, 2013. The Tribunal notes that subsection 72(1) of the CPP provides limits to the retroactivity of the payments to July 2012. **There is no basis on which the payments can be made from an earlier date.**

[18] **The Appellant raises various reasonable considerations; however, the Tribunal is bound by the CPP provisions.** It is not empowered to exercise any form of equitable power in respect of the appeals coming before it. It is a statutory decision-maker and is required to interpret and apply the provisions as they are set out in the CPP: *MSD v Kendall* (June 7, 2004), CP 21690 (PAB).

(My emphasis)

[17] A review of the hearing file before the General Division indicates that there was some evidence before it which addressed the issue of whether the Appellant was incapable of forming or expressing an intention to make an application on his own behalf.

For instance, in a letter dated August 16, 2011, the Appellant's family physician described the Appellant's mental status after the contributor's death. The Appellant was assessed as having moderate dementia. He was seen as having no insight then into his limitations and was not able to make a coherent plan as far as how he would manage tasks such as meal preparation, laundry, shopping and banking. The family physician followed the Appellant on a regular basis. The Appellant exhibited increasing paranoia. The family physician was not convinced that the Appellant was capable of making informed decisions with regards to his own legal or financial affairs.

[18] On the other hand, a social worker conducted an assessment of the Appellant's testamentary capacity and his ability to grant power of attorney for property and personal care. The social worker was of the opinion that, on September 8, 2011, the Appellant demonstrated that he was capable of making a new will and making changes to have his relatives act as his executors, and that he was also capable of revoking his power of attorney and capable of giving a power of attorney for property and a power of attorney for

personal care. The social worker's opinions would seem to undermine any allegations that the Appellant was incapacitated in September 2011.

[19] The Respondent argues that the Appellant did not furnish evidence to "satisfactorily support a finding of incapacity". However, the General Division did not refer to any of the medical evidence before it nor make any findings of fact regarding whether the Appellant could be found incapacitated. It is unclear whether the General Division might have found that the evidence before it was insufficient or could have "satisfactorily support[ed] a finding of incapacity".

[20] In fact, the General Division appears to have characterized the Appellant's alleged incapacity as a "reasonable consideration" but then held that it was bound by the *Canada Pension Plan* and did not have any equitable jurisdiction to review those considerations. Yet, the General Division is empowered and does have the jurisdiction to consider questions of an appellant's incapacity under subsections 60(8) to 60(11) of the *Canada Pension Plan*. It erred when it declined to consider the Appellant's allegations of incapacity in this case. The General Division should have considered the Appellant's submissions that he was incapacitated during the material time.

[21] As a footnote, I should add that I have not considered any of the medical records which were not in evidence before the General Division. The Federal Court has held that, under the DESDA, the introduction of new evidence is no longer an independent ground of appeal: *Belo-Alves*, at para. 73 and *Tracey v. Minister of Employment and Social Development*, 2015 FC 1300 at para. 29.

ISSUE 3: WAS A SUMMARY DISMISSAL APPROPRIATE?

[22] A summary dismissal is appropriate when there are no triable issues, when there is no merit to the claim, or as subsection 53(1) of the DESDA reads, there is "no reasonable chance of success". On the other hand, if there is a sufficient factual foundation to support an appeal and the outcome is not "manifestly clear", then the matter is not appropriate for a summary dismissal. A weak case is not appropriately summarily dismissed, as it involves assessing the merits of the case and examining the evidence and assigning weight to it.

[23] The Respondent argues that the Appellant did not furnish evidence before the General Division to satisfactorily support a finding of incapacity. From this, the Respondent implicitly acknowledges that, to some extent, the General Division was required to assess the evidence before it to determine whether it was sufficient to make any findings. That being so, this was not a proper case for the General Division to utilize the summary dismissal procedure.

CONCLUSION

[24] As the trier of fact, the General Division is in the best position to make findings based on the evidence before it. Accordingly, the appropriate disposition is to remit the matter to the General Division for a new hearing.

[25] The appeal is allowed and the matter remitted to a different member of the General Division for a redetermination.

Janet Lew

Member, Appeal Division