Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *G. T. v. Minister of Employment and Social Development,* 2017 SSTADIS 409

Tribunal File Number: AD-16-1035

BETWEEN:

G. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: August 14, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] At its root, this appeal is about whether there is any basis whereby a disabled contributor's child's benefit can be paid earlier than 11 months before an application for a disabled contributor's child's benefit was made, under subsection 74(2) of the *Canada Pension Plan*.

[2] No leave to appeal 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. As I have determined that no further hearing is required, this appeal before me is proceeding pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations.*

ISSUE

[3] The issues before me are as follows:

a. Can a disabled contributor's child's benefit be paid earlier than 11 months before an application for a disabled contributor's child's benefit was made under subsection 74(2) of the *Canada Pension Plan*?

b. If so, did the General Division err in summarily dismissing the Appellant's appeal?

FACTUAL BACKGROUND

[4] The relevant facts, which are not in dispute, are as follows:

a. S. H. was born in January 1995 to the Appellant and to H. H.;

b. Mr. H. H. and the Appellant separated in December 1995. Their daughter has resided with the Appellant since then. Mr. H. H. and the Appellant subsequently divorced;

c. Mr. H. H. applied for a Canada Pension Plan disability pension several times, including in 1995, May 1997, and October 2006. He listed his daughter in his May 1997 application but neglected to list her in his October 2006 application, presumably because she was no longer residing with him. The Respondent approved his October 2006 application.

d. Mr. H. H. was never required to pay any child maintenance and, indeed, has had no contact with his daughter or the Appellant since their divorce in early 1996. Consequently, he claims that he did not consider informing the Appellant that he had been approved for a disability pension;

e. The Respondent did not inform the Appellant that her daughter was eligible for a disabled contributor's child's benefit, commencing with the month in which a disability pension became payable to Mr. H. H. in October 2006;

f. At some point, the Appellant suspected that Mr. H. H. was receiving a disability pension. She learned that she could, as a result, apply for a disabled contributor's child's benefit on behalf of their daughter. In September 2012, the Appellant applied for a disabled contributor's child's benefit on behalf of their daughter, and the application was approved for payment, effective October 2011.

g. Initially, the Appellant sought payment of the disabled contributor's child's benefit retroactive to 1995, but the Respondent denied this request because Mr. H. H.'s 1995 application for a disability pension had been denied.

[5] The Appellant and her current spouse maintain that the disabled contributor's child's benefit should be payable effective October 2006.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(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.

[7] The Appellant submits that the General Division failed to identify and address the primary issue before it, namely, whether the disabled contributor's child's benefit payments should have commenced in October 2006, rather than in October 2011. She argues that commencement of payment of the disabled contributor's child's benefit should be based on the disabled contributor's October 2006 disability application, as it was ultimately successful.

[8] The Appellant acknowledges that the disabled contributor failed to list his daughter in his 2006 application. The Appellant's spouse explains that this likely occurred because Mr. H. H. did not have any contact with his daughter or with the Appellant after their divorce in early 1996, and because he did not provide any financial support for his daughter. The Appellant's spouse speculates that Mr. H. H. may have also been mentally or physically incapacitated to the point that he relied on someone else to complete the October 2006 application. These explanations, however, are not relevant and, in any event, the incapacity provisions under subsection 60(8) of the *Canada Pension Plan* are inapplicable in the context of section 74 of the *Canada Pension Plan*.

[9] The disabled contributor had listed the daughter in his earlier May 1997 application. The Appellant claims that subparagraph 44(1)(*b*)(ii) of the *Canada Pension*

Plan—the “late applicant provisions”—requires the Respondent to review a disabled contributor’s original application (May 1997) concurrent with his late application (October 2006) to determine eligibility. She suggests that the General Division had also ignored the fact that the disabled contributor had listed their daughter in his May 1997 disability application. She argues that had the General Division been aware of this fact, it would have determined that the disabled contributor’s child’s benefit was payable commencing in May 1997, on the basis of subparagraph 44(1)(*b*)(ii) of the *Canada Pension Plan*. Or, at the very least, the fact that her daughter had been listed in an earlier application could have served as the basis for allowing payment to commence in October 2006, when the disabled contributor’s disability application was ultimately successful.

[10] Although the General Division broadly defined the issue before it as whether the appeal should be summarily dismissed, it was aware that the appeal centered on whether there was any basis to have the disabled contributor’s child’s benefit commence in October 2006, or even earlier. At paragraphs 18 and 19, the General Division addressed the Appellant’s argument that the disabled contributor’s child’s benefit should commence in October 2006 or even May 1997. It wrote:

> [18] To receive a CPP disabled contributor’s child benefit a person must meet all eligibility requirements as set out in the CPP. The Tribunal cannot disregard the fact that S. H. was not listed in the disabled contributor’s successful application for CPP disability benefits in October 2006.
>
> [19] The Tribunal disagrees with the submission that “***the** application*” in paragraph 74(2) of the CPP includes an earlier unsuccessful CPP disability benefit application. Paragraph 74(1) specifically refers to the application for a disabled contributor’s child benefit and does not refer to a CPP disability benefit application;

[11] The Appellant argues that the General Division was unaware that the disabled contributor had listed his daughter in his May 1997 disability application. I find that the member was aware of this fact. Indeed, it referred to Mr. H. H.’s submissions that he had listed his daughter in his May 1997 application. However, the General Division determined

that the Appellant could not rely on this fact to establish greater retroactivity of the benefit, given its interpretation of subsection 74(1) of the *Canada Pension Plan*.

[12] The Appellant relies on subparagraph 44(1)(*b*)(ii) of the *Canada Pension Plan* for greater retroactive payments of the disabled contributor's child's benefit, but this subparagraph does not provide for greater retroactive payments. Subparagraph 44(1)(*b*)(ii) of the *Canada Pension Plan* provides that a disability pension is payable to a contributor, who has not reached 65 years of age, to whom no retirement pension is payable, who is disabled and who:

> is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received.

[13] The Appellant argues that the May 1997 application "[was] actually the application that [was] ultimately approved under the 'Late Applicant Provision' under subparagraph 44(1)(b)(ii) of the CPP." I see no merit to this allegation. It is evident from the parties' submissions that the disabled contributor was found disabled on the basis of his October 2006 application. While a contributor can rely on the late applicant provisions to establish a minimum qualifying period, it does not thereby enable him to rely on earlier applications to determine the earliest date that he can be deemed disabled and to establish the commencement date of payment of a disability pension. Furthermore, if the Respondent had approved the disabled contributor's May 1997 application, it would have been needless for him to apply for a disability pension again in October 1996.

[14] The Appellant further submits that the Respondent breached its duty under paragraph 5(2)(*b*) of the DESDA to investigate whether the disabled contributor's daughter was eligible for a disabled contributor's child's benefit, and, if so, to inform her of her entitlement to such a benefit. Although the paragraph requires the Respondent to perform the duties and functions "relating to social development with a view to promoting social well-being and income security," I do not find that that duty is so broad that it extends to actively notifying individual Canadians of their entitlements or benefits under the *Canada Pension*

Plan. In any event, even if this duty were that pervasive, the DESDA only came into force several years after October 2006.

[15] The Appellant further submits that the General Division erred in finding that she is the (current) spouse of the disabled contributor. She notes that they have been divorced since early 1996. Although the General Division clearly erred in this regard, it did not base its decision on this fact.

[16] Finally, the Appellant argues that the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248, requires that a decision-maker interpret legislation in a broad and generous manner such that any doubts arising from the legislation should be resolved in favour of a claimant. In this regard, the Appellant argues that the General Division erred in its interpretation of subsection 74(1) of the *Canada Pension Plan*, in finding that the words "the application" necessarily refer to an application for a disabled contributor's child's benefit, rather than to any application, including an "earlier unsuccessful CPP disability benefit application." Subsections 74(1) and (2) read as follows:

> **Disabled Contributor's Child's Benefit and Orphan's Benefit**
>
> **Persons by whom application may be made**
>
> **74 (1)** An application for a disabled contributor's child's benefit or orphan's benefit may be made on behalf of a disabled contributor's child or orphan by the child or orphan or by any other person or agency to whom the benefit would, if the application were approved, be payable under this Part.
>
> **Commencement of payment of benefit**
>
> **(2)** Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,
>
> **(a)** in the case of a disabled contributor's child's benefit, the later
>
> of
>
> **(i)** the month commencing with which a disability pension is payable to the contributor under this Act or under a provincial pension plan, and

(ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and

…

but in no case earlier than the twelfth month preceding the month following the month in which the application was received.

(My emphasis)

[17] I do not find any ambiguity in the words "the application," given that the initial reference to an application within the subsection refers to "an application for a disabled contributor's child's benefit." The subsection does not refer to any application for a disability pension.

[18] The General Division determined that a person must meet all eligibility requirements as set out in the *Canada Pension Plan* to qualify for a disabled contributor's child's benefit. The General Division examined subsections 74(1) and (2) of the *Canada Pension Plan* and determined that a disabled contributor's child cannot rely on an application for a disability pension and, instead, must make a separate application for a disabled contributor's child's benefit, to establish entitlement to such a benefit. The General Division dismissed any notion that the Appellant could rely on her spouse's October 2006 disability application to establish entitlement to a disabled contributor's child's benefit on behalf of their daughter, where she was otherwise not listed in that disability application.

[19] I agree that there is a legislative oversight or gap that effectively penalizes children of claimants who fail to either file early applications or include their children in their application. This was the situation in *DesRosiers v. Minister of Social Development* (January 4, 2006), CP22965 (PAB). Mr. DesRosiers and Ms. DesRosiers divorced in 1980. Mr. DesRosiers first applied for a disability pension in 1986 and again in 1996. He did not indicate on his applications that he had custody and control of a child. In November 2002, Ms. DesRosiers made an application for a disabled contributor's child's benefit on behalf of their child. She received payments for the 11 months preceding her application, and for the months following her application, until her son turned 25 years old. She sought greater

retroactivity of payments to 1986, when Mr. DesRosiers first applied for a disability pension. As the Pension Appeals Board noted in *DesRosiers*, unfortunately, the problem of Ms. DesRosiers and her son was not unique. The Board wrote:

> As the Minister's counsel pointed out, a similar case is that of Ms. Renton in which, relying on consistent case law, the Board stated:
>
> The following comment [in *Leblanc*] is also appropriate in this case.
>
> "There is no discretionary power in the Board to either amend the application of the father to include his child Jennifer, neither is there any discretion to make an order effective retroactively to 11 months preceding the father's application. There is in my view a legislative gap which clearly allows a parent for whatever reason to prejudice a child's right to a benefit. Unfortunately while there is no question it is unfair and unjust the Board cannot fill that legislative gap."

[20] The Board found that it had no discretionary power to amend the application to include the child. The Board recognized that there was a clear legislative gap that allowed a parent to prejudice a child's right to a benefit by naming him or her in an application, but the Board did not have the authority to fill that gap.

[21] Here, there are clear factual similarities to the *DesRosiers* situation, although in the DesRosiers' case, Mr. DesRosiers had failed to include his son's name in either his first or second application.

[22] The legislation has not been amended since *DesRosiers* and, regrettably, there is no authority for the General Division or Appeal Division to either amend the October 2006 application or to grant greater retroactive benefits.

SUMMARY DISMISSAL PROCEDURE

[23] A summary dismissal is appropriate when there are no triable issues or when there is no merit to the claim or, as the statute 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.

[24] The General Division found that it was empowered only to the extent of its governing statute and that it was required to interpret and apply the provisions as set out in the *Canada Pension Plan*. The General Division found the provisions of the Canada Pension Plan to be clear and the evidence unequivocal. The General Division found that there was no chance for the Appellant to succeed on an appeal, given the law and the facts.

[25] I agree with the General Division member that the maximum retroactive payment that could be made was no earlier than 11 months before an application for a disabled contributor’s child’s benefit had been made, and that there were no provisions under the *Canada Pension Plan* that permitted greater maximum retroactive payments. As such, the General Division rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

DISPOSITION

[26] For the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division