



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. A. v. Minister of Employment and Social Development*, 2018 SST 1207

Tribunal File Number: GP-18-466

BETWEEN:

L. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Jane Galbraith

Teleconference hearing on: September 25, 2018

Date of decision: October 5, 2018

DECISION

[1] The deceased contributor has made sufficient contributions to the Canada Pension Plan (CPP) for the Claimant to qualify for the Death and Survivor benefits.

OVERVIEW

[2] The Claimant's wife died in February 2017. The Claimant's wife had contributions to the CPP from 1976 to 1984 inclusive, totally 9 years.

[3] She had applied in April 2000 for a CPP disability pension, under the late applicant provision. She had been granted a CPP disability pension on appeal to the Pension Appeal Board (PAB), which determined the deceased had proven she was disabled by her Minimum Qualifying Period (MQP) of December 1995. She was deemed disabled in January 1999. The payment of her benefit started in May 1999.¹

[4] The Minister denied the Claimant's application for CPP survivor's and death benefits, and also denied on reconsideration. The Minister stated in the reconsideration decision that the estate does not qualify as the deceased would have had to have made valid contributions to the CPP in any 10 years in her contributory period, which the Minister stated was from January 1, 1966 to the month prior to the date her disability pension commenced in May 1999, which would be April 1999.² The Claimant appealed the reconsideration decision to the Social Security Tribunal.

PRELIMINARY MATTERS

[5] The Minister requested that the appeal be summarily dismissed. This was not granted, as the Minister had not provided an indisputable legal and factual basis to support the position that the contributory period ended in the month before the deceased began receiving a CPP disability pension in May 1999. It was suggested that possibly other dates could be argued related to the deceased's disability in determining when the contributory period ended.

¹ CPP Section 42(2)(b)

² GD1-18

[6] The Minister provided a Submission dated September 11, 2018 after receiving this letter. This submission was filed late but I decided to accept it as it was an argument that could have been presented verbally at the hearing. It was shared with the Claimant.

ISSUE(S)

[7] Has the deceased contributor made sufficient contributions to the CPP for the Claimant to qualify for the Death and Survivor benefits?

ANALYSIS

Facts not in dispute

[8] The Minister stated the deceased contributor's contributory period commenced in January 1, 1966. The Claimant's son asked in the hearing if the start of the contributory period could be considered when his mother arrived in Canada. I clarified at the hearing and the Claimant's son accepted that the legislation is clear that the start of the contributory period is January 1, 1966.³

[9] Both parties agree the contributor made 9 years of contributions to the CPP.

[10] What has remained constant in the Minister's submissions is that the contributor has 20 years to be included in the period from January 1, 1966 to December 31, 1986. The Claimant agrees that these years should be included. I agree that that these years count toward the contributory period.

The contributory period

[11] In the circumstances of this appeal, the contributory period for the purposes of the survivor's pension and the death benefit ends the earliest of the month before the contributor reaches 70, the month the contributor dies, or the month before the month the contributor started receiving a retirement pension; but excluded from this period is any month excluded from the contributory period "by reason of disability" and any month the contributor was a family allowance recipient (child rearing provision or CRP).⁴ This means to determine the Claimant's

³ Section 49 *Canada Pension Plan*

⁴ Section 49 *Canada Pension Plan*

wife's contributory period, I must determine the months excluded by reason of the CRP and also the months excluded "by reason of disability".

The Child Rearing Provision (CRP) should be applied

[12] The years a CPP contributor was the family allowance recipient or primary care giver for children under the age of 7 can be excluded from the contributory period.⁵ There was some confusion about this CRP exclusion in the Minister's various submissions. In the Minister's June 13, 2018 submission this was acknowledged and in this case the years 1986 to 1991 were removed from the contributory period when calculating the contributory period. However in the Minister's September 11, 2018 submission this exclusion was not included in their calculations, increasing her contributory period by 6 years.

[13] The legislation is clear that these years for child rearing are eligible for exclusion and should be excluded when calculating the contributory period for the deceased contributor.

[14] I find the years 1986 to 1991 are excluded from the contributory period as described clearly in the legislation.

The contributor was granted a disability pension

[15] The PAB decided the contributor had proven that she was disabled as defined by the CPP by her MQP of December 1995. The CPP states that a person is considered disabled "only if he is determined in the prescribed manner to have a severe and prolonged mental or physical disability."⁶

[16] The Minister submits that the contributor was deemed disabled in January 1999 as she applied for a disability pension in April 2000. A person cannot be deemed to have become disabled earlier than 15 months prior to the date of the application for benefits.⁷ The exact wording of the legislation is "a person is deemed to have become disabled at the time that is determined in the prescribed manner to be the time when the person became...disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) - be deemed

⁵ Section 49(d) *Canada Pension Plan* and Section 77 of the *CPP Regulations*

⁶ Section 42(2)(a)(i) and 42(2)(a)(ii) *Canada Pension Plan*

⁷ Section 42(2)(b) *Canada Pension Plan*

to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.”

[17] The PAB found the Claimant’s wife to be disabled by December 1995. It is clear to me that this was determined in the prescribed manner according to the CPP. The deemed date of disability is not the same as the date she was determined to be disabled. I accept that December 1995 is when the contributor was determined to be disabled.

Submissions regarding months excluded “by reason of disability”

[18] The Minister has provided several different submissions on the excluded months.

[19] Again, the Minister’s submissions on this point are confusing to say the least. The initial reconsideration letter maintaining their position in November 2017 paraphrased the legislation regarding the definition of the contributory period. In particular it stated the contributory period ended “usually, when the individual takes a disability, ...”.⁸ This is not precise wording from the appropriate legislative provision. In the next paragraph it is stated that the contributory period ended on the month prior to the date when she started receiving a disability pension.

[20] The Minister in the June 2018 submission stated the contributory period ended the month before she began receiving the disability pension. The disability payments began in May 1999, therefore her contributory period would end in April 1999. However the submission concluded that this totalled 33 years and 1 month.⁹ Using this argument the correct calculation would be a total 33 years and 4 months. Later in this submission after removing the 6 years of child rearing from the total it stated that the contributory period had been reduced to 27 years and 3 months.¹⁰ Applying this exclusion would result in the contributory period ending in April 1999, which would be 27 years and 4 months.

[21] In September 2018 the Minister provided another submission stating that section 49 of the CPP described the contributory period. The Minister now changed their position stating the end of the contributory period was January 1999 when she was deemed to be disabled by the

⁸ GD1-18

⁹ GD5-3

¹⁰ GD5-4

CPP. It also concluded that the contributory period totalled 33 years, therefore requiring 10 years of valid contributions to be eligible for the Death and Survivor benefit. The exclusion for child rearing was not included in this calculation, which I find was an error as this calculation should also have included the CRP. Using the contributory period of 33 years and excluding the 6 years for the CRP the total contributory period would be 27 years.

[22] As I have received differing and conflicting submissions from the Minister I will rely on their last submission as their position on the issue. They did not attend the hearing so there was no way to confirm on what legislation or case law they based their submission. They also did not address the issue raised in the letter relating to the summary dismissal that other dates related to the deceased's disability could be argued in determining when the contributory period ended. I find the wording of the Minister's September 2018 submission does not reflect the legislation.

[23] The Minister stated in submissions of June 2018 that I do not have the authority to vary legal requirements set out in the legislation, which governs the minimum contributory requirements that must be met to be eligible for the requested benefits. I agree but also find that the legislation is ambiguous on this issue. There are many terms used in relation to disability as it relates to the contributory period; by reason of disability, determined to be disabled, deemed to be disabled.

Determining the months excluded "by reason of disability"

[24] The wording of the legislation excludes "any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability".¹¹

[25] The term "by reason of disability" must be considered in relation to other sections of the CPP. A person is considered to be disabled only if determined in prescribed manner to have a severe and prolonged mental or physical disability.¹² A person is deemed to be disabled no earlier than fifteen months before the application is made.¹³

¹¹ Section 49(c) *Canada Pension Plan*

¹² Section 42(2)(a) *Canada Pension Plan*

¹³ Section 42(2)(b) *Canada Pension Plan*

[26] When a person is deemed to be disabled is based on the date they made their application. It only relates to when their disability payment will start, it is distinct from determined to be disabled. Payments start four months after the date deemed disabled when the person was found disabled earlier than 15 months prior to the application.¹⁴

[27] This applies to the deceased contributor's situation. In this case the contributor could not be deemed to have become disabled earlier than 15 months prior to the date of the application, but only for the purposes of payment of the disability pension.

[28] I find nothing in the legislation unambiguously states the contributory period ends when the contributor is deemed to be disabled which appears to be for the purposes of the commencement of payment of the disability pension. All other references made in the legislation refer to "by reason of disability" or "when he is determined to have become disabled". For instance, the contributory period for the purposes of calculation of the disability benefit is outlined again in Section 56 CPP, which provides the calculation on the amount a Claimant would receive in disability payments. It states the period "ending with the month in which he is determined to have become disabled for the purpose of paragraph 44(1)(b)." It also repeats the language in Section 49 about the periods to be excluded.¹⁵

[29] As a result any month by reason of disability should be excluded from the contributory period. The contributor was determined by the PAB, in the prescribed manner, to have a severe and prolonged mental or physical disability as of December 1995.

[30] The Minister was given an opportunity to provide a legal or factual basis for their submission for me to consider but provided only legislative references to support their position. I find that these legislative references direct me that the date the contributor was determined to be disabled would be the start of the months excluded by reason of disability. In this case that would be December 1995 as stated in the PAB decision.

¹⁴ Section 69 *Canada Pension Plan*

¹⁶ *Bartlett v Canada (AG)*, 2018 FCA 165

Case Law

[31] Recently, the Federal Court of Appeal confirmed that it was reasonable for the Appeal Division, in interpreting its home statute, to apply section 49 of the CPP to calculate the contributory period in the context of a retirement pension. The Court found it reasonable that the Appeal Division confirmed a calculation of the contributory period which would appear to exclude only months when the contributor received payment of a disability pension. This would appear to be inconsistent with my finding, however, the Court emphasized that the sole issue for the Court was to determine whether or not the Appeal Division decision “based primarily on the Applicant’s circumstances” was reasonable. With all due respect, the Court did not conduct any analysis in making this decision, let alone an analysis of the issue of months excluded by reason of disability.¹⁶

[32] There are several decisions by the Appeal Division of the Social Security Tribunal that although not binding on me, are persuasive that the contributory period ends or months are excluded “by reason of disability” when the Claimant was determined to be disabled and not when disability benefits commenced.

[33] In *MESD v. S.O.* the issue centered on the Claimant having enough contributions to be entitled to a disability pension. However the Appeal Division stated that the Claimant’s contributory period ended when she was found to be disabled and in this case it was October 2004. Due to the fact it was determined the Claimant was disabled in October 2004, her 2005 contributions were not considered. It was not stated that her contributory period would end when the Claimant began to receive a disability pension, which would have been in 2005.¹⁷

[34] In *Yuksel* the Appeal Division cites CPP 44(2)(b) and subsection 56(5) when stating the Claimant’s contributory period would end with the month the Claimant is determined to have become disabled.¹⁸ Again there is no mention that the contributory period ends on the date the disability payment began.

¹⁶ *Bartlett v Canada (AG)*, 2018 FCA 165

¹⁷ *MESD v. S.O.*, 2015 SSTAD 1210

¹⁸ *MESD v. Zohre Yuksel* AD-17-232

[35] The issue in *Storto* was that the period of disability had not been determined and therefore could not be excluded. But the language in the decision was that “the deceased contributor was never determined to be disabled”.¹⁹ This language influences my conclusion that it is the determination of the disability and not the payment that is the significant date to be considered.

[36] *Skoric* most influences me in describing the date that should be used to determine the months excluded from the contributory period in relation to CPP death benefits. This appeal centered on which version of the legislation was applicable to the case but some of the focus of the discussion was referring to the date the contributory period ended which is relevant to this case. In *Skoric* the Claimant would be successful if the court found that the end of the contributory period was the date he was “determined to have become disabled”, which they did. In paragraph 23 the Court concludes that the month in which the contributor is determined to have become disabled clearly refers to the date of the onset of the disability. The Court goes further and states that it is “not good interpretive practice to attribute the same meaning to different words used in adjacent subsections of an elaborate statutory scheme...”. It is noted that the determination that a person is disabled is not the same as approving the application.²⁰ I also conclude from this interpretation that the date when a disability pension is paid also does not have the same meaning as when it is determined a person is disabled as described in the legislation.

[37] In Canada, courts have been especially careful to apply a liberal approach to so-called social legislation. In *Rizzo & Rizzo* the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner.²¹ Any doubt about the legislation should be resolved in favour of the Claimant.

[38] *Villani* notes the applicable principles of legislative interpretation. It summarizes that remedial legislation has a benevolent purpose which courts should be careful to respect.²² *Villani* also explains that when the legislation was drafted “that the precise words of

¹⁹ *Canada (Attorney General) v. Storto* (1994), 174 N.R. 221 (F.C.A.)

²⁰ *Canada (MHRD) v. Skoric* [2000] 3 FC 265 (FCA)

²¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R.

²² *Villani v Canada (Attorney General)* [2001] FCA 248 paragraph 26 and 41

subparagraph 42(2)(a)(i) were chosen with particular care by the drafters of the *Plan*.” Precise wording was not provided in the description of the end of the contributory period.

[39] The legislation is not clear in defining what date should be used to define the end of the contributory period. It is clear from the legislation however that any month should be excluded by “reason of disability”. The date that a Claimant applies for a disability benefit can affect when their disability benefit becomes payable. This is distinctly different than when it was determined they became disabled.

[40] I am not satisfied that the date of the commencement of payment of a disability benefit is the appropriate date to use based on the legislation and the case law reviewed. I am also not satisfied that the deemed date of disability is the appropriate date to be used.

[41] Taking a liberal approach and resolving ambiguity in favour of the Claimant, I conclude that the appropriate date is the date the Claimant is determined or found to be disabled. This is the date to be used to determine months excluded from the contributory period by reason of disability.

CONCLUSION

[42] I find the contributory period of the Claimant’s wife to be 24 years. These are the years between 1966 and December 1985 (20 years) and from 1992 to 1995 (4 years). This calculation accounts for the exclusion for CRP and by reason of disability as stated in Section 49 of the CPP.

[43] The deceased contributor made 9 years of contributions, which meets the minimum one third of her contributory period of 24 years. As such the Claimant qualifies for the Death and Survivor benefits.

[44] The appeal is allowed.

Jane Galbraith
Member, General Division - Income Security