



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. D. v Minister of Employment and Social Development*, 2020 SST 631

Tribunal File Number: AD-20-4

BETWEEN:

**K. D.**

Appellant  
(Claimant)

and

**Minister of Employment and Social Development**

Respondent  
(Minister)

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Neil Nawaz

DATE OF DECISION: July 16, 2020

## **DECISION AND REASONS**

### **DECISION**

[1] I have decided that the General Division made an error of law when it excluded the period from July 2015 to June 2017 from the Claimant's retirement contributory period. However, I have substituted my decision for the General Division's and concluded that no months should be removed from the Claimant's retirement contributory period by reason of disability.

### **OVERVIEW**

[2] The Claimant is appealing the amount of her Canada Pension Plan (CPP) retirement pension. She claims that she was disabled from May 2005 to June 2017 and wants those months removed from her contributory period. This would have the effect of increasing her retirement pension.

[3] The Claimant was born in July 1952 and, because of her health, has not worked since May 2005. She applied for a CPP disability pension, but the application was refused because she had not made enough contributions to the plan. Since she was already getting private disability benefits, she took the matter no further, but she was concerned about the impact of her disability on her eventual CPP retirement pension. She maintains that Service Canada staff reassured her that disability would be taken into account when she retired.

[4] The Claimant later discovered that, in fact, Service Canada would not be considering her disability when the time came to calculate her retirement pension, unless she was also getting a CPP disability pension. This meant that her contributory period would be extended to her 65<sup>th</sup> birthday, thereby reducing her retirement pension.

[5] In an effort to shorten her contributory period, the Claimant applied for a CPP disability pension in October 2016. This time, she met the basic eligibility requirements for the pension. Because she had been through a divorce, she had received a share of her former husband's CPP contributions through a division of unadjusted pensionable earnings, also known as a credit split.

[6] The Minister approved the Claimant's application and found that she had become disabled as of December 2007. However, the Claimant did not receive any disability payments as of that date because, in cases where a disability pension would not have been approved but for a credit split, the *Canada Pension Plan* prohibits payment of the disability pension until the month after the credit split takes place.

[7] The Claimant's credit split took place in June 2017, so she could not be paid a disability pension until the following month. But this was also the month she turned 65, and the *Canada Pension Plan* says a disability pension can't be paid to someone after they reach that age.

[8] The Minister then proceeded to calculate the Claimant's CPP retirement pension based on the maximum possible contributory period. The Claimant appealed this determination to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated September 19, 2019, allowed the appeal in part. The Claimant had wanted the months from May 2005 to June 2017 to be removed from her contributory period because she was disabled. The General Division declined to remove all the months that the Claimant had wanted, although it did exclude the period from July 2015 to June 2017.

[9] The Claimant has now requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed the following errors in arriving at its decision:

- It excluded only 24 months from her contributory period rather than all the months from May 2005 to June 2017; and
- It decided that it had no authority to rectify the misleading advice that the Minister's staff gave her at the time of her first CPP disability application.

[10] In a decision dated January 26, 2020, I granted leave to appeal because I saw an arguable case that the General Division had misinterpreted the provision of the *Canada Pension Plan* governing contributory period exclusions.

[11] I held a hearing by teleconference because, in my view, that format respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

[12] Having reviewed the record and considered the parties' written submissions, I have concluded that the General Division committed an error of law in coming to its decision. I have decided that the appropriate remedy in this case is to substitute my decision for the General Division's and allow no exclusions from the Claimant's contributory period by reason of disability.

[13] These are my reasons.

## ISSUES

[14] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.<sup>1</sup>

[15] I have to decide the following questions:

- Issue 1: Did the General Division err when it decided not to exclude more than 24 months from the Claimant's contributory period?
- Issue 2: Did the General Division err when it decided that it had no authority to rectify allegedly misleading advice from the Minister's staff?

## ANALYSIS

**Issue 1: Did the General Division err in law when it decided not to exclude more than 24 months from the Claimant's contributory period?**

### **Section 49(c) of the Canada Pension Plan**

[16] The amount of a claimant's CPP retirement pension depends, in part, on the length of their contributory period as defined by the *Canada Pension Plan*. Section 49(c) says that, when calculating a retirement pension, the Minister has to remove from the contributory period "any month that was excluded from the contributor's contributory period under this Act [...] by reason of disability."<sup>2</sup> The meaning of these words will decide this appeal.

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<sup>1</sup> *Department of Employment and Social Development Act* (DESDA), section 58(1).

<sup>2</sup> *Canada Pension Plan*, section 49(c).

[17] As the General Division noted, there are several possible interpretations to the phrase “by reason of disability.” No one disputes that, whatever the exclusion period, it ended in June 2017, the month of the Claimant’s credit split and the month before she turned 65. However, it is not clear what month her contributory period ended and her exclusion period began. There are four possibilities:

- May 2005, when the Claimant stopped working because of her poor health. This is the month that the Claimant believes should mark the end of her contributory period and the start of her exclusion period.
- December 2007, when the Claimant was actually found to have become disabled for the purpose of her CPP disability application.<sup>3</sup> This is the month that would end the Claimant’s contributory period if I had adopted the logic of *L.A.*,<sup>4</sup> a recent Appeal Division case that I will discuss at length later in these reasons.
- July 2015, which was 15 months before the Claimant applied for her CPP disability pension and the earliest she could have been deemed disabled under the *Canada Pension Plan*. This is the month that the General Division determined was the end of the Claimant’s contributory period.
- July 2017, the month the Claimant’s credit split occurred and the month her disability pension would have started if she had not also turned 65 that same month. This is the month that the Minister favours as the end of the Claimant’s contributory period, since it believes that any exclusion must correspond to when a claimant was actually eligible to receive a CPP disability pension.

## Case Law

[18] As the General Division noted, the courts have never directly addressed what the words, “... by reason of disability” mean, so there is no binding precedent to follow in this situation.

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<sup>3</sup> Based on fragmentary evidence in the file, the General Division concluded that the Minister had found the Claimant disabled as of December 2007, with a deemed disability date of July 2015, and a first payment date of July 2017. In submissions to the Appeal Division, the Minister confirmed that it had, in fact, assigned the Claimant an actual date of disability of December 2007 and furnished a copy a signed agreement to that effect.

<sup>4</sup> *Minister of Employment and Social Development v L.A.*, 2019 SST 965.

There is a case called *Storto*,<sup>5</sup> but it merely confirms that a period of disability can be removed from a contributory period only if the claimant is determined to be disabled under the terms set out in the *Canada Pension Plan*. However, *Storto* does seem to rule out May 2005 as a potential end date for the Claimant’s contributory period, since no one—not the Minister or the General Division—has ever found that she became disabled as of that date under the *Canada Pension Plan*. In these types of assessments, the date of disability does not always correspond to the date the claimant actually stopped working.

[19] In a more recent case, *Bartlett*,<sup>6</sup> the Federal Court of Appeal upheld a decision to exclude months beginning with the date of deemed disability, rather than with the date of first payment.<sup>7</sup> This case is helpful because it tells us that when a claimant comes into pay for disability does not determine the beginning of an exclusion period. However, the written reasons in *Bartlett* are brief and, other than confirming the applicability of section 49(c), the Court did not discuss the precise meaning of the words in that section.

[20] In the absence of clear guidance from the courts, the Appeal Division has addressed section 49(c) with conflicting results. In one case,<sup>8</sup> the Appeal Division determined that the contributory period ended when the claimant was *deemed* disabled under section 42(2)(a) of the *Canada Pension Plan*.<sup>9</sup> In other cases, the Appeal Division found that the contributory period ended when the claimant was found to have *actually* become disabled.<sup>10</sup>

[21] I’m not bound by any of these cases and, what’s more, I don’t find any of them useful. None of them saw any apparent ambiguity in the words, “...by reason of disability,” and all of them reached their conclusions without analyzing the text and context of section 49(c).

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<sup>5</sup> *Canada (Attorney General) v Storto* (1994), 174 NR 221 (FCA).

<sup>6</sup> *Bartlett v Canada (Attorney General)*, 2018 FCA 165.

<sup>7</sup> Under section 69 of the *Canada Pension Plan*, payment of a disability pension begins four months after the date of disability or the deemed date of disability, whatever the case may be.

<sup>8</sup> *I.Q. v Canada (Minister of Employment and Social Development)*, 2017 SSTADIS 743. In this case, The Appeal Division found no merit in the Claimant’s argument that his contributory period ended when he was found to have actually become disabled, although it did allow leave to appeal based on another argument.

<sup>9</sup> Under section 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled, for payment purposes, more than 15 months before the Minister received their application for a disability pension. According to section 69 of the *Canada Pension Plan*, pension payments start four months after the deemed date of disability.

<sup>10</sup> *Minister of Employment and Social Development v S.O.*, 2015 SSTAD 1210; *Minister of Employment and Social Development v Z.Y.*, 2018 SST 145.

[22] Last year, the Appeal Division issued a decision that did perform such an analysis.<sup>11</sup> That case, *L.A.*, involved a claimant who wanted to exclude months from his deceased wife's contributory period so that he would be eligible for CPP death and survivor benefits. Although different benefits were at issue, the Appeal Division still had to apply section 49(c). After engaging in a comprehensive exercise in statutory interpretation, the Appeal Division concluded that "...by reason of disability" means that months to be excluded from the contributory period start when a person is found to have actually become disabled according to the *Canada Pension Plan*.

### **The General Division's decision**

[23] The General Division performed its own analysis of section 49(c). In the end, it concluded that the Claimant's contributory period ended with the deemed date of disability. In doing so, the General Division took pains to explain why it disagreed with what I might describe as the more liberal approach adopted by the Appeal Division in *L.A.*

[24] First, the General Division saw nothing in the *Canada Pension Plan* to support the Minister's position that "by reason of disability" means "when disability payments start." According to the General Division, a finding of disability, whether deemed or actual, and the first payment date for that disability are two distinct events.

[25] Second, the General Division rejected *L.A.*'s interpretation of section 49(c), finding that, where the so-called late applicant rule applied, the deemed date of disability—and not the actual date of disability—marked the end of a contributory period. The General Division looked first to the wording of section 49(c), noting that the contributory period ended on "any month that *was* excluded from the contributor's contributory period [...] by reason of disability." The General Division stressed the word "was" because, in its view the section

is talking about months that were already excluded from the contributory period because of disability. That means I have to see if some other part of the CPP excluded months from the Claimant's contributory period for that reason.<sup>12</sup>

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<sup>11</sup> *L.A. supra*, Note 4.

<sup>12</sup> General Division decision, paragraph 36.

The General Division proceeded to find that the various *Canada Pension Plan* provisions that restrict eligibility for disability are mirrored by the provision used to exclude months from the contributory period by reason of disability. The General Division specifically found that the following restrictions were, in effect, incorporated into section 49(c):

- Section 42(2), which says that a disability must be severe and prolonged;
- Section 44(1)(b), which says that a person is entitled to a disability pension during his or her contributory period;
- Section 44(2)(b), which says that where a disability pension is payable, the contributory period ends in the month in which a contributor is determined to have become disabled;
- Section 44(1)(b)(ii), which says that a person shall not be deemed disabled earlier than fifteen months before the application date.

[26] The General Division determined that, as a late applicant—someone who applied for the disability pension years after she last qualified for it—the Claimant was entitled to a retirement contributory period that was no longer than her disability contributory period. The General Division found that her retirement contributory period ended in July 2015, which was 15 months before she applied for her CPP disability pension and the earliest that she could have been deemed disabled under section 44(1)(b)(ii).

[27] The General Division took issue with *L.A.*'s finding that the deemed date of disability is only meant to limit how much back pay a late applicant gets. The General Division noted the late applicant rule is prefaced by the words, “for the purposes of this Act,” which, in its view, suggests that the whole of the *Canada Pension Plan*, and not just the part that deals with payment of the disability pension, was subject to the 15-month limit. It was significant, said the General Division, that the section setting out the 15-month limit doesn't say anything about payment, which is governed by another part of *Canada Pension Plan*: under section 69, a disability pension is paid four months after “the month in which the applicant became disabled.”

[28] For the General Division, the *Canada Pension Plan*'s mechanisms to restrict disability, such as the late applicant rule, are no less applicable when it comes to calculating a retirement



pension. I agree with the General Division on this principle. However, I think that the General Division erred in not also extending that principle to include restrictions associated with credit splitting.

### **The General Division misinterpreted section 49(c)**

[29] The General Division concluded that the Claimant could not be determined to have become disabled before July 2015. The General Division decided that, because section 42(2)(b) excluded July 2015 to June 2017 from her contributory period for disability purposes, section 49(c) also excluded those months “by reason of disability” for retirement pension purposes.

[30] I have concluded that the General Division erred in its interpretation of section 49(c). I base this conclusion on (i) the section’s wording; (ii) its wording in the context of the *Canada Pension Plan* as a whole; and (iii) its wording in the context of Parliamentary intent.

#### ***(i) The wording of section 49(c)***

[31] Section 49 of the *Canada Pension Plan* defines the contributory period for the purpose of calculating the CPP retirement pension. Reading the section as a whole makes it clear that there are four possible circumstances that can bring a retirement contributory period to an end: (i) reaching age 70; (ii) dying; (iii) receiving retirement pension; and (iv) being disabled. What does it mean to be disabled in this context?

[32] The wording of section 49(c) is less than clear, but I have to believe that it is informed by some underlying logic. The section could have been written in any number of ways that could have reduced or eliminated its ambiguity. For instance, it could have said:

- “... any month in which the Claimant was found to be disabled under this Act” or
- “... any month in which the Claimant was deemed to be disabled under this Act,” or
- “... any month in which the Claimant began receiving a disability pension under this Act.”

[33] Of course, section 49(c) does not say anything as direct as these hypothetical alternatives. Instead, it says a retirement contributory period ends “the month preceding the month in which

the retirement pension commences but excluding (c) any month that *was excluded* from the contributor's contributory period under this Act ... *by reason of disability* [my emphasis]." I agree with the General Division that the phrase "was excluded" has significance. The fact that it is in the past tense suggests that the end of the retirement contributory period is connected to an event that has already happened. What might that event be?

[34] The event that section 49(c) refers to is an exclusion from another contributory period, this one for the purpose of disability. Why didn't the CPP's drafters use more precise language along the lines of my hypothetical alternatives? One possible reason that none of them would have captured the admittedly rare scenario in which a claimant is approved for disability benefits but later sees them terminated if they recover and resume working. The actual wording of section 49(c), confusing as it is, would appear to be designed to cover a temporary or closed period of disability by excluding months, not just from the beginning of the period, but also up to its end.

[35] The words "was excluded" raise the question of who does the exclusion. The obvious answer is the Minister in its administrative capacity or, on appeal, the Tribunal in its adjudicative capacity. Either way, their job is: (i) to decide whether an applicant for disability benefits has established a valid contributory period; (ii) to use that contributory period to determine whether the applicant has established a minimum qualifying period (MQP); and (iii) to assess whether the Claimant's disability was severe and prolonged during that MQP. Section 49(c) is telling us that once the Minister or the Tribunal has established disability, an exclusion occurs, and it is tied to the contributor's contributory period—not their MQP or their payment period.

[36] This disability contributory period is defined by section 44(2)(b). Its structure parallels section 49, and it also excludes "any month that was excluded from the contributor's contributory period under this Act [...] by reason of disability."<sup>13</sup> Again, this wording only makes sense if it is intended to cover previous periods of disability that turned out to be temporary. This brings us back to what the *Canada Pension Plan* was attempting to convey, whether in section 44(2)(b) or section 49(c) by the vague phrase "...by reason of disability." Does the exclusion period begin with the month in which the claimant was (i) found to have

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<sup>13</sup> Section 44(2)(b)(iii) of the *Canada Pension Plan*.

become disabled under the Act; (ii) deemed to have become disabled under the Act; or (iii) became eligible to receive disability pension payments under the Act? To answer this question, I find it useful to take a closer look at the provisions that define disability in the *Canada Pension Plan*.

**(ii) *The wording of section 49(c) in the context of the Canada Pension Plan as a whole***

[37] Section 49(c) alludes to other sections of the *Canada Pension Plan* and those sections, in turn, refer to still more sections. Read together, they convey a clearer idea of how the disability and retirement benefits are supposed to interact with one another.

[38] What does it mean to be disabled? Section 42(2) says that a person “shall be considered be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability.” Under section 44(2)(b)(ii), the disability contributory period ends when the contributor is determined to have become disabled “for the purpose of paragraph 1(b).” Section 44(1)(b) sets out when a person is entitled to a disability pension. It says:

- (b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who
  - (i) has made base contributions for not less than the minimum qualifying period,
  - (ii) 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, or
  - (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made...

[39] This section tells us something important. A claimant might have a severe and prolonged disability but they are still subject to numerous restrictions on whether they can actually collect a pension for it. They can’t already be receiving a retirement pension. They can’t be found disabled after their MQP. They can’t receive more than 11 months of retroactive pension

payments, no matter how long ago they became disabled. They can't receive a pension dating back to before their credit split, if that credit split was the only way they were able to establish an MQP in the first place.

[40] I agree with the General Division that the rules governing disability eligibility and payment are incorporated by reference into the rules for calculating the retirement pension. However, I do not think that the General Division went far enough. In its decision, the General Division wrote:

The CPP provides social benefits, but it also contains measures to limit their cost. The late applicant provision allows someone to receive disability benefits when they would not otherwise be able to. However, the CPP restricts the amount of retroactive payment that person will get, through the “deemed disability” provision, and the credit split provision. Consistent with this, I interpret the CPP to also limit the effect a late determination of disability will have on the amount of a retirement pension.<sup>14</sup>

The General Division recognized that, as well as restricting retroactive disability benefits, the late applicant rule can also work to reduce the amount of a future retirement pension. But the General Division did not extend similar recognition to another cost-limiting measure—the one associated with credit splits.

[41] Where a claimant would not have qualified for disability benefits but for a credit split, section 55.2(9) prevents payment of benefits in any month before the credit split took place. The General Division was certainly aware of this rule—it mentioned it more than once in its decision<sup>15</sup>—but it did not explain why it decided that the rule had no effect on the Claimant's retirement contributory period, whereas the late applicant rule did. It is hard to see any difference in substance between the two rules—both impose arbitrary limits on when a disabled person can start to receive a disability pension—yet the General Division used one, but not the other, in its calculation of the Claimant's retirement contributory period.

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<sup>14</sup> General Division decision, paragraph 43.

<sup>15</sup> General Division decision, paragraphs 10 and 43.

*(iii) The wording of section 49(c) in the context of Parliamentary intent*

[42] The CPP's primary function is to provide social benefits to Canadians, but it also contains measures that have no discernible function other than to limit costs. What's more, these measures don't just limit payment for disability; they also define eligibility for disability. First, there is the rule that prevents a retirement pension recipient from receiving disability benefits. There is also the late applicant rule, which allows persons to apply for disability benefits years after they became disabled but restricts their right to retroactive payments. Then there is the credit split provision, which allows separated or divorced persons to qualify for disability benefits by transferring their former partners' CPP contributions and earnings credits but bars payment of benefits in any month before the credit split took place. With these rules in mind, I am convinced that disability has the same meaning, and is subject to the same restrictions, for all purposes across the *Canada Pension Plan*.

[43] My interpretation of section 49(c) is reinforced by what I know about its legislative history.<sup>16</sup> In 1986, Parliament changed the wording of section 49(c) from "... any month for which a disability pension was payable" to its current wording of "... any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability." This amendment was intended to slightly expand the exclusion period and correspondingly reduce the contributory period, thereby increasing the pension amount for retirement applicants who had also been found disabled; where formerly the four-month waiting period under section 69 was included in the retirement contributory period, now it was excluded from it. The effect of this change was to decouple the meaning of disability, for the purpose of determining a retirement pension, from payment and to associate it more closely with eligibility.

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<sup>16</sup> See Minister's written submissions dated May 19, 2020, paragraphs 43-45 (AD7-17). This information was not, to my knowledge, available to the General Division at its hearing last year. The Appeal Division is ordinarily limited to considering whether the General Division erred according to specific criteria, and it is prohibited from considering new evidence. However, there is an exception to that rule if the new evidence provides general background information only (*Sharma v Canada (Attorney General)*, 2018 FCA 48 and *Greeley v Canada (Attorney General)*, 2019 FC 1493). It "applies to non-argumentative orienting statements" that can assist in understanding the history and nature of a case (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 and *Delios v Canada (Attorney General)*, 2015 FCA 117). Although, strictly speaking, this information could have, and perhaps should have, been submitted at the General Division, I decided to accept it as an exception to the general rule against new evidence and in the interest of providing the broadest possible context to the provisions governing the calculation of the CPP retirement contributory period.

**(iv) Where I differ with L.A.**

[44] The Claimant wanted me to follow *L.A.* because, in that case, the Appeal Division found that the section 49(c) disability exclusion period begins with the month in which a claimant is found to have actually become disabled, rather than the month in which the claimant is deemed disabled. As my analysis has shown so far, I do not share my Appeal Division colleague's interpretation of section 49(c) and the associated provisions of the *Canada Pension Plan*. While I am not bound by previous Appeal Division decisions, I do not depart from them lightly, and I want to explain in detail why I cannot follow *L.A.*

[45] Although I disagree with *L.A.*, I also disagree with the Minister that its facts are materially distinguishable from those of this case. Although *L.A.* is about the impact of disability on death and survivor's benefits, rather than retirement benefits, and although the deceased contributor's MQP in *L.A.* was not affected by a credit split, as in this case, the principles that emerge from this prior decision are broadly applicable and would have altered the outcome of this appeal, had I followed them.

[46] I have two problems with *L.A.* First, the Appeal Division said that it was a mistake to assume that "disability" meant "deemed disability" when section 49(c), read as a whole, referred to months that had already been excluded from the contributory period "by reason of disability." In doing so, the Appeal Division agreed with the claimant that, when the Pension Appeals Board (PAB), the predecessor of the Appeal Division, found that the deceased contributor qualified for the disability pension, it must have decided that her contributory period ended in December 1995, when she actually became disabled. The General Division accepted the claimant's argument that, if the PAB had not ended the contributory period in December 1995, the deceased contributor would not have met the rule (the requirement to have valid contributions for five out of ten years within a contributory period) that enabled her to have an MQP in the first place.<sup>17</sup>

[47] However, The Appeal Division's conclusion that the PAB had already excluded months after December 1995 was based on a questionable premise—that the claimant's contributory period ended when the PAB found that she had actually become disabled. As we have seen, the contributory period mentioned in section 49(c) is the disability contributory period, and under

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<sup>17</sup> *L.A. supra*, Note 4, paragraphs 30-30.

section 44(2)(b)(ii), the disability contributory period ends when the contributor is determined to have become disabled for the purpose of section 44(1)(b). Section 44(1)(b)(ii) makes it clear that disability occurs when a contributor becomes disabled or is deemed disabled, whatever the case may be. In *L.A.*, the deceased contributor was deemed disabled in December 1999, and this is therefore the month her contributory period must have ended. Moreover, the deceased contributor was always in a position to establish an MQP whenever the disability contributory period ended. In finding that the former depended on the latter, the Appeal Division, in my respectful view, conflated the two types of period.

[48] My second problem with *L.A.* lies in the Appeal Division's refusal to import rules meant to restrict payment of disability benefits into the framework used to calculate other types of benefits. The fact that the deceased contributor was "deemed disabled" in December 1999, it said, was nothing more than a "legal label" for a mechanism meant to cap the amount of retroactive disability benefits, to which the deceased contributor in *L.A.* would have otherwise been entitled.

[49] Here, I have to disagree. The circuitous language in section 49(c) convinces me that "disability," as used in that provision, encompasses all forms of legally constructed disability in the *Canada Pension Plan*, and not just the type of "severe and prolonged" disability that is established when a claimant proves that he or she could not regularly pursue substantially gainful employment as of a certain date. In *L.A.*, the Appeal Division drew a distinction between actual disability and deemed disability, the latter being an "artificial" construct whose only purpose is to limit costs. That may be so, but I see no indication that Parliament intended that construct, however artificial, to be confined to just the disability provisions. Section 42(2)(b) links the deemed date of disability to the date a person is determined to have become disabled. For regular applicants, there is no distinction between the two dates, but for the late applicants, the earliest that they can be deemed disabled is 15 months before they applied. It is important to note that section 42(2)(b) is prefaced by the words, "for the purposes of this Act," suggesting that the deeming provision—and by extension other legally constructed dates of disability—applies to the entire *Canada Pension Plan*, not just the part about disability.

[50] I take no pleasure interpreting the law in the way that I have. If I am correct, section 49(c) acts to restrict the amount of the Claimant's retirement pension simply because she submitted her

application for disability benefits years after she actually became disabled. In doing so, it effectively penalizes her on one pension for applying late on another. Nevertheless, this is what I believe the drafters of the *Canada Pension Plan* intended to happen.

**Issue 2: The General Division did not err when it decided that it had no authority to rectify allegedly misleading advice from the Minister's staff**

[51] The Claimant has always blamed her delay in applying for a credit split and then reapplying for the disability pension on what she claims was misleading advice that she received years ago from the Minister's staff at a Service Canada office. Unfortunately, I cannot help her in this matter.

[52] Under section 66(4) of the *Canada Pension Plan*, a decision to remedy erroneous advice is a discretionary matter for the Minister, and the Minister only. I understand that the Minister reviewed its records earlier this year and determined that its staff had not misled the Claimant. It therefore saw no reason to adjust the amount of her retirement pension. That decision, right or wrong, is discretionary and therefore beyond the jurisdiction of either the General Division or the Appeal Division.<sup>18</sup>

[53] I have no doubt that the Claimant had a long held and sincere, though inaccurate, belief that her CPP retirement pension would somehow reflect her incapacity from work even if she had never been approved for CPP disability benefits. Unfortunately, the sincerity of her belief is irrelevant. Even if the Minister's staff did, in fact, provide her with such erroneous advice, I cannot step in and provide a remedy. Ultimately, I am bound to follow the law as written. I cannot simply ignore the terms of the *Canada Pension Plan* and impose a solution that I happen to think is fair.

**REMEDY**

[54] The Appeal Division has the authority to address whatever errors that the General Division may have committed.<sup>19</sup> I have the power to:

- confirm, rescind, or vary the General Division's decision;

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<sup>18</sup> *Canada (Minister of Human Resources Development) v Esler*, 2004 FC 1567.

<sup>19</sup> DESDA, section 59(1).



- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

I also have the power to decide any question of fact or law necessary to carry out the above remedies.

[55] The General Division concluded that, since the Claimant could not be deemed disabled before July 2015, that marked the end of her disability contributory period and thus the beginning of her exclusion period for the purpose of section 49(c). In my view, the General Division committed an error by failing to take into account the effect of section 55. 2(9), which extended that Claimant's disability contributory period—and by extension, her retirement contributory period—to June 2017. In short, if the General Division had interpreted section 49(c) correctly, it would not have excluded any months “by reason of disability.”

[56] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. The Federal Court of Appeal has said that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. The Claimant has been seeking answers for many years about the impact of her disability on her retirement pension. If I were to refer this matter back to the General Division for another hearing, it would only delay a final resolution.

[57] The Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of how many months should be excluded from the Claimant's contributory period. Both parties agreed that the General Division had made a legal error, but they had different views about how the General Division erred. The Claimant argued that section 49(c), properly applied, required exclusion of months “by reason of disability” going back to December 2007, when the Minister found she was no longer capable of work. By contrast, the Minister argued that the General Division should not have removed any months at all from the Claimant's contributory period because there was no way for her to be eligible for disability benefits before retirement.

[58] The essential facts in this case are not in dispute, and the main issue is purely a matter of law. The record is therefore complete, and I see no reason not to decide the merits of this matter

myself. As my analysis has shown, I found that the General Division erred in its interpretation of section 49(c) by failing to recognize that the Claimant's credit split imposed restrictions on her eligibility to receive disability benefits, which in turn reduced her exclusion period "by reason of disability." Since the Claimant's credit split took place in June 2017, the same month she began receiving her retirement pension, I must conclude that no months can be removed from her contributory period.

## CONCLUSION

[59] I am dismissing this appeal. While I agree that the General Division committed an error in arriving at its decision, the error was not the one that the Claimant wanted me to find. Instead, I agreed with the Minister that the *Canada Pension Plan* does not exclude a period of disability from a retirement contributory period unless an applicant is actually eligible to receive a disability pension. Since the Claimant's credit split did not occur until her retirement pension had already started, I am giving the decision that the General Division should have given and ordering that no months be removed from her contributory period by reason of disability.



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Member, Appeal Division

HEARD ON:	June 1, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. D., Appellant Tiffany Glover, Representative for the Respondent