Citation: ***Minister of Employment and Social Development v. H. B.,*** **2015 SSTAD 492**

Date: April 16, 2015

File number: AD-14-589

APPEAL DIVISION

Between:

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

Appellant

and

H. B.

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on April 16, 2015

REASONS AND DECISION

INTRODUCTION

[1] On August 11, 2014, the General Division of the Social Security Tribunal of Canada, (the "Tribunal"), determined that, commencing March 2009, a disability pension under the *Canada Pension Plan*, ("CPP"), was payable to the Respondent.

[2] On December 2, 2014 the Appellant filed an application with the Appeal Division of the Tribunal for leave from the decision of the General Division. The Tribunal granted leave to appeal on January 22, 2015. Following the grant of leave the parties had 45 days to make submissions to the Tribunal. Counsel for the Appellant filed submissions on March 09, 2015, however, the Tribunal did not receive any submissions from the Respondent.

[3] The issues in the appeal being clear and being based entirely on a question of law, the appeal proceeded on the written record.

ISSUE

[4] At issue is the question of whether the General Division erred in law in its determination of the Respondent's entitlement to CPP disability payments, specifically,

> Was it an error of law for the General Division to calculate benefit entitlement based on the Respondent's first application for a CPP disability benefit?

THE LAW

[5] The applicable statutory provision governing the time when an applicant for CPP disability benefits may be deemed to be disabled is found at ss. 42(2)(b) of the CPP, namely that,

> b) A person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) – be deemed 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. (S.C. 1992, c. 1, s. 23; 2009, c. 32, s. 31.)

SUBMISSIONS

[6] The Appellant submitted that the only application in respect of which the General Division could have made and ought to have made a determination is the Respondent's July 4, 2012 application. Counsel for the Appellant contends that the General Division did not have jurisdiction to consider and adjudicate on the Respondent's prior application of July 2009.

[7] The Appellant further submitted that as the issue to be resolved involves a question of law, the Appeal Division does not owe deference to the General Division decision and that "correctness" is the appropriate standard of review. Accordingly, the Appeal Division, as the reviewing body, must conduct its own analysis of the question and decide whether or not it agrees with the determination that was made by the General Division Member. In the event that the Appeal Division disagrees with the determination that was made by the General Division, then the Appeal Division should substitute its decision for that of the General Division.

STANDARD OF REVIEW

[8] The Appellant stands on one ground of appeal only. He argues that the General Division erred in law in finding that maximum retroactivity (of the Respondent's CPP disability benefits) could be provided on the basis of the Respondent's first application for CPP disability benefits. The Tribunal concursIn the Tribunal's viewthe question of the start date for disability benefits is a purely legal question that is delimited by CPP ss. 42(2)(b), which provision limits the retroactive period to fifteen months prior to a successful application.

ANALYSIS

[9] In the instant appeal, the question turns on the interpretation of the phrase "the making of any application." At issue is the ambit of the Tribunal's jurisdiction in relation to applications for CPP disability benefits.

[10] This question of whether the Tribunal could backdate the award of disability payments to include a prior unsuccessful application has been discussed and adjudicated upon in several

decisions. Thus, for example, in *Sarrazin*[1], the PAB found that ss. 42(2)(b) limits the retroactive time to 15 months, before the later of (i) the time when a successful application for disability benefits was made, or (ii) when the amendments came into force in June 1992." The PAB went on to state that, "it was irrelevant whether the claimant had actually become disabled prior to that time, or had made a previous claim for benefits which was denied because it was too late under the legislation in force prior to the June 1992 amendments to ss. 44(1)(b)."

[11] Further definitive statements were made by the Federal Court and the Federal Court of Appeal in *Dillon*[2] and in *Baines*[3], respectively. In *Dillon*, the Federal Court stated that whether a previous application for disability benefits had been dismissed many years before, and that decision was not appealed from, the granting of benefits for the same condition on a subsequent application could not be made retroactive to the date of the first application. The earlier decision was *res judicata*.

[12] Again, in *Baines*, the Federal Court of Appeal clarified that "where the claimant's initial application was refused seven years before, the fact that a subsequent application was allowed for the same injury did not permit the tribunal to backdate the award beyond the 15-month statutory maximum to the date of the initial application. The Review Tribunal did not have jurisdiction to reopen the original file and the PAB could only consider issues within the Review Tribunal's jurisdiction."

[13] In the instant appeal, the Respondent had made an earlier unsuccessful claim for CPP disability benefits in July 2009. Her application was denied at both the initial and reconsideration stages and she did not appeal the denial. Three years later the Respondent filed a subsequent application for CPP disability benefits that ultimately proved successful before the General Division. Thus, both *Dillon* and *Baines* are on all fours with the issue raised in this appeal, (the length of the time between the earlier unsuccessful application and the current application being irrelevant). Both cases address squarely the question of whether a Tribunal, in this case the General Division, has jurisdiction to extend the reach of its inquiry to an earlier, unsuccessful application for CPP disability benefits. In both cases as well as in the earlier PAB

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[1] *Sarrazin v. MHRD* June 27, 1997, CP 5300; *CEB & PG (TB) 8682 PAB*
[2] *Dillon v. Canada (Attorney General)* 2007 FC 900.
[3] *Baines v. Canada (Minister of Human Resources Development)*, 2011 FCA 158, leave to appeal to the SCC refused , 2012 Can LII 22038 (SCC).

decision, the question has been answered in the negative. The Tribunal sees no reason to diverge from these decisions. Accordingly, the Tribunal finds that the General Division Member lacked the requisite jurisdiction to consider the Respondent's earlier application for CPP disability benefits, thereby committing an error of law.

CONCLUSION

[14] The appeal is allowed.

[15] The Appellant has requested that the Tribunal exercise its jurisdiction under the *Department of Employment and Social Development Act* s. 59 to give the decision the General Division should have given. The Tribunal is of the view that this is the most efficient manner in which to deal with the case. Accordingly, the Tribunal finds that the Respondent became disabled within the meaning of the *Canada Pension Plan* in April 2011. The Respondent is entitled to a disability pension under the *Canada Pension Plan* commencing August 2011.

Hazelyn Ross
Member, Appeal Division