

**Citation: *P. G. v. Minister of Employment and Social Development*, 2015 SSTAD 987**

**Date: April 17, 2015**

**File number: AD-15-260**

**APPEAL DIVISION**

**Between:**

**P. G.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(Formerly Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Hazelyn Ross, Member, Appeal Division**

**Decided on the Record on August 17, 2015**

## **DECISION**

[1] The appeal is dismissed.

## **INTRODUCTION**

[2] This is an appeal from a decision of the General Division of the Social Security Tribunal of Canada (the Tribunal) to summarily dismiss the Appellant's appeal because it had no reasonable chance of success. On July 20, 2012, the Appellant applied for a *Canada Pension Plan* (CPP) disability pension. At the time the Appellant made the application he was already receiving a CPP retirement pension. The Respondent denied the application as well as the Applicant's request for reconsideration on the basis that it was made more than fifteen months after the Appellant began to receive a retirement pension. The Respondent's letter states in part, "the information in your file shows that you have been receiving a retirement pension since November 2010 and that you applied for a disability benefit more than 15 months after that date. As a result, we must maintain our original decision to deny your disability application".

[3] The Appellant appealed the reconsideration decision to the General Division. On March 17, 2015, the General Division served the Appellant with notice that it intended to summarily dismiss his appeal.<sup>1</sup> On April 28, 2015, the General Division issued its decision summarily dismissing the appeal.

## **GROUND OF THE APPEAL**

[4] The Appellant's appeal documents consist mainly of medical reports. He submitted that the medical reports support his position that he is disabled. The Appellant did not address the question of whether or not his retirement pension could be cancelled in favour of a disability pension.

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<sup>1</sup>Under section 53 of the *Department of Employment and Social Development Act*, the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success. Section 22 of the *Social Security Tribunal Regulations* require the General Division to give written notice to the appellant and to allow the appellant a reasonable period of time to make submissions before summarily dismissing an appeal.

[5] The Respondent addressed this issue in his submissions. The Respondent took the position that, on the facts of the Appellant's case, the General Division's decision to summarily dismiss the appeal was correct in law.

[6] For the reasons set out below I am satisfied that the General Division committed no reviewable error and that its decision must stand.

## **ISSUE**

[7] The Tribunal frames the issue as: Did the General Division commit a reviewable error by summarily dismissing the Appellant's appeal?

## **THE LAW**

[8] This is an appeal against a decision of the General Division made pursuant to subsection 53(3) of the *Department of Employment and Social Development (DESD) Act*, summary dismissal. Therefore the Appellant does not require leave to bring this appeal to the Appeal Division of the Tribunal.<sup>2</sup> The Appellant applied for a disability pension after he began to receive a CPP retirement pension. CPP section 66.1 and section 66.1 (1.1) govern his application. These statutory provisions provide,

**66.1. Request to cancel benefit** – (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced request cancellation of that benefit.

**(1.1) Exception** – subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an Appellant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the Appellant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

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<sup>2</sup> Per the DESD Act subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal." Subsection 56(2) Despite subsection (1) no leave is necessary in the case of an appeal brought under subsection 53(3) [summary dismissal by the General Division].

The Application is also governed by 46.2. (1) of the *Social Security Tribunal Regulations* (the Regulations), *S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 2*, namely,

**46.2. (1)** A beneficiary may submit to the Minister, within the interval between the date of commencement of payment of the benefit and the expiration of six months after that date, a request in writing that the benefit be cancelled.

## **STANDARD OF REVIEW**

[9] Counsel for the Respondent submitted that the appropriate standard of review of General Division decisions is reasonableness for questions of fact and for questions of mixed fact and law. Counsel also submitted that on questions of law, the Appeal Division should show no deference to the General Division but should apply a correctness standard to its decisions. In the instant case, Counsel for the Respondents submits that reasonableness is the appropriate standard of review as the main question before the Appeal Division involves a question of mixed fact and law. The Tribunal agrees that “reasonableness” is the appropriate standard.

[10] The questions currently before the Tribunal seem rather clear cut, namely did the General Division (a) properly apply the law with respect to applications/requests to cancel one benefit in favour of another, and (b) did the General Division properly apply the law relating to summary dismissal of appeals. However, these questions require the anterior factual determination of when the Applicant made the request to cancel his CPP retirement pension in favour of a disability pension. This is a question of mixed fact and law. For this reason, the Tribunal finds that the appropriate standard of review is reasonableness.

## **ANALYSIS**

[11] CPP subsection 66(1) permits a pensioner who is receiving a CPP retirement pension to cancel his or her pension in favour of a CPP disability pension. However, the right to do so is not an unlimited right because CPP subsection 66.1(1.1) mandates that the beneficiary who is requesting the cancellation of a benefit cannot be deemed to have become disabled in or after the month that their retirement pension first became payable. In plain words, the pensioner seeking to convert his CPP retirement pension to a CPP disability pension must be deemed to

have become disabled prior to the month that the retirement pension first could have been paid to the pensioner (became payable).

[12] A further restriction is placed by subsection 46.2 (1) of the Regulations, which requires the pensioner to a) make a written request and b) make that request within six months of the commencement of the pension. It is this latter provision that causes problems for the Appellant. Counsel for the Respondent noted the facts of the case are not in dispute.

[13] The Appellant commenced receiving a retirement pension in November 2010. He did not apply within six months to have his retirement pension cancelled as required by section 46.2 of the Regulations. Instead, it was July 2012 when the Appellant filed an application for a CPP disability pension. Thus, the Appellant had been receiving CPP retirement pension payments for some eighteen months prior to making his application for a CPP disability pension. The Appellant was not entitled to receive both the CPP disability pension and the CPP retirement pension, this being expressly prohibited by CPP paragraph 44(1)(b). Furthermore, the Appellant did not file a written request to cancel the retirement pension within the six month time frame mandated by section 46.2 (1) of the Regulations. The Tribunal relies on the cases of *A.T. v. MHRSD* (May 15, 2013), CP 28176 (PAB); and *Ramlochan v. Canada (Attorney General)* an unreported decision of the Federal Court.

[14] These were the circumstances that were before the General Division when it made the decision to summarily dismiss the appeal. Counsel for the Respondent submits that given the uncontested facts and the applicable law, there was only one conclusion possible, namely that the appeal could not succeed. Therefore, the General Division had properly summarily dismissed the appeal.

[15] It follows from the submission of Counsel for the Respondent that, at least in the instant case, the proper test to be applied was whether on the facts and law before the General Division, it was clear and obvious that the appeal could not succeed. Members of the SST Appeal Division have articulated the test for summary dismissal as “whether it is plain and obvious on the face of the record that an appeal is bound to fail.” *M.C. v. Canada Employment Commission*, 2015 SSTAD 237. I am not certain that this test is any different from the substance of what was proposed by Counsel for the Respondent. However, I do conclude that

where the facts are not in dispute; the applicable law is clear; and where on the undisputed facts the law supports one clear decision that is not in an appellant's favour; then it would be appropriate for the General Division to dismiss the appeal summarily. Further, given that the issue before the General Division involved a question of mixed fact and law, its decision should be reviewed applying a standard of reasonableness.

[16] Applying a standard of reasonableness to the General Division decision the Tribunal finds that the General Division decision both correctly states and applies the various legal tests set out in CPP subsections 66.1(1) and 66.1(1) as well as subsection 46.2(1) of the Regulations all of which provisions are set out and discussed above. In addition, the General Division did not err in its factual findings, which as Counsel for the Respondent submitted were uncontested. Thus, the Tribunal finds that, per *Dunsmuir*, overall, the General Division decision is reasonable in that it demonstrates the existence of justification, transparency and intelligibility within the decision-making process. Further, on considering the facts and the submissions before me, the Tribunal finds that the General Division decision was reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and the requirements of the CPP and Regulations.

[17] In light of the above, the Tribunal finds that the General Division did not commit any reviewable error when it summarily dismissed the Appellant's appeal.

## **CONCLUSION**

[18] The Appeal is dismissed.

*Hazelyn Ross*  
Member, Appeal Division