

Citation: *Minister of Employment and Social Development v. A. A.*, 2015 SSTAD 711

Appeal No. AD-15-294

BETWEEN:

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

Applicant

and

A. A.

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision**

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 5, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 25, 2015. The General Division found the Respondent to have a severe and prolonged disability, with an onset in August 2010. The General Division determined that payment of a disability pension should commence effective December 2010. Counsel for the Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on May 20, 2015, on the basis that the General Division made an error of law. To succeed on this application, the Applicant must satisfy me that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] Counsel for the Applicant submits that the General Division erred in law in applying section 69 of the *Canada Pension Plan* to determine the commencement of payment of a disability pension. Counsel submits that subsection 55.2(9) of the *Canada Pension Plan* takes precedence over section 69 of the *Plan*, and that as such, payments of a disability pension should commence effective March 2011.

ANALYSIS

[3] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an application has a reasonable chance of success.

[4] 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.

[5] The Applicant must satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted. The General Division relied on section 69 of the *Canada Pension Plan*, which reads as follows:

Payment of benefit

69. Subject to section 62, where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled, except that where the applicant was, at any time during the five year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan,

(a) the pension is payable for each month commencing with the month next following the month in which the applicant became disabled as a result of which the payment is approved; and

(b) the reference to “fifteen months” in paragraph 42(2)(b) shall be read as a reference to “twelve months”.

[6] The Applicant does not contest the finding that the Respondent was disabled as of 2010 when she ceased working. However, counsel for the Applicant submits that the General Division erred in determining the effective date of payment of a disability pension under the *Canada Pension Plan*.

[7] Counsel submits that as the Respondent required a division of unadjusted pensionable earnings to have a minimum qualifying period of December 31, 2010, subsection 55.2(9) of the *Canada Pension Plan* applies and takes precedence over section 69, in determining the effective date of payment of a disability pension. Subsection 55.2(9) of the *Canada Pension Plan* reads as follows:

Payment of benefit

(9) Where there is a division under section 55.1 and a benefit is or becomes payable under this Act to or in respect of either of the persons subject to the division for a month not later than the month following the month in which the division takes place, the basic amount of the benefit shall be calculated and adjusted in accordance with section 46 and adjusted in accordance with subsection 45(2) but subject to the division, and the adjusted benefit shall be paid effective the month following the month in which the division takes place but in no case shall a benefit that was not payable in the absence of the division be paid in respect of the month in which the division takes place or any prior month.

[8] If section 55.2(9) of the *Canada Pension Plan* should apply, this may well change the effective date when the disability pension commences. The Applicant has satisfied me that there is a reasonable chance of success on the issue as to which section of the *Canada Pension Plan* takes precedence in determining the commencement of payments of a disability pension.

CONCLUSION

[9] The Application is granted.

[10] This decision granting leave in no way presumes the result of the appeal on the merits of the case.

Janet Lew

Member, Appeal Division