Citation: *M. H. v. Minister of Employment and Social Development,* 2015 SSTAD 804

Appeal No. AD-15-265

BETWEEN:

M. H.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 24, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 21, 2015. The General Division refused to exercise its discretion in favour of extending the time for the Applicant to file a notice of appeal, as it found that she lacked an arguable case. The Applicant prepared a letter dated May 8, 2015 and filed it with the Social Security Tribunal on May 11, 2015. The Social Security Tribunal accepts her letter as an application requesting leave to appeal to the Appeal Division. To succeed on this leave application, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.

BACKGROUND and HISTORY OF PROCEEDINGS

[2] The Applicant first applied for a Canada Pension Plan (CPP) disability pension on June 2, 1992. A briefing note of the Respondent indicates that the Applicant had in fact received a CPP disability pension from July 1991 until February 1998, after which she resumed employment (Document GD7, page 46).

[3] The Applicant applied for a CPP disability pension again on April 27, 2011 (Document GD7, pages 42 to 45). The Respondent denied the Applicant's 2011 application for a CPP disability pension on May 11, 2011. The Respondent noted that the Applicant had been in receipt of a CPP retirement pension since May 2006 (N.B. the briefing note indicates that the Applicant has been in receipt of a CPP retirement pension since March 2006). The Respondent advised the Applicant that the *Canada Pension Plan* does not allow an individual to receive both a CPP disability pension and CPP retirement pension at the same time. The Respondent advised that a CPP retirement pension could be cancelled in favour of a CPP disability pension, only if the applicant was deemed to have become disabled before the start of the CPP retirement pension. The Respondent advised that in this case however, as the Applicant had applied for a CPP disability benefit in April 2011, the earliest date she could be deemed disabled was January 2010, which was well after the date she began receiving a retirement pension (Document GD7, page 26). The Applicant did not seek a reconsideration of the decision of the Respondent.

[4] The Applicant applied for a CPP disability pension a third time on June 10, 2013, when she was 68 years old (Document GD7, pages 21 to 24). She was already in receipt of a CPP retirement pension. The Applicant seeks leave to appeal in respect of this third application for a CPP disability pension.

[5] In the Questionnaire accompanying this third application for a disability pension, the Applicant disclosed that she had cancer in April 2008 and since then, has been unable to work as a bookkeeper and has managed to be hired only once. She also disclosed that she last worked as a professional warehouse demonstrator from May 2012 to January 2013. She indicated that she stopped working because of sickness. She also indicated that she could no longer work as of April 2008, when she was almost 63 years of age. She listed numerous difficulties and functional limitations in the Questionnaire (Document GD7, pages 97 to 103).

[6] The Applicant's earnings history current to 2013 indicates that she had earnings and contributions to the Canada Pension Plan between the years 1967 to 2012, other than for the years: 1971, 1973 to 1976, 1984, 1991 to 1998, 2003, 2005 and 2006. Although the General Division did not consider it, I calculate the minimum qualifying period when the Applicant had to have been found disabled was on or before December 31, 2005.

[7] The Respondent denied this third application for a disability pension initially on June 19, 2013. The Respondent explained that the Applicant did not meet the requirements under the *Canada Pension Plan*, as she had already attained age 65 well before the deemed date of disability of March 2012, as calculated under the *Canada Pension Plan* (Document GD7, page 14).

[8] In a letter dated June 24, 2013 to the Respondent, the Applicant advised that she was actually disabled in April 2008, when she was 63 years of age. She advised that, at that time, she underwent surgery and then followed that up with aggressive therapy (Document GD7, page 13).

[9] In a letter dated April 18, 2014, the Applicant advised that she had been in receipt of a CPP disability pension after an accident in October 1989. The Applicant questioned why the Respondent, which would have had access to her file, had not brought the fact that she had

received a CPP disability pension previously to her attention when she applied for a CPP retirement pension (Document GD7, page 8).

[10] In a reconsideration decision dated May 2, 2014, the Respondent denied the Applicant's application for a disability pension, again noting that she had reached age 65 when she applied for the CPP disability pension on June 10, 2013 (Document GD7, page 6).

[11] The Applicant attempted to appeal the reconsideration decision with the Respondent on May 13, 2014, but was advised in a letter dated June 23, 2014 from the Respondent that the appeal should properly be filed with the General Division of the Social Security Tribunal (Document GD7, page 4).

[12] The Applicant appealed the reconsideration decision to the General Division on July 7, 2014 (the "Notice of Appeal"). She advised that she has had a disability since October 10, 1989 when she was involved in an accident, but since then, has had to deal with "very traumatic life changing events", including being diagnosed with advanced bilateral breast cancer in April 2008 (Document GD1).

[13] The Applicant advised in her Notice of Appeal when she received the reconsideration decision, but the date is somewhat illegible. Given that she had attempted to file an appeal with the Respondent on May 13, 2014, she would have received the reconsideration decision sometime between May 2 and May 13, 2014.

[14] By letter dated July 11, 2014, the Social Security Tribunal wrote to the Applicant advising that her Notice of Appeal was incomplete. The Social Security Tribunal wrote:

> In order for the appeal to be filed, the Tribunal must receive **in writing** the following information **without delay:**
>
> - **A copy of the reconsideration decision being appealed (Note: it may be that you did not request a reconsideration decision from Service Canada, which must be done before appealing to the Tribunal.**
>
> **Timeframe to File your Notice of Appeal**
>
> A complete Notice of Appeal must be received within 90 days of the date that the reconsideration decision from the Department of Employment and Social Development Canada was communicated to the Appellant.

If Notice of Appeal is filed beyond Timeframe

If you wish to proceed and do not provide the requested information within the timeframe specified above, you will be required to request, **without delay**, an extension of time to file the complete Notice of Appeal. You can request an extension of time by providing a written explanation or by completing Section 2B of the Notice of Appeal form, addressing **all** of the following:

(a) Whether there was a continued intention to pursue the appeal;
(b) Whether the matter discloses an arguable case;
(c) Whether there was a reasonable explanation for the delay; and
(d) Whether there would be prejudice to the other parties in extending the deadline.

[15] The Applicant filed a letter with the Social Security Tribunal on July 14, 2014, enclosing a completed Disability Tax Credit Certificate; letter dated August 14, 2008 from the BC Cancer Agency; her 1992 income tax return and a Langley Memorial Hospital Emergency Room record. The Applicant amended the Notice of Appeal to include more concise reasons for the appeal. She advised that she had been unable to apply for a CPP disability pension when she was between the ages of 60 and 65, as she was unaware of the availability of the benefit and because of critical life events (Document GD2).

[16] On August 11, 2014, the Social Security Tribunal sent a follow-up letter to the Applicant, reminding her that the Notice of Appeal was incomplete and that she was required to provide a copy of the reconsideration decision and the date the reconsideration decision had been communicated to her.

[17] On August 15, 2014, the Applicant filed a copy of the reconsideration decision of the Respondent with the Social Security Tribunal (Document GD1A).

[18] On August 18, 2014, the Applicant filed another letter with the Social Security Tribunal. She sought to clarify some information. She advised that when she was involved in an accident in October 1989 and was left with permanent disabilities, someone had recommended she apply for CPP disability. She understood it was a temporary support program only and thought that as it would reduce her CPP retirement pension, she should stop receiving it as soon as possible. She subsequently secured employment with an employer who provided workplace accommodations (Document GD3).

[19] On October 10, 2014, the Applicant filed another letter dated July 13, 2014. She again advised that no one had advised that she could apply for a CPP disability pension (Document GD4).

[20] On November 14, 2014, the Social Security Tribunal wrote to the Applicant advising her that as her Notice of Appeal appeared to be late, she could request an extension of time for filing by providing a written explanation or by completing Section 2B of the Notice of Appeal form, addressing whether she held a continued intention to pursue the appeal, whether the matter discloses an arguable case, whether there was a reasonable explanation for the delay, and whether there would be any prejudice to the other parties in extending the deadline for filing the notice of appeal.

[21] On November 28, 2014, the Applicant filed another letter. She addressed the questions set out in the letter dated November 14, 2014 from the Social Security Tribunal (Document GD5).

[22] On December 15, 2014, the Applicant filed another letter with the Social Security Tribunal. She reiterated that had she been aware of the CPP disability pension, she would have applied for it at the same time when she applied for the CPP retirement pension. She advised that following her accident in 1989, she had been in receipt of a CPP disability pension, but as she understood that it would decrease the amount of any CPP retirement pension, she secured sedentary employment as soon as she could. The CPP disability pension was discontinued once she resumed working (Document GD6).

[23] On April 21, 2015, the General Division rendered its decision. It made the following findings:

- That allowing for a reasonable period of time for mailing, that the Applicant received the reconsideration decision on May 12, 2014.
- The Applicant did not perfect the Notice of Appeal until November 28, 2014, when she explained why the appeal was filed late.

[24] Ultimately, the General Division did not extend the time for filing the Notice of Appeal, as it found that the Applicant did not have an arguable case. The Applicant was 68 years of age when she applied for a CPP disability benefit on June 10, 2013 and the General Division determined that a disability pension is only available to an applicant up to age 65.

[25] If I accept that the Notice of Appeal was perfected on November 28, 2014, this would mean that the appeal was filed close to 120 days late.

[26] On May 11, 2015, the Applicant immediately filed an application requesting leave to appeal the decision of the General Division.

[27] The Respondent did not file any written submissions.

SUBMISSIONS

[28] The Applicant appeals the decision of the General Division, on the grounds that it is part of an unfair CPP disability process.

[29] The Applicant submits that the Government of Canada ought to have notified her of the availability of a disability pension when she applied for a CPP retirement pension and that it ought not to place the burden on individuals to learn of the availability of such benefits. The Applicant points out that, in her case, Social Services had classified her as a Person with Disabilities. She also points out that one of the tax forms for Canada Revenue Agency has a designation for disability, which led her to receiving information about the disability tax credit.

[30] The Applicant submits that when she learned of the existence of CPP disability pensions in May 2011, she was still ill from cancer treatments and the side-effects from those treatments. She was also grappling with depression.

[31] Essentially, the Applicant submits that the retirement pension which she has been receiving since 2006 ought to be cancelled in favour of a disability pension, payable from April 2008, when she claims she could no longer work, to May 2010, when she turned 65 years of age.

ANALYSIS

[32] 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). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[33] 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.

[34] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

[35] The Applicant has not raised any grounds which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. While she alleges that the disability process is unfair, she does not allege that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, nor does she allege that the General Division erred in law or 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. There should be at least one reviewable error made by the General Division that gives the appeal a reasonable chance of success.

[36] While the Applicant has not raised appropriate grounds of appeal, subsection 58(1) of the DESDA nonetheless enables the Appeal Division to determine if there is an error of law, whether or not the error appears on the face of the record.

[37] Subsection 52(1) of the DESDA requires an appeal of a decision to be brought to the General Division in the prescribed form and manner and within 90 days after the day on which the decision is communicated to the appellant. In this case, 90 days fell on August 10, 2014. The General Division found that the Applicant did not perfect the Notice of Appeal until November 28, 2014, when she provided reasons explaining her late appeal.

[38] Subsection 24(1) of the *Regulations* prescribes the manner in which an appeal is to be brought. An appeal must be in the form set out by the Social Security Tribunal on its website and contain the information listed in the subsection. The subsection does not stipulate that an applicant is to provide reasons why the General Division should allow further time for the bringing of the appeal.

[39] Although the Applicant did not raise it, her Notice of Appeal appears to have been perfected on August 15, 2014, days after she had received a reminder letter from the Social Security Tribunal that the reconsideration decision remained outstanding. The Applicant filed a copy of the reconsideration decision on August 15, 2014. While the Notice of Appeal may have been perfected considerably earlier than that determined by the General Division, it was nonetheless filed late – by five (5) days.

[40] This would have necessarily triggered the General Division to consider the Applicant's request to extend the time for filing under subsection 52(2) of the DESDA. Subsection 52(2) provides that the General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the party. The decision whether to extend the time involves a discretionary one.

[41] The Federal Court of Appeal has recently confirmed that to set aside a discretionary order, an appellant must prove that the decision-maker committed a palpable and overriding error: *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Décor Grates*

Incorporated, 2015 FCA 100; *Horseman v. Twinn, Electoral Officer for Horse Lake First Nation*, 2015 FCA 122; and *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139.

[42] In *Budlakoti*, the Federal Court of Appeal referred to *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 (CanLII), 431 N.R. 286, where Stratas J.A. defined palpable and overriding error as one exacting a high standard:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[43] The General Division did not come to its decision arbitrarily or capriciously. It considered and weighed the following criteria:

> (i) whether there was a continuing intention to pursue the appeal;
>
> (ii) whether the matter discloses an arguable case;
>
> (iii) whether there was a reasonable explanation for the delay; and
>
> (iv) whether there would be any prejudice to the other parties in extending the deadline for filing the notice of appeal.

[44] Of these, the General Division found that three of the four factors favoured an extension of time to file the Notice of Appeal. The General Division found that one factor – whether the matter discloses an arguable case – weighed heavily against allowing an extension of time to file the Notice of Appeal. In considering this factor, the General Division wrote:

> [12] The Tribunal notes that the Appellant applied for a CPP disability benefit on June 10, 2013. At that time she was 68 years of age. A disability benefit is only available to an applicant up to age 65.
>
> [13] Paragraph 44(1)(b) states that "a disability pension shall be paid to a contributor who has not reached sixty-five years of age." The language of this paragraph is not permissive. It sets out unambiguously that in order to qualify for a disability benefit the contributor must be less than 65 years of

> age. As the Appellant was 68 years of age when she applied for the benefit. The appeal is bound to fail. (*sic)*

[45] The General Division regarded the Applicant's age at the time of her application for CPP disability benefits as an absolute bar to entitlement to CPP disability benefits, without considering whether there might be exceptions to the general rule.

[46] Subsections 60(8) to 60(11) of the *Canada Pension Plan* contain the incapacity provisions. They provide that if an applicant had been incapable of forming or expressing an intention to make an application on his or her own behalf on the day on which the application was actually made, the application can be deemed to have been made in the month preceding the first month in which the relevant benefit could have been commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[47] Subsection 60(10) requires the period of incapacity to be a continuous period except as otherwise prescribed. Notably, subsection 60(11) provides that subsections 60(8) to (10) apply only to individuals who were incapacitated on or after January 1, 1991.

[48] In other words, if the Applicant was continuously incapacitated – i.e. incapable of forming or expressing an intention to make an application for benefits – from the date when she might have become incapacitated sometime after January 1, 1991 up to the date when she made her third application for a CPP disability pension, she might yet qualify for a CPP disability pension, provided that she meets all other requirements under the *Canada Pension Plan.*

[49] While ultimately there may not have been sufficient or any evidence to support a finding of incapacity, there is an arguable case as to whether the General Division committed a palpable and overriding error, if it failed to consider the incapacity provisions.

APPEAL

[50] The parties may wish to address the following on appeal: based on the sole ground upon which leave has been granted, did the General Division commit an error of law? What is the applicable standard of review and what are the appropriate remedies, if any?

[51] I invite the parties to also address the issue as to how the evidence supports a finding of incapacity sometime after January 1, 1991 up to the date when the Applicant applied for a CPP disability pension in June 2013, given that the Applicant submits that she was able to work up to April 2008, had applied for a retirement pension in or about 2006 and had also previously applied for a CPP disability pension in April 2011. How does the fact that the Applicant made these two applications in or about 2006 and in April 2011 show that she was incapable of forming or expressing an intention to make an application for CPP disability benefits?

[52] Although the General Division did not address the issue, I invite the parties to also address the issue of the Applicant's minimum qualifying period, when she is required to have been found disabled. If I have properly calculated the minimum qualifying period as December 31, 2005, how does the Applicant reconcile this with the fact that in her Questionnaire and even as recently as June 2013, she submits that she was able to work until April 2008, when she became sick? (I am aware that the Applicant also submits that she has been disabled since her accident in October 1989, but I reject this submission outright, as the Applicant had consistent earnings and contributions to the Canada Pension Plan from 1999 to 2004, other than for 2003.)

[53] Finally, I invite the parties to provide written submissions in respect of the form of hearing, and explain why the appeal should proceed by other than on the written record, subject to any additional submissions which the parties may wish to make, including any in response to this leave decision.

[54] I must stress that the appeal is not a *de novo* hearing. By that, I mean that I will not be taking evidence or hearing from witnesses, though the parties should be prepared to advise me as to when the Applicant filed an application for a CPP retirement pension and clarify when she actually began receiving a retirement pension. (The hearing file provides conflicting dates as to when she began receiving a retirement pension.)

CONCLUSION

[55] The Application is granted.

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

Janet Lew
Member, Appeal Division