Citation: *D. C. v. Minister of Employment and Social Development*, 2015 SSTAD 888

Appeal No. AD-15-278

BETWEEN:

D. C.

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: Hazelyn Ross

DATE OF DECISION: July 17, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] On January 26, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), issued a decision in which it denied the Applicant's appeal from a decision refusing him payment of a *Canada Pension Plan* (CPP), disability pension. The Applicant seeks leave to appeal this decision (the Application), on the basis that the General Division miscalculated the date of the minimum qualifying period (MQP); erred in law in making its decision; and based its decision on erroneous findings of fact.

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success. The issues that arise for determination are,

1) Did the General Division err in law by finding that the Applicant's MQP is December 31, 1997?
2) Did the General Division base its decision on erroneous findings of fact that the Applicant 1) retained work capacity; and 2) was improving substantially without treatment?

THE LAW

[4] The applicable legislative provisions are found at sections 56 to 59 of the *Department of Employment and Social Development Act* (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "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." The Grounds of Appeal, which are the only grounds of appeal, are set out in section 58 of the DESD Act.[1]

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[1] **58(1) Grounds of Appeal** –

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.

SUBMISSIONS

[5] The Applicant submits that the following are the errors made by the General Division:

a) Error of law in making its decision, by finding that the Applicant's Minimum Qualifying Period (MQP) is December 31, 1997 and not January 31, 2004;

b) Error of law in making its decision, by failing to find that the Applicant had both a severe and prolonged disability in accordance with the *Canada Pension Plan*;

c) based its decision on an erroneous finding of fact that the Applicant had work capacity without regard to the totality of the material before it;

d) based its decision on an erroneous finding of fact that the Applicant was improving substantially with treatment, without regard to the totality of the material before it; and

e) such other grounds as may appear.

ANALYSIS

[6] Applications for leave to appeal are the first stage of the appeal process. The threshold is lower than that which must be met on the hearing of the appeal on the merits. However, in order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). An "arguable case" has been likened to "a reasonable chance of success." *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. With this in mind, the Tribunal must first determine if the reasons for the Application relate to a ground of appeal that would have a reasonable chance of success.

Did the General Division err in law with respect to the Applicant's MQP?

[7] At the hearing, the MQP date emerged as an issue. It continues to be so in the Application. The Applicant contended that the correct MQP is January 31, 2004. On his behalf, his Counsel submitted that previously the Respondent had accepted January 31, 2004 as the MQP and, therefore, was bound by this date. Counsel for the Applicant contended that the Respondent had not established that the Applicant's 2004 income or any part of it was income from self-employment, and he made the further contention that, any income from self-

employment was susceptible of pro-rating under the provisions of the CPP; thus making 2004 a valid contribution year for the Applicant. Accordingly, it was an error on the part of the General Division to find that the MQP was December 31, 1997.

[8] The Respondent states that December 31, 1997 is the correct MQP date. Counsel for the Respondent contends that $200.00 of the $426.00 that the Applicant reported as his earnings in January 2004 was income from self-employment. The Respondent submitted that when the formula set out by CPP subsection 13(1) is applied to the Applicant's January 2004 earnings, his CPP contributions were less than the prorated year's basic exemption for 2004. Accordingly, 2004 was not a valid contribution year for the Applicant.

[9] Each party relies on the legislative provisions in CPP subsection 13(1) as well as case law to support their view. The Applicant relies on *Fletcher v. R.* 2007 TCC 414 and *Reid v. R.* 2008 TCC 421, while the Respondent relies on *Minister of Social Development v. Sauvé*, June 14, 2007, CP 23192, (PAB).

The Case Law

Fletcher v. R

[10] In *Fletcher*, a decision of the Tax Court of Canada, the Appellant disputed the types of and quantum of the assessments for CPP contribution on his self-employed earnings. Pro-rationing was not the issue and the Tax Court did not address it in the judgment. The Tribunal distinguishes Fletcher on this basis and finds that it does not assist the Applicant.

Reid v. R

[11] The issue of prorated CPP contributions was squarely raised in *Reid* in the context of an application for a CPP pension. The Tax Court was called upon to adjudicate the question of how CPP contributions are assessed on income from self-employment for the year in which the contributor reaches pensionable age. After setting out the general approach of the CPP to income that is derived after a person begins to receive a CPP retirement pension, Boyle, J, noted that income from self-employment is treated differently. He stated that, per CPP subsection 13(1) income from self-employment is subject to pro-ration over a 12 month period. In Reid's case,

Boyle, J, found that Reid's income from self-employment was subject to CPP contributions, on a pro-rated basis, despite the fact that the income was earned after Reid began to receive his retirement pension.

[12] *Reid*, therefore, assists the Applicant only in so far as it addresses the question of whether the Applicant was required to make CPP contributions on that portion of his 2004 income that was income from self-employment. However, the real issue is not whether the Applicant was required to make CPP contributions on his 2004 income from self- employment; rather it is whether or not, this income, when prorated for his CPP contributions, brought him above the prorated basic exemption for 2004, thereby making 2004 a valid contribution year. According to the materials submitted by the Respondent, in 2004, the Year's Basic Exemption was $3,500, with a pro-ration factor for the Applicant of $291.66. Therefore, 2004 was not a valid contribution year for the Applicant.

Minister of Social Development v. Sauvé

[13] Counsel for the Respondent relies on the case of *Minister of Social Development v. Sauvé*, June 14, 2007, CP 23192, (PAB) for his position. In *Sauvé*, which the Tribunal finds to be on all fours with the instant case, the PAB addressed the same question arising in the Applicant's case. The facts in *Sauvé* are strikingly similar to those of the instant case. As with the Applicant, Sauvé disputed the MQP date, taking the position that it was much later than the date proposed by the Minister.

[14] Hurley, J., writing for a unanimous Pension Appeals Board, found that pro-ration did not assist Mr. Sauvé as his pro-rated earnings were less than the pro-rated basic exemption for the same period. Hurley, J's conclusion is stated in the following paragraph,

> [8] Basic exemptions, unadjusted pensionable earnings, contributions to the *Plan*, self-employed earnings and a year's basic exemption may be prorated, provided, in the case of self-employed earnings that the earnings are above the prorated year's basic exemption for the same portion of the year: see Section 13 and Paragraph 19(1)(b). In 2002 Mr. Sauvé's self-employed earnings were $2,220, the year's basic exemption $3,900. If (taking the Minister's example), Mr. Sauvé's disability began in June 2002, his prorated self-employment earnings for the first half of the year were $1,100, which is less than the prorated basic exemption for the same period, $1,950. Accordingly, proration does not assist Mr. Sauvé in meeting the contributory requirements.

[15] Similarly, the Tribunal finds that pro-ration does not assist the Applicant.

[16] Counsel for the Applicant has submitted that the Respondent has not established that any part of the Applicant's 2004 income was income from self-employment. On the basis of the documents on file, the Tribunal finds that, on a balance of probabilities, the Applicant earned some $200.00 from self-employment. The Tribunal record refers to a T-1 as well as reproduces a receipt indicating the payment. As well, there is the Applicant's testimony to this effect.

Is the Applicant entitled to rely on the earlier statement that his MQP was January 2004?

[17] Counsel for the Applicant put forward this submission. While seemingly a sympathetic argument, the Tribunal cannot agree with it. As stated in *Fletcher,* the Applicant's reliance of erroneous information from CPP authorities does not relieve the Tribunal of the responsibility to make decisions that are in accordance with the provisions of the CPP. The Tribunal relies on the following paragraphs in the judgment of O'Connor, J.:

> [8] Regrettably, the Appellant can not (*sic*) succeed in his appeal simply because he relied on false information from CPP representatives. The calculations must be made in accordance with the CPP and not on the basis of the false information given by those representatives.
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> [9] In *Boynton v. R.* [2001] 3 C.T.C. 2320, Hamlyn, T.C.J. stated:
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> > 11. The statements by the CCRA official relied upon by the Appellant to his detriment does not constitute a bar to the reassessment. The law is clear that if an employee of Revenue Canada imparts erroneous information to a taxpayer who acts on it to his or her detriment, that of itself does not bar the Minister from assessing the taxpayer's liability to tax, interest and penalties in accordance with the applicable statutory provisions.
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> [10] This dicta referred to erroneous information by a Canada Revenue Agency official, but the same applies to erroneous information by a CPP official.

[18] In light of the above, the Tribunal finds that the General Division did not err in finding that the Applicant's MQP is December 31, 1997. Accordingly, the Tribunal is not satisfied that the appeal would have a reasonable chance of success on this ground.

Did the General Division base its decision on erroneous findings of fact?

[19] Counsel for the Applicant submitted that the General Division based its decision on two erroneous findings of fact, namely that the Applicant retained work capacity; and was improving substantially without treatment. In light of the Tribunal's finding that the General Division did not err in regards to the date of the MQP, these issues are essentially rendered moot by the facts of the Applicant's case. The pertinent facts are that the Applicant continued to work after the MQP. It is not disputed that he had valid earnings in 2001, 2002, 2003. Indeed, this is the reason that the MQP was so vigorously contested, as a finding that his MQP was in 2004 would have brought the Applicant within the "4 of 6 years of valid contribution" requirement. Accordingly, the Tribunal finds no error on the part of the General Division in regard to its finding that the Applicant had retained work capacity.

[20] Having come to this conclusion, the Tribunal finds that it need not address the question of whether the General Division erred by finding that the Applicant was improving without treatment.

CONCLUSION

[21] Counsel for the Applicant submitted that the Application should be granted because the General Division erred in law by finding that the Applicant's MQP is December 31, 1997 and not January 2004. Counsel also submitted that the General based its decision on erroneous findings of fact that the Applicant had retained work capacity; and was improving substantially without treatment. On the basis of the above analysis, the Tribunal finds that an arguable case has not been raised. The Tribunal is not satisfied that the appeal has a reasonable chance of success. Accordingly, the Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division