

Citation: *K. V. v. Minister of Employment and Social Development*, 2015 SSTAD 1039

Date: August 31, 2015

File number: AD-15-411

APPEAL DIVISION

Between:

K. V.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on August 31, 2015

DECISION

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

INTRODUCTION

[2] The Applicant applied for and was found to be eligible for a *Canada Pension Plan* (CPP), disability pension in 1988. He received this pension until 1997, when payment was terminated because he had become employed. This employment was, however, short lived. Subsequently, the Applicant made a number of unsuccessful applications for a CPP disability pension.

[3] In a decision dated April 20, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), determined that the Applicant was entitled to a CPP disability pension. The General Division Member determined that the payments would commence as of March 2010. The Applicant disputes the start date of the disability pension. On his behalf, Counsel for the Applicant submits that the payments should properly commence as of March 1997, in other words, he seeks to increase the period of retroactivity.

GROUNDS OF THE APPLICATION

[4] Counsel for the Applicant submitted that under the Automatic Reinstatement provisions of the CPP, the Applicant is entitled to a greater period of retroactivity, in short, that the General Division made an error of law. Counsel for the Applicant also argues that the Functional Capacity Evaluation of March 20, 1997 did not examine the Applicant's psychological state. The clear inference being that the Tribunal should not rely on this evaluation to determine when the Applicant became disabled.

THE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.¹ To grant leave the Appeal Division must be satisfied

¹ Sections 56 to 59 of the *Department of Employment and Social Development (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."

that the appeal would have a reasonable chance of success. The Federal Court of Appeal has equated a reasonable chance of success to an arguable case: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. The Grounds of Appeal are set out in section 58 of the *Department of Employment and Social Development (DESD) Act*.² These are the only grounds on which an Applicant may appeal a decision of the General Division.

[6] CPP sections 42(2)(b) and 70.1 as well as *CPP Regulations*³ section 71 also apply. CPP paragraph 42(2)(b) provides the time period for when a person is deemed to have become or to have ceased to be disabled; while section 70.1 and *Regulation 71* address reinstating a disability pension.

THE ISSUE

[7] The Tribunal must decide whether the appeal would have a reasonable chance of success.

ANALYSIS

Is the Applicant entitled to automatic reinstatement of his CPP disability pension?

[8] The Applicant submitted that he was entitled to have his CPP disability pension automatically reinstated because he became disabled shortly after he attempted to return to the workforce in 1997. Under CPP section 70.1 a person whose disability payments were stopped because he or she returned to the workforce could apply to have the pension reinstated if they became disabled within two years of the time payment of their pension stopped.

70.1 Reinstatement of disability pension – (1) Subject to this section, a person who has ceased to receive a disability pension because they have returned to work is entitled to have that disability pension reinstated if, within two years after the month in which they ceased to receive the

² **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.

³ *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236.*

disability pension, they become incapable again of working. (S.C. 2004, c. 22, s.20)

(2) *Request for Reinstatement* – a request by a person for reinstatement of a disability pension shall be made to the Minister in accordance with the regulations... (namely, section 71)

[9] Section 71 of the *CPP Regulations* provide that the request must (a) be a written request; (b) be made within twelve months after the month in which the applicant became

71. (1) A request for reinstatement of a disability pension under section 70.1 of the Act shall be made in writing at any office of the Department of Human Resources Development or the Department of Employment and Social Development. (SOR/2005-38, s.1)

(2) The request shall be made within 12 months after the month in which the person became incapable again of working.

[10] Counsel for the Applicant argued that the Automatic Reinstatement provisions became law in 1995, thus the Applicant was entitled to be reinstated in 1997. Unfortunately, Counsel for the Applicant is not correct in his argument. Section 70.1 came into force on January 31, 2005, and is not expressed to be of retroactive application. Thus, the Applicant was not entitled to automatic reinstatement in 1997.

Did the General Division err by holding that payment of the Applicant's disability benefits should commence as of March 2010?

[11] The Tribunal finds that the General Division did not err. CPP para. 42(2)(b) states that the date of deemed disability commences no sooner than 15 months prior to the date of the application for CPP disability benefits. In the instant case, the relevant application was made on February 8, 2011. This was the Applicant's fifth application for a disability pension after his original CPP disability pension was stopped in 1997. The former four had all resulted in refusals that the Applicant had either not appealed or had appealed unsuccessfully.

[12] I can find no authority that would allow me to find that the Applicant should be awarded a greater period of retroactivity. Indeed the case law is clear on the issue, for example in *Galay v. Canada (Minister of Social Development)* (June 3, 2004) CP 21768 (PAB) the Pension Appeals Board held that the words "before the time of making the application" in CPP s. 42(2)(b) refers to the time that the application was received by the Minister. And, in *Sarrazin v.*

Canada (Minister of Human Resources Development) (June 27, 1997), CP 5300, the PAB expanded on its analysis of the retroactivity of CPP section 42(2)(b). The PAB stated that “Section 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.”

[13] Further, in *Baines v. (Minister of Human Resources Development)*, 2011 FCA 158 (leave to appeal to the Supreme Court of Canada refused), the Federal Court of Appeal made it clear that, “where the claimants 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.”

[14] Further reliance is placed on the PAB decision in *Meseyton v. Canada (Minister of Social Development)* (June 4, 2004) CP 21108 (PAB), which decision squarely addressed the question of whether or not retroactivity could apply to a prior unsuccessful application that was not appealed. In *Meseyton*, the PAB concluded that “the fact that the claimant had previously made an unsuccessful application for benefits, failed to appeal the Minister’s refusal, did not entitle the claimant to an extension of the 15-month period of retroactivity on his subsequent successful application.” Similarly, the Applicant is not entitled to have his disability payments extended to the time when they were first stopped; a decision that he did not appeal. (GT1-543)

[15] The above decisions remain good law and guide the process of the successor SST Tribunal and the decisions of its Appeal Division. Here, the successful application was the application of February 2011. Thus, the fifteen month period of retroactivity commenced as of November 2009. As payment of a CPP disability benefit commences four months later, the General Division correctly found that payment of the Applicant’s CPP disability pension would commence as of March 2010. Accordingly, the Tribunal finds that the Applicant has not met his onus to satisfy the Tribunal that his appeal would have a reasonable chance of success.

CONCLUSION

[16] In light of the foregoing leave to appeal to the Appeal Division is refused.

OTHER

[17] The General Division decision contained a number of mistakes regarding dates. At paragraph seven the minimum qualifying period (MQP) date is stated as December 31, 2012; at paragraph thirty- seven it is given as December 31, 2002. In the context of the decision, the Tribunal finds that the MQP is December 31, 2002. As well, the date the Applicant suffered the workplace injury is given as September 2007 in several places in the decision. The Applicant suffered the injury in September 1987. Notwithstanding these mistakes, the Tribunal finds that the validity of the decision is not affected. The underlying legal premises were not affected and further paragraphs in the decision indicated what dates were actually intended.

Hazelyn Ross
Member, Appeal Division