Citation: *R. G. v. Minister of Employment and Social Development*, 2015 SSTAD 1191

Appeal No. AD-15-907

BETWEEN:

R. G.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Summary Dismissal

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 2, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated June 4, 2015 of the General Division, whereby it summarily dismissed his application for a Canada Pension Plan disability pension, on the basis that he was already in receipt of a Canada Pension Plan retirement pension and that it was too late for him to cancel his retirement pension. The General Division summarily dismissed his appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on August 12, 2015 (the "Notice of Appeal"). No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

2. Did the General Division err in choosing to summarily dismiss the Appellant's appeal?

3. Did the General Division err in determining that the Appellant was unable to cancel his Canada Pension Plan retirement pension in favour of a Canada Pension Plan disability pension?

FACTUAL OVERVIEW

[4] The Appellant applied for a Canada Pension Plan disability pension on February 28, 2013. He enclosed various medical records dating back to April 2012, in support of his

application for a disability pension. One of the reports indicates that the Appellant had a non-ischemic cardiomyopathy which led to insertion of a defibrillator system in 2007, which was subsequently upgraded in 2010. He has been diagnosed with recurrent congestive heart failure and ventricular tachycardia. The Appellant listed numerous functional limitations and restrictions in the Questionnaire accompanying his application for a Canada Pension Plan disability pension.

[5] The Respondent denied the application initially and upon reconsideration. In its reconsideration letter dated June 13, 2013, the Respondent wrote that "a person cannot apply for a Canada Pension Plan disability benefit 15 months or more after receiving a Canada Pension Plan retirement pension". The Respondent advised the Appellant that as he had applied for a Canada Pension Plan disability pension more than 15 months after he began receiving a retirement pension, it could not change the retirement pension to a disability pension. The Respondent noted that the Appellant had been receiving a retirement pension since April 2010 and that he had applied for a disability pension more than 15 months after that date. The Appellant appealed the reconsideration decision to the Social Security Tribunal on July 10, 2013, on the basis that he is legitimately disabled. He did not address the fact that he has been in receipt of a Canada Pension Plan retirement pension.

[6] On May 12, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> **Applicable CPP Provisions**
>
> Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must not be in receipt of a CPP retirement pension.
>
> For the purposes of the CPP a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP).
>
> The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any

time, for a disability pension. There is an exception to this provision and it is found in section 66.1 of the CPP.

Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

Application of CPP Provisions

The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

The Appellant began to receive a CPP retirement pension in April 2010, and he did not apply within six months to have this pension cancelled. He applied for CPP disability in February 23, 2013, which was more than 15 months after he started to receive the retirement pension.

The Tribunal has considered the Appellant's position that he has a "legitimate case of disability to work" because of a serious heart issue, and that he was told by his doctors to stop working in 2007 (see Notice of Appeal).

The Tribunal, however, is bound by the CPP provisions. It is not empowered to exercise any form of equitable power in respect of the appeals coming before it. It is a statutory decision-maker and is required to interpret and apply the provisions as they are set out in the CPP: *MSD v Kendall* (June 7, 2004), CP 21690 (PAB).

[7] The General Division invited the Appellant to provide detailed written submissions by no later than June 15, 2015, explaining why his appeal had a reasonable chance of success.

[8] On May 17, 2015, the Applicant filed a Hearing Information form and Authorization to Disclose. In his accompanying letter, he listed some of his physicians, and invited the Social Security Tribunal to contact them to verify his medical status (Document GD5).

[9] On May 26, 2015, the Appellant filed submissions, explaining that he would not have applied for a Canada Pension Plan retirement pension, if he could have predicted that his health would have deteriorated to the extent it has. He advised that he had been first diagnosed with heart failure in 2007, and had been encouraged to go on disability, but he did not as he managed to improve. His health has however deteriorated since then, and it has impacted his daily life and ability to work. He has progressive heart failure and other heart complications. He notes that his entire medical team supports his claim for a disability pension (Document GD6).

[10] On June 4, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

a) Subsection 53(1) of the *Department of Employment and Social Development Act*, which states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success;

b) Section 22 of the *Social Security Tribunal Regulations*, which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions;

c) Paragraph 44(1)(b) of the *Canada Pension Plan*, which sets out the eligibility requirements for a Canada Pension Plan disability pension. The section stipulates that an applicant must not be in receipt of a Canada Pension Plan retirement pension.

d) Paragraph 42(2)(b) of the *Canada Pension Plan*, which states that a person cannot be deemed disabled for more than fifteen months before the Respondent received the application for a disability pension;

e) Subsection 70(3) of the *Canada Pension Plan*, which states that once a person starts to receive a Canada Pension Plan retirement pension, that person cannot apply or re-apply, at any time, for a disability pension;

f) Section 66.1 of the *Canada Pension Plan* and section 46.2 of the *Canada Pension Plan Regulations*, which sets out an exception to subsection 70(3) of the *Canada Pension Plan*, as they allow a beneficiary to cancel a benefit after it has started, if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started; and

g) subsection 66.1(1.1) of the *Canada Pension Plan*, which states that if a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a

> disability benefit is if the person is deemed to be disabled before the month the retirement pension first became payable.

[11] The General Division found the Appellant to be ineligible for a Canada pension Plan disability pension, as he began to receive a Canada Pension Plan retirement pension in April 2010 and had not applied within six months to have this pension cancelled. The General Division found that the Appellant had applied for a Canada Pension Plan disability pension in February 2013, which was more than 15 months after he began receiving the retirement pension. The General Division also found that as the Appellant had applied for the Canada Pension Plan disability in February 2013, the earliest date that he could be deemed disabled was November 2011, which was after his retirement pension had started.

[12] On August 12, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

[13] On September 24, 2015, counsel for the Respondent filed submissions.

SUBMISSIONS

[14] In the Notice of Appeal filed on August 12, 2015, the Appellant submitted that his financial advisor had recommended that he apply for a Canada Pension Plan retirement pension, without informing him that this could disentitle him to a Canada Pension Plan disability pension. The Appellant submitted further that he is in desperate need of a disability pension as he is unable to work and support his family. He confirmed that he has provided supporting medical opinions from his physicians and specialists. He advised that he is currently awaiting a heart transplant. He requested that the appeal be considered on humanitarian and compassionate grounds. The Appellant enclosed a copy of his consent to treatment and recent admittance to Toronto General Hospital.

[15] In submissions filed on September 24, 2015, counsel for the Respondent submitted that the General Division correctly stated and applied the test as to when it must summarily dismiss an appeal under section 53 of the DESDA. Counsel for the Respondent further submitted that the General Division also correctly stated the law with respect to the cancellation of a retirement pension in favour of a disability pension under the *Canada*

Pension Plan. Counsel further submitted that given the uncontested facts and the applicable law, there was only one possible conclusion and the appeal therefore was "bereft of any chance of success" and was properly summarily dismissed.

ISSUE 1: STANDARD OF REVIEW

[16] The Appellant did not address the issue of the standard of review.

[17] Counsel for the Respondent provided submissions on this issue. Counsel submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. Counsel submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard.

[18] Counsel for the Respondent submits that the main issue in this appeal, whether the appeal has a reasonable chance of success, involves a question of mixed fact and law. Counsel submits that the Appeal Division should review the General Division's decision on a reasonableness standard, but however, it should show no deference to the General Division's statement of the test for summary dismissal and to the General Division's statement of the law with respect to the cancellation of a retirement pension in favour of a disability pension.

[19] I largely concur with these submissions. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. And, when applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[20] The applicable standard of review will depend upon the nature of the alleged errors involved.

[21] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

(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.

[22] From what I can determine, the Appellant has not set out any grounds of appeal under subsection 58(1) of the DESDA. He does not dispute any of the factual or legal findings made by the General Division, nor does he allege that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction. If ultimately I should find that the General Division erred in law in making its decision, whether or not the error appears on the face of the record, a correctness standard would apply.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S APPEAL?

[23] Although the Appellant did not question the appropriateness of the summary dismissal procedure, I will address that issue before I assess the decision of the General Division.

[24] Counsel for the Respondent submits that the first task for the General Division was to identify the law with respect to summary dismissals under section 53 of the DESDA. Counsel submits that the General Division did not err in this regard, as it correctly stated that under section 53 of the DESDA, it must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Counsel submits that the decision of the General Division to summarily dismiss the appeal contains no reviewable error to permit the intervention of the Appeal Division and that it is reasonable.

[25] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require me to conduct my own analysis and substitute my own view as to the correct outcome: *Dunsmuir* and *Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[26] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 3 and 20 of its decision.

[27] It is insufficient to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law to the facts. If the correct law is applied, the decision to summarily dismiss must be reasonable. This requires an assessment on a reasonableness standard, as it involves a question of mixed fact and law.

[28] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. In *A.P. v. Minister of Employment and Social Development and P.P.*, (August 12, 2015), SSTAD-15-297 (currently unreported), I used the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. I determined that a weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it. Essentially, "no reasonable chance of success" has been interpreted to mean "no chance of success whatsoever".

[29] The General Division understood the distinction between an "utterly hopeless" and "weak case" and recognized when a matter should be appropriately summarily dismissed. The General Division found that there were very limited circumstances under the *Canada Pension Plan* and the *Regulations* thereto, whereby an Appellant could cancel his Canada

Pension Plan retirement pension in favour of a Canada Pension Plan disability pension. The General Division found that, given the factual circumstances before it, the Appellant did not fall within the exception to the general rule that once an applicant is in receipt of a Canada Pension Plan retirement pension, he cannot apply for and receive a Canada Pension Plan disability pension. The General Division also found that it was not empowered to exercise any form of equitable power in respect of any appeals before it, and that it was bound to interpret and apply the provisions of the *Canada Pension Plan.*

[30] The General Division considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA. The General Division was unable to find an adequate or factual foundation to support the appeal. As the General Division was satisfied that the appeal was without any merit, it rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

ISSUE 3: DID THE GENERAL DIVISION ERR IN DETERMINING THAT THE APPELLANT WAS UNABLE TO CANCEL HIS CANADA PENSION PLAN RETIREMENT PENSION?

[31] Setting aside the issue of the appropriateness of a summary disposition of this matter, there must be at least one valid ground of appeal under subsection 58(1) of the DESDA, to succeed on an appeal. Although the Appellant did not identify any grounds of appeal nor allege any errors on the part of the General Division, under subsection 58(1) of the DESDA, I can still find that the General Division might have erred in law, whether or not the error appears on the face of the record.

[32] Counsel for the Respondent submits that the General Division correctly stated the law with respect to the cancellation of a retirement pension in favour of a disability pension and that it made no reviewable errors in this regard. Counsel for the Respondent referred to the same sections cited by the General Division.

[33] Paragraph 42(2)(b) of the *Canada Pension Plan* reads:

> (2) *When person deemed disabled* - For the purposes of this Act,

(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person – including a contributor referred to in subparagraph 44(1)(b)(ii) – be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

[34] Paragraph 44(1)(b) of the *Canada Pension Plan* reads:

Benefits payable – (1) Subject to this Part,

. . .

(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, **to whom no retirement pension is payable**, who is disabled and who

(i) has made contributions for not less than the minimum qualifying period,

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, …

(My emphasis)

[35] Section 66.1 of the *Canada Pension Plan* allows a beneficiary to request cancellation of a benefit, provided that it is done in the prescribed manner and within the prescribed time interval after payment of that benefit has commenced, though subsection 66.1(1.1) provides an exception. An applicant cannot cancel a retirement pension in favour of a disability pension under the *Canada Pension Plan* where the applicant is deemed to have become disabled for the purposes of entitlement to a disability pension in or after the month for which the retirement pension first became payable. Subsection 46.2(1) of the *Canada Pension Plan Regulations* prescribes how and when a person may request cancellation of a benefit.

[36] Subsection 70(3) of the *Canada Pension Plan* reads in part that, "A person who commences a retirement pension under this Act or under a provincial pension plan is thereafter ineligible to apply or re-apply, at any time, for a disability pension under this Act,

except as provided in section 66.1 or in a substantially similar provision of a provincial pension plan, as the case may be".

[37] Counsel for the Respondent submits that when read together, the effect of paragraphs 42(2)(b) and 44(l)(b), subsections 66. l (1.1) and 70(3) of the *Canada Pension Plan,* and subsection 46.2(2) of the *Canada Pension Plan Regulations* is that a retirement pension cannot be cancelled in favour of a disability pension if the application for the disability pension is made more than 15 months after the commencement of the payment of the retirement pension. Counsel relied upon *Ramlochan v. Canada*, FC, T-148-13, October 22, 2013 (unreported) for the proposition that, in such cases, there is no arguable case. I agree with these submissions.

[38] The General Division referred to and applied each of these sections in determining eligibility for a Canada Pension Plan disability pension. The General Division properly out the law in its analysis and applied the law to the facts.

[39] The Appellant has been in receipt of a Canada Pension Plan retirement pension since April 2010.

[40] Had the Appellant wanted to cancel his Canada Pension Plan retirement pension, section 66.1 of the *Canada Pension Plan* requires that he have done so, in writing, within six months after payment of the Canada Pension Plan retirement pension had started. As the Appellant had not sought to cancel his Canada Pension Plan retirement pension within six months after payments had started, he could not avail himself of this provision.

[41] Had the Appellant wanted to cancel his Canada Pension Plan retirement pension in favour of a Canada Pension Plan disability pension, subsection 66.1(1.1) of the *Canada Pension Plan* requires that he be deemed to have become disabled by no later than the month before the Canada Pension Plan retirement pension became payable.

[42] The earliest that the Appellant could be deemed disabled under the *Canada Pension Plan* is November 2011, fifteen months before he made the application for a Canada Pension Plan disability pension in February 2013. This clearly was well after the month before the

Canada Pension Plan retirement pension became payable. The Appellant could not avail himself of subsection 66.1(1.1) of the *Canada Pension Plan* either.

[43] Given the application of the law to these particular facts, the General Division was correct to conclude that the Appellant was unable to cancel the Canada Pension Plan retirement pension in favour of a Canada Pension Plan disability pension.

[44] The decision of the General Division suggests that there are no other means whereby an appellant might be able to cancel his Canada Pension Plan retirement pension in favour of a disability pension. An appellant might be able to rely upon subsections 60(8) to 60(11) of the *Canada Pension Plan.* These subsections 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.

[45] In other words, if the Appellant was continuously incapacitated – i.e. incapable of forming or expressing an intention to make an application for benefits – from the date when he might have become incapacitated up to the date when he made his application for a Canada Pension Plan disability pension, he might have yet qualified for a Canada Pension Plan disability pension, provided that he met all other requirements under the *Canada Pension Plan.* In the Appellant's case, it would require a very tight timeframe, as he would have had to have been continuously incapacitated between October 2010 (six months after payment of the Canada Pension Plan retirement pension had started) and February 28, 2013, when he applied for a Canada Pension Plan disability pension.

[46] Had there been any allegation or any evidence, however remote, which hinted at the possibility that the Appellant might have been continuously incapacitated between October 2010 and February 28, 2013 for the purposes of the *Canada Pension Plan,* then it might have been a reviewable error of law for the General Division not to have conducted any analysis and not to have made findings on this issue.

[47] It is not altogether clear that the General Division considered the incapacity provisions under the *Canada Pension Plan* and how they might have affected the Appellant, but based on the evidence and submissions before it, the incapacity issue was, for all intents and purposes, irrelevant as there was no indication that the Appellant might have been continuously incapacitated between October 2010 and February 28, 2013.

[48] Finally, the General Division also properly recognized that it does not have any equitable jurisdiction to grant the relief sought by the Appellant. It was bound to follow the *Canada Pension Plan* and the *Regulations* thereto, in determining eligibility to a Canada Pension Plan disability pension. It is irrelevant whether the Appellant has deteriorated to the extent that he can longer work, since he began receiving a Canada Pension Plan retirement pension, as one cannot receive both pensions simultaneously and one can only cancel the Canada Pension Plan retirement pension in favour of the Canada Pension Plan disability pension under very limited circumstances.

[49] Even had the Appellant been able to cancel his Canada Pension Plan retirement pension in favour of the Canada Pension Plan disability, he would still have to be found disabled as defined by the legislation, by his minimum qualifying period. In this case, he would have had to have been found disabled by December 31, 2009 and while he certainly had medical issues by then, that does not necessarily mean that he would have qualified for a Canada Pension Plan disability pension.

CONCLUSION

[50] Given the considerations above, the Appeal is dismissed.

Janet Lew
Member, Appeal Division