

Citation: *Minister of Employment and Social Development v. H. T.*, 2015 SSTAD 1273

Date: October 28, 2015

File number: AD-15-893

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

H. T.

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Date of Decision: October 28, 2015

DECISION

[1] The Application for leave to appeal is granted and the appeal is allowed.

INTRODUCTION

[2] On May 11, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision finding that the Respondent had a severe and prolonged disability as described by s. 42 of the *Canada Pension Plan*, (CPP). Accordingly, she was entitled to a CPP disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION FOR LEAVE TO APPEAL

[3] The Applicant submitted that the General Division erred in fact and law, which errors warrant that the Appeal Division grants the Application. The Applicant argued that the General Division erred by applying the wrong date of onset of July 2010 as well as an incorrect start date for the payment of the disability pension.

[4] The Applicant requested of the Appeal Division that it grant the Application. AS well, the Applicant asked the Appeal Division to exercise its power under section 59 of the Department of Employment and Social Development, (DESD), Act and give the decision the General Division ought to have given. The Respondent states that the decision the General Division ought to have given is that, pursuant to paragraph 42(2)(b) of the *CPP*, the Respondent is deemed disabled as of September 2010. , pursuant to section 69 of the *CPP*, payment of the disability pension commence 4 months later in January 2011.

SUBMISSIONS

[5] This being a case where the decision could have a negative impact on the Respondent, the Appeal Division gave her an opportunity to make submissions before it decided the appeal. The Respondent was asked to make submissions on or before October 6, 2015. As of the date this decision was issued the Tribunal had received no submissions from her.

ISSUE

[6] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[7] Leave to appeal a decision of the General Division of the Tribunal is the first stage of the appeal process.¹ The threshold is lower than that which must be met on the hearing of the appeal on the merits. However, in order for the Tribunal to grant leave to appeal, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success².

[8] In *Canada (Minister of Human Resources Development) v. Hogervorst (2007)*, 2007 FCA 41 and also in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. In *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC), the Federal Court stated that the Applicant must present some arguable ground upon which the proposed appeal might succeed. Determining whether there is an arguable case does not involve determining the merits of the case. It does, however, involve a consideration of the applicable law and the evidentiary foundation presented.

[9] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the DESD Act. They are,

- (1) a breach of natural justice;
- (2) that the General Division erred in law; and
- (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.³

¹ Sections 56 to 59 of the 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.”

² The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

³ **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.

ANALYSIS

[10] To grant this Application the Appeal Division must find that, if the matter was to proceed to a full hearing, at least one of the grounds of the Application relate to a ground of appeal. The Appeal Division must also find that there is a reasonable chance that the appeal would succeed on this ground. For the reasons set out below the Tribunal is satisfied that this appeal would have a reasonable chance of success.

The Alleged Errors

[11] The Applicant asserts that the General Division has misapplied the provisions governing payment of a CPP disability pension. Specifically, the Applicant states that the General Division erred with respect to the deemed date of disability and the effective payment date. The Respondent also asserts that the General Division erred in law by failing to apply paragraph 42(2)(b) of the *Canada Pension Plan* (*CPP*) (i.e. the 15 month maximum retroactivity for *CPP* disability benefits).

[12] The Applicant argued that based on the date of the Respondent's application for CPP disability pension, September 2010 is the correct deemed date of disability. Accordingly, payment of the pension would commence four months later in January 2011.

[13] The disputed findings are contained at paragraph 30 of the General Division decision. The Member stated her findings as:

[50] The Tribunal finds that the Appellant had a severe and prolonged disability in July 2010 when she stopped work due to the symptoms of her medical condition after having significantly modified her job duties in an effort to remain employed as long as possible. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of November 2010.

Facts

[14] The Respondent applied for a CPP disability pension on December 12, 2011. Her application was denied and the denial was upheld on reconsideration. The Respondent appealed the reconsideration decision. On April 9, 2015 a Member of the General Division heard the appeal. The Member rendered her decision on May 11, 2015.

[15] The following statutory provisions govern the grant of a CPP disability pension.

CPP paragraph 42(2)(b) of the CPP provides that,

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.

CPP Section 69 deals with when payment of a CPP disability pension commences

Commencement of pension

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".

[16] The statutory provisions are clear. Paragraph 42(2)(b) of the CPP provides for a maximum retroactivity period of fifteen months from the date of the application, which in this case is December 12, 2011. The period of retroactivity is therefore September 2010 to December 2011.

[17] CPP Section 69 provides that payment of the CPP disability pension commences four months after the date of deemed disability. In the Respondent's case that date is January 2011.

[18] The General Division deemed the Respondent to have become disabled as of "July 2010 when she stopped work due to the symptoms of her medical condition." This is an error of law. The correct base date is not when an Applicant for CPP disability pension stopped work: rather it the date he or she made the application for the pension. The application was made on December

10, 2011, therefore, this is the date that the General Division should have used to compute both the deemed date of disability and the date of commencement of payment.

[19] The Appeal Division finds that the Applicant has raised an arguable case.

[20] Accordingly, the Tribunal grants the Application.

THE APPEAL

[21] Counsel for the Applicant asked the Appeal Division to not only grant the Application but also to allow the appeal and to exercise its power under section 59 of the DESD Act to give the decision that the General Division should have given, which is that the Respondent was disabled as of September 2010 with payment commencing four months later in January 2011.

[22] Given the following circumstances, the Appeal Division is of the view that this is an appropriate case in which to, simultaneously, grant leave, allow the appeal and exercise the jurisdiction granted in s. 59 of the DESD Act and without further notice to the Respondent:

- 1) the Appeal Division gave the Respondent the opportunity to file submissions in respect of this Application. As of the date of issue of these reasons, the Respondent did not file any submissions.
- 2) the Appeal Division is satisfied that, on the basis of the applicable law, the Applicant has raised an arguable case; and
- 3) the Tribunal is mandated to conduct proceedings as informally and quickly as possible as the circumstances and the considerations of fairness and natural justice permit,

CONCLUSION

[23] Accordingly, the Application is granted and the appeal is allowed.

DECISION

[24] The Appeal Division exercises its jurisdiction under s. 59 of the DESD Act to give the decision the General Division should have given. Accordingly, it is the decision of the Appeal Division that, the Respondent's application for a CPP disability pension having been received in December 2011, pursuant to CPP paragraph 42(2)(b) the Respondent is deemed disabled as of September 2010. Therefore, pursuant to CPP s. 69 payment of the disability pension commences effective January 2011, which is four months after the date the Respondent is deemed to be disabled.

Hazelyn Ross
Member, Appeal Division