Citation: *J. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1249

Appeal No. AD-15-422

BETWEEN:

J. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 22, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated June 12, 2015 of the General Division, whereby it summarily dismissed her application for a Canada Pension Plan disability pension, on the basis that she was already in receipt of a Canada Pension Plan retirement pension and that it was too late for her to cancel her retirement pension. The General Division summarily dismissed her appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on July 2, 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 her 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 September 4, 2013. The Respondent denied the application initially and upon reconsideration. In its

reconsideration letter dated February 26, 2014, the Respondent advised that no one can receive a Canada Pension Plan retirement pension and a disability pension at the same time. The Respondent also advised that a Canada Pension Plan retirement pension can be withdrawn in favour of a Canada Pension Plan disability pension only if the applicant is deemed to have become disabled before the beginning of the retirement pension. The Respondent further advised that "the earliest date you can be deemed disabled according to the legislation is June 2012" and as this date is after the month she began receiving a retirement pension, she could not receive a disability pension.

[5] The Appellant appealed the reconsideration decision to the Social Security Tribunal on May 6, 2014, on the basis that she meets the requirements for a disability pension. Initially she had been hopeful that she could return to work but despite undergoing therapy, has not been able to return to work. She outlined the problems she has encountered with the Workers' Compensation Board, from receiving inaccurate assessments and misinformation and to feeling bullied by it. The Appellant explained that as a result of her head injury, she has struggled with her appeals, appointments, Workers' Compensation Board claim and generally everything.

[6] Although the Respondent has written to her and advised that the earliest date she can be considered to be disabled is June 2012, the Appellant submits that the earliest date she could be considered to be disabled would be May 11, 2012, when she turned 60. The Appellant also indicates that she applied for a Canada Pension Plan retirement pension before May 2012 and only began to receive a Canada Pension Plan retirement pension in June 2012.

[7] The Appellant attached additional medical information, to show how she has been treated before the Workers' Compensation Board and how it has impacted upon her, such that she has been unable to keep up and cope with her paperwork, including her claim for a disability pension under the *Canada Pension Plan.* The Appellant did not address the Respondent's submissions that she cannot now cancel her retirement pension in favour of a disability pension under the *Canada Pension Plan.*

[8] On May 20, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> Paragraph 66.1(1) of the *Canada Pension Plan* (CPP) sets out that a recipient can cancel a retirement pension in favour of a disability benefit only if the recipient is deemed to be disabled before the month the retirement pension became payable.
>
> Paragraph 42(2)(b) of the CPP sets out that the earliest a person can be deemed to be disabled is 15 months before the date of the disability benefit application. See also *Quiring v. Canada (A.G)*, 2005 FCA 294.
>
> In your case you commenced receiving a retirement pension in June 2012. Your application to cancel your retirement pension in favour of a disability benefit was received by the Minister on September 4, 2013, 15 months before the date of the disability benefit application is June 2012. As detailed above in order to qualify for a cancellation of your retirement pension in favour of a disability benefit you would be required to be deemed disabled no later than May 2012. As the earliest you could be deemed disabled is June 2012 you cannot qualify for a cancellation.

[9] The General Division invited the Appellant to provide detailed written submissions by no later than June 23, 2015, explaining why her appeal had a reasonable chance of success.

[10] On June 9, 2015, the Appellant filed submissions, explaining that when she applied for an early retirement pension in June 2012, she had been optimistic that she would recover from her injuries, to enable her to return to work. However, she has not seen any improvement in her condition and remains unable to work. She notes that she continues to see her physicians and continues to receive treatment for her multiple injuries. The Applicant noted the provisions of subsection 66.1(1) of the *Canada Pension Plan* set out in the letter dated May 20, 2015 from the Social Security Tribunal, and submits that she ought to be able to cancel her retirement pension in favour of a disability pension, as she submits that she has not been able to work since June 2011 – well before she began receiving a retirement pension (Document GD4).

[11] On June 12, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

i. 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;

ii. 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;

iii. Section 66.1(1.1) of the *Canada Pension Plan*, which sets out that a recipient can cancel a retirement pension in favour of a disability benefit only if the recipient is deemed to be disabled before the month the retirement pension became payable;

iv. Paragraph 42(2)(b) of the *Canada Pension Plan*, which states that the earliest that a person can be deemed to be disabled is 15 months before the date of the application for a disability pension. The General Division also relied upon *Quiring v. Canada (Attorney General)*, 2005 FCA 294.

[12] The General Division noted that the Service Canada Statement of Benefits details that the Appellant commenced receipt of a Canada Pension Plan retirement pension on June 1, 2012 and that she applied for a Canada Pension Plan disability pension on September 4, 2013.

[13] The General Division found that the Appellant was not entitled to a cancellation of her retirement pension in favour of a disability pension. The General Division noted that the Appellant had commenced receiving a retirement pension in June 2012 and that her application to cancel her retirement pension in favour of a disability pension was received by the Respondent on September 4, 2013. The General Division also noted that 15 months before the date of the disability benefit application is June 2012.

[14] The General Division noted that under paragraph 42(2)(b) of the *Canada Pension Plan*, the earliest a person can be deemed to be disabled is 15 months before the date of the disability benefit application, and under subsection 66.1(1.1) of the *Canada Pension Plan*, a recipient can cancel a retirement pension in favour of a disability pension only if the recipient is deemed to be disabled before the month the retirement pension became payable. In this case, the General Division held that the Appellant cannot be deemed disabled prior to

the commencement of her retirement pension as 15 months prior to September 2013 is not before June 2012.

[15] On July 2, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division. On August 17, 2015, the Appellant filed additional submissions, consisting largely of medical reports from a number of different specialists. Some, if not all, of these medical records were before the General Division. She wrote:

> I was 59 years old at the time of my accident on **June 22, 2011**, a full year before I commenced receiving a retirement pension in June of 2012. I almost feel that because it's the month of June **2011** that I had my accident and the month of June **2012** you say is the earliest I can be deemed disabled that it's an over site of the full 1 year difference between June 22. 2011 and June 2012 that is causing confusion.

[16] Counsel for the Respondent also filed submissions, also on August 17, 2015.

SUBMISSIONS

[17] In the Notice of Appeal filed on July 2, 2015, the Appellant submitted that she had a work-related accident on June 22, 2011, resulting in a head injury and other bodily injuries. She explained that she began to receive a Canada Pension Plan retirement pension in June 2012. She remained hopeful that her head injury would sufficiently improve, enabling her to return to work. Ultimately she accepted that she would not be able to return to work and therefore applied for a Canada Pension Plan disability pension. She noted that the Workers' Compensation Board has recently assessed her at "78% total disability" but that as there are some outstanding claims, this disability award could increase. She also noted that she has qualified for a "100% Loss of Earnings" award. She noted that the Workers' Compensation Board recognizes her disability and queries how her disability appeal can be denied. The August 2015 submissions attached additional medical records showing the extent of her injuries.

[18] In submissions filed on August 17, 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

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

[20] 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.

[21] 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.

[22] I 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.

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

[24] 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.

[25] From what I can determine, the Appellant has not set out any grounds of appeal under subsection 58(1) of the DESDA. She does not dispute any of the factual or legal findings made by the General Division – other than that she suggests that the General Division was confused over when her accident occurred -- nor does she 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?

[26] 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.

[27] 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.

[28] 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.

[29] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 3 and 18 of its decision.

[30] 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.

[31] 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".

[32] 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*, whereby an Appellant could cancel her 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, she 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.*

[33] 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 HER CANADA PENSION PLAN RETIREMENT PENSION?

[34] 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.

[35] 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.

[36] 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.

[37] Subsection 66.1(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. Under subsection 66.1(1.1) of the *Canada Pension Plan,* 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.

[38] Counsel for the Respondent submits that the Appeal Division should be persuaded by *Greathead v. Minister of Social Development* (March 14, 2006), CP23044 (PAB) and by *Minister of. Social Development v. Desjardins* (October 5, 2006), CP23966 (PAB). In *Greathead,* the Pension Appeals Board held that an applicant cannot seek to cancel a Canada Pension Plan retirement pension that is already in play in favour of a Canada Pension Plan disability pension if the date when he or she is disabled or deemed to be disabled for the purposes of entitlement to a disability pension is during or after the month for which the retirement pension first became payable. In *Desjardins,* the Pension Appeals Board held that subsection 66.1(1.1) of the *Canada Pension Plan* is clear and unequivocal and that the *Canada Pension Plan* provisions allowing the cancellation of a retirement pension in favour of a disability pension are not flexible.

[39] Counsel for the Respondent submits that when read together, the effect of paragraphs 42(2)(b) and subsection 66. l(1.1) of the *Canada Pension Plan* 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.

[40] The General Division referred to paragraph 66.1(1) of the *Canada Pension Plan,* but clearly was also referring to subsection 66.1(1.1) of the *Canada Pension Plan,* which provides an exception to the general rule that a beneficiary may request cancellation of a benefit. The General Division applied each of these sections in determining eligibility for a Canada Pension Plan disability pension. The General Division properly set out the law in its analysis and applied the law to the facts.

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

[42] The fact that the Appellant was involved in a work-related accident in June 2011 and may have been incapable regularly of pursuing any substantially gainful employment since then is of no consequence, as the *Canada Pension Plan* determines the earliest date when an applicant is deemed disabled. The deemed disability date under the *Canada Pension Plan* is dependent upon the date of application for the disability pension.

[43] The earliest that the Appellant could be deemed disabled under the *Canada Pension Plan* is June 2012, fifteen months before she applied for a Canada Pension Plan disability pension in September 2013. Sadly, the Appellant simply did not apply for a disability pension early enough and hence, cannot avail herself of subsection 66.1(1) of the *Canada Pension Plan.*

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

[45] 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*, in determining eligibility to a Canada Pension Plan disability pension.

[46] In the *Desjardins* decision, the Pension Appeals Board found the provisions of the *Canada Pension Plan* allowing for the cancellation of retirement benefits in favour of disability benefits to be inflexible, and in this case, the inflexibility resulted in unfairness to Mr. Desjardins. The Board wrote:

> However, neither the Review Tribunal nor this Board is entitled to exercise an equitable jurisdiction. We are obliged to apply this legislation strictly.

[47] I am persuaded by the reasoning of the Pension Appeals Board that I am obliged to apply the legislation strictly.

CONCLUSION

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

Janet Lew
Member, Appeal Division