Citation: *M. L. v. Minister of Employment and Social Development*, 2015 SSTAD 1282

Appeal No. AD-15-885

BETWEEN:

M. L.

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: November 3, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated July 6, 2015 of the General Division, whereby it summarily dismissed her application of November 8, 2012 for a Canada Pension Plan disability pension, as it was satisfied that the appeal did not have a reasonable chance of success, on the basis that the Appellant could not be deemed to be disabled for the purposes of the *Canada Pension Plan,* prior to receiving a Canada Pension Plan retirement pension.

[2] The Appellant filed an appeal to the Appeal Division (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 claim?

3. Did the General Division err and if so, what remedies, if any, are appropriate and available to the Appellant?

FACTUAL OVERVIEW & HISTORY OF PROCEEDINGS

[4] The Appellant applied for and was granted a Canada Pension Plan retirement pension with an effective date of onset of August 1, 2009.

[5] On November 8, 2012, approximately 40 months after she began receiving her Canada Pension Plan, the Appellant made an application for a Canada Pension Plan disability pension.

[6] The Respondent denied the application for a Canada Pension Plan disability pension initially on November 19, 2012 and on reconsideration on March 6, 2013, on the basis that she had been receiving a retirement pension since August 2009 and her application for a disability pension was made more than 15 months after the month in which she began to receive a retirement pension.

[7] The Appellant appealed the reconsideration to the Office of the Commissioner of Review Tribunals on December 12, 2012. Under section 257 of the *Jobs, Growth and Long-term Prosperity Act*, any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[8] On July 16, 2013, the Social Security Tribunal acknowledged receipt of the appeal to the General Division. On October 10, 2013, the Respondent filed a Notice of Readiness. The Appellant filed her Notice of Readiness on October 25, 2013 and again on November 14, 2013.

[9] On April 4, 2014, the Social Security Tribunal wrote to the parties, advising of the next steps to be undertaken.

[10] On April 15, 2014, the Appellant filed a Hearing Information Form.

[11] On April 8, 2015, the Social Security Tribunal advised the parties that it considered the appeal ready to proceed. The Social Security Tribunal advised the parties that if they wished to file any additional documents or written submissions that had not already been sent to the Social Security Tribunal , to file them without delay.

[12] On April 17, 2015, the Appellant filed a second Hearing Information form.

[13] On April 27, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal from the reconsideration decision of the Respondent because:

> Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.
>
> Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.
>
> Paragraph 44(1)(b) of the *Canada Pension Plan* (CPP) sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:
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> i. Be under 65 years of age;
>
> ii. Not be in receipt of the CPP retirement pension;
>
> iii. Be disabled; and
>
> iv. Have made valid contributions to the CPP for not less than the Minimum Qualifying Period ().
>
> 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.
>
> 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 (subsection 66.1(1.1) of the CPP).
>
> Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

> 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.

[14] The General Division also advised that as the Appellant had applied for a disability pension on November 8, 2012 and started to receive a retirement pension in August 2009, she could not be found disabled 15 months or more after receiving a Canada Pension Plan retirement pension.

[15] The General Division invited the Appellant to provide detailed written submissions by no later than May 29, 2015, explaining why her appeal had a reasonable chance of success. On May 4, 2015, the Appellant contacted the Social Security Tribunal, in response to the letter of April 27, 2015 from the General Division. The Appellant confirmed that she had previously provided reasons why her appeal had a reasonable chance of success (though there was in fact no response addressing this issue in particular). The Social Security Tribunal confirmed that the Appellant could provide written submissions explaining why her appeal had a reasonable chance of success.

[16] On July 6, 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. Paragraph 44(1)(b) of the *Canada Pension Plan,* which sets out the eligibility requirements for the Canada Pension Plan disability pension;

iv. 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.

v. Section 66.1 of the *Canada Pension Plan,* which sets out an exception to subsection 70(3) of the CPP;

vi. Section 66.1 of the *Canada Pension Plan* and section 46.2 of the *Canada Pension Plan Regulations*, which 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.

vii. Subsection 66.1(1.1) of the *Canada Pension Plan*, which provides an exception to the general rule set out in section 66.1 of the *Canada Pension Plan*. 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.

viii. Subsection 66.1(1.1) and paragraph 42(2)(b) of the *Canada Pension Plan*, which, when read together, state that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

[17] The General Division found that the effect of these provisions is that the *Canada Pension Plan* does not allow the cancellation of a retirement pension in favour of a disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid

[18] On August 10, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

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

SUBMISSIONS

[20] In the Notice of Appeal, the Appellant advised that she had had a heart attack on October 7, 2007. She submits that that she has been disabled since then.

[21] The Appellant also advised in her Notice of Appeal that she was the first Dura Heart LVAD patient in Canada, and given the "extraordinary nature of [her] medical condition coupled with the rigorous and exacting attention to detail required by the unique treatment that [she has] thus far received, there should be a "special exception to the rule".

[22] The Appellant also explained that when her former employer initiated her Canada Pension Plan retirement pension in 2009, she did not fully comprehend and was not in a position to diligently explore her options or to learn that a Canada Pension Plan disability

pension might have been available to her. She requested that "between the period August 2009 and the effective date of [this] ruling, any Canada Pension Plan Disability benefit granted [be] offset [against] the current Canada Pension Plan Retirement payments that [she has] thus far received. Subsequent, the effective date of [this] ruling, [she] would receive only Canada Pension Plan Disability benefit".

[23] The Appellant provided a summary of information, along with letters of support from her physicians regarding her complicated health history.

[24] Although the Appellant does not use the precise language of the DESDA, the Appellant essentially submits that the General Division refused to exercise its jurisdiction and should have exercised discretion and granted her a Canada Pension Plan disability pension.

[25] Counsel for the Respondent submits 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 submits that the General Division also correctly stated the law with respect to cancelling a retirement pension in favour of a disability pension under the *Canada Pension Plan.* Counsel submits that the General Division did not err in its application of the law to the facts, which are not in dispute.

[26] Counsel for the Respondent further submits that, given the uncontested facts and the applicable law, there was only one possible conclusion. As the application for a disability pension was made more than 15 months after the Appellant began to receive her retirement pension, the Appellant was precluded from requesting cancellation of her retirement pension. Counsel submits that the appeal is therefore bereft of any chance of success and was properly summarily dismissed. Counsel submits that the decision of the General Division is entirely reasonable as it is transparent, intelligible and is the only acceptable outcome based on the law and the facts. Counsel submits that the decision contains no reviewable error to permit the intervention of the Appeal Division.

ISSUE 1: STANDARD OF REVIEW

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

[28] The Respondent provided submissions on this issue. Counsel for the Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. The Respondent 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.

[29] 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. The Respondent 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 a 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.

[30] 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.

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

[32] 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.

[33] From what I can determine, the Appellant does not dispute any of the factual findings made by the General Division, as it rendered a decision on the basis of the evidence before it. Rather, she submits that her circumstances are exceptional, and that she did not fully comprehend her options or learn about the existence of the Canada Pension Plan disability pension until sometime after her former employer had already initiated her Canada Pension Plan retirement application in 2009. Her submissions amount to an allegation that the General Division failed to exercise its jurisdiction. This calls for review on a correctness standard.

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

[34] 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.

[35] 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, which it did at paragraph 3 of its decision. 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.

[36] Counsel for the Respondent submits that the appeal should be dismissed because the General Division correctly stated the law with respect to the cancellation of a retirement pension in favour of a disability pension, and because the Appellant did not meet the statutory requirements set out in the *Canada Pension Plan* that she had to request a cancellation of the retirement pension, in writing, within six months after payment of the benefit had started. Counsel relied upon three authorities:

i. *Greathead v. Minister of Social Development (*March 14, 2006), CP 23044 (PAB) at para. 10, a decision of the former Pension Appeals Board;

ii. *Minister of Social Development v. Desjardins* (October 5, 2006), CP 23966 (PAB) at para. 17; and on

iii. *Ramlochan v. Canada,* FC T-148-13, October 22, 2013 (unreported) at paras. 24 to 25.

[37] Counsel for the Respondent submits that in *Greathead v. MSD,* the then Pension Appeals Board held that an applicant cannot seek to cancel a Canada Pension Plan retirement pension that is already in pay 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 purpose of entitlement to a disability pension is during, or after, the month for which the retirement pension first became payable.

[38] Counsel further submits that in *MSD v. Desjardins,* the Pension Appeals Board held that subsection 66. l (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 benefit are not flexible.

[39] Counsel acknowledges that decisions of the Pension Appeals Board are not binding on the Social Security Tribunal , but submits that they have some persuasive value.

[40] Counsel submits that when read together, the effect of these provisions 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 15 months after the commencement of the payment of the retirement pension. Counsel refers to *Ramlochan v. Canada,* FC, T-148-13, October 22, 2013 (unreported) at paras. 24 to 25, a decision of the Federal Court, which counsel submits establishes that in such cases, there is no arguable case.

[41] Counsel submits that the General Division did not err in its application of the law to the facts, which are not in dispute. Counsel submits that, given the uncontested facts and the

applicable law, there was only one possible conclusion. As the application for a disability pension was made more than 15 months after the Appellant began to receive her retirement pension, counsel submits that the Appellant was precluded from requesting cancellation of her retirement pension. Counsel submits that the appeal is therefore bereft of any chance of success and was properly summarily dismissed. Counsel submits that the General Division's decision is reasonable as it is transparent, intelligible and is the only acceptable outcome based on the law and the facts.

[42] 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.

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

[44] 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.

[45] I have previously reviewed the jurisprudence as it relates to the appropriateness of the summary dismissal procedure set out in the respective rules of court in the federal and provincial realms, and in determining whether an appeal has a reasonable chance of success (see *A.P. v. Minister of Employment and Social Development and P.P.*, 2015 SSTAD 973). In those contexts, the courts have used the expressions "triable issue" and "manifestly clear" (which seems to be akin to "plain and obvious"), and determined whether there is any merit to the claim. From this, I derived the distinction between an "utterly hopeless" and "weak" case; 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. As long as there is an adequate factual foundation to support the appeal and the outcome is not "manifestly clear", then the matter is not appropriate for a summary dismissal. I have concluded that in essence, "no reasonable chance of success" has been more or less interpreted to mean "no chance of success at all".

[46] 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 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.*

[47] 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?

[48] 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. The Appellant submitted that the General Division failed to exercise its jurisdiction.

[49] 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.

[50] 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.

[51] 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
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> (i) has made contributions for not less than the minimum qualifying period,
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> (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)

[52] 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.

[53] 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".

[54] 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 the three cases referred to above, including, *Ramlochan v. Canada,* FC, T-148-13, October 22, 2013 (unreported) for the proposition that, in such cases, there is no arguable case.

[55] I agree with these submissions and, although the decisions of the Pension Appeals Board are not binding upon me, I do find them persuasive.

[56] 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.

[57] The Appellant has been in receipt of a Canada Pension Plan retirement pension since August 2009.

[58] Had the Appellant wanted to cancel her Canada Pension Plan retirement pension, section 66.1 of the *Canada Pension Plan* requires that she 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 her Canada Pension Plan retirement pension within six months after payments had started, she could not avail herself of this provision.

[59] 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* requires that she be deemed to have become disabled by no later than the month before the Canada Pension Plan retirement pension became payable.

[60] The earliest that the Appellant could be deemed disabled under the *Canada Pension Plan* is August 2011, fifteen months before she made the application for a Canada Pension Plan disability pension in November 2012. This clearly was well after the month before the Canada Pension Plan retirement pension became payable in August 2009. The Appellant could not avail herself of subsection 66.1(1.1) of the *Canada Pension Plan* either.

[61] 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.

[62] The decision of the General Division suggests that there are no other means whereby an appellant might be able to cancel her 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.

[63] 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 she might have become incapacitated up to the date when she made her application for a Canada Pension Plan disability pension, she might have yet qualified for a Canada Pension Plan disability pension, provided that she met all other requirements under the *Canada Pension Plan.* Showing incapacity is a fairly onerous requirement, as it goes well beyond being severely disabled and having difficulties with concentration or being unable to fulfill the usual activities of daily living. It is not a matter also of being necessarily occupied with

one's own health and recovery, but involves being incapable of forming or expressing the intention to make a timely application. The incapacity must also be continuous. In the Appellant's case, she would have had to have been continuously incapacitated between February 2010 (six months after payment of the Canada Pension Plan retirement pension had started) and November 8, 2012, when she applied for a Canada Pension Plan disability pension.

[64] Had there been any allegation from the Appellant, as well as supporting evidence, however remote, which hinted at the possibility that the Appellant might have been continuously incapacitated between February 2010 and November 8, 2012, 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.

[65] 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 February 2010 and November 8, 2012.

[66] 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's circumstances are exceptional, 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. The General Division did not err in refusing to exercise its jurisdiction, as it did not have any discretion outside of the *Canada Pension Plan.*

CONCLUSION

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

Janet Lew
Member, Appeal Division