

Citation: *Minister of Employment and Social Development v. J. M.*, 2015 SSTAD 1318

Date: November 10, 2015

File number: AD-15-888

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

J. M.

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Date of Decision: November 10, 2015

DECISION

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

INTRODUCTION

[2] The Applicant appeals from a decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued on May 7, 2015. In its decision, the General Division found that the Respondent had a severe and prolonged disability as of March 2010 and, therefore, she was entitled to a *Canada Pension Plan* (CPP) disability pension. The General Division determined that payment of the disability pension would commence as of July 2010.

GROUND OF THE APPLICATION

[3] The Applicant submits that the General Division decision contravened the provisions of paragraph 42(2)(b) of the CPP by deeming the Respondent disabled on a date that is more than fifteen months before it received her application.

THE ISSUE

[4] Does the Appeal have a reasonable chance of success?

THE GOVERNING LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.¹ To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success.² In *Canada (Minister of Human Resources Development) v. Hogervorst (2007)*, 2007 FCA 41 as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

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.”

[6] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in s. 58 of the *Department of Employment and Social Development (DESD) Act*. They are that either there has been a breach of natural justice; or the General Division erred in law; or based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.³

SUBMISSIONS

[7] Recognising the potential, negative impact of its decision on the Respondent, the Appeal Division gave her an opportunity to make submissions before it decided the Application. However, the Respondent did not make submissions on whether or not the Application should be granted. Instead, she indicated that she was leaving it to the Tribunal to decide “her” appeal. At the same time, the Respondent acknowledged that she had received all of the materials that had been sent to her by the Tribunal, which materials included the Application and the Applicant’s submissions. Accordingly, the Appeal Division is confident that the Respondent is aware of the nature of the current Application.

[8] The Applicant submitted that the issue is governed by ss. 42(2)(b) of the CPP. Under this statutory provision the earliest an applicant can be deemed disabled is fifteen-months prior to the date the Respondent received their application for a disability pension. The provision reads:

(2) *When a person deemed disabled* - 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.

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.

[9] Payment of the disability pension is governed by s. 69 of the CPP, which provides,

69. *Commencement of pension* - 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".

THE FACTS

[10] The Tribunal record reveals that the Applicant received the Respondent's application for a CPP disability pension on December 01, 2011. (GT1-14). The Applicant denied the application and upheld the denial on reconsideration. (GT1-06-08). The Respondent appealed the reconsideration decision and on May 5, 2015 a Member of the General Division of the Tribunal heard the appeal. On May 07, 2015 the Member issued her decision. At paragraph 35 of the decision the Member found that, "the Appellant had a severe and prolonged disability in March 2010, when she stopped working." The General Division Member went on to find that "according to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of July 2010." It is from these findings that the Applicant appeals.

ANALYSIS

[11] The issue is readily resolved by the application of the statutory provisions; CPP ss. 42(2)(b) is clear that the deemed date of disability is to be established by reference to the date that the application for the benefit is made. In *Minister of Social Development v. Galay* (June 3, 2004), CP 21768 (PAB) the PAB interpreted the words "the time of the making of any application" to mean at the time the Respondent received the application.) This is a point that was made in the earlier PAB decisions of *Bueno v MHRD* (April 23, 1997), CP 03253 and *Sarrazin v. MHRD* (June 27, 1997), CP 5300. Thus, the General Division erred when it

established the deemed date of disability by reference to the date that the Respondent stopped working. Accordingly, the appeal has a reasonable chance of success.

CONCLUSION

[12] The Application is allowed.

THE APPEAL

[13] Counsel for Applicant asked the Appeal Division to allow the appeal and to exercise its power under s. 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, pursuant to section 69 of the *CPP*, payment commencing four months later in January 2011.

[14] Given the clear legal position and the Tribunal's mandate to conduct proceedings as informally and quickly as possible as the circumstances and the considerations of fairness and natural justice permit, the Appeal Division is of the view that this is an appropriate case in which to exercise the jurisdiction granted in s. 59 of the DESD Act.

[15] Accordingly, the Appeal Division allows the appeal.

CONCLUSION

[16] The Appeal is allowed.

DECISION

[17] 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 Tribunal that, The Respondent's application for a CPP disability pension was received on December 1, 2011. Therefore, pursuant to CPP ss. 42(2)(b) and CPP s. 69, the Respondent is deemed disabled as of September 2010; payment of the disability pension commences as of January 2011.

Hazelyn Ross
Member, Appeal Division