

**Citation:** *E. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1377

**Date:** November 30, 2015

**File number:** AD-15-495

**APPEAL DIVISION**

**Between:**

**E. M.**

**Applicant**

**and**

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

**Respondent**

**Decision by:** Hazelyn Ross, Member, Appeal Division

## **DECISION**

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

## **INTRODUCTION**

[2] On February 24, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision in the Applicant's appeal from a reconsideration decision that denied him greater retroactivity of his *Canada Pension Plan* (CPP) disability pension. In its decision the General Division confirmed the Applicant's disentitlement to greater retroactivity. The Applicant seeks leave to appeal the decision, (the Application).

## **GROUND OF THE APPLICATION**

[3] The Applicant applied for and was granted a CPP disability pension with a date of onset of March 2010. (GT1-32) He challenged the date of onset. He argued that he had severe mental health issues for which he had been receiving treatment for more than seven years.<sup>1</sup>

[4] The Respondent refused to extend the period of retroactivity.

[5] On appeal to the Tribunal, the issue before the General Division was whether the Applicant's application could be deemed to have been received at an earlier date due to an inability to form or to express an intention to apply for a CPP disability pension. The General Division concluded that, in light of the facts and the law, it was not possible to deem his application as having been received at an earlier date.

[6] The Application restates the Applicant's position. He argued that there was valid reason to extend the period of retroactivity to either 2006 or 2007.

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<sup>1</sup> Letter of August 29, 2011, requesting reconsideration, stated: "the Appellant believes that he is entitled to a larger retroactive amount of CPP Disability pension because he has been treated for severe mental health issues for more than seven years. The mental illness prevented him from making a disability application. He will produce medical reports to substantiate this claim."

[7] The Applicant requested and was given additional time in which to disclose facts that he stated were required in order for a proper and fair decision to be made regarding his appeal. The Tribunal received the Applicant's additional submissions on October 20, 2015. (AD2)

[8] In this decision a reference to the Applicant's submissions is a reference to the totality of his submissions.

## **ISSUE**

[9] The issue is, does the appeal have a reasonable chance of success?

## **THE LAW**

[10] Leave to appeal a decision of the General Division of the Tribunal is the first stage of the appeal process.<sup>2</sup> 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 success<sup>3</sup>. In *Canada (Minister of Human Resources Development) v. Hogervorst (2007)*, 2007 FCA 41 and 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.

[11] 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. The three grounds on which an appellant may bring an appeal are set out in section 58 of the *Department of Employment and Social Development (DESD) Act*. An appeal may be brought in respect of a breach of natural justice; an error in law on the part of

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<sup>2</sup> 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."

<sup>3</sup> 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."

the General Division; and an error of fact made in a perverse or capricious manner or without regard for the material before it.<sup>4</sup>

## **Incapacity**

[12] The legislative provisions that govern “incapacity” are found in the subsections 60(8) to (11) of the CPP. The sections provide as follows:

[8] *Incapacity* – Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of the evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person’s own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have 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.

[9] Where an application for benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

- a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
- b) the person had ceased to be so incapable before that day, and
- c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the

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<sup>4</sup> **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.

person's last relevant period of incapacity to have commenced, whichever is the later.

[10] *Period of incapacity* – For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[11] *Application* – Subsections (8) to (10) apply only to individuals who were incapacitated after January 1, 1991.

[13] When a person is deemed disabled is set out at paragraph 42(2)(b) of the CPP, namely:

(2) *When 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.

[14] Section 69 deals with when payment of a CPP disability pension commences.

**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".

## ANALYSIS

[15] 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 not satisfied that this appeal would have a reasonable chance of success.

[16] The Applicant raised a number of issues in the Application. He submitted that the General Division misapprehended the period of retroactivity he was requesting, and that he had, in fact, been incapacitated by way of his mental health condition for the seven years prior to the date he was deemed disabled. The Applicant also argued that the General Division drew an incorrect inference from the fact that he had retained a Legal Aid lawyer to assist him with his appeal. He explained that it was his local MLA who had been instrumental in finding him legal assistance. Finally, the Applicant submitted that the fact that he voluntarily withdrew from the Ontario Disability Support Programme, (ODSP), in 2006 was proof of his incapacity as he did so despite needing the funds that ODSP had been providing.

[17] CPP subsection 60(8) allows the Minister to deem an application as having been made earlier than the date on which it was actually made where it is established that the applicant for the benefit was incapable of making the application on the date on which it was actually made. The legislation provides for two possible retroactive dates: either in the month preceding the first month in which the relevant benefit could have 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.

[18] This is a contentious area of the CPP legislation. However the existing case law has clarified that it is the intention to make an application for benefits that is relevant. In *Canada (Attorney General) v. Danielson*, 2008 FCA 78, the Federal Court of Appeal (FCA), described section 60 as "precise and focused in that it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity of forming or expressing an intention to make an application. " The FCA went on to state that the activities of a claimant during the period between the claimed date of commencement of disability and the date of application may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered."

[19] The Federal Court of Appeal returned to the question in *Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86. This time the FCA addressed the question of the nature of the "capacity to form the intention to apply for benefits." In the opinion of the FCA, "the capacity to form the intention to apply for benefits is not different in kind from the

capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his worldview does not indicate a lack of capacity.”

[20] In *Slater v. Canada (Attorney General)*, 2008 FCA 375, the FCA elaborated on the type of evidence necessary to establish whether an applicant lacked the capacity to form or express the intention to apply for a benefit. The FCA stated that it was necessary to look at both medical evidence and the relevant activities of the applicant.

[21] The Pension Appeals Board (PAB) dealt with this question in *Nenshi v. Canada (Minister of Social Development)*, (January 9, 2006), CP 22251 (PAB). The PAB stated that “it is not whether a person is capable to deal with the consequences of an application, but rather whether the person was capable of forming an intention to apply or not. The capacity lacking which an applicant must establish is of forming or expressing an intention to make an application, not the preparation process and completion of the application.” In relation to the appellant, *Nenshi*, the PAB noted that she “always knew she was ill and received treatment for such illness. She may not have been able to deal with the physical act of completing the forms, but she could form and express an intent to apply.”

[22] In the Applicant’s case, the General Division Member examined his medical records as required by *Slater*. The Member also examined the Applicant’s activities during the claimed period of incapacity, including his decision to withdraw from the ODSP programme. Also considered was the Applicant’s oral testimony, which made reference to his work situation; his injuries; his employment history in Canada; and his mental health condition. The Appeal Division finds that the General Division Member properly applied the case law referred to earlier. The pertinent passages of the General Division decision are paragraphs 33 to 35:

[33] While the Tribunal finds that the Appellant did, in fact, have some mental issues for a period of time, the Tribunal is unable to find that these mental issues were long in duration and extended for the entire seven plus years that the Appellant claims. The Appellant was able to work during this period of time and while he testified that this work was due to the good nature of a friend of his, he still was able to make a meagre living during this period of time. The evidence presented to the Tribunal both from the Appellant’s testimony and on

file shows an individual who certainly suffered from a severe mental illness but there is no indication that the Appellant was incapacitated such that he was incapable of forming or expressing an intention to make an application for CPP disability benefits.

[34] While the amount of work that the Appellant did during this time certainly was limited, as the financial records indicate, the picture that is painted of the Appellant does not portray him as someone who was incapacitated. The Appellant did exhibit bizarre behaviour in the example of his decision to turn down the ODSP benefits, which were granted to him in June of 2005 and revoked in February 2006 at the request of the Appellant; however the Tribunal was unable to find evidence that would indicate that Appellant's incapacity.

[35] The Tribunal is guided by the Federal Court of Appeal decision in *Slater v. Canada (Attorney General)*, 2008 FCA 375, where the Court stated:

In determining whether or not a claimant had the mental capacity to form or express an intention within the meaning of subsections 60(8) and (9), it was necessary to look at both the medical evidence and the relevant activities of the individual concerned – between the claimed date of commencement of disability and the date of application – which cast light on the capacity of the person concerned during that period of so “forming and expressing” the intent.

In arriving at its decision, the Tribunal took into account the Appellant's mental state, his employment record and the fact that he had employed a legal aid lawyer to help him with his appeal with ODSP benefits. The Tribunal finds that, although the Appellant was suffering from a mental illness during this period of time and his medications were not helping him deal with these issues, he was able to maintain some type of work schedule and was able to be aware of the ability to apply for ODSP benefits and find a legal aid lawyer to assist him in that process. While the Appellant may have been unable during some point of the seven years in forming or expressing an intent these events show the Tribunal that he was not incapacitated during the entire period. As per the *CPP*, the Appellant needs to be found incapacitated during the entire period and it is for this reason that the Tribunal finds that the Appellant was not incapacitated as per the *CPP*.

[23] The Appeal Division finds that no error arises from the General Division's application of the law to the facts of the Applicant's case. The General Division neither misapprehended the law, nor the facts of the Applicant's case, nor did the General Division arrive at a decision



without regard to the facts before it. The crucial factor is whether the Applicant lacked the capacity to form the intent to apply for CPP disability benefits and these paragraphs of the decision make it very clear that the General Division addressed this issue in the context of the totality of the evidence about the Applicant's circumstances. That the General Division came to a conclusion different from that which the Applicant desired is not by itself an indication that the General Division erred in any way.

[24] Further, the additional information submitted by the Applicant does little to alter this finding. It does contain a letter from Dr. Charles Chamberlaine of the London Health Sciences Centre, however, Dr. Chamberlaine's letter does not expand on the information he had already provided. It merely reiterated information he had previously provided and which had been placed before the General Division. Accordingly, the Appeal Division is not satisfied that the appeal has a reasonable chance of success.

## **CONCLUSION**

[25] The Application is refused.

*Hazelyn Ross*  
Member, Appeal Division