

**Citation:** *Minister of Employment and Social Development v. T. S.*, 2015 SSTAD 1417

**Date:** December 11, 2015

**File number:** AD-15-1144

**APPEAL DIVISION**

**Between:**

**Minister of Employment and Social Development**

**Applicant**

**and**

**T. S.**

**Respondent**

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

## **DECISION**

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), is granted.

## **INTRODUCTION**

[2] On August 10, 2015, the Tribunal's General Division issued its decision in the Respondent's appeal of a reconsideration decision. The General Division found that the Respondent met the definition of "severe and prolonged disability" contained in s. 42 of the *Canada Pension Plan*, (CPP), entitling him to a CPP disability pension. The Applicant seeks leave to appeal the decision, (the Application).

## **GROUND OF THE APPLICATION**

[3] The Applicant submitted that the General Division erred by basing 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.

## **ISSUE**

[4] The Appeal Division must decide whether the appeal has a reasonable chance of success.

## **THE 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.<sup>1</sup> To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success<sup>2</sup>. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 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.

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<sup>1</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>2</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."

[6] Section 58 of the DESD Act sets out the three grounds on which an appellant may bring an appeal to the Appeal Division. The grounds are that the General Division either committed a breach of natural justice or refused to or improperly exercised its jurisdiction; or 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.<sup>3</sup>

## **ANALYSIS**

[7] In order to grant leave to appeal the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that the Tribunal must first find that, were the matter to proceed to a hearing at least one of the grounds of the Application relate to a ground of appeal. The Appeal Division must then determine whether there is a reasonable chance that the appeal would succeed on this ground. For the reasons set out below the Appeal Division is satisfied that this appeal would have a reasonable chance of success.

### **The Alleged Errors**

[8] At paragraph 36 of the decision, the General Division Member found that the Respondent had a severe and prolonged disability in October 2008 when he suffered a stroke. The General Division Member went on to find that payment of the disability pension would commence effective February 2009. The Applicant submitted that the General Division decision is wrong in law. In the Applicant's submission the correct deemed date of disability pursuant to paragraph 42(2)(b) of the CPP is November 2009. Further, according to the Applicant, pursuant to section 69 of the CPP, payments would commence four months later, in March 2010. Counsel for the Applicant submits that these are the correct dates because the Respondent's application for a CPP disability pension, in respect of which the General Division made its determination, was received in February 2011.

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<sup>3</sup> **58(1) Grounds of Appeal –**

The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

## Facts

[9] The Tribunal record confirms that the Respondent made two applications for a CPP disability pension. The Applicant received the first application on September 30, 2009. The application was denied by a letter dated December 16, 2009 (GT1-09). On April 22, 2010, the Respondent filed a request for a reconsideration of the denial of the first application. (GT1-13) The reconsideration request was refused because it was filed after the 90-day deadline to do so had passed. (GT1-15) The Respondent then filed a second application for a CPP disability pension. As the Applicant contends, the General Division correctly noted that this second application had been date-stamped as having been received on February 21, 2011.<sup>4</sup>

[10] It is clear that the Member based his decision on a different date. At paragraph 36 of the decision, the General Division Member stated that the application was received in October 2009. Not only does this date not appear anywhere in the Tribunal record it is not the correct date for the determination of the Respondent's eligibility for a CPP disability pension.

### **The Legislative Provisions that govern payment of a Disability Pension**

[11] CPP 42(2)(b) provides for when an applicant can be deemed disabled:

*(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.

[12] The statutory provision governing payment of the disability pension is CPP, section 69, which section 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

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<sup>4</sup> At paragraph 1 of the decision, the General Division Member wrote: The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on February 21, 2011.

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".

[13] In light of the fact that the Respondent's application in respect of which the General Division rendered its decision was made in February 2011, and in light of the fact that the General Division Member used an incorrect date of application, the questions are what are the correct deemed dates of disability and commencement of payment.

[14] The Appeal Division finds that these questions are readily resolved by the proper application of the statutory provisions. CPP 42(2)(b) is clear that the deemed date of disability is to be established by reference to the date 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 a date in October 2009. The proper date is the date of the Application, namely, February 21, 2011. This means that the deemed date of disability is incorrect as is the date on which payment should commence. Accordingly, the Appeal Division is satisfied that the appeal has a reasonable chance of success.

## **CONCLUSION**

[15] The Application is granted.

*Hazelyn Ross*  
Member, Appeal Division