



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. K. L.*, 2016 SSTADIS 20

Date: January 12, 2016

File number: AD-15-910

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

K. L.

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] The Application for leave to appeal is granted.

[2] The appeal is allowed.

INTRODUCTION

[3] On June 4, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision finding that the Respondent had a severe and prolonged disability as described by s. 42 of the *Canada Pension Plan*, (CPP). Accordingly, he was entitled to a CPP disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION

[4] The Applicant submitted that the General Division erred in fact and law, warranting the granting of leave to appeal. The Applicant argued that while it did not contest the grant of disability benefits to the Respondent, the General Division erred by applying a wrong date of onset of June 2009. In the Applicant's submission the correct date is November 2009.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[6] 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 success². In *Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41* as well as in *Fancy v. Canada (Attorney*

¹ Sections 56 to 59 of the *Department of Employment and Social Development, (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.”

General), 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[7] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the DESD Act. They are,

- (1) a breach of natural justice;
- (2) that the General Division erred in law; and
- (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.³

ANALYSIS

[8] 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,

- (a) at least one of the grounds of the Application relate to a ground of appeal; and
- (b) 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.

The Alleged Errors

[9] At the hearing, the Applicant's representative did request that the appeal be allowed and the date of onset of disability be established as November 2009. Para 55 (3) GT1-12 However, at paragraph 64 of its decision the General Division deemed the Respondent disabled as of June 2009⁴ with payment of the disability pension to commence as of October 2009.

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; 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.

⁴ At paragraph 36, the General Division states, "The application was received in November 2011; therefore the Appellant is deemed disabled in August 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of December 2010".

[64] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2009 when he stopped working due to injuries suffered in an MV A in that month. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of October, 2009."

[10] The Appeal Division finds that the Applicant has raised an arguable case.

[11] The applicable legislative provisions are paragraph 42(2)(b) of the CPP, and CPP section

69. Under CPP paragraph 42(2)(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.

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

Commencement of pension

69. 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".

[13] The Respondent made his application in February 2011, not June 2009, which is the date he stopped working. Therefore, pursuant to CPP section 42, paragraph (2)(b) the General Division erred when it found the Respondent disabled as of June 2009. All else follows from this error.

[14] Accordingly, the Tribunal grants the Application.

[15] The Applicant also asked that at the same time the Appeal Division should allow the appeal and exercise its power under section 59 of the Department of Employment and Social Development Act (DESDA) to give the decision that the SST-GD should have given, which is that the Respondent was disabled as of November 2009 with payment commencing 4 months later, in March 2010, pursuant to section 69 of the CPP. Because this is a case where the decision could negatively impact on the Respondent, the Appeal Division finds he should be allowed the opportunity to make submissions before it decides the appeal.

THE APPEAL

[16] 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 July 2010 with payment commencing four months later, in November 2010, pursuant to section 69 of the *CPP*.

[17] The Tribunal allowed the Respondent the opportunity to make submissions regarding the appeal. However, the Respondent elected to make no submissions and advised the Tribunal of his position. (AD2)

[18] Given the circumstances of the case and the Tribunal's finding that the Applicant has raised an arguable case; and also in light of 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 Tribunal is of the view that this is an appropriate case in which to exercise the jurisdiction granted in s. 59 of the DESD Act.

[19] Having examined the document in question and, also, having regard to the Applicant's submissions, the Tribunal finds that, on a balance of probabilities, the Applicant first received the Application on October 27, 2011. In the view of the Tribunal this is the only logical and plausible explanation for how the stamp came to be affixed to the document.

[20] The Tribunal notes that the information on the two stamps differ, thus it is an open question as to where the stamps were affixed. In any event, the Tribunal is of the view that the only way the October stamp could have been affixed to the document is if it had been placed

there by a service Canada employee. Accordingly, the Tribunal would grant the appeal. The Tribunal finds that this is in keeping with the view of the CPP as a benefits conferring legislation with reasonable doubts and ambiguities being resolved in favour of the person claiming the benefit.

CONCLUSION

[21] The Appeal is allowed.

DECISION

[22] The Tribunal 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 application was received in October 2011; therefore pursuant to CPP ss. 42(2)(b) the Respondent is deemed disabled as of July 2010. Therefore, pursuant to CPP s. 69 payment of the disability pension commences effective November 2010, which is four months after the date the Respondent is deemed to be disabled.

Hazelyn Ross
Member, Appeal Division