Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. Q. v. Minister of Employment and Social Development,* 2016 SSTADIS 109

Tribunal File Number: AD-15-1056

BETWEEN:

R. Q.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 9, 2016

REASONS AND DECISION

OVERVIEW

[1] This appeal is about whether an appellant can rely on previously filed applications for a Canada Pension Plan disability pension to determine the commencement date of payment of a disability pension.

[2] The Appellant appeals a decision dated July 14, 2015 of the General Division, whereby it summarily dismissed his appeal of a decision denying his request for greater retroactivity of payment of a Canada Pension Plan disability pension under the *Canada Pension Plan*. The payment date was based on the Appellant's third application for a Canada Pension Plan disability pension, though the Appellant sought payment based on when he filed his first application. The General Division summarily dismissed the appeal, given that it was satisfied that it did not have a reasonable chance of success.

[3] The Appellant filed an appeal of the decision of the General Division on September 24, 2015 (the "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

[4] The issues before me are as follows:

1. Is a standard of review analysis applicable?

2. Did the General Division err in choosing to summarily dismiss the Appellant's appeal?

3. Did the General Division fail to observe a principle of natural justice?

BRIEF HISTORY OF PROCEEDINGS

[5] The key dates are as follows:

- July 17, 2003 – the Appellant applied for a Canada Pension Plan disability pension for the first time. The Respondent denied the application but the Appellant did not seek a reconsideration of the Respondent's decision;

- February 13, 2006 – the Appellant applied for a Canada Pension Plan disability pension a second time. Again, the Appellant did not seek a reconsideration of the Respondent's decision. (The Appellant's insurer sought a reconsideration on March 1, 2006, but this was premature, as the Respondent had yet to even make an initial decision (pages GD2-75 to GD2-77 of the hearing file).);

- June 1, 2011 – the Appellant was deemed to have a filed a Canada Pension Plan disability pension a third time, by submitting the form "Application for Canada Pension Plan Disability Benefits under the agreement on Social Security between Canada and the Republic of the Philippines". The Appellant indicated in this third application that he had worked in the Philippines. Counsel for the Respondent notes that in his two previous applications, the Appellant had not indicated that he worked outside of Canada, although someone (presumed to be an agent for the Respondent) wrote "Phillipines [*sic*] on the second application (GD2-83 to GD2-85);

- March 8, 2013 – the Respondent granted the disability application. The Respondent found that the earliest the Appellant could be deemed disabled, based on his application of June 2011, was March 2010 and that the effective date of payment therefore was July 2010. The Appellant sought a reconsideration of this decision, submitting that the effective date should be based on his first application filed in 2003. He stated that the Respondent had mishandled his two earlier applications, as he had informed Service Canada that he had worked outside Canada and had not been informed in return that

> any contributions made in the Philippines could be applied towards his contributions to the Canada Pension Plan. The Respondent maintained its position.

[6] The Appellant appealed the reconsideration decision to the General Division. The General Division gave notice to the Appellant on May 13, 2015, advising that it was considering summarily dismissing the appeal on the basis of subsection 60(1) and paragraph 67(2)(b) of the *Canada Pension Plan.* The General Division also advised that it did not have jurisdiction under subsection 66(4) of the *Canada Pension Plan* to determine whether there had been any administrative errors or erroneous advice provided to the Appellant.

[7] The Appellant requested the General Division not to summarily dismiss the appeal. He advised that he had been misinformed by a representative on behalf of the Respondent that he could not rely on any foreign contributions. The Appellant explained that he did not fully comprehend the question in the application form which asked if he had worked in another country, because of his "agitated state of mind and [his] medical issues".

[8] The Appellant submitted that the circumstances upon which his third application was approved already existed at the time of his first application. The Appellant submitted that as the agreement on social security between Canada and the Philippines formed the basis upon which his third application was approved, his first application should not have been denied, and his first application should have been the basis for calculating the deemed date of disability and effective date of payment of the disability pension.

GENERAL DIVISION DECISION

[9] The General Division summarily dismissed the appeal as it found that it had no reasonable chance of success. The General Division effectively found that it did not have the jurisdiction to consider the Appellant's first or second applications for a Canada Pension Plan disability pension, as the Appellant had not sought a reconsideration of the Respondent's decisions. The General Division also found that the onus was on the Appellant to exercise due diligence in completing application forms for a Canada Pension Plan disability pension, and that there was no reciprocal duty on the Respondent to inform the

Appellant of any international agreements, or to ensure that applicants understood the forms and comprehensively or accurately completed them.

ISSUE 1: STANDARD OF REVIEW

[10] Counsel for the Respondent raised the issue of the standard of review. Counsel submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. Counsel submits that for questions of law, the Appeal Division should not show deference to the General Division and should apply a correctness standard. Counsel 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 and that as such, the Appeal Division should review the decision of the General Division on a reasonableness standard.

[11] In *Canada (Attorney General) v. Jean*, 2015 FCA 242 (CanLII), the Federal Court of Appeal suggests that the Appeal Division "must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context". As the Federal Court of Appeal pointed out, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the DESDA, where it hears appeals pursuant to subsection 58(1) of the DESDA. Subsection 58(1) of the DESDA sets out the grounds of appeal, and subsection 59(1) of the DESDA sets out the powers of the Appeal Division. The only grounds of appeal under subsection 58(1) are 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.

[12] I must therefore determine whether any of the grounds advanced by the Appellant fall within any of the grounds of appeal set out in subsection 58(1) of the DESDA.

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

[13] The Appellant did not address the issue of the appropriateness of the summary dismissal of his appeal before the General Division, but I will nonetheless briefly address it.

[14] 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.

[15] The first step required the General Division to correctly state the test for a summary dismissal. It did that by citing subsection 53(1) of the DESDA at paragraph 3 of its decision. Having correctly identified the test, the second step required the General Division to apply the law to the facts.

[16] Counsel for the Respondent submits that the General Division's decision is reasonable and that it contains no reviewable error to permit the intervention of the Appeal Division. Counsel submits that the General Division correctly stated the law with respect to the eligibility criteria, the deemed date of disability and when a disability pension may commence, under sections 42, 44, and 69 of the *Canada Pension Plan*, and that it then reasonably applied the law to the facts by reviewing the relevant dates for the Appellant's relevant application. Having done so, counsel submits that the General Division found that there was no chance for the Appellant to succeed on appeal.

[17] The General Division addressed the Appellant's submissions that the effective date of payment should have been based on his first application. The General Division noted that there were no provisions within the *Canada Pension Plan* which permitted it to allow for greater retroactivity of payments, or for it to consider earlier applications when it had no jurisdiction to do so. The General Division found that it was empowered only to the extent of its governing statute and that it was required to interpret and apply the provisions as set out in the *Canada Pension Plan.* The General Division found the provisions of the *Canada Pension Plan* to be clear and the evidence unequivocal.

[18] I find that 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 FAIL TO OBSERVE A PRINCIPLE OF NATURAL JUSTICE?

[19] Setting aside the issue of the appropriateness of summarily dismissing the appeal, I will consider whether, as the Appellant alleges, the General Division erred in determining that he was not entitled to greater retroactivity of payment of a disability pension, on the grounds that it failed to observe a principle of natural justice.

[20] The Appellant does not dispute the maximum retroactivity provisions under the *Canada Pension Plan*, but is of the position that the provisions should apply to his first application, rather than to his most recent application. In this regard, counsel for the Respondent is mistaken when she submits that the Appellant does not appear to be challenging the dates used by the Respondent to calculate the retroactive payments. Although the Appellant couches his submissions in terms of a breach of the principles of natural justice, he is clearly seeking retroactivity of payments based on his first application.

[21] The Appellant submits that the General Division failed to observe a principle of natural justice, as it did not consider the fact that the Respondent had not forwarded either his first or second applications to its International Operations unit for a review under the agreement for social security between Canada and the Philippines. The Appellant submits that although the General Division determined that he should have exercised due diligence, the same too should apply to the Respondent and it should have forwarded all "applications involving applicants who originate from a different country … to International Operations to determine how treaties may have an impact on said applications".

[22] Counsel for the Respondent submits that any alleged erroneous advice which the Appellant may have received from the Respondent relates to the Appellant's previous two disability applications. Counsel submits that, notwithstanding the advice the Respondent's representatives allegedly provided to the Appellant that appealing the Respondent's

decisions would be futile, the Appellant should have appealed the Respondent's decisions in respect of both of those applications. The Appellant did not appeal the Respondent's decisions and counsel submits that the files in relation to both applications are now closed. Counsel submits that those two previous applications are separate and distinct from the third application, the focus of this appeal. Counsel effectively submits that the Appeal Division does not have the jurisdiction to consider the first or second applications, as those appeals are not properly brought before me.

[23] Counsel for the Respond**e**nt further submits that even if the Appellant is now permitted to raise the issue of alleged erroneous advice, the Appeal Division does not have any jurisdiction to consider the issue, as it is only empowered to the extent set out under section 82 of the *Canada Pension Plan*, and section 82 does not deal with erroneous advice.

[24] Counsel for the Respondent submits that the Appellant seeks a remedy with regard to retroactive payment that neither the Respondent nor the Appeal Division can provide under the *Canada Pension Plan*. Counsel submits that the Appellant has received the maximum retroactive payment set out in the *Canada Pension Plan.*

[25] I accept the submissions of counsel that neither the Respondent nor the Appeal Division can grant greater retroactivity of payment of a disability pension than that set out by the *Canada Pension Plan*, and I agree with the end result arrived at by the General Division. The fact that the General Division may not have considered the fact that the Respondent had not forwarded either the first or second applications to its International Operations unit was not a relevant consideration before it, given that neither the first nor second applications were the subject of the appeal. The General Division simply did not have jurisdiction to deal with the first or second applications. Hence, it cannot be said that it failed to observe a principle of natural justice.

[26] However, while the Appellant is, on the face of it, seeking greater retroactivity, for all intents and purposes, he is seeking remedial action for the erroneous advice he received and for the administrative error that was made by the Respondent's representatives, and seeking retroactivity based on when he made his first application.

[27] The General Division rightly noted in its letter of May 13, 2015 that it did not have any jurisdiction under subsection 66(4) of the *Canada Pension Plan* to determine whether there had been any administrative errors or erroneous advice provided to the Appellant. The General Division did not address the subsection or the issue of any remedial relief in its decision.

[28] While neither the General Division nor the Appeal Division has the jurisdiction to undertake any remedial action, subsection 66(4) of the *Canada Pension Plan* however requires the Respondent to "take such remedial action as the Minister considers appropriate". The subsection reads:

> Where person denied benefit due to departmental error, etc.
>
> > **(4)** Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied
> >
> > > **(a)** a benefit, or portion thereof, to which that person would have been entitled under this Act,
> > >
> > > **(b)** a division of unadjusted pensionable earnings under section 55 or 55.1, or
> > >
> > > **(c)** an assignment of a retirement pension under section 65.1, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.

[29] The hearing file seems to establish that there was an administrative error made at least as early as 2006. At page GD2-31 of the hearing file (reproduced at Appendix 1), a file review conducted in 2011 revealed that a clerical error had been made in respect of the 2006 application. The file summary indicates "clerical error identified" and that the 2006 application should have been forwarded to the Respondent's International Operations unit for a review under the Canada/Philippines agreement on social security.

[30] Unfortunately for the Appellant, the Appeal Division does not have the jurisdiction to compel the Minister to review the 2006 (or 2003) application and to satisfy itself whether,

as a result of erroneous advice or administrative error, the Appellant had been denied a benefit to which he was entitled under the *Canada Pension Plan*. While the Appeal Division does not have this jurisdiction, it would seem appropriate for the Minister to formally reconsider the matter under subsection 66(4) of the *Canada Pension Plan*. It does not appear to have ever done so. Failing that, the Appellant can ask the Minister to consider taking remedial action under subsection 66(4) of the *Canada Pension Plan.*

CONCLUSION

[31] The appeal is dismissed although, given the circumstances, I would encourage the Respondent to consider undertaking a review pursuant to subsection 66(4) of the *Canada Pension Plan*.

Janet Lew
Member, Appeal Division

FILE SUMMARY

☐ TELEPHONE ☐ INTERVIEW

The following additional information relating to the above noted claim has been obtained.	
03-10-2011	Clerical Error identified when client's 2nd DSB application submitted on Februay 13, 2006 was processed:

06-09-2011: Clt submitted his 3rd DSB application (protected date of this app is 01/06/2011 when he submitted his foreign benefit DSB app under the agreement with the Philippines).
15-09-2011: During ECC the client complained several times that he had mentioned his work in the Philippines previously but this fact was never considered (further details are on my ECC File Summary on the IO file).

A review of the regional DSB file shows that question 6 "Have you ever worked in another country?" was answered "NO" by the client on both his previous applications - the 1st received 17-07-2003, the 2nd 13-02-2006.
However, 2006 application has Philippines (misspelled) handwritten and circled in question 6. The handwriting is identical to that on ECC sheet dated 15-06-2006. It is reasonable to assume that the conversation touched on the subject of his foreign work in the Philippines, and the agent added this information to his application.

This application was denied on 15-06-2006. At that time, it should have been forwarded to International Operations for a review under the Canada/Philippines Agreement.

Please review the 2006 application including medical questionnaire and report. The client claims he cannot afford to pay for a new medical report. In the last 2 weeks, he has been several times in Service Canada office in BC re-submitting copies of his previous medical reports, questionnaires and correspondence.

My worksheet is based on his new application, and medical questionnaire dated 13-02-2006.