



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 94

Date: February 29, 2016

File number: AD-15-1210

APPEAL DIVISION

Between:

C. S.

Appellant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] This is an appeal against a decision of the General Division made pursuant to subsection 53(3) of the *Department of Employment and Social Development (DESD) Act*. The Appellant applied for and was awarded a *Canada Pension Plan, (CPP)*, retirement pension in October 2011. He applied for a CPP disability pension in October 2013. He did not apply to have the retirement pension cancelled within six months of its commencement. Based on these undisputed facts, the General Division found that the Applicant was not eligible for a CPP disability pension and summarily dismissed his appeal.

GROUND OF THE APPEAL

[3] The Appellant repeated the submissions he made in response to the Tribunal's notice that the General Division intended to summarily dismiss his appeal. He submitted that at the time he applied for a CPP retirement pension he did not know that he would become permanently disabled. As well, he was of the view that he could not apply for both a disability benefit and a CPP retirement pension at the same time. He felt that to do so would amount to fraud on his part. He submitted that these circumstances explain his delay in making the application for a disability pension.

[4] Further, the Applicant submitted that, in his view, he was being punished for doing the right thing. The Appellant submits that his age and medical conditions prevent him from pursuing regularly any substantially gainful occupation.

[5] As this is an appeal from a summary dismissal of an appeal, leave to appeal is not required; the appeal can be brought directly to the Appeal Division of the Tribunal.

THE APPLICABLE LEGAL PROVISIONS

[6] The law governing the conversion of a CPP retirement pension to a CPP disability pension is found at section 66.1 and section 66.1 (1.1) of the CPP.

66.1. Request to cancel benefit – (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced request cancellation of that benefit.

(1.1) Exception – subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an Appellant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the Appellant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

[7] The Application is also governed by 46.2. (1) of the *Social Security Tribunal Regulations* (the Regulations), *S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 2*, namely,

- a. **(1)** A beneficiary may submit to the Minister, within the interval between the date of commencement of payment of the benefit and the expiration of six months after that date, a request in writing that the benefit be cancelled.

[8] Other statutory provisions that apply to this appeal include paragraph 44 (1)(b) of the CPP, which paragraph sets out the eligibility requirements for receipt of a CPP disability pension. Specifically, that in order for an applicant to qualify for a CPP disability pension, he or she must not be in receipt of a CPP retirement pension.

[9] The General Division noted that this requirement is also set out in subsection 70.1(3) of the CPP, namely, “once a beneficiary starts to receive a CPP retirement pension, that beneficiary cannot apply or re-apply, at any time, for a disability pension.” However, the General Division also noted that subsection 66.1 of the CPP and subsection 46.2 of the *Canada Pension Plan Regulations* (CPP Regulations) provide exceptions to paragraph 44 (1)(b) and subsection 70.1 (3) of the CPP.

[10] For the purposes of this appeal it is paragraphs 44 (1)(b), and subsection 66.1(1) of the CPP and subsection 46.2 of the CPP Regulations that are important. Subsection 66.1(1) of the CPP allow a beneficiary to cancel a retirement pension in favour of a disability pension provided the Appellant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable. Therefore, where the Appellant became disabled prior to receiving a retirement pension, that retirement pension could not be cancelled in favour of a disability pension.

Furthermore, the Appellant has only a short 6month period in which to request the cancellation.

ISSUE

[11] The issue can be stated as: Was it an error of law for the General Division to summarily dismiss the Appellant's appeal?

SUBMISSIONS

[12] Pursuant to section 36 of the Tribunal Regulations¹ the Tribunal invited the parties to make submissions. They were required to make their submissions no later than December 15, 2015. The Tribunal received submissions from the Respondent but not the Appellant. The Respondent took the position that the General Division had not erred either in its statement or its application of the relevant statutory provisions, thus, the Appeal Division had no basis to disturb the General Division decision and should dismiss the appeal.

[13] The test on a summary dismissal of an appeal is that the "appeal has no reasonable chance of success." The language of the applicable provision is in mandatory terms: the General Division must summarily dismiss an appeal if it is satisfied that it (the appeal) has no reasonable chance of success." The question is, of course, how does a decision-maker decide what amounts to a reasonable chance of success?

[14] Before deciding this question, the Appeal Division must decide how it will approach appeals of General Division decisions, generally, and this decision, specifically. Recent decisions of the Federal Court of Appeal and the Federal Court indicate that the Appeal Division is, likely, not required to engage in a "standard of review analysis." Instead, the Appeal Division ought to confine its inquiry to an assessment of whether or not the General Division breached any of the provisions of section 58(1) of the DESD Act. Thus, in *Canada (Attorney General) v. Paradis*; *Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242, the Federal Court of Appeal drew a distinction between appeals heard pursuant to the transitional provisions of the *Jobs, Growth and Long-term Prosperity Act*, S.C.

¹ *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236.*

2012, c. 19, ss. 266-267, and appeals from decisions rendered by the General Division of the Tribunal. The Federal Court of Appeal took the position that when the Appeal Division hears appeals under section 58 (1) of the DESD Act, the governing statute of the Tribunal, it needs must confine itself to the mandate provided by sections 55 to 69 of the Act:

[19]... Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division “erred in law in making its decision, whether or not the error appears on the face of the record” (paragraph 58(1)(b) of the *Act*). There is no need to add to this wording the case law that has developed on judicial review.

[15] The Federal Court of Appeal returned to the question in *Maunder v. Canada (Attorney General)*, 2015 FCA 274, affirming the position it set out in *Jean Paradis*. In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question in the context of applications for leave to appeal decisions of the General Division. As with the prior Federal Court of Appeal decisions, the Federal Court observed that the scope of the Appeal Division’s jurisdiction when determining whether to grant leave to appeal has now been codified and set out in the DESD Act. Roussel, J. wrote:

“in contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success.”

[16] applying *Jean, Maunder and Tracey*, the Appeal Division must determine whether or not the General Division decision to summarily dismiss the Appellant’s appeal demonstrates an error that would bring it within the grounds of appeal set out in section 58(1) of the DESD Act. For the reasons set out below, the Appeal Division finds that no error arises from the General Division decision to summarily dismiss the appeal.

ANALYSIS

[17] Section 53 of the DESD Act articulates the test by which the General Division must decide whether it should dismiss an appeal summarily. The General Division is enjoined to dismiss an appeal summarily if it is satisfied that the “appeal has no

reasonable chance of success.” Section 53 is written in mandatory terms. Once satisfied that an appeal has no reasonable chance of success, the General Division has no discretion to act otherwise than to dismiss the appeal. ” The question is, of course, by what yardstick does a decision-maker decide what amounts to a reasonable chance of success? This is also the case where the Appeal Division must decide an appeal from a decision of the General Division.

[18] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. More recently, Members of the Appeal Division have articulated the test for summary dismissal as “whether it is plain and obvious on the face of the record that an appeal is bound to fail.” *M.C. v. Canada Employment Commission*, 2015 SSTAD 237.

[19] The Appeal Division is of the view that in situations where the facts are not in dispute; the applicable law is clear; and where on the undisputed facts the law supports one clear decision that is not in an appellant’s favour; then this would a situation where the appeal would have no reasonable chance of success. In such a case, it would be appropriate for the General Division to dismiss the appeal summarily. This is also the view urged upon the Appeal Division by the Counsel for the Respondent.

[20] The Appeal Division finds that the facts of this case are not seriously in dispute. The Appellant applied for and was granted a CPP disability pension in October 2011. He underwent several surgeries including surgery to fix his shoulders in April 2012. When his recovery was delayed, and when his doctors advised him that he would be permanently disabled, the Appellant applied for a disability pension. He did so in October 2013, which is two years after he began to receive a retirement pension. As he was by then receiving his CPP retirement pension, the Appellant could cancel the retirement pension in favour of a disability pension only if he could be deemed to have become disabled in or after the month that he began to receive the CPP pension. It is clear from paragraph 44(1)(b) of the CPP that the Appellant could not receive both a CPP retirement pension and a CPP disability pension at the same time. Furthermore, he would have had to apply to cancel his retirement pension within six months of receiving it, namely, by March 2012.

[21] The CPP provides at paragraph 42(2)(b) that an applicant for a disability pension cannot be deemed to have become disabled more than 15 months prior to the date the Application was received. The General Division correctly noted that this date was July 2012. While this might have the effect of falling into compliance with paragraph 66.1(1) of the CPP it, nonetheless, is still caught by the requirement that the application to cancel the retirement pension must have been made within six months of the date the applicant began to receive the pension. As this window closed some four months prior to the deemed date of disability the applicant cannot be awarded a disability pension. Therefore, the decision of the General Division to summarily dismiss the appeal gives rise to no reviewable error.

CONCLUSION

[22] The Appellant appealed the decision of the General Division to summarily dismiss his appeal. On the facts, evidence and law that was presented to the General Division, the Appeal Division finds that the General Division correctly determined that the appeal did not have a reasonable chance of success.

[23] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division