



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 168

Tribunal File Number: AD-16-230

BETWEEN:

**L. M.**

Appellant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Janet Lew

DATE OF DECISION: May 6, 2016

## **REASONS AND DECISION**

### **OVERVIEW**

[1] This case pertains to whether the Applicant is entitled to a higher amount of a monthly disability pension than what she is already receiving, and whether she is entitled to a longer period of retroactive payments. She seeks leave to appeal the decision of the General Division dated April 29, 2015 which determined that she had a “severe” and “prolonged” disability at the end of her minimum qualifying period on December 31, 2000, and that it is long continued and of indefinite duration. The General Division deemed the Applicant disabled in October 2009 and payment of a disability pension therefore commenced effective four months after that date, in February 2010.

[2] The Applicant filed an application requesting leave to appeal with the Social Security Tribunal on January 28, 2016, after having initially filed it with her local Service Canada Centre in Midland, Ontario on September 1, 2015. She did not raise any specific concerns about the General Division’s decision, although she contends that when she makes telephone enquiries of Service Canada, she is told by an automated voice system that her monthly disability pension represents the monthly amount of the Old Age Security pension. The Applicant also indicates that she has been recently separated from her spouse and implies that she is seeking a division of unadjusted pensionable earnings.

[3] The leave application appears to have been filed late. For the Applicant to succeed on this application, I must be satisfied that it is appropriate in this case that I exercise my discretion to extend the time for filing the leave application. In the event that I extend that time I must also be satisfied that the appeal has a reasonable chance of success.

### **ISSUES**

[4] The two issues before me are as follows:

- (1) should I exercise my discretion and extend the time for filing the leave application, and

(2) does the appeal have a reasonable chance of success?

## **SUBMISSIONS**

[5] The Applicant is seeking greater retroactivity of payment of a Canada Pension Plan disability pension, as well as a higher monthly disability pension. The Social Security Tribunal wrote to the Applicant on March 23, 2016, in regards to these two issues. The Social Security Tribunal also asked questions about the lateness of her leave application. It also directed some questions towards the Respondent.

[6] The Respondent filed submissions on April 22, 2016, asking that the appeal be allowed in part. The Respondent concedes that the General Division erred in calculating the deemed date of disability and the effective commencement date of payment of a disability pension. The Respondent agrees with the General Division's findings that the Applicant's disability has been severe and prolonged since December 2000 and that she made an application in January 2010 but claims that, pursuant to paragraph 42(2)(b) of the *Canada Pension Plan*, the earliest date the Applicant can be deemed disabled is 15 months prior to the date of application, which is October 2008. The Respondent argues that the Applicant should have been deemed disabled as of October 2008 and that the correct effective date of payment would be four months later, in February 2009.

[7] The Respondent maintains that the monthly amount of the disability pension is correct, as the calculation was made in accordance with section 56 of the *Canada Pension Plan*. The Respondent advises that it does not have sufficient information to determine whether a division of unadjusted pensionable earnings would be advantageous for the Applicant.

[8] The Applicant also responded on April 22, 2016. She indicates that she received the decision of the General Division sometime in June 2015, and that her leave application therefore was filed on time on September 1, 2015 (though she mistakenly filed it with the Respondent's office initially, rather than with the Social Security Tribunal). She received the General Division's decision coincidentally at the same time she began receiving the Canada Pension Plan disability pension. She did not explain why the monthly amount of the

pension ought to be higher, nor did she provide a date on which payment of the disability pension should have commenced.

[9] The Applicant's earlier letter of March 7, 2016 addressed some of these questions. The Applicant claims that had she not become disabled, she would have continued to make contributions to the Canada Pension Plan. She argues that the monthly amount of the disability pension ought to be based on projected or expected contributions to the Canada Pension Plan, had she not become disabled. She notes that when she last worked in 1994/1995, she earned \$22 per hour. She also argues that the monthly amount should be increased to sustain a certain standard of living. The Applicant did not provide a date on which the disability pension should have commenced.

[10] The Applicant advises that she is currently applying for a division of unadjusted pensionable earnings. It is unclear whether she has sought any advice about how such a division might impact her.

## **ANALYSIS**

### **(a) Late application**

[11] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out the four criteria which should be considered in determining whether to extend the time period beyond 90 days within which an applicant is required to file his or her application for leave to appeal. They include whether: an applicant held a continuing intention to pursue the application or appeal; the matter discloses an arguable case; there is a reasonable explanation for the delay; and there is no prejudice to the other party in allowing the extension. In *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (CanLII), the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour.

[12] The Applicant advises that she did not receive a copy of the General Division decision until sometime in June 2015 and that she therefore filed the leave application on

time, albeit she mistakenly filed it with the Respondent's office initially. I find that the Applicant did not file an application requesting leave to appeal on time with the Social Security Tribunal. However, the fact that she had filed an application with the Respondent shows that she held a continuing intention to file an appeal. Once the Applicant discovered her error, she filed the leave application with the Social Security Tribunal. This reasonably explains the delay in filing the leave application. I do not see that the Respondent would suffer any prejudice if I were to extend the time for filing. In any event, the Respondent consents to allowing the appeal, in part. There clearly is an arguable case.

[13] It is in the interests of justice that I exercise my discretion and extend the time for filing the application requesting leave to appeal.

**(b) Application for leave to appeal**

[14] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

- (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.

[15] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within the grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

**i. Greater retroactivity of payment of a disability pension**

[16] The General Division found that the Appellant had a severe and prolonged disability in December 2000. The General Division held that, pursuant to paragraph 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension. The application for a disability pension was received by the Respondent in January 2010. The General Division determined that the earliest the Applicant could be deemed disabled was October 2009 and that, according to section 69 of the *Canada Pension Plan*, payment of a disability pension should commence four months later, in February 2010.

[17] The Applicant submits that she is entitled to a longer period of retroactive payments, although did not suggest a date for payment. The Respondent concedes that the General Division erred in determining the deemed date of disability and the commencement date of payment of the disability pension. The Respondent acknowledges that the deemed date of disability -- fifteen months retroactive from January 2010 -- is October 2008, and the effective date of payment is February 2009. Given the Respondent's concession and the obvious error made by the General Division, I am satisfied that the appeal has a reasonable chance of success.

**ii. Amount of monthly disability pension**

[18] The Applicant argues that she is entitled to a greater monthly disability pension than what she is already receiving. In her letter of March 7, 2016, she argues that the monthly amount of the disability pension ought to be based on the contributions she might have made to age 65, had she not become disabled. She also argues that the monthly amount should be increased to sustain a certain standard of living.

[19] The General Division did not undertake the calculation of the monthly amount of the disability pension. The Respondent advises that the amount of the monthly pension was calculated in accordance with section 56 of the *Canada Pension Plan*. The section sets out the amount of the disability pension, which consists in part of a flat rate benefit. The section also sets out the calculation of the flat rate benefit. There is no allowance for any contributions which an applicant might have made had he or she continued contributing to

the Canada Pension Plan after the onset of his or her disability. There is no allowance either to ensure a certain standard of living.

[20] I am not satisfied that this ground speaks to any of the enumerated grounds under subsection 58(1) of the DESDA.

**iii. Division of unadjusted pensionable earnings**

[21] The General Division did not address this issue and I do not find that it is properly before me. As I understand it, the Applicant will be making an application for a division of unadjusted pensionable earnings.

**CONCLUSION**

[22] The application for leave to appeal is allowed. Given the Respondent's concession, I am inclined to proceed to hearing the matter on the record at the earliest opportunity available, short of any further submissions from the Applicant. The parties may make submissions within the time permitted under the DESDA, or may, by consent of the parties, seek to abridge the time to respond.

*Janet Lew*

Member, Appeal Division