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

Citation: ***Minister of Employment and Social Development v. H. P.*****, 2016 SSTADIS 164**

Date: May 9, 2016

File number: AD-15-1035

APPEAL DIVISION

Between:

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Appellant

And

H. P.

Respondent

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

PERSONS IN ATTENDANCE

Appellant	-	H. P.
Appellant's Representative	-	Gerry Schopke
Respondent's Representative	-	Christine Singh

Canada

DECISION

[1] The Appeal Division of the *Social Security Tribunal,* (the Tribunal), allows the appeal.

[2] The matter is referred back to the General Division for reconsideration by a different Member.

INTRODUCTION

[3] This is an appeal of the decision of a Member of the General Division issued on June 23, 2015. The Appeal Division granted leave to appeal on the basis that the General Division may have based its decision on an erroneous finding of fact that it made perversely or capriciously or without regard for the material that was before it. Leave was also granted on the basis that the General Division may have erred in law with regard to its application of the proration provision in the *Canada Pension Plan,* (CPP).

[4] The appeal arises out of the General Division finding at paragraph 45 of its decision that the Respondent became disabled within the meaning of subparagraph 42(2)(a)(i) of the CPP as of November 2003. The Appellant submits that this finding prevents the General Division from making the further finding that the Respondent was entitled to a CPP disability pension effective August 2011.

[5] The Appellant and the Respondent both agree that the General Division erred in its application of the proration provision. They disagree as to the appropriate disposition of this appeal. The Appellant takes the position that the appeal should be allowed and the matter returned to the General Division for redetermination, while the Respondent prefers that the Appeal Division make the decision that the General Division should have made, arguing that returning the matter to the General Division would not only incur further delay, it would be "punitive" against the Respondent.

ISSUE(S)

[6] The issues to be decided on this appeal are: -.

a. Did the General Division commit an error of law in its application of the pro-ration provision? (para. 38)

b. Did the General Division ignore medical evidence and base its decision on an erroneous finding of fact when it found that the Respondent had been prescribed and had been taking "anti-seizure medication" since at least 2000? (para. 38)

c. Did the General Division ignore medical evidence and base its decision on an erroneous finding of fact that it made perversely or capriciously or without regard for the material that was before it, with respect to the Respondent's diagnosis with a seizure condition? (para. 38)

d. If the Appeal Division finds that the General Division either erred in law or based its decision on an erroneous finding of fact, what is the appropriate disposition of the appeal?

STANDARD OF REVIEW

[7] In deciding this appeal, the Appeal Division is mindful of recent decisions of the Federal Court and the Federal Court of Appeal with regard to its jurisdiction when it either hears an appeal or decides an Application for leave to appeal. These decisions mandate that the Appeal Division confine its enquiry to a determination of whether the General Division has breached any of the provisions of subsection 58(1) of the Department of Employment and Social Development Act (DESD Act) without engaging the principles or language of "judicial review"[1]. The decisions take the view that this was the legislator's intent when it created the Appeal Division and that it is the legislator's intent that is paramount. This position was underscored in the recent decision of the Federal Court of Appeal in *Minister of Citizenship and Immigration v. Huruglica et al* 2016 FCA 93. In *Jean, Maunder,* and in *Tracey* the Courts were at pains to specifically delimit the ambit of the Appeal Division as excluding "judicial review." The Appeal Division is bound by the decisions of the Federal Court and Federal Court of Appeal, however, the status of and the applicability of the substantial body of case law built up under the former regime remains to be clarified.

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[1] *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis,* 2015 CAF 242 (CanLII), 2015 FCA 242; *Maunder v. Canada (Attorney General),* 2015 FCA 274; *Tracey v. Canada (Attorney General)* 2015 FC 1300. The Federal Court of Appeal and the Federal Court observed that the scope of the Appeal Division's jurisdiction is set out in section 58 of the DESD Act.

THE APPLICABLE STATUTORY PROVISIONS

Leave to Appeal

[8] Appeals to the Appeal Division are governed by sections 56 to 59 of the DESD Act. The grounds of appeal are set out at subsection 58(1) and are:-

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;
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.

[9] Per subsection 58(2) leave to appeal is granted only where the Appeal Division is satisfied that the appeal has a reasonable chance of succesubsection The Appeal Division granted leave to appeal with respect to possible breaches of paragraphs 58(1)(b) and (c).

The Pro-Ration Provision in the CPP

[10] The CPP allows for proration with respect to the calculation of an applicant's minimum qualifying period (MQP), in certain circumstances. The governing statutory provision is found in section 19 of the CPP, which sets out how the year's basic exemption is to be calculated. With respect to qualifying for a disability pension, the section does not lend itself readily to understanding. Suffice it to say that "proration" allows a contributor, who might not otherwise be able to qualify, to do so on the basis of their pro-rated contribution to the CPP for the year in question. There are, however, certain conditions:-

1. Proration puts an end to the contributory period;
2. The applicant must have eligible earnings and contributions for the year in question;
3. The contributor's earnings must be less than the Year's Basic Exemption; and
4. The disabling event must have taken place during the prorated period.

[11] The position is clearly and succinctly set out by Salhany, J. in *Canada (Minister of Human Resources and Skills Development v. Snowdon*, CP 25013, November 19, 2007 under the head "minimum qualifying period."

> [4] The parties agreed that the Respondent's minimum qualifying period (MQP) was December 31, 2001. However, the Respondent also made contributions to the *Plan* in 2002 based on earnings of $2,752 in 2002 which were below the Years Basic

> Exemption (YBE) of $3,900.00. These contributions were reimbursed to her because she had earned less than the YBE for that year. However, s. 19 of the *Plan* allows proration for the year the contributory period ends because of disability under the *Plan*. For 2002, the prorated amount is established by dividing the YBE by 12 and multiplying by the number of months before and including the month the Respondent became disabled. For 2002, the prorated amount was $325.00. Dividing the Respondent's earnings by $325.00 allowed her eight months of prorated earnings. This means that if the Respondent is able to establish that she was disabled between January 1, 2002 and August 31, 2002 within the meaning of paragraph 42(2)(a) of the *Plan*, she is entitled to disability benefits. As already indicated, the onus of proof is upon a balance of probabilities.

[12] While not binding upon it, the Appeal Division finds the *Snowdon* decision highly persuasive and applicable to the instant case. That the applicant must have become disabled in the prorated period was made clear in the similarly persuasive decision of *Canada (Minister of Social Development) v. Gorman,* (August 1, 2006), CP 22414 PAB, where it is stated that to be eligible for disability benefits, the claimant would have to be found to be disabled within the meaning of the CPP during the extended period. Thus, to properly apply the proration provision, the General Division would have had to have found that the Respondent became disabled between January 1, 2007 and April 30, 2007.

ANALYSIS

The General Division misapplied the Pro-Ration Provision

[13] Counsel for the Appellant argued that the General Division misinterpreted and misapplied the provisions of subsection 44(2.1) of the CPP. Counsel points out that having found that the Appellant had a possible prorated MQP of April 2007; and having applied the proration provision, the General Division erred when it found at paragraph 45 of the decision that she had "a severe and prolonged disability in November 2003."

[14] As stated earlier, the Respondent's representative conceded this point and the Appeal Division concurs. The Appeal Division finds that this is an error of law. The General Division decision is therefore, reviewable on this ground.

[15] Notwithstanding its error of law, the General Division did go on to properly apply the provisions of paragraph 42(2)(b) of the CPP. The Respondent's representative argued that

despite the error of law, the intention of the General Division was clear, that is that the General Division intended to find that the Appellant was disabled within the meaning of the CPP. He urged the Appeal Division to apply section 59 of the CPP and to give the decision the General Division ought to have given. For the following reasons, the Appeal Division is not persuaded that this is the appropriate course of action.

[16] As the PAB set out in *Snowdon,* the disabling event must have occurred during the prorated period. This was not the finding of the General Division. By finding that the Respondent became disabled in November 2003, it effectively means that the Respondent could not meet this all important requirement. Thus, the General Division decision is at best equivocal on the issue to be determined, namely, whether or not the Respondent became disabled between January 1, 2007 and April 30, 2007.

[17] Counsel for the Appellant submitted that this is a question that the Appeal Division cannot determine without a full hearing. She states that the Respondent has submitted a wealth of medical information and she takes the position that the General Division ignored medical evidence particularly the evidence that tended to show that a seizure diagnosis was not made until 2007 and that the Respondent had, in fact, been treated for an entirely different medical condition.

[18] The Appeal Division finds that it not so much that the General Division disregarded the fact that the seizure diagnosis was made only in 2007, but that the Member extrapolated from the Respondent's reported symptoms and the fact that she had continued to take anti-seizure medicine that had been prescribed to treat an entirely medical condition. From these facts the General Division concluded that the Respondent must have been suffering from seizures from the time she had been prescribed the anti-seizure medication. Given that there appears not to have been any mention of seizures prior to 2007, the Appeal Division is not persuaded that without a clear evidentiary basis, it was in the realm of the General Division to draw the inference. The Appeal Division finds that this is an error of mixed fact and law, sufficient to allow the appeal.

[19] With respect to the appropriate disposition of the appeal, the Appeal Division is of the view that the issue of the Appellant's eligibility for a CPP disability pension remains live and is

properly determined by the General Division, whose function it is to take evidence. Accordingly, the Appeal Division would refer the matter back to the General Division for reconsideration.

DECISION

[20] The Appeal Division granted leave to appeal on the basis that the Appellant had raised an arguable case. Having heard the arguments of the parties, and on the basis of the above discussion, the Appeal Division allows the appeal. Further, pursuant to section 59 of the DESD Act, the Appeal Division refers the matter back to the General Division for reconsideration by a different Member.

Hazelyn Ross
Member, Appeal Division