



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 197

Tribunal File Number: AD-16-245

BETWEEN:

**M. B.**

Appellant

and

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

Respondent

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

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DECISION BY: Hazelyn Ross

DATE OF DECISION: June 1, 2016

## **DECISION**

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

## **INTRODUCTION**

[2] This is an appeal of a decision of the General Division of the Tribunal issued January 11, 2016 that dismissed the Appellant's appeal from a reconsideration decision that refused to cancel her retirement pension in favour of a disability pension.

## **THE FACTUAL BACKGROUND**

[3] The Appellant is in receipt of a *Canada Pension Plan*, (CPP), retirement pension, which she began to receive as of November 2012. She applied for a CPP disability pension. The Respondent received her application on July 15, 2014. The Respondent denied the application on the basis that it had been made more than fifteen months after the Appellant began to receive a retirement pension. The Respondent upheld its decision on reconsideration. The Appellant appealed the reconsideration decision to the General Division of the Tribunal which dismissed her appeal summarily.

[4] The Appellant now appeals from the General Division decision.

## **ISSUE**

[5] Did the General Division err when it dismissed the appeal summarily?

## **THE LAW**

[6] The following statutory provisions govern this appeal.

### ***Grounds of appeal:-***

[7] An appellant can appeal to the Appeal Division of the Tribunal on the basis of the three grounds of appeal found at subsection 58(1) of the *Department of Employment and Social Development Act*, (the DESD Act), namely:-

- 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.

***Payment of a disability pension:-***

[8] Section 44 of the CPP provides for payment of a Disability pension on certain conditions. In short, a disability pension is payable to a person who has made the requisite contributions to the CPP, and who is disabled as defined by section 42 of the CPP. In addition, the contributor must not be in receipt of a CPP retirement pension

**Benefits payable**

**44 (1)** Subject to this Part,

**(a)** a retirement pension shall be paid to a contributor who has reached sixty years of age;

**(b)** a disability pension shall be paid to a contributor who has not reached sixty- five years of age, to whom no retirement pension is payable, who is disabled and who

**(i)** has made contributions for not less than the minimum qualifying period,

**(ii)** is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

**(iii)** is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

***Cancellation of a retirement pension:-***

[9] The CPP also provides for cancellation of a retirement pension in favour of a disability benefit, again on certain conditions being met. Subsections 66.1 and 66.1 (1.1) govern the application. These statutory provisions provide,

**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.

[10] 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,

**46.2. (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.

## **SUBMISSIONS**

[11] The Appellant submitted that to deny her the disability pension was unfair. She explained that she took an early pension to supplement her income; that she was advised by one of her doctors to apply for a disability pension; and that at the time she applied for a retirement pension she had been ignorant of the fact that she could obtain a disability pension. She blames her ignorance on the failure of Service Canada personnel to advise her of the consequences of taking a CPP retirement pension. At the same time she submits that the decision in *MSD v. R. Desjardins*, (October 5, 2006) CP 23966 allows a contributor to receive a CPP disability pension at the same time as he or she is receiving a retirement pension.

[12] The Respondent's representative submitted that the General Division came to the right decision concerning the Appellant's eligibility for a disability pension; had cited the correct law; and made no error in applying the law to the facts of the Appellant's case. Moreover, she submitted that the General Division's decision to dismiss the appeal summarily was the appropriate one. The Respondent's representative made the further submission that *Desjardin*, could have no impact on the decision, given the statutory provisions.

## ANALYSIS

### **Did the General Division cite the correct legal provision(s)?**

[13] With regard to summary dismissal of an appeal, Section 53 of the Department of Employment and Social Development Act, (DESD Act), states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.<sup>1</sup> At paragraph 3 of its decision, the General Division identified this section as being applicable.

[14] The specific issue raised in this appeal is whether the Applicant's retirement pension could be cancelled in favour of a disability pension. At paragraph 13 of its decision, the General Division identified the applicable statutory provisions as being subsection 66.1 (1.1) of the CPP and section 46.2. (1) of the *Regulations*. The former Pension Appeals Board, (PAB), discussed the impact of subsection 66.1 (1.1) in *Desjardins*. It described section 66.1(1.1) "clear and unequivocal." The question before the PAB was whether the Review Tribunal had erred in its interpretation of the applicable sections of the CPP and applied those provisions incorrectly to the facts of Mr. Desjardin's case.

[15] At paragraph 17 of the decision, the General Division quoted the PAB as stating that the provisions of the Plan allowing for the cancellation of retirement benefits in favour of disability benefits are not flexible. The Appeal Division is of the view that the PAB left no room for misinterpretation in its decision that a retirement pension was not payable at the same time as a disability pension. Subsection 66.1(1.1) speaks always to a cancellation of a retirement pension in favour of a disability pension. (*Desjardins* at paras. 17 and 18)

[16] CPP subsection 46.2. (1) allows a recipient of a CPP benefit to ask the Minister to cancel the benefit; however, the request must be made in writing and within six months of the benefit commencing. The General Division correctly identified this provision and discussed its legal implication at paragraph (6) of the decision.

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<sup>1</sup> 53 (1) The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

**Did the General Division err in its application of the law to the facts?**

[17] The facts of the Appellant's case are straightforward and have been set out above. They are not in dispute. The General Division found that when CPP subsection 66.1(1.1) together with subsection 46.2. (1) were applied to the facts of the case, the Appellant's retirement pension could not be cancelled in favour of a disability pension. Thus her appeal did not have a reasonable chance of success.

[18] The General Division referred to paragraph 42(2)(b) of the CPP (the maximum retroactivity provision) in its analysis. The Appeal Division is not certain that this paragraph assists the analysis as the issue really resides in whether the request to cancel the pension was made within the required six months. Once outside the six month window, any issue of disability is rendered moot.

[19] The Appellant submitted that she had been ill advised by Service Canada employees. She stated that she has been unable to work since November 2013 and had been advised by Dr. Cynthia Blair to apply for a disability pension. At the same time, she admits that she took the retirement pension in October 2012. While she does not state when Dr. Blair advised her to apply for a disability pension, because of her statement that she applied for the retirement pension to supplement a part-time income, the Appeal Division infers that this advice came well after the Appellant began to receive a retirement pension, and, likely, around the time she made the request to cancel her retirement pension. (AD1-2) In any event, none of this assists the Appellant as the relevant concern is not what advice she received from her doctor or when she was advised to make the application but when she actually did so. It is not in dispute that this was done only in April 2014.

**The Decision to dismiss the appeal summarily.**

[20] "Summary Dismissal" is required where an appeal has no reasonable chance of success. 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. Notwithstanding the Appellant's

position that she is entitled to a disability pension the Appeal Division finds that her appeal did not have a reasonable chance of success.

[21] Subsection 46.2. (1) of the *Regulations* mandated that the Appellant had until no later than April 2013 to make the request to cancel her retirement pension. It is not in dispute that it was only in April 2014 that the request was made. More than six months had passed since she began to receive a retirement pension. In light of the operation of the CPP subsection 66.1(1.1) and subsection 46.2. (1) of the *Regulations*, in April 2014 the Applicant was well out of time to make the request to cancel her retirement pension in favour of a disability pension. Therefore, it was appropriate for the General Division to invoke and apply section 53(1) of the DESD Act.

[22] In light of the above, the Tribunal finds that the General Division did not commit any reviewable error when it summarily dismissed the Appellant's appeal. The decision to summarily dismiss the appeal is in accordance with subsection 53(1) of the DESD Act.

## **CONCLUSION**

[23] For the above reasons, the appeal is dismissed.

*Hazelyn Ross*

Member, Appeal Division