



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. D. S.*, 2016 SSTADIS 198

Tribunal File Number: AD-16-706

BETWEEN:

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

Applicant

and

D. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 2, 2016

REASONS AND DECISION

OVERVIEW

[1] At its core, this case is about whether the date of payment of a Canada Pension Plan disability pension should be based on the date of application or the date of effective disability.

[2] The Applicant seeks leave to appeal the decision of the General Division dated February 17, 2016. The General Division determined that the Respondent has a severe and prolonged disability and that he became disabled in October 2011, when he stopped working due to symptoms from fibromyalgia. The General Division determined that payment of a disability pension therefore should commence as of February 2012, four months after the disability arose. The Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on May 13, 2016, on the basis that the General Division erred in law by failing to consider paragraph 42(2)(b) of the *Canada Pension Plan* and by failing to determine the deemed date of disability. For the Applicant to succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

SUBMISSIONS

[3] The Applicant does not contest the finding of disability. However, counsel for the Applicant submits that the General Division failed to consider paragraph 42(2)(b) of the *Canada Pension Plan* and thereby failed to determine the date of deemed disability. The Applicant submits that, based on the date of application of October 2013, the earliest the Respondent could be deemed disabled was July 2012, rather than October 2011.

ANALYSIS

[4] 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.

[5] Before I can consider granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA 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.

[6] The Applicant indicates that the General Division correctly noted that the Applicant received the Respondent's application for a disability pension on October 2, 2013.

[7] The Applicant acknowledges that the General Division correctly applied section 69 of the *Canada Pension Plan* to indicate the applicable rule to determine the effective date of payment. However, he argues that the General Division erred in law because it failed to consider paragraph 42(2)(b) of the *Canada Pension Plan*, when determining the date of payment of a Canada Pension Plan disability pension. The Applicant further argues that the payment date is based on the date of application, rather than the date of effective disability.

[8] Paragraph 42(2)(b) of the *Canada Pension Plan* provides that, "in no case shall a person ... be deemed to have become disabled earlier than fifteen months before the time of the making of any application". In other words, the maximum retroactivity permitted under the *Canada Pension Plan* is 15 months prior to the date of application.

[9] The Applicant maintains that, as the application for a disability pension was made on October 2, 2013, the earliest date that the Respondent could be deemed disabled was fifteen months prior to October 2013, which is July 2012.

[10] The Applicant submits that, based on the erroneous deemed date of disability, the General Division further erred in its determination of the effective payment date, pursuant to section 69 of the *Canada Pension Plan*, identifying the effective date of payment as

February 2012. The Applicant further submits that, as the Respondent should have been deemed disabled in July 2012, the correct effective date of payment would be four months later, in November 2012.

[11] The Applicant submits that the General Division therefore erred, initially by failing to apply paragraph 42(2)(b) of the *Canada Pension Plan* in determining the deemed date of disability, and that it then compounded that error by using the effective date of disability in calculating the payment date.

[12] I am satisfied that the appeal has a reasonable chance of success based on the ground that the General Division may have erred in law by failing to consider the deemed date of disability in determining the commencement date of payment of a Canada Pension Plan disability pension.

CONCLUSION

[13] The application for leave to appeal is granted.

[14] This decision granting leave to appeal does not in any way prejudge the result of the appeal on the merits of the case. However, given the strength of the ground of appeal and the legal nature of the issue involved on appeal, I am inclined to proceed to hearing the matter on the record at the earliest opportunity available, short of any compelling submissions from the Respondent. 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