



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. L. B.*, 2016 SSTADIS 219

Tribunal File Number: AD-16-252

BETWEEN:

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

Applicant

and

L. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 17, 2016

REASONS AND DECISION

OVERVIEW

[1] At its core, this case is about how one determines the end of a contributory period, for the purposes of calculating a Canada Pension Plan retirement benefit.

[2] When the Respondent turned 65 years of age, her *Canada Pension Plan* disability pension was automatically converted to a retirement pension. The Applicant based the amount of the Respondent's retirement pension on a contributory period of 79 months. The Respondent appealed this calculation. On November 9, 2015, the General Division found that the Respondent had a contributory period of 75 months between January 1966 and February 1978, for the purposes of her retirement benefit calculation.

[3] The Applicant filed an application requesting leave to appeal the decision of the General Division, alleging that it erred in law and in fact and that it acted outside its jurisdiction when it determined the Respondent's contributory period.

ISSUE

[5] Does the appeal have a reasonable chance of success?

FACTS

[6] The relevant facts, for the purposes of this application, are as follows:

- i. the Respondent was found disabled under the *Canada Pension Plan* on the basis of her first application for a disability pension. Consequently, she was deemed disabled as of November 1977 and the effective date of payment of a disability pension began as of March 1978;
- ii. the Respondent turned 65 years of age in December 2012 and her disability pension was automatically converted to a retirement pension. The

Respondent based the monthly amount of the retirement pension on a contributory period of 79 months;

- iii. the Respondent disputed the amount of the monthly retirement pension, arguing that the contributory period should be 75 months. The Applicant responded by letter dated August 28, 2013, notifying her of its calculation. The Respondent sought an appeal of the Applicant's reconsideration decision which maintained that it had properly calculated the amount of the monthly retirement pension as being 79 months; .
- iv. the General Division rendered its decision on November 9, 2015. It concluded that, pursuant to paragraph 44(2)(b) of the *Canada Pension Plan*, the Respondent's contributory period was 75 months.

SUBMISSIONS

[7] The Applicant argues that the General Division erred, as it found that the Respondent's contributory ended in the month when the Respondent was deemed disabled. The Applicant submits that the contributory period ends with the commencement of an applicant's disability pension, not when she is deemed disabled.

[8] The Applicant argues that the General Division further erred when it failed to consider or apply section 49 of the *Canada Pension Plan*, which sets out when a contributory period ends, and that it erred by relying instead on the wrong provisions of the *Canada Pension Plan* and on other considerations. The Applicant argues that, pursuant to section 49 of the *Canada Pension Plan*, the contributory period excludes months when the Respondent received a *Canada Pension Plan* disability pension, which in this case started in March 1978.

ANALYSIS

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* 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.

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

[11] The Applicant submits that this appeal concerns the determination of the contributory period establishing the retirement benefit. The Applicant argues that retirement pension is calculated differently than a disability pension. The Applicant argues that the calculation of a retirement pension is governed by sections 46 to 51 of the *Canada Pension Plan*, which require the contributor's contributory period to be determined for the purposes of calculating the benefit. The Applicant maintains that the General Division treated the appeal before it as a disability case, rather than a retirement matter, which resulted in it applying the wrong provisions of the *Canada Pension Plan*.

[12] The General Division applied paragraph 44(2)(b) of the *Canada Pension Plan* in calculating the contributory period. Paragraph 44(2)(b) of the *Canada Pension Plan* reads:

44. Benefits payable . . .

(2) Calculation of minimum qualifying period in case of disability pension and disabled contributor child's benefit – For the purposes of paragraphs (1)(b)(e) and (e), . . .

(b) the contributory period of a contribution shall be the period ...

[13] Paragraphs 44(1)(b) of the *Canada Pension Plan* establishes to whom a disability pension is payable, while paragraph 44(1)(e) of the *Canada Pension Plan* establishes to whom a disabled contributor's child benefit is payable.

[14] The applicant argues that section 49 of the *Canada Pension Plan* is applicable, rather than paragraph 44 of the *Canada Pension Plan*. The section defines the contributory period of a contributor for the purposes of calculating a retirement pension, death benefit, survivors' pension or orphan's benefit. The section reads:

49. Contributory period – The contributory period of a contributor is the period commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and ending

(a) where a benefit other than a disability pension commences before the end of 1986, when he reaches sixty-five years of age, or if he makes a contribution for earnings after he reaches sixty-five years of age, with the month for which he last made such a contribution, and in any case not later than the month in which he dies, or

(b) where a benefit other than a disability pension commences after the end of 1986, with the earliest of

(i) the month preceding the month in which he reaches seventy years of age,

(ii) the month in which he dies, or

(iii) the month preceding the month in which the retirement pension commences,

but excluding

(c) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and

(d) in relation to any benefits payable under this Act for any month after December, 1977, any month for which he was a family allowance recipient in a year for which his unadjusted pensionable earnings were equal to or less than his basic exemption for the year.

[15] The Applicant argues that, based on the applicable law, the Respondent was deemed disabled as of November 1977 and her disability pension became payable in March 1978, and that her contributory period therefore ended in February 1978, the

month prior to the month in which her disability pension commenced, pursuant to paragraph 49(b) as it then read.

[16] There is an arguable case therefore as to whether section 44 or section 49 of the *Canada Pension Plan* applies when determining the Respondent's contributory period. I am satisfied that the appeal has a reasonable chance of success on the grounds identified by the Applicant.

CONCLUSION

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

[18] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew

Member, Appeal Division