



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 244

Tribunal File Number: AD-16-201

BETWEEN:

L. C.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Divisio

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 29, 2016

REASONS AND DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses the application for leave to appeal.

INTRODUCTION

[1] The facts of this matter are not in dispute. The Applicant is in receipt of a *Canada Pension Plan, (CPP)*, retirement pension; payment of which commenced in July 2012. He suffered a severe subarachnoid haemorrhage in August 2012 (a month after his retirement pension commenced). Having become aware of the possibility of receiving CPP disability benefits he applied for them. (GD1A-5) While his application was made within the 15 months prescribed by the CPP the Respondent denied his application and maintained the denial on reconsideration.

[2] The Applicant appealed the denial and on November 25, 2015 a Member of the General Division of the Tribunal denied his appeal. The Member held that, as the Applicant had not become disabled prior to the month before he started receiving his retirement pension he could not cancel that pension in favour of a disability pension.

[3] The Applicant seeks leave to appeal the General Division decision, (the Application).

GROUNDS OF THE APPLICATION

[2] The Applicant submitted that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. (AD1-2)

ISSUE

[3] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE GOVERNING STATUTORY PROVISIONS

[4] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act) govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) “an appeal to the Appeal Division may only be brought if leave to appeal is granted.” Subsection 58(3) provides that “the Appeal Division must either grant or refuse leave to appeal.”

[5] Subsection 58(1) of the *Department of Employment and Social Development, (DESD), Act*, sets out the only three grounds of appeal, 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.

ANALYSIS

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.¹ In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

¹ *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[8] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

[9] For the reasons that follow leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

The General Division did not base its decision on an erroneous finding of fact.

[10] In the Application, the Applicant contended that by relating his application to his CPP retirement pension, the General Division erred. He noted that even as he was receiving a retirement pension, he was still paying into the CPP and he expressed his view that he is entitled to CPP disability benefits by virtue of this fact alone. This is, of course, not true. Entitlement to a disability pension is not as of right; applicants must meet the criteria set out by the CPP. Further, the CPP does not allow payment of two benefits at the same time. To this end, at section 66.1, it does provide for the cancellation of one benefit and the receipt of another. To take advantage of this provision applicants must still bring themselves within the statutory parameters in order to qualify for the benefit. CPP section 66.1 states:-

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 applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant 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.

[11] In the Applicant's case it is the exception at subsection **1.1** that is important. What the subsection says is that if an applicant becomes disabled, or is found disabled, in the same month or any time after he or she begins to receive a retirement pension, that applicant cannot cancel their retirement pension in favour of a disability pension. It follows, therefore, that for the Applicant to receive the benefit of the cancellation provision, he would have had to have become disabled at the very latest in the month before he began to receive the CPP retirement pension.

[12] The Appeal Division finds that at paragraphs 5 through 7 of the decision the General Division Member cited the correct statutory provisions and applied them appropriately to the facts of the Applicant's case as set out above. At paragraph 14 of the decision, the General Division asked the pertinent question, namely, "was the Appellant disabled, as defined by the CPP legislation, before the effective date of his retirement pension?" The answer is clearly no. The Applicant himself stated that he began to receive his retirement pension in July and suffered the incident in August of the same year. The General Division found that the medical evidence supported this sequence of events. This is the sole basis of the General Division decision (paras. 14-16) and it reveals no error either of fact or of law.

CONCLUSION

[13] The Applicant seeks leave to appeal from the decision of the General Division that he is not entitled to cancel his retirement pension in favour of a disability pension. On the basis of the foregoing analysis, the Appeal Division is not satisfied that the appeal would have a reasonable chance of success.

[14] Leave to appeal is refused.

Hazelyn Ross
Member, Appeal Division