



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. B. U.*, 2016 SSTADIS 248

Tribunal File Number: AD-16-734

BETWEEN:

Minister of Employment and Social Development

Applicant

and

B. U.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 30, 2016

REASONS AND DECISION

DECISION

[1] The application for leave to appeal is granted and the appeal is allowed.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated March 4, 2016. The GD conducted an in-person hearing on March 3, 2016 and determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found her disability was “severe and prolonged” as of the minimum qualifying period (MQP).

[2] On May 27, 2016, within the prescribed time limit, the Applicant’s representative filed an application with the Appeal Division (AD) requesting leave to appeal. It alleged that the GD had erred in law when it determined the first payment date of the Respondent’s disability pension.

OVERVIEW

[3] The Respondent submitted an application for CPP disability benefits on October 10, 2013. She indicated that she had a Grade 10 education and over the years was periodically employed as a sales clerk and babysitter. After her marriage ended, she worked for a commercial cleaning company from June 2006 to March 2009, when she was involved in a motor vehicle accident.

[4] The Applicant denied her application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged as of her MQP date of December 31, 2009.

[5] On October 10, 2014, the Respondent appealed these denials to the GD. In a decision dated June 11, 2015, the GD allowed the appeal and found the Respondent disabled as follows:

For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in October 2013 therefore the Appellant is deemed disabled in July 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of November 2012.

[6] On May 27, 2016, the Applicant filed an Application for Leave to Appeal with the Appeal Division (AD) of the Social Security Tribunal alleging an error of law on the part of the GD. I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

- (a) There are no gaps in the file or need for clarification;
- (b) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[7] The Applicant's submissions were set out in its Application for Leave to Appeal. On June 13, 2016, the Respondent's representative submitted a letter confirming its understanding that the Applicant was not seeking to appeal his client's eligibility for CPP disability benefits, only the date from which said benefits were payable. Given this, the Respondent would be taking no position on the matter.

THE LAW

[8] Under section 55.1 of the CPP, a spouse may apply for a Division of Unadjusted Pensionable Earnings (DUPE), which triggers an equitable sharing of CPP credits after a separation or divorce.

[9] Subsection 55.2(9) of the CPP relates to when a benefit becomes payable where there is a DUPE:

Where there is a division under section 55.1 and a benefit is or becomes payable under this Act to or in respect of either of the persons subject to the division for a month not later than the month following the month in which the division takes place, the basic amount of the benefit shall be calculated and adjusted in accordance with section 46 and adjusted in accordance with subsection 45(2) but subject to the division, and the adjusted benefit shall be paid effective the month following the month in which the division takes place but in no case shall a benefit that was not payable in the absence of the division be paid in respect of the month in which the division takes place or any prior month.

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are that:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The GD 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.

[11] Leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success. In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also found that having an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

[12] According to subsection 59(1) of the CPP, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the AD in whole or in part.

ISSUES

[13] The issues before me are as follows:

- (a) Does the appeal have a reasonable chance of success?
- (b) If so, did the GD err in failing to consider and apply the provisions of subsection 55.2(9) of the CPP?
- (c) Should the AD give the decision that the GD should have given in this case?

SUBMISSIONS

[14] The Applicant concedes the finding that the Respondent was disabled under paragraph 42(2)(a) of the CPP but alleges the GD erred in law by failing to consider subsection 55.2(9) in determining the effective payment date. The GD found that pursuant to paragraph 42(2)(b) of the CPP, the earliest the Respondent could be deemed disabled was fifteen months prior to the date the application was received by the Applicant. Since the Respondent's disability application was received by the Applicant in October 2013, the GD found that the Respondent was deemed disabled in July 2012 and, pursuant to section 69 of the CPP, determined that payment should begin four months later, in November 2012.

[15] However, the Applicant alleges that the GD failed to appreciate that it was a DUPE that provided the Respondent with her MQP of December 31, 2009. Although it was not explicitly addressed in the Applicant's submissions to the GD, the DUPE was reflected in the Record of Earnings with codes that were explained in the HRSDC Explanation of Decision.

[16] On November 7, 2013, the Applicant informed the Respondent that she could apply for DUPE. She proceeded to do so in January 2014.

[17] The Applicant submits that the GD erred in law by failing to apply subsection 55.2(9), which mandates a first payment date effective the month following the month in which a DUPE takes place—in this case, February 2014.

[18] As noted above, the Respondent took no position on the issue of the first payment date.

ANALYSIS

[19] Having reviewed the evidence and law, I must agree with the Applicant that the GD erred in law in rendering its decision. Although it is not immediately obvious on the record, it is nevertheless a fact that the Appellant's MQP was derived from credits allocated following a DUPE. It is clear that the effect of subsection 55.2(9) of the CPP is to prevent commencement of any benefit—including the disability pension—prior to the effective date of a DUPE. Having reviewed the record from the Applicant's database reproduced at Tab 4 of its submissions, I am satisfied that the Respondent did in fact apply for, and was granted, a DUPE effective January 2014. As a result, notwithstanding the provisions of section 69, the Respondent's CPP disability pension must commence February 2014.

[20] The Applicant's appeal is focused on the issue of first payment date, and I see no reason to disturb the GD's conclusion that the Respondent was disabled. Based on a review of the facts of this case, I am satisfied that the Applicant's case not only has a reasonable chance of success, but it must ultimately succeed. For that reason, it is appropriate for me at this juncture to give the decision that the GD should have given without any further submissions or hearing. Accordingly, both the Application for Leave to Appeal and the Appeal itself are granted, and I find that the effective first payment date for the Respondent's CPP disability pension is February 2014.

CONCLUSION

[21] The appeal is allowed.



Member, Appeal Division