



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. A. v. Minister of Employment and Social Development*, 2016 SSTADIS 269

Tribunal File Number: AD-16-112

BETWEEN:

S. A.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: July 14, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Upon the request of the Appellant, (AD12), the hearing of this appeal proceeded on the basis of the written record.

DECISION

[1] The Appeal is allowed in part.

INTRODUCTION

[2] The Appellant applied for and was granted a *Canada Pension Plan* R.S.C. 1985, c. C-8 disability pension by reason of mental illness. Originally, the Respondent found that she had become disabled in December 2012; when her employer confirmed that she stopped working in November 2012, the Respondent conceded that she had become disabled in November 2012. The Appellant appealed the decision to the General Division of the Tribunal. She argued that she became disabled in October 2008 but was incapable of forming the intention to apply for benefits until November 2012. Her disability pension should commence in October 2008.

[3] The General Division found that the Appellant had not met her evidentiary onus to establish a continuing incapacity between October 2008 and November 2012. It dismissed her appeal. On January 18, 2016 the Appeal Division granted the Appellant leave to appeal from the General Division decision. The Appeal Division found that the General Division may have breached a principle of natural justice by the manner in which it participated in the proceedings. Leave was also granted on the basis that the General Division erred by giving the wrong start date for the commencement of the Appellant's disability pension.

ISSUE

[4] The issues in the Appeal are:-

1. Did the General Division interfere in and impede the Appellant's ability to present her case?

2. Did the General Division cite the wrong start date for the payment of the Appellant's disability pension?

THE LAW

[5] The Department of Employment and Social Development Act, (DESD Act) sets out three grounds of appeal, namely that:-

- 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.

[6] Subsection 60(8) of the CPP addresses incapacity. The subsection allows the Minister, in certain circumstances, to deem an application to have been made earlier than the date on which it was actually made in cases where the applicant has been found to have been incapable of forming or expressing the intention to make an application for a CPP benefit.

[7] Section 69 of the CPP governs when the payment of a disability pension starts, providing that "where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month in which the applicant became disabled..."

SUBMISSIONS

[8] The Appellant submitted that the General Division unnecessarily interfered with the proceedings. She cited two instances where this occurred. These are time stamped 23:03 and 25:29 to 26:58 of the recording of the General Division hearing.

[9] The Respondent's representative submitted that the principles of natural justice were observed and that the interventions alleged by the Appellant were actually interventions that were intended to clarify the Appellant's evidence. She submitted that:-

1. The General Division Member, between 22:30 and 23:26 of the recording, clarifies the date regarding the treatment the Appellant is receiving and the type of treatment she received at this time; and

2. Between 25:29 and 26:58 of the recording interrupts the Appellant to finish a line of questioning regarding the discharge summary from her treatment in April 2011.

[10] The Respondent's representative submitted that these interruptions amounted to allowable, active participation by the General Division.

ANALYSIS

Did the General Division "commandeer" the proceedings?

[11] Having had the opportunity to listen to the whole of the recording of the hearing, the Appeal Division noted:-

1. The Appellant was self-represented.
2. At the outset of the hearing the General Division Member confirmed that he and the Appellant had the same documents, namely, the Notice of Appeal; the reconsideration file (GD-2) which contained the application for disability benefits; the CPP medical report; the Applicant's record of CPP contribution (GD3 in six parts); hospital charts from Trillium, Mississauga and William Osler, Brampton, including admission records. The Appellant confirmed that these were all of the hospital records she would be relying on. She did not state that any documents were missing.
3. The Appellant asked, and the General Division Member agreed, to identify documents when he referred to them. The Member asked the Appellant to do the same.
4. The General Division Member set out the issue, namely, when payment should commence. The Appellant agreed that this was the issue.
5. The General Division Member was about to propose a method of proceeding when the Appellant interjected. He had begun by stating, "I could ask you questions which I think are relevant to the issue..."
6. The Appellant indicated that there were certain issues that she wanted to go over contained in GD1B-1. She clarified the date she stopped work as November 2012 and that she did not start receiving her benefits until April 2013. She stated that the first month's payment remained outstanding even though the Respondent had conceded the change in the date she stopped working.
7. The Appellant began to discuss her work history at Pella Windows. She voiced her objection to the current Human Resources manager commenting on her performance because she was not the manager when the Appellant was working. The General Division Member went over the content of the report with the Appellant, who expressed her disagreement with her employer's the assessment of her performance. She testified it was worse than was reflected on the employer's report.
8. Throughout the hearing the Member was respectful towards the Appellant, who participated fully. At the end of the hearing the General Division could be left in no doubt of the Appellant's position. She was steadfast that she became disabled as of her first hospitalisation in October 2008, and that she remained so until she resigned her position at Pella Windows and Doors in November 2012.

9. Throughout the hearing the Appellant drew the Member's attention to what she perceived to be inconsistencies in the Respondent's findings.
10. The Member did alert the Appellant that he may interrupt her for the purpose of clarifying or directing her answer before he started taking the evidence (approx. 16:43)
11. At 22:30 the General Division Member interrupts the Appellant who was discussing her medical report from William Osler "this is in respect to treatment." The Appellant goes on to describe her physical and mental conditions
12. At 23:06 the Member interrupts to clarify the date when she found incapable of consenting to electro convulsive therapy/treatment, the Member asks for clarification of the type of treatment and the condition that the treatment was supposed to treat.
13. At 25:29 the General Division Member clarifies which hospital the Appellant was speaking about. The Appellant stated that she wished to go back to discussing her previous admissions; the Member indicated that he would leave it to the Appellant but that they should finish discussing the most recent hospitalisation.

[12] The Appellant cited these interventions as examples of how the General Division Member commandeered the proceedings and prevented her from presenting her case fully. The Respondent takes the position stating that these interventions were intended to clarify aspects of the testimony. The Appeal Division agrees with the Respondent. The Appellant may have wished to present her case in her own way, while the Member preferred to receive the evidence in a more systematic way. This, however, is not a breach of natural justice. At the end of the day, there could be no doubt of the Appellant's position. The Appellant was firm in her contention that she became disabled as of October 27, 2008. Her testimony in this regard was fulsome. This is reflected in both the evidence and the analysis sections of the decision.

[13] The Appellant had the opportunity to testify about her hospitalisation of October 2008. She also had the opportunity to give evidence about subsequent hospitalisations; and her difficulties at work. The Appeal Division finds that the Appellant equated her incapability to consent to electro-convulsive treatment in October 2008 to incapacity to form the intent to apply for CPP disability benefits. However, this was but one aspect to be considered.

[14] In *Canada (Attorney General) v. Danielson*, 2008 CA 78, the Federal Court of Appeal, (FCA), examined the legal test in section 60 of the CPP. The FCA described section 60 as "precise and focused in that, "it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply, of 'forming or expressing an intention to make an application'".

[15] Approving the approach in *Morrison v. The Minister of Human Resources Development*, CP 04182 (March 7, 1997), the FCA stated that it was necessary to look both at the medical evidence as well as the applicant's activities in order to decide whether or not the applicant met the test: the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so "forming and expressing" the intent" were important to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered.

[16] The General Division looked at the Appellant's activities between October 2008 and November 2012. At paragraph 25 it found that the Applicant

“...was likely incapable of making an application by reason of psychosis during the period from October 2008 when she was admitted to Trillium Health Centre to December 24, 2008 when she was discharged. At that point her condition was described as “much improved and stable.”

[17] The General Division then looked at the Appellant's activities between 2009 and 2010. It found that there was no medical evidence after her discharge in December 2008 to support a finding that the incapacity continued. The Appellant was able to work and to manage her affairs up until November 2012. It concluded that there was no evidentiary basis on which to find that she was incapable of making an application in either 2009 or 2010.

[18] The General Division continued its analysis with respect to 2011 and 2012. It found that the Appellant met the definition of “incapacity” during the two periods of hospitalisation in January 2011 to April 2011 and from June 1, 2011 to June 29, 2011. The General Division concluded she had had three separate periods of incapacity.

[19] Despite coming to this conclusion, the General Division held that the Applicant could not come within the definition of incapacity because :-

- a. her application was not made within the time limit set out by paragraph 60(9) of the CPP; and
- b. she did not have a continuous period of incapacity as required by the paragraph 60(10) of the CPP.

[20] The Appeal Division finds that the General Division's approach to determining the incapacity of the Appellant accords with *Morrison*. Thus, the General Division did not err in its application of the law to the circumstances of the Appellants case nor, as previously discussed did it breach a principle of natural justice by preventing the Appellant from fully presenting her case.

[21] The Appeal is dismissed with respect to this ground of appeal.

Did the General Division err in law with respect to the date of commencement of benefits?

[22] Given the clear wording of Section 69 of the CPP that payment of a disability pension commences with the fourth month in which an applicant becomes disabled, it would have been an error of law for the General Division to state that payment of the Applicant's pension would commence in April 2013. However, the General Division Member did not make such a finding. In fact, it made no finding as to the date of commencement of the Appellant's disability pension, confining its discussion only to the issue of continuing incapacity between October 2008 and November 2012.

[23] The Appellant did raise the issue at the hearing. She stated that she had not received payment for March 2013. She indicated that her enquiries about the payment had not been answered to her satisfaction.

[24] In its submissions to the General Division, (GD9-6), the Respondent conceded the point, stating that "it is the position of the Minister, Ms. S. A. should receive benefits one month prior than originally decided." The question arises as to whether the General Division's failure to make this finding is an error of law. The Appeal Division finds that it is. The issue had been raised in the parties' submissions and at the hearing. Thus it was a live issue that the General Division should have addressed. The General Division failed to comply with the provisions of s. 69 of the CPP when it did not officially correct the error. Accordingly, the appeal is allowed in relation to this ground of appeal.

CONCLUSION

[25] Leave to appeal was granted on two bases. First that the General Division may have breached natural justice by participating excessively in the proceedings. Second that the General Division erred in law when it stated that payments of the CPP would begin in April 2013, five months after the date the Appellant was deemed to have become disabled. For the reasons set out above the Appeal Division dismisses the first ground of appeal. The Appeal Division allows the second ground of appeal. In accordance with section 69 of the CPP payment of the Appellant's disability pension commences March 2013.

[26] The Appeal is allowed in part.

Hazelyn Ross
Member, Appeal Division