



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Minister of Employment and Social Development v. J. J.*, 2016 SSTADIS 263

Tribunal File Number: AD-16-728

BETWEEN:

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

Applicant

and

**J. J.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**On Leave to Appeal**

**Appeal Division**

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DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 11, 2016

## REASONS AND DECISION

### INTRODUCTION

[1] On February 24, 2016, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal of a decision of the Minister of Employment and Social Development (Applicant). The Respondent had been denied benefits on a claim for a disability pension, because the Applicant had determined that the Respondent did not have a severe disability on or before December 31, 2013. The Applicant appealed to the GD of the Tribunal.

[2] The GD held the appeal by questions and answers, and it determined that:

- a) The Respondent's minimum qualifying period (MQP) is December 31, 2013;
- b) She had a severe disability as defined in the *Canada Pension Plan* (CPP) on or before her MQP; and
- c) The definition of a "prolonged disability" does not mean the disability has to be permanent;
- d) The Respondent's disability meets to test of "long continued" and, at the MQP, there was little likelihood of her condition improving;
- e) *Canada (MHRD) v. Henderson*, 2005 FCA 309 is distinguishable; and
- f) At the MQP, the Respondent's disability was long continued and of indefinite duration, and, therefore, prolonged.

[3] Based on these conclusions, the GD allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on May 25, 2016, within the 90 day time limit.

## ISSUE

[5] Whether the appeal has a reasonable chance of success.

## LAW AND ANALYSIS

[6] Pursuant to subsection 57(1)(a) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal.”

[8] 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.”

[9] Subsection 58(1) of the DESD Act states that the only grounds of appeal are 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] The Applicant’s grounds of appeal are that the GD erred in law in arriving at its decision in that it allowed a closed period of disability, contrary to established jurisprudence. The Applicant’s arguments can be summarized as follows:

- a) The *Henderson* case should be read as an unreserved statement that the CPP does not provide a pension to those who are disabled from working over a temporary period;

- b) *Henderson* was confirmed by the Federal Court of Appeal in *Litke v. Canada (HRSD)*, 2008 FCA 366;
- c) *Litke* re-emphasizes that the restrictive interpretation of the word “indefinite” and does not carve out an exception to the rule that closed periods are not allowed under the CPP;
- d) The GD granted a disability pension for a temporary period of disability, which is a period with a definite duration;
- e) The GD cited *Henderson* and *Litke* but did not apply them correctly;
- f) The GD was persuaded by a line of Pension Appeal Board (PAB) decisions which allowed for closed periods under exceptional circumstances;
- g) PAB decisions are not binding on the GD; and
- h) Closed periods are not allowed under the CPP and the Respondent does not meet the prolonged branch of the test for disability.

### **Error of Law**

[11] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of misconduct, at pages 2, 10, and 11.

[12] The GD referred to PAB decisions and recognized that they were not binding. However, it was persuaded by these decisions that where the prognosis at the time of the application is not positive, an award of a closed period pension is possible.

[13] The GD distinguished the *Henderson* case at paragraph [50] on the basis that the accepted medical opinion in that case was that surgery would improve Mr. Henderson’s condition and enable him to work, whereas the medical opinions prior to July 2014 in the present matter did not present a likelihood of improvement.

[14] The GD referred to the *Litke* case at paragraph [46] but did not discuss its applicability (or non-applicability) to the present matter.

[15] In the circumstances, whether the GD erred in law in making its decision warrants further review.

[16] On the ground that there may be an error of law, I am satisfied that the appeal has a reasonable chance of success.

## **CONCLUSION**

[17] The Application is granted but limited to subsection 58(1)(b) of the DESD Act.

[18] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[19] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, on the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng  
Member, Appeal Division