Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Minister of Employment and Social Development v. T. T.,* 2016 SSTADIS 355

Tribunal File Number: AD-16-1058

BETWEEN:

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

Applicant

and

T. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Hazelyn Ross

Date of Decision: September 13, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies for leave to appeal the decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued on May 11, 2016. In its decision the General Division determined that the Respondent was eligible for a disability pension payable under the *Canada pension Plan,* (the CPP). The General Division found the Respondent to have become disabled as of September 2011. Based on the date the application was received, the General Division deemed the Respondent disabled as of March 2012, with payment of the disability pension commencing in July 2012.

ISSUE

[2] The issue is whether the appeal has a reasonable chance of success.

THE LAW

[3] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development,* (DESD), Act govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[4] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1]

[5] 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.[2] In *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 41 and in *Fancy v. Canada*

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

(Attorney General), 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[6] Subsection 58(1) of the 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.

[7] *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.

REASONS FOR THE APPLICATION

[8] The Applicant submitted that the General Division erred in law and 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. The Applicant states that the errors occurred when the General Division determined that the Respondent was eligible for a CPP disability pension as of September 2011 because at that date he did not meet the minimum contributory requirements of the CPP and did not have a minimum qualifying period, (MQP). (AD1-7) The Applicant also submitted that the Appeal Division should dispose of the Application by granting its application and allowing the appeal on all of the grounds identified in the Application.

[9] After, the Applicant had filed its Application, the Respondent sent a letter to the Appeal Division in which he stated that he agreed "with the appeal and asked that the file be sent back to the Tribunal." (AD1A-1)

ANALYSIS

[10] On reading the decision, the Appeal Division finds that the General Division erred in law in its application of paragraph 44(2)(a) of the CPP, which addresses the calculation of the minimum qualifying period where an application has been made for a CPP disability pension.

Subsection 44(2)(a)of the CPP provides that a contributor shall only be considered to have made contributions for not less than the minimum qualifying period if he meets one of the following three conditions:-

(i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period f or at least four years,

(1.1)for at least 25 calendar years included either wholly or partly in the contributor's contributory period, of which at least three are in the last six calendar years included either wholly or partly in the contributor's contributory period, or

(ii) for each year after the month of cessation of the contributor's previous disability benefit.

[11] In the Respondent's case he had previously applied for and had been granted a CPP disability benefit. Payment ceased in May 2006. (GD2-171) The Respondent made the current application on June 25, 2013. (GD2-44) His record of contributions show that the Applicant made no contributions to the CPP between the years 1989 and 2008. (GD2- 51) Counsel for the Applicant submitted that, when the General Division determined that the Respondent had become disabled in September 2011, thus ending his contribution period, he did not have sufficient contributions to meet the four out of six rule. The Appeal Division agrees. By September 2011, the Respondent had made to the CPP in 2009; 2010; and 2011. He had not made contributions for the required minimum of four years.

[12] Thus, the General Division erred in law and in fact in its determination.

[13] Furthermore, the Appeal Division finds that the General Division also erred in regard to the date it deemed the Respondent disabled. At paragraph 102 of the decision, the General Division concluded:-

> [102] The Tribunal finds that the Appellant had a severe and prolonged disability as of September 2011. 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 June 2013; therefore the Appellant

> is deemed disabled in March 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of July 2012.

[14] The Appeal Division finds this conclusion to be an error of law. Subsection 42(2)(b) of the CPP states that a person is deemed to have become or to have ceased to be disabled at the time that the determination is made that they are disabled. Having found that the Applicant had become disabled as of September 2011, the General Division could not then go on to deem his disabled as of March 2012. The statutory provision reads:

> (2) *When a person deemed disabled* - a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) - be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

CONCLUSION

[15] For all of the above reasons the Appeal Division is satisfied that the appeal would have a reasonable chance of success. The Application is granted.

[16] The applicant has requested 15 days' notice of the Tribunal's intention to proceed in writing in order to make written submissions in regard to the deference to be paid to the General Division decision. The Appeal Division hereby grants that request. The Applicant will have 15 days from the date on which the Leave decision is communicated to it to file its submissions.

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

Hazelyn Ross .
Member, Appeal Division