



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 384

Tribunal File Number: AD-16-911

BETWEEN:

B. K.

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: September 30, 2016

REASONS AND DECISION

INTRODUCTION

[1] The appellant applied for and was granted a *Canada Pension Plan*, (CPP), retirement pension. The records of the Social Security Tribunal of Canada, (the Tribunal), show that she began receiving the pension in October 2013. (GD2-19). On March 23, 2015, the Respondent received her application for a disability pension under the CPP. The Respondent denied the application on the basis that it had been made more than fifteen months after payment of the retirement pension had begun. It upheld its decision on reconsideration and the Appellant appealed the reconsideration decision to the Tribunal's General Division.

[2] In a decision dated June 27, 2016, the General Division invoked the provisions of subsection 53(3) of the *Department of Employment and Social Development, (DESD), Act* to dismiss her appeal summarily.

[3] On July 7, 2016, the Appellant filed an application for leave to appeal from the General Division decision, (the Application).

[4] This appeal proceeded by On the Record for the following reasons:

- a) The Member has determined that no further hearing is required.
- b) Pursuant to subsection 37(a) of the Social Security Tribunal Regulations, the Member has determined that no further hearing is required.
- c) The requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

GROUND OF THE APPEAL

[5] On her behalf, the Appellant's representative submitted that there were strong humanitarian and compassionate grounds on which the Appeal Division could allow the appeal. He indicated that a conclusive diagnosis of the Appellant's medical condition was not reached until well after she began to receive her retirement pension. The Appellant has been diagnosed

as suffering from Amyotrophic Lateral Sclerosis or ALS. Her representative argued that this is a progressive, neurodegenerative disease that meets the CPP criteria for a severe and prolonged disability and he submitted that the Tribunal should dispense with the “technicality” of the time limitation and allow the Appellant to receive the higher disability pension.

THE LAW

[6] Subsection 56(2) governs appeals from summary dismissals of an appeal, providing that it is not necessary to obtain leave in order to appeal from a General Division decision issued pursuant to subsection 53(3) of the DESD Act which dismissed an appeal summarily.

[7] Section 66.1 sets out the applicable law regarding the conversion of a CPP retirement pension to a CPP disability pension:-

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

[8] The Application is also governed by 46.2. (1) of the *Canada Pension Plan Regulations*, namely,

(1) A beneficiary may submit to the Minister, within the interval between the date of commencement of payment of the benefit and the expiration of six months after that date, a request in writing that the benefit be cancelled.

[9] Other statutory provisions that apply to this appeal include paragraphs 42(2)(b) and 44 (1)(b) of the CPP, which paragraphs speak to the eligibility requirements for receipt of a CPP disability pension. Paragraph 44 (1)(b) specifies that in order for an applicant to qualify for a CPP disability pension, he or she must not be in receipt of a CPP retirement pension.

[10] For the purposes of this appeal paragraph 44 (1)(b), and subsection 66.1(1) of the CPP and subsection 46.2 of the CPP Regulations are particularly important. Subsection 66.1(1) of the CPP allow a beneficiary to cancel a retirement pension in favour of a disability pension provided the Appellant 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. Thus, the disability must be established prior to the date the retirement pension commenced. However, by operation of paragraph 42(2)(b) of the CPP, the contributor cannot be deemed disabled any earlier than fifteen months before he or she makes their application for a disability pension.

ISSUE

[11] The issue that the Appeal Division must decide is: Did the General Division err by dismissing the Appellant's appeal summarily?

SUBMISSIONS

[12] Pursuant to section 36 of the *Social Security Tribunal Regulations*¹ the parties had forty five days from the day on which the appeal was filed to make submissions to the Appeal Division. The Appellant filed an incomplete appeal on July 2, 2016. She perfected her appeal on August 9, 2016. While more than forty-five days have passed since the Appellant completed her appeal, the Tribunal received no submissions from the Respondent. However, submissions were received from the Appellant's representative.

[13] In his submissions, the Appellant's representative repeated the arguments that had been made to the General Division. He stated that the Appellant did not make the application for a disability pension in a timely manner because of the length of time it took for the diagnosis to be made; and also because she had never been informed that she had to make the application within a specific time frame.

¹ *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236*

STANDARD OF REVIEW

[14] The test on a summary dismissal of an appeal is that the “appeal has no reasonable chance of success.” The language of the applicable provision is in mandatory terms: the General Division must summarily dismiss an appeal if it is satisfied that it (the appeal) has no reasonable chance of success.” The question is, of course, how does a decision-maker decide what amounts to a reasonable chance of success?

[15] Before deciding this question, the Appeal Division must decide how it will approach appeals of General Division decisions, generally, and this decision, specifically. The Appeal Division is guided by the recent decisions of the Federal Court and the Federal Court of Appeal in which the Courts hold that in its role as the Tribunal’s appellate body, the Appeal Division is not required to engage in a standard of review analysis: *Canada (Attorney General) v. Jean*; *Canada (Attorney General) v. Paradis*, 2015 CAF 242 (CanLII), 2015 FCA 242 ; *Maunder v. Canada (Attorney General)*, 2015 FCA 274, affirming the position it set out in *Jean Paradis*. In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question in the context of applications for leave to appeal decisions of the General Division.

[16] The Federal Court of Canada solidified its position in respect to the role of an internal appellate body in *Huruglica v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No. 845, where it concluded:-

[43] It flows that in creating an internal appellate body, within the executive branch of government, the principle of standard of review, a function of the division of powers between the executive and the judiciary, is of lesser importance and applicability. The traditional standard of review analysis is not required.

[17] Therefore, applying the dicta in these cases, the role of the Appeal Division is to determine whether or not the General Division decision to summarily dismiss the Appellant’s appeal demonstrates an error that would bring it within the grounds of appeal set out in section 58(1) of the DESD Act. For the reasons set out below, the Appeal Division finds that no error arises from the General Division decision to summarily dismiss the appeal.

ANALYSIS

[18] Section 53 of the DESD Act sets out the test by which the General Division must decide whether it should dismiss an appeal summarily. The General Division is enjoined to dismiss an appeal summarily if it is satisfied that the “appeal has no reasonable chance of success.” Section 53 is written in mandatory terms. Once satisfied that an appeal has no reasonable chance of success, the General Division has no discretion to act otherwise than to dismiss the appeal.

[19] In *Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41*, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. More recently, Members of the Appeal Division have articulated the test for summary dismissal as “whether it is plain and obvious on the face of the record that an appeal is bound to fail.”

M.C. v. Canada Employment Commission, 2015 SSTAD 237.

[20] The Appeal Division is of the view that in situations where the facts are not in dispute; the applicable law is clear; and where on the undisputed facts the law supports one clear decision that is not in an appellant’s favour then this would be a situation where the appeal would have no reasonable chance of success. In such a case, it would be appropriate for the General Division to dismiss the appeal summarily. This is also the view urged upon the Appeal Division by the Counsel for the Respondent.

[21] The Appeal Division finds that the facts of this case are not in dispute. The Appellant applied for and was granted a CPP disability pension. Payment of the pension commenced in October 2013. She applied for a CPP disability pension in March 2015. This was some eighteen months after she began to receive her retirement pension.

[22] Even if, the Appellant could have met all of the criteria set out by section 66.1 of the CPP as well as subsection 46(2) of the Regulations, she could not meet the requirements of paragraph 44(2)(b) of the CPP, in that the earliest date on which she could be deemed disabled fell well after the month in which she began to receive a CPP retirement pension.

[23] This was the finding of the General Division. The Appeal Division finds that in arriving at its conclusion, the General Division identified and applied the correct law to the facts of the Appellant’s case. The Appeal Division also finds that in doing so, the General Division did not

commit an error of law; nor did it base its decision on an erroneous finding of fact; neither did the General Division breach a principle of natural justice nor fail to exercise its jurisdiction or to act outside of its jurisdiction.

[24] The Appeal Division finds that the decision of the General Division to summarily dismiss the appeal does not give rise to a reviewable error.

[25] Humanitarian and compassionate considerations do not form any part of the jurisdiction of the General Division. Indeed the Tribunal, like all other tribunals, can exercise only that jurisdiction given to it by its governing statute: *R. v. Conway*, 2010 SCC 22.² In *Conway*, Abella, j. writing for the Court made the clear statement that a tribunal can grant only such remedies as it is empowered by its enabling statute to provide. Thus, the General Division could not consider the Appellant's ALS condition, regardless of how deserving of the award of a disability pension it rendered the Appellant. Similarly, section 58(1) of the DESD Act, expressly omits compassionate considerations from the grounds of appeal.

CONCLUSION

[26] The Appellant appealed the decision of the General Division to summarily dismiss her appeal. On the facts, evidence and law that was presented to the General Division, the Appeal Division finds that the General Division correctly determined that the appeal did not have a reasonable chance of success.

[27] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division

² [101] “ A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.”