



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. S. B.*, 2016 SSTADIS 399

Tribunal File Number: AD-16-1158

BETWEEN:

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

Applicant

and

S. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 12, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 7, 2016. The General Division found the Respondent had a severe and prolonged disability in October 2009 and that as her application for a disability pension had been received in July 2011, that she was therefore deemed disabled in April 2010. The General Division determined that payments would commence four months later as of August 2010.

[2] The Applicant filed an Application Requesting Leave to Appeal on September 27, 2016, on the grounds that (1) the General Division failed to consider the effect of a division of unadjusted pensionable earnings on the commencement date of payment of a disability pension and (2) it erred in fact without regard for the material before it when it determined that the Respondent had applied for a pension in July 2011 rather than in June 2011.

ISSUE

[3] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[4] The Applicant submits that the General Division erred in law by establishing the Respondent's date of payment without considering subsection 55.2(9) of the *Canada Pension Plan* (CPP). The Applicant argues that, pursuant to subsection 55.2(9) of the CPP, payment of a disability pension can only commence in the month following the month in which a credit split takes place. The Applicant claims that as the credit split occurred in September 2011, the Respondent's minimum qualifying period is December 2010. The Applicant further submits that payments should begin in October 2011.

ANALYSIS

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out the grounds of appeal as being limited to 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.

[6] I need to be satisfied that the reasons for appeal fall within one of the grounds of appeal and that the appeal has a reasonable chance of success before granting leave. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Error of law

[7] The Respondent had to rely upon a division of unadjusted pensionable earnings to have a minimum qualifying period that ended on December 31, 2010.

[8] Section 69 of the CPP reads as follows:

Commencement of pension

69. Subject to section 62, where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled, except that where the applicant was, at any time during the five year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan,

- (a) the pension is payable for each month commencing with the month next following the month in which the applicant became disabled as a result of which the payment is approved; and

(b) the reference to “fifteen months” in paragraph 42(2)(b) shall be read as a reference to “twelve months”.

[9] Subsection 55.2(9) of the CPP reads as follows:

Payment of benefit

(9) 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] It appears that subsection 55.2(9) of the CPP takes precedence over section 69 of the CPP, which changes the effective date when the disability pension commences. However, the General Division made no mention of the effect that the credit split had on the commencement date of payment of a disability pension, nor did it make any explicit reference to subsection 55.2(9) of the CPP. I am therefore satisfied that the appeal has a reasonable chance of success on the ground that the General Division erred in law by failing to consider the effect of subsection 55.2(9) of the CPP when determining the effective date of commencement of payment of the disability pension to the Respondent.

(b) Erroneous finding of fact

[11] Finally, the Applicant argues that the General Division based its decision on an erroneous finding that the Respondent had filed her application for a disability pension in July 2011.

[12] The Respondent’s application bears two date stamps: “June 30, 2011” and “July 6, 2011” (GT1-20). Notwithstanding the fact that the General Division may have erred in finding that the application had been made in July 2011, it is doubtful that such a finding would have had any impact on the outcome, bearing in mind that its finding regarding the onset of a deemed disability is irrelevant in the circumstances where an claimant relied on a

division of unadjusted pensionable earnings to establish a minimum qualifying period and where subsection 55.2(9) of the CPP applies. Nonetheless, given that the two grounds may be inextricably intertwined, I am satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[13] The application for leave to appeal is granted.

[14] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division