



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. F. L.*, 2016 SSTADIS 406

Tribunal File Number: AD-16-720

BETWEEN:

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

Applicant

and

F. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 17, 2016

REASONS AND DECISION

DECISION

[1] Leave to appeal is allowed.

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal (SST) dated March 3, 2016. The GD had earlier conducted a hearing by videoconference on June 9, 2016 and determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found her disability was “severe and prolonged” as of the minimum qualifying period (MQP).

[3] On May 20, 2016, within the prescribed time limit, the Applicant filed an application with the Appeal Division (AD) requesting leave to appeal. It alleged that the GD erred in law when it determined the first payment date of the Respondent’s disability pension.

[4] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[5] The Respondent submitted an application for CPP disability benefits on October 27, 2011. She disclosed that she was 48 years old, had a one-year college diploma and was employed for 18 years as a municipal worker, a job that ended in 2002, when she decided to become a “stay-at-home mom.”

[6] The Applicant initially denied her application on the grounds that her disability was not severe and prolonged as of her MQP date, which at the time was December 31, 2007. On April 10, 2012, the Respondent applied for, and later received, a Division of Unadjusted Pensionable Earnings (DUPE), which extended her MQP to December 31, 2008. On November 13, 2012, the Applicant again denied application on reconsideration.

[7] On October 10, 2014, the Respondent appealed these denials to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the SST in February 2013. In a decision dated June 11, 2015, the GD allowed the appeal and found the Respondent disabled as follows:

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 October 2011; therefore the Appellant is deemed disabled in July 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of November 2010.

[8] On May 20, 2016, the Applicant filed an application for leave to appeal with the Appeal Division (AD) of the SST alleging an error in law on the part of the GD.

THE LAW

[9] Under section 55.1 of the CPP, a spouse may apply for a DUPE, which triggers an equitable sharing of CPP credits after a separation or divorce.

[10] Subsection 55.2(9) of the CPP relates to when a benefit becomes payable where there is a DUPE:

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.

[11] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are 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.

[12] Leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success. In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also found that having an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

ISSUE

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

SUBMISSIONS

[14] In its application requesting leave to appeal, amended on June 2, 2016, the Applicant conceded the finding that the Respondent was disabled under paragraph 42(2)(a) of the CPP but alleged that the GD erred in law by failing to consider subsection 55.2(9), together with section 69, in determining the effective payment date. The Applicant argued that, as the GD found that pursuant to paragraph 42(2)(b) of the CPP, the earliest the Respondent could be deemed disabled was fifteen months prior to the date the application was received. Since the Respondent's disability application was received by the Applicant in October 2011, the GD found that the Respondent was deemed disabled in July 2010 and, pursuant to section 69 of the CPP, determined that payment should begin four months later, in November 2010.

[15] However, the Applicant alleges that the GD failed to appreciate that it was a DUPE that provided the Respondent with her MQP of December 31, 2008. Although it was not explicitly addressed in the Applicant's submissions to the GD, the DUPE was reflected in the

Respondent's Record of Earnings (GT1-24), which contained codes that were explained in an HRSDC submission dated February 23, 2013.

[16] The Applicant submits that the GD erred in law by failing to apply subsection 55.2(9), which mandates a first payment date effective the month following the month in which a DUPE takes place—which in this case was May 2012.

ANALYSIS

[17] Having reviewed the evidence and law, I think the Applicant has a reasonable chance of success in showing that the GD erred in law in rendering its decision. It appears that the Respondent's MQP was derived from credits allocated following a DUPE, and it is clear that the effect of subsection 55.2(9) of the CPP is to prevent commencement of any benefit—including the disability pension—prior to the effective date of a DUPE. Having reviewed the record, I am satisfied that the Respondent did in fact apply for, and was granted, a DUPE effective April 2012. Accordingly, the Applicant has an arguable case that the Respondent's CPP disability pension should have commenced as of May 2012.

CONCLUSION

[18] For these reasons, I am allowing leave to appeal on the grounds the GD may have erred in law when it determined the first payment date of the Applicant's CPP disability pension.

[19] I invite the Respondent to submit her position on the merits of this appeal. The parties are also free to make submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.



Member, Appeal Division