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

Citation: *Minister of Employment and Social Development v. L. T.,* 2016 SSTADIS 414

Tribunal File Number: AD-15-1060

BETWEEN:

Minister of Employment and Social Development and Canada

Appellant

and

L. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Hazelyn Ross

HEARD ON: October 12, 2016

DATE OF DECISION: October 25, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative	-	Fazia Ahmed-Hassan
Respondent (self-represented)	-	L. T.
Articling student	-	Cindy Ko

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), allows the appeal.

[2] This is a Minister's appeal of a General Division decision which held that the Respondent was entitled to receive a disability pension under the *Canada Pension Plan*, (CPP). Leave to appeal was granted on the basis that the Appellant had put forward an arguable case with respect to the two main planks under which it submitted its application for leave to appeal.

[3] This appeal proceeded by Teleconference for the following reasons:

a) The information in the file, including the need for additional information.

b) The form of hearing provides for any special accommodations required by the parties.

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

GROUNDS OF THE APPEAL

[4] The Appellant argued that the General Division erred when it found that the Respondent was entitled to a disability pension as it had not found that she had become disabled within the pro-rated period. The Appellant also argued that the General Division decision was based on erroneous findings of fact made with respect to its interpretation and application of the medical evidence.

ISSUE

[5] The issues before the Appeal Division are:

1) Did the General Division err in law with respect to its application of the pro-ration provisions contained in subsection 44(2.1) of the CPP?

2) Did the General Division base its decision on an erroneous finding of fact that it made perversely or capriciously or without regard for the material before it, namely

    i. By determining that the medical evidence supported a finding that the Respondent had a disability that was severe and prolonged within the meaning of the CPP?
    ii. By disregarding the fact that there was no medical evidence that predated September 2009, and by disregarding aspects of the medical evidence when it found that the Respondent suffered from a severe and prolonged disability as of November 2008; and, By determining that the effective date of payment of the disability pension was April 2010 instead of April 2011?

THE GOVERNING STATUTORY PROVISIONS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act*, (DESD Act), sets out the following grounds of appeal:

(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] Disability benefits are payable to contributors to the CPP who meet the requirements set out in subsection 44(1)(b) of the CPP.

> 44. *Benefits payable* - Subject to this Part,
>
> **(b)** A disability pension shall be paid to a contributor who has not reached sixty five years of age, to whom no retirement pension is payable, who is disabled and who (i) has made contribution for not less than the minimum qualifying period.

[8] Subsection 44(2.1) of the CPP allows for the possibility of a minimum qualifying period (MQP), based on an applicant's pro-rated contributions where the applicant is a late-applicant, as follows:

> **(2.1)** For the purposes of determining the minimum qualifying period of a contributor referred to in subparagraph (1)(b)(ii), the basic exemption for the year in which they would have been considered to have become disabled, and in which the unadjusted pensionable earnings are less than the relevant Year's Basic Exemption for that year, is an amount equal to that proportion of the amount of that Year's Basic Exemption that the number of months that would not have been excluded from the contributory period by reason of disability is of 12.

SUBMISSIONS

[9] The Appellant's representative submitted that the General Division misinterpreted and misapplied the pro-ration provisions of the CPP, and that, this being a question of law, it was owed no deference. She made the further submission that this was a sufficient basis on which to allow the appeal. She suggested that the appropriate remedy was for the Appeal Division to remit the matter back to the General Division in order that it corrects the errors of law.

[10] With respect to the alleged errors of fact, the Appellant's representative submitted that they were clear and unambiguous and warranted the Appeal Division allowing the appeal.

[11] The Respondent made no formal submissions. She relied mainly on the General Division's reasoning.

ANALYSIS

[12] For the following reasons, the Appeal Division allows the appeal.

The General Division misapplied the proration provisions

[13] The Appellant's representative pointed out that the Respondent had two possible MQPs. This was not in dispute. It had been established at the hearing before the General Division. The first MQP date of December 31, 2004 was established in respect of valid contributions to the CPP in 1998, 1999, 2000, and 2001. (GT1-28) The Respondent initially stopped working in 2004 but returned to the workplace in 2006. She made valid CPP contributions in 2006, 2007 and 2008. (GT1-28 & 34). According to subsection 44(2.1) of the CPP, this second period of work could result in a pro-rated MQP, the pro-rated period being January 1, 2009 to May 31, 2009. The Appellant's representative submitted that the pro-ration provisions could apply only if the Respondent were to be deemed to have become disabled during the pro-rated period. The Appellant's representative relied on the decision of the Pension Appeals Board, (PAB), in *M.S.D v. Gorman* (August 1, 2006), CP 22414 (PAB).

[14] At paragraph 9 of its decision, the General Division stated the test as whether "it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP". The Appellant's representative submitted that this was an incorrect formulation of the test, and that it led to the General Division erring in law.

[15] The Appellant's representative submitted that the correct test is whether the disability occurred during the prorated period and that a correct statement of the test appears in the Appeal Division decision of *G.T. v. Minister of Human Resources and Skills Development*, CP 28158, February 13, 2014. The Appellant's representative made the further argument that in deeming the Respondent disabled as of November 2008, the General Division misapplied the pro-ration provision, as November 2008 falls outside of the prorated period. Accordingly, this too, is an error of law.

The Appeal Division agrees. While a PAB decision is not binding upon the Tribunal it can be of persuasive value. As well, the Appeal Division is not bound by its prior decisions. However, in the instant case, the Appeal Division is persuaded that both *Gorman* and *G.T. v. Minister of Human Resources and Skills Development* are accurate statements of the law regarding pro-ration and apply. The Appeal Division finds that the General Division was obliged to find that the Respondent had become disabled during the prorated period; which it did not. It found she

had become disabled prior to the pro-rated period. This was an error of law on which the appeal succeeds.

The General Division based its decision on erroneous findings of fact

[16] In its decision, the General Division determined that the medical evidence supported a finding that the Respondent had a severe and prolonged disability as defined by the CPP. However, the Appellant's representative pointed out that the medical evidence post-dated the Respondent's pro-rated MQP. Accordingly, the medical evidence was not a reliable indicator of her physical and mental condition on or before her MQP of December 31, 2004, or during the pro-rated period.

[17] With respect to errors of fact in the General Division decision; the Appellant's representative made the following arguments:

1) The decision was based, in part, on an MRI that was carried out in 2010; however, the General Division did not explain why it based its decision on the MRI.
2) Dr. Dunne's medical report does not support a finding of disability; nor did the General Division mention his follow-up report that also does not support a finding of disability. GT1-43
3) Dr. Reddy's report of September 2009, on which the General Division relied, was a late report and the General Division did not mention that of Dr. Evans, nor did it apply *Klabouch v. Canada (Social Development),* 2008 FCA 33.
4) The reports that find the Respondent disabled are dated in 2012, which is four years after the post-date MQP; nor did the General Division mention that one year after the Respondent stopped work, Dr. Buchanan indicated that there was generally a good prognosis for the type of disease from which the Respondent suffered.

[18] On examining the Tribunal Record, the Appeal Division is persuaded that the medical reports are dated as submitted by the Appellant. The earliest medical report, that of Dr. Reddy, is dated September 9, 2009. In it, Dr. Reddy did not make a clear finding of disability and carried a good prognosis. He stated: "I did explain to her and her husband that subtle diseases generally carry with them a good prognosis and hopefully that will reassure them that there is

nothing serious going on as they were quite concerned." Case law indicates that where the prognosis for recovery is good, an applicant would not be found to be disabled: *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309.

[19] In the Respondent's case, the General Division found the medical information supports a finding that from July 2008, the Appellant developed increasing chronic muscle pain, numbness, tingling, fatigue and sleeping problems consistent with Fibromyalgia. Her deteriorating medical condition led to her work stoppage. The General Division went on to find that :

> [28] In September 2009, Dr. Evans diagnosed Dysrhythmic Disorder and Anxiety Disorder, along with Depression. Drs. Buchanan, Dunne and Daly confirm continuing and deteriorating chronic pain, numbness and tingling, mostly on her left side, from 2009 to 2012. In 2012, Drs. Reddy and Dunne confirmed the permanency of her condition, with a prognosis of "*poor*". Dr. Reddy and Dr. Evans confirm her deteriorating psychological condition of Dysrhythmic Disorder, anxiety and depression.

[20] Even accepting the General Division's findings, the Appeal Division is not satisfied that they point to a determination that the triggering event that rendered the Respondent disabled occurred on, or prior to, the MQP of December 2004, or during the pro-rated period of January 1, 2009 to May 31, 2009. Accordingly, the appeal also succeeds on this ground.

[21] This finding also goes to the Appellant's third ground of appeal, namely, that there was a lack of objective evidence of a serious medical condition. The Respondent submitted that she did, in fact, have such evidence, that the evidence was available prior to the General Division hearing; and that she was at a loss as to why it had not been submitted as she had provided it to her former counsel. Be that as it may, the fact is that the evidence was not before the General Division and, absent a failure to observe a principle of natural justice by the General Division, which the Appeal Division does not find, the Appeal Division cannot now consider it. Accordingly, the appeal also succeeds on this basis.

[22] As well, the Appellant submitted that the General Division erred with respect to the start dates of the disability pension. The Appeal Division agrees. The General Division made the following findings concerning the commencement of the Respondent's disability benefit:

> [36] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2008, when she last worked at a plywood plant. 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 March 2012; therefore the Appellant is deemed disabled in December 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of April 2010.

[23] These findings are not only inconsistent; they point to an error of law. First, the General Division found that the Respondent became disabled in November 2008. Having made this finding, it then went on to deem her disabled as of December 2010. This is a clear error of law. The first part of paragraph 42(2)(b) of the CPP provides that a person is deemed to have become disabled at the time that it is determined in the prescribed manner to be the time when the person became disabled. There cannot be two discrete dates for the onset of disability. Secondly, even if the General Division was correct in its application of paragraph 42(2)(b) of the CPP, section 69 of the CPP negates a start date for a disability benefit that pre-dates the onset of disability, which is precisely what the General Division found. Pursuant to section 69 of the CPP, a deemed date of disability of December 2010 would result in a start date of April 2011. Thus, the appeal also succeeds on this ground.

CONCLUSION

[24] Leave to appeal was granted on the basis that the General Division decision may contain errors of law and also that it was based on erroneous findings of fact concerning the medical evidence that it made in a perverse or capricious manner or without regard for the material before it. On the basis of the above analysis, the Appeal Division is satisfied that the General Division made the errors on which leave to appeal was granted. Accordingly, the appeal is allowed.

DECISION

[25] At the hearing, the Appellant's representative submitted that an appropriate remedy would be for the Appeal Division to refer the matter back to the General Division for reconsideration. The Appeal Division concurs. Accordingly, the matter is remitted back to the General Division to allow it to correct the errors in accordance with this decision.

Hazelyn Ross
Member, Appeal Division