



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. L. O.*, 2017 SSTADIS 15

Tribunal File Number: AD-16-1074

BETWEEN:

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

Applicant

and

L. O.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Margot Ballagh

Date of Decision: January 20, 2017

REASONS AND DECISION

DECISION

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

OVERVIEW

[2] The Applicant filed, within the prescribed time limit, an application to the Appeal Division of the Social Security Tribunal of Canada (Tribunal) for leave to appeal the Tribunal's decision by the General Division dated May 31, 2016. The General Division determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP) and that payment of the pension should start as of June 2013. The Applicant expressly did not contest that the General Division granted the Respondent disability benefits; however, it alleged that the General Division erred in law when it chose the wrong commencement date of payment because it failed to consider the effect that a division of unadjusted pensionable earnings (DUPE) has on the date when payment of the pension should start.

ISSUE

[3] I must decide if the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[5] 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."

[6] The only possible grounds of appeal as set out in subsection 58(1) of the DESD Act are as follows:

- (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] Section 55.1 of the CPP allows for a possible DUPE for sharing of CPP credits between former spouses after a separation or divorce.

[8] Subsection 55.2(9) of the CPP sets out when a benefit becomes payable where there is a DUPE as follows:

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.

SUBMISSIONS

[9] The Applicant does not contest the finding of disability. The Applicant alleged that the General Division erred in law when it failed to consider the effect that the Respondent's DUPE had on her date of payment. In particular, the Applicant alleged that the General Division erred in law by establishing the Respondent's date of payment to start in June 2013. The Applicant submitted that the earliest date of payment available to the Respondent was March 2014, which was the month after the month that her DUPE took place.

[10] The Applicant filed with the General Division an Explanation of the Decision under Appeal in which it was indicated that the Respondent had applied for a DUPE in February 2014. In the application for leave to appeal at the Appeal Division, the Applicant stated that the Respondent's minimum qualifying period (MQP) was December 31, 2010 as a result of the DUPE and that, without the benefit of the DUPE, the Respondent would have had an MQP of December 2003. As such, the General Division would not have been able to legally make a finding of disability in December 2010 that allowed payment of her disability benefit.

ANALYSIS

[11] I can grant leave to appeal only if I am satisfied that the reasons for appeal fall within the specified grounds of appeal as set out in subsection 58(1) of the DESDA (referred to above) and that the appeal has a reasonable chance of success. Direction in this regard was provided by the Federal Court in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[12] The Applicant argued that leave to appeal should be granted on the ground that the General Division erred in law when it failed to consider the effect that the Respondent's DUPE had on her date of payment and incorrectly determined that the disability benefits should start to be paid as of June 2013.

[13] Subsection 55.2(9) of the CPP is clear that 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. Evidence was filed at the General Division that a DUPE took place in February 2014 and that the MQP was extended to December 2010 as a result of that DUPE.

[14] The General Division decision did not mention whether a DUPE occurred or why the DUPE was not considered in determining the date of payment. The General Division decision concluded that the Respondent had a severe and prolonged disability "at least at the time of her MQP in December 2010". The date of payment of June 2013 was determined with reference to paragraph 42(2)(b) and section 69 of the CPP (these provisions are set out in the Appendix to this decision); however the DUPE provisions in section 55.1 and subsection 55.2(9) of the CPP are not considered in the decision.

[15] Accordingly, I am satisfied that the reason for appeal falls within the specified grounds of appeal as set out in subsection 58(1) of the DESDA, namely that the General Division may have committed an error of law in failing to consider the effect of the DUPE on the date of commencement of pay of the disability benefit. I am also satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[16] Leave to appeal is granted but only in relation to the application of s.55.2(9) CPP.

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

Margot Ballagh
Vice-chairperson and Member, Appeal Division

APPENDIX

Canada Pension Plan

Paragraph 42(2)(b):

For the purposes of this Act, ...

(b) 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.

Section 69:

Subject to section 62, where a 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”.