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

Citation: *Minister of Employment and Social Development v. A. R.,* 2017 SSTADIS 38

Tribunal File Number: AD-16-1108

BETWEEN:

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Applicant

and

A. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: February 10, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 10, 2016. The General Division had earlier conducted a hearing by videoconference 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."

[2] On September 7, 2016, within the prescribed time limit, the Applicant filed an application with the Appeal Division requesting leave to appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[3] The Respondent initially applied for CPP disability benefits in September 2011 but was refused by the Applicant because she had not paid enough into the Canada Pension Plan to establish a minimum qualifying period (MQP).

[4] On June 5, 2013, the Respondent applied for a division of unadjusted pensionable earnings (DUPE) and, at the same time, submitted a second application for CPP disability benefits. She disclosed that she was 45 years old, had a one-year college diploma and was last employed as a cashier, a job she left on "doctor's orders" in August 2012. The Applicant claimed that she was disabled from work as a result of a number of medical conditions, including fibromyalgia, arthritis, degenerative disc disease and post-traumatic stress disorder.

[5] The Applicant initially denied the Respondent's application on the grounds that she had no MQP. In October 2013, the Respondent's DUPE application was approved, which established an MQP ending December 31, 2011, or alternatively, by application of the proration provision, February 29, 2012. On February 7, 2014, the Applicant again denied the Respondent's application on the basis that she failed to show that she had a "severe and prolonged" disability during her MQP.

[6] On April 29, 2014, the Respondent appealed this denial to the General Division. In a decision dated June 10, 2016, the General Division allowed the appeal and found the Respondent disabled as follows:

> [58] The Tribunal finds that the Appellant [the Respondent in the current decision] had a severe and prolonged disability in August 2012, when the Appellant once again attempted to be employed but was unable to meet the work conditions due to the effects of her PTSD and the physical conditions related to her peripheral neuropathy. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of December 2012.

[7] On September 7, 2016, the Applicant filed an application for leave to appeal with the Appeal Division of the Tribunal alleging errors in law on the part of the General Division.

THE LAW CPP

[8] According to paragraph 42(2)(*b*) of the CPP, a person cannot be deemed disabled, for payment purposes, more than fifteen months before the Applicant received the application for a disability pension. According to section 69 of the CPP, payments start four months after the date of disability.

[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.

Department of Employment and Social Development Act

[11] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "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."

[12] Subsection 58(2) of the DESDA provides that "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[13] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

[14] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits.

[15] At the leave stage, the Applicant does not have to prove the case. Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada*.[2]

ISSUE

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

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).

[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

SUBMISSIONS

[17] The Applicant submits that the General Division erred in law as follows:

(a) It found that the Respondent was entitled to a disability benefit based on a date of onset of August 2012, which was after her MQP of December 2011 or her prorated MQP of February 2012. In *Canada v. Zakaria*[3] the Federal Court reaffirmed that a CPP disability applicant must prove the existence of disability prior to the expiry of the MQP and continuously thereafter. It is not legally possible to find that the Respondent was disabled after her MQP and also find her eligible for disability benefits.

(b) The General Division also erred in law by establishing the Respondent's date of payment as December 2012. A DUPE was required to give the Respondent an MQP and she applied for one in June 2013. The General Division found that the MQP date was either December 31, 2011 or February 29, 2012, and continuously thereafter. According to subsection 55.2(9) of the CPP, the earliest date of payment available to the Respondent was July 2013, the month after the DUPE took place. As such, the General Division was not able, legally, to make a finding of disability that allowed payment of her disability benefit.

[18] In a letter dated September 16, 2016, the Respondent accused the Applicant of mistakes that had delayed her CPP disability benefit for five years. She specifically criticized Service Canada staff, who did not advise her to apply for a DUPE at the time she made her first CPP disability application in 2011. The Respondent did not specifically address the legal issues raised by the Applicant, but maintained that she became disabled prior to the MQP and managed to carry on a job thanks to the benevolence of her employer.

ANALYSIS

[19] Having reviewed the submissions, I must agree that the Applicant has raised an arguable case. The General Division's decision explicitly found that the Respondent's date of disability onset was August 2012—at least six months after her period of eligibility ended.

[20] On the face of it, not only is the General Division's putative date of disability onset too late for the MQP, it is also too early for the first payment date permitted by her June 2013 DUPE. If the law requires the Respondent to be found disabled before February 2012, but after June 2013, then it would appear her appeal was always doomed to fail.

CONCLUSION

[21] For the above reasons, the Applicant has persuaded me that it has a reasonable chance of success on appeal. I am allowing leave on the claimed grounds.

[22] I invite the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division