



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *T. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 171

Tribunal File Number: AD-16-969

BETWEEN:

**T. S.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 21, 2017

## REASONS AND DECISION

### INTRODUCTION

[1] The Appellant applied for a disability pension under the *Canada Pension Plan* (CPP) in April 2015. He had been in receipt of a CPP retirement pension since January 2013.

[2] The Respondent notified the Appellant that he was not eligible to receive a CPP disability pension, because he applied 15 months after he had started receiving a CPP retirement pension. The Appellant made a request for reconsideration. The Respondent advised him, by letter dated September 19, 2015, that the initial decision was being maintained.

[3] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) in December 2015. He requested that the Tribunal allow his appeal because he was suffering from health issues and was “unfit for work forever.” He stated that he was not disabled until spring 2015; therefore, he would not have applied for a disability pension within 15 months of receiving a retirement pension.

[4] On May 11, 2016, the General Division dismissed the appeal summarily on the basis that the Appellant does not meet the eligibility requirements of paragraph 44(1)(b) of the CPP; specifically, the Appellant had been in receipt of a CPP retirement pension and could not be deemed to have been disabled before he started receiving his retirement benefit. The General Division also noted that it is required to interpret and apply the provisions as they are set out in the CPP.

[5] The Appellant filed an incomplete application to appeal to the Tribunal’s Appeal Division on July 25, 2016. In a letter dated August 17, 2016, the Tribunal asked him to complete his application. The Appellant provided further information on September 7, 2016, and his appeal was then considered complete. His reasons for appeal can be summarized as follows:

- a) He is eligible for a disability pension because he is disabled.
- b) His application has been refused because he did not apply for a disability pension within 15 months and because he did not become disabled within 15 months.

- c) He has paid into the CPP fund throughout his working career and is therefore entitled to CPP disability benefits.
- d) He is being discriminated against because he applied after the 15 months had elapsed.
- e) It is wrong to deny him his disability pension when he has provided medical documents to show that he is disabled.

[6] On April 18, 2017, the Appellant made a request to expedite his appeal due to financial hardship.

[7] The Respondent did not file submissions before the Appeal Division. The submissions filed at the General Division stated that:

- a) the CPP does not allow the payment of both a disability pension and a retirement pension at the same time;
- b) the Appellant began receiving a retirement pension in January 2013;
- c) he made an application to cancel his retirement pension in favour of a disability pension on April 23, 2015, more than 15 months after his retirement pension had commenced; therefore, he is ineligible for a disability pension according to the language of the CPP; and
- d) the Tribunal is bound by the language of the CPP and does not have the authority to vary the legal requirements set out in the CPP.

[8] This appeal proceeded on the basis of the record for the following reasons:

- a) the lack of complexity of the issue under appeal;
- b) the fact that the Appeal Division member had determined that no further hearing was required; and
- c) the requirements under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

## ISSUE

[9] The Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division, or confirm, reverse or modify the General Division's decision.

## LAW AND ANALYSIS

[10] The Appellant appeals a decision dated May 11, 2016, whereby the General Division summarily dismissed his appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[11] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Because no further hearing is required, this appeal before the Appeal Division is proceeding pursuant to paragraph 37(a) of the *Social Security Tribunal Regulations*.

[12] Subsection 58(1) of the DESD Act sets out the grounds of appeal 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.

[13] The Appellant does not dispute any of the factual findings that the General Division made. Rather, he alleges that the result is unfair because he became disabled more than 15 months after he had started receiving a CPP retirement pension, and that it is wrong to deny him a CPP disability pension when he is disabled.

[14] The relevant provisions of the CPP are:

- a) Subsection 66.1(1.1), which states that a recipient can cancel the retirement pension in favour of the disability benefit only if the recipient is deemed to have been disabled before the month the retirement pension became payable;
- b) Subsection 66.1(1.1), read with paragraph 42(2)(b), which states that the earliest a person can be deemed to be disabled is 15 months before the date on which the disability application is received by the Respondent; and
- c) Paragraph 44(1)(b), which sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:
  - a) be under 65 years of age;
  - b) not be in receipt of the CPP retirement pension;
  - c) be disabled; and
  - d) have made valid contributions to the CPP for not less than the minimum qualifying period.

### **Legal Test for Summary Dismissal**

[15] Subsection 53(1) of the DESD Act allows the General Division to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[16] Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or it may confirm, rescind or vary the General Division's decision in whole or in part.

[17] Here, the General Division correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 3 of its decision.

[18] However, it is insufficient to simply cite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act without properly applying it. After identifying the

legislative basis, the General Division must correctly identify the legal test and apply the law to the facts.

[19] The General Division asked “[...] whether the appeal should be summarily dismissed” at paragraph 2 of its decision.

[20] The General Division decision does not state what legal test it applied to arrive at its conclusion to summarily dismiss the appeal.

### **The General Division’s Decision**

[21] While the General Division did not state the legal test applied, it did explain the basis upon which it summarily dismissed the appeal:

[16] The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the CPP.

[17] The Appellant stated in his submissions he was not disabled when he began receiving his CPP retirement pension.

[18] In accordance with s. 42(2)(b) of the regulations the earliest the Appellant can be deemed disabled is January 2014, which is 15 months earlier than the April 23, 2015 date of application. In accordance with s.66.1(1.1) the Appellant can cancel the retirement pension in favour of the disability benefit only if the recipient is deemed to be disabled before the month the retirement pension became payable. The month prior to the retirement pension becoming payable is December, 2012.

[19] The Appellant cannot cancel his retirement pension in favour of a disability benefit because he cannot be deemed disabled before he started receiving his retirement pension.

[20] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

[22] Because the General Division member did not identify the legal test applicable to a summary dismissal and did not apply that legal test to the facts, the General Division decision is based on an error of law.

[23] The legal test applicable to a summary dismissal is the first question that needs to be answered. The question of whether there was an error in law (or another type of error) in the Respondent's decision on the specific issues would follow.

[24] Given the error of law on the preliminary question of the legal test applicable to summary dismissals, the Appeal Division is required to make its own analysis and decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division, or confirm, reverse or modify the decision: *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, at paragraph 8, and subsection 59(1) of the DESD Act.

### **Application of Legal Test for Summary Dismissal**

[25] Although the General Division erred by neither identifying nor applying the applicable legal test, paragraphs 16 to 20 of the General Division decision are correct, and I agree with the findings stated in them.

[26] Although "no reasonable chance of success" was not further defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act, the Tribunal notes that it is a concept that has been used in other areas of law and that has been the subject of previous decisions of the Appeal Division.

[27] There appear to be three lines of cases in previous decisions of the Appeal Division on appeals of summary dismissals by the General Division, namely:

- a) AD-13-825 (*J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD715),  
AD-14-131 (*C.D. v. Canada Employment Insurance Commission*, 2015 SSTAD594),  
AD-14-310 (*M.C. v. Canada Employment Insurance Commission*, 2015 SSTAD237),  
AD-15-74 (*J.C. v. Minister of Employment and Social Development*, 2015 SSTAD596).
- The legal test applied was: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, *Sellathurai v. Canada*

*(Public Safety and Emergency Preparedness)*, 2011 FCA 1, and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.

- b) AD-15-236 (*C.S. v. Minister of Employment and Social Development*, 2015 SSTAD 974), AD-15-297 (*A.P. v. Minister of Employment and Social Development*, 2015 SSTAD973), and AD-15-401 (*A.A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178). The Appeal Division has applied a differently articulated legal test: whether there is a “triable issue” and whether there is any merit to the claim using the language of “utterly hopeless” and “weak” case in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not “manifestly clear,” then the matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary dismissal, as it necessarily involves assessing the merits of the case, examining the evidence and assigning weight to it.
- c) AD-15-216 (*K.B. v. Minister of Employment and Social Development*, 2015 SSTAD 929). The Appeal Division did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[28] I find that the application of the two tests cited in paragraph 27 of this decision leads to the same result in the present case—the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a “weak” case but rather an “utterly hopeless” one, as it does not involve assessing the merits of the case or examining the evidence.

[29] Neither the General Division nor the Appeal Division of the Tribunal can vary the eligibility requirements under subsection 44(1) of the CPP, no matter what the circumstances may be.

[30] The Appellant’s main argument is that it is unfair that he has been denied a disability pension when he has provided evidence that he is disabled. He calls this “discrimination” based on a 15-month rule.



[31] The Tribunal asked for further details on the Appellant's argument that he has been "discriminated" against and, in his reply, the Appellant refers to himself as an "old white boy" and states that he was denied a disability pension because of "the 15 months law." In the Appellant's most recent correspondence, the Appellant asks why the Canadian government "has been harassing, refusing, discriminating against this poor old white minority Anglophone disabled man."

[32] Having reviewed the Appellant's submissions and the record, I find that this ground of appeal is not a challenge of the CPP on the basis of the *Canadian Charter of Rights and Freedoms* but rather the Appellant's assertion that denying him a disability pension because of the 15-month provision in the CPP (subsection 66.1(1.1) and paragraph 42(1)(b)) is unfair and wrong.

[33] The operation of paragraph 42(1)(b) and subsection 66.1(1.1) of the CPP are determinative of this appeal. For this appeal to have a reasonable chance of success (or any chance of success), the Appellant needs to be able to establish that he was disabled no later than December 2012.

[34] It is clear from the record that the Appellant has been in receipt of a retirement pension since January 2013 and that he made an application for a disability pension in April 2015. He claims a disability as of spring 2015 and states that he was not disabled before then. The CPP permits the cancellation of a retirement pension in favour of a disability pension only in very limited circumstances, and the Appellant's situation does not fall within the circumstances set out in the legislation. The Tribunal cannot vary the legal requirements set out in the CPP. Regardless of the evidence or arguments that could be presented at a hearing, the appeal on this issue is bound to fail.

[35] After reviewing the Appellant's notice of appeal, his submissions, the General Division's record, its decision, the Appeal Division's previous decisions relating to summary dismissals and, after applying the legal test applicable to a summary dismissal, I hereby dismiss the appeal.

## **CONCLUSION**

[36] The appeal is dismissed.

Shu-Tai Cheng  
Member, Appeal Division