



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 188

Tribunal File Number: AD-16-945

BETWEEN:

H. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 28, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 19, 2016. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that he was already in receipt of a Canada Pension Plan retirement pension and that there was no basis whereby he could cancel his retirement pension in favour of a disability pension.

[2] By way of background, the Applicant filed two applications for a Canada Pension Plan disability pension, in March 2011 and in December 2012. This matter relates to the second application filed in December 2012.

[3] The Applicant has been in receipt of a Canada Pension Plan retirement pension since April 2011. The *Canada Pension Plan* allows an applicant to cancel a retirement pension and replace it with a disability pension, either if the request to do so is made within six months after payment of the retirement pension has commenced, or if the applicant is deemed disabled before the month in which the retirement pension became payable. In this case, as the Applicant had filed his application in December 2012, the earliest date that he could be deemed disabled under the *Canada Pension Plan* was September 2011, which was well after he began receiving a retirement pension. If the Applicant had been able to establish that he had been incapacitated, his application for a disability pension could have been deemed to have been made earlier than it had been and, under those circumstances, he might have been able to cancel his retirement pension in favour of a disability pension. Ultimately, the General Division rejected any suggestion that the Applicant had been incapacitated. The Applicant argues that the General Division erred in this regard.

ISSUE

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

ANALYSIS

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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 that it made in a perverse or capricious manner or without regard for the material before it.

[6] I need to be satisfied that the reasons for appeal fall within any of the above grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[7] The Applicant filed an application requesting leave to appeal on July 18, 2016, on the grounds that the General Division had failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, and that it had also erred in law in making its decision. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

[8] The Applicant's submissions largely consist of medical records and a list of his annual earnings (AD1-32). The list indicates that he had nominal earnings, which the Applicant claims establishes that he was never engaged in a substantially gainful occupation. His earnings, however, do not address the issue of incapacity. The issue of whether the Applicant was incapable regularly of pursuing a substantially gainful occupation was irrelevant to the issue of whether he could cancel his retirement pension in favour of a disability pension, as the focus necessarily was on the issue of whether he was incapacitated. Disability and incapacity are two distinct issues and it was insufficient for the Applicant to

argue that he was disabled, as this alone would not have enabled him to cancel his retirement pension.

[9] The Applicant argues that the medical evidence establishes that he was incapacitated throughout the material time, as he was incapable of forming or expressing an intention to make an application. He argues that the “severity, harshness, extremes of a mental condition would qualify ... Not being able to hold a job continuously persistently and uninterrupted would seem to be a severe or extreme mental condition” (AD1-4). This largely calls for a reassessment of the medical evidence. If the Applicant is seeking a reassessment on the issue of his alleged incapacity, there is no place under the DESDA for the Appeal Division to conduct a reassessment when determining whether leave should be granted or refused: *Tracey*. The grounds of appeal are very specific and are limited to those under subsection 58(1) of the DESDA.

[10] If the Applicant is alleging that the General Division erred in assessing whether he was incapacitated, I do not see any errors on the face of the record in this regard. The General Division cited and applied the correct test for incapacity. It referred to some of the leading jurisprudence, including *Canada (Attorney General) v. Danielson*, 2008 FCA 78 and *Canada (Attorney General) v. Kirkland*, 2008 FCA 144. The General Division examined the Applicant’s relevant activities and found that he worked during the applicable timeframe, lived independently, was financially responsible and applied for regular Employment Insurance benefits. Notwithstanding the purported severity of the Applicant’s condition and any of the medical opinions provided by health caregivers that suggest he was incapacitated, the General Division determined that, by being able to engage in or perform these activities, the Applicant did not meet the definition of “incapacity” under the *Canada Pension Plan*. I see no error in the member’s analysis in this regard.

CONCLUSION

[11] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division