



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. A. R.*, 2017 SSTADIS 195

Tribunal File Number: AD-16-1108

BETWEEN:

Minister of Employment and Social Development

Appellant

and

A. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 28, 2017

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) issued on June 10, 2016, which determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was “severe and prolonged.” Leave to appeal was granted on February 10, 2017, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[2] The Respondent initially applied for CPP disability benefits in September 2011, but the Appellant refused her application because she had not paid enough into the CPP to establish a minimum qualifying period (MQP).

[3] 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 that she left on “doctor’s orders” in August 2012. The Respondent claimed that she had been disabled from work as a result of a number of medical conditions, including fibromyalgia, arthritis, degenerative disc disease and post-traumatic stress disorder.

[4] The Appellant 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 Appellant again denied the Respondent’s application on the basis that she failed to show that she had had a “severe and prolonged” disability during her MQP.

[5] 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 present 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.

[6] On September 7, 2016, the Appellant filed an application for leave to appeal with the Tribunal's Appeal Division, alleging that the General Division erred in law as follows:

- (a) It determined that the Respondent was eligible for CPP disability benefits, yet found that she became disabled after her MQP.
- (b) It determined that the earliest date of payment available to the Respondent was December 2012—six months before she applied for her DUPE.

[7] In a letter dated March 17, 2017, the Respondent declared that she would not challenge a change in the date of her first payment to July 2013; however, if the Appellant was insisting that she did not have a severe and prolonged disability, then she would endorse the matter being returned to the General Division for a reassessment of her medical conditions.

[8] Having heard from the parties, I have now decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

- (a) There are no gaps in the file or need for clarification.
- (b) The Respondent has indicated that she does not object to a redetermination of the first payment date.
- (c) This form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

CPP

[9] According to paragraph 42(2)(b) of the CPP, a person cannot be deemed to be disabled, for payment purposes, more than 15 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.

[10] 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.

[11] Subsection 55.2(9) of the CPP pertains 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

[12] 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.”

[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.

ISSUES

[14] The issues before me are as follows:

- (a) Did the General Division err in law when it found that the Respondent became disabled after her MQP?
- (b) Did the General Division err in law when it determined that the first possible date of payment of the Respondent's CPP disability benefit was December 31, 2012— six months before her DUPE?
- (c) If the answer to either of the above questions is “yes,” then what is the appropriate remedy?

SUBMISSIONS

[15] In its submissions dated March 20, 2017, the Appellant wrote that it did not contest the General Division's finding that the Respondent was disabled. However, it submitted that the General Division's decision contained the following errors of law:

- (a) The General Division found that the Respondent was entitled to a disability benefit based on an onset date of August 2012, which was after her MQP of December 2011 or her prorated MQP of February 2012. In *Canada v. Zakaria*,¹ the Federal Court reaffirmed that a CPP disability applicant must prove the existence of the 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 to 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

¹ *Canada (Attorney General) v. Zakaria*, 2011 FC 136.

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.

[16] The Appellant requests that the Appeal Division render the decision that the General Division should have rendered and find that the Respondent became disabled as of September 2011, pursuant to paragraph 42(2)(b) of the CPP, with payment commencing in July 2013, in accordance with subsection 55.2(9) of the CPP.

[17] In her submissions, the Respondent wrote that she had nothing more to add to the material that was already on file. She said that she did not object to changing her payment date to one month after her DUPE, but that, if the Appellant's position was that her disability fell short of "severe and prolonged," then she felt that the matter would be best returned to the General Division for reconsideration. However, she also maintained that would be a waste of time to do so, since the Appellant had chosen not to attend the first hearing, in which the medical evidence proved that she was 100 percent qualified for CPP disability benefits before the end of her MQP.

ANALYSIS

[18] Having reviewed the submissions, I agree with the Appellant that the General Division erred in finding that the Respondent was eligible for CPP disability benefits, even though it found that she became disabled in August 2012—after the end of her MQP on December 31, 2011 (or, alternatively, on February 29, 2012 by application of the proration provision). I also agree that, if the Respondent qualifies for CPP disability benefits, subsection 55.2(9) of the CPP will serve to prevent a first payment date earlier than the month in which she was approved for a DUPE.

[19] As an aside, I concede that I erred in speculating that, due to the intersection of her fact situation with paragraph 42(2)(b), subsection 55.2(9) and section 69 of the CPP, the

Respondent's appeal before the General Division might have been "doomed to fail." I recognize, of course, that subsection 55.2(9) means only that the first CPP disability payment—not the onset of the disability itself—must come after the approval of a DUPE.

CONCLUSION

[20] For the reasons discussed above, and in view of the Respondent's willingness to agree to a later first payment date, the appeal succeeds on the grounds for which leave was granted.

[21] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. I find it appropriate at this juncture, without any further submissions or hearings, to render the decision that the General Division should have rendered. Accordingly, I find that the Respondent became disabled in September 2011, and that the first payment date for her CPP disability pension is July 2013.



Member, Appeal Division