



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. A. M.*, 2017 SSTADIS 229

Tribunal File Number: AD-16-974

BETWEEN:

Minister of Employment and Social Development

Applicant

and

A. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: May 23, 2017

REASONS AND DECISION

INTRODUCTION

[1] On April 27, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on July 28, 2016.

ISSUE

[2] The member must decide whether the appeal has a reasonable chance of success.

THE LAW

[3] 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.”

[4] Subsection 58(2) of the DESD Act provides that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[5] According to subsection 58(1) of the DESD Act, 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 that it made in a perverse or capricious manner or without regard for the material before it.

[6] Paragraphs 42(2)(a) and (b) of the CPP pertain to the issue of when a person is deemed to be disabled:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(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.

[7] Paragraph 44(1)(b) sets out when a disability pension is payable under the CPP:

(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

has made base contributions for not less than the minimum qualifying period,

(i) (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made.

[8] Paragraph 44(2)(a) sets out the method for calculating the minimum qualifying period (MQP) for the purposes of a disability pension, and paragraph 44(2)(b) defines the contributory period for an applicant seeking a disability pension under the CPP.

[9] Section 19 of the CPP states, in part:

19 The amount of the basic exemption of a person for a year is the amount of the Year's Basic Exemption except that,

(a) for a year in which the person reaches eighteen or seventy years of age or die, in which their contributory period ends under this Act or under a provincial pension plan by reason of disability or in which a disability pension ceases to be payable to them under this Act or under a provincial pension plan, the amount of the basic exemption is equal to that proportion of the amount of the Year's Basic Exemption that the number of months in the year

(i) after

(a) they reach eighteen years of age, or

(b) the disability pension ceases to be payable, or

(ii) before

(a) they reach seventy years of age,

(b) they die, or

(c) the month following the month in which their contributory period ends under this Act or under a provincial pension plan by reason of disability, including, if they die, the month in which they die, is of 12

[10] Subsection 44(2.1) of the CPP sets out when the MQP can be calculated on a prorated basis in the case of a late applicant, which pertains to the Respondent in this case:

(2.1) For the purpose of determining the minimum qualifying period of a contributor referred to in subparagraph (1)(b)(ii), the basic exemption for the year in which they would have been considered to have become disabled, and in which the base unadjusted pensionable earnings are less than the relevant Year's Basic Exemption for that year, is an amount equal to that proportion of the amount of that Year's Basic Exemption that the number of months that would not have been excluded from the contributory period by reason of disability is of 12.

SUBMISSIONS

[11] The Respondent did not make any submissions in response to the issues raised by the Applicant.

[12] The Applicant submitted that the General Division made the following errors:

- (i) The Applicant argued that the General Division erroneously found that the Respondent had a valid MQP date of December 31, 2008, and also miscalculated the possible proration period to be January 1, 2010, to October 31, 2010, when it was actually from January 1, 2010, to November 30, 2010.
- (ii) The Applicant argued that the proration provisions contained within the CPP do not apply in this case as there was no “triggering event” within the proration period that would allow proration to be applied, thereby extending the MQP date.

ANALYSIS

Was the MQP Miscalculated?

[13] The Applicant asserts that the General Division miscalculated the Respondent’s MQP date, which would result in an error of mixed fact and law.

[14] In the decision rendered by the General Division, there is no indication or reference that there was any dispute between the parties over the MQP at the time of the hearing before the General Division member. The General Division wrote that it agreed with the parties that the MQP was December 31, 2008, but that the proration provisions under the CPP may apply and that there was a possibility that an alternative MQP date would be sometime between January 1, 2010, and October 31, 2010.

[15] The calculation of the MQP date is a central issue in determining entitlement to a disability pension under the CPP, because an applicant must be found to have become disabled on or before the MQP date in order to be entitled to receive a CPP disability pension.

[16] Pursuant to paragraph 44(2)(b) of the CPP, the Applicant has argued that the contributory period during which the Respondent could have made valid contributions commenced in 1977, when the Respondent turned 18 years old. The contributory period ended either when the Respondent was determined to have become disabled, or when the Respondent was deemed to have become disabled. The General Division determined that the Respondent became disabled when she stopped working at Walmart due to chronic back, hip and foot pain,

which was attributed to a work-related injury in 2006. A review of the Respondent's Record of Earnings showed that she did not meet the contributory requirements at any point during her contributory period to establish an MQP (paragraph 44(2)(a) and subparagraph 44(1)(b)(ii) of the CPP).

[17] The General Division's finding that the Applicant had an MQP date of December 31, 2008, is an error of mixed fact and law, which has a reasonable chance of success on appeal. I am granting leave on this ground.

Did the General Division Misapply the Proration Provisions?

[18] The Applicant asserts that the General Division erred in law by misapplying the proration provisions of the CPP.

[19] The General Division was aware of the issue of a possible prorated MQP date. The CPP provides proration provisions under certain circumstances. The Applicant has not disagreed with the General Division on whether the proration provisions may apply in the matter at hand. However, the Applicant has argued that the prorated MQP date determined by the General Division is both incorrect and not applicable under the circumstances of this case.

[20] The General Division determined that the Respondent's MQP was from January 1, 2010, to October 2010, based on a proration of her earnings. Relying on both section 19 and subsection 44(2.1) of the CPP, the Applicant argues that this prorated MQP was incorrectly calculated by the General Division and should properly be from January 1, 2010, to November 30, 2010.

[21] The incorrect calculation of the prorated MQP date is not the substantive issue on which the Applicant has focused its submissions. In the Applicant's submission:

29. The SST-GD states in its decision that in order to be able to use the proration provisions, the Respondent must be found to be disabled prior to October 2010. They found her to be disabled as of November 2006.

30. This is an incorrect application of the provisions. ...the test is not whether the claimant's disability existed during the prorated period, but rather whether the onset of the claimant's disability occurred during the prorated period.

[22] The Applicant asserts that, without a finding that the person became disabled in the prorated year, there is no "triggering event" that allows for proration under the CPP. There is no evidence on the record before the General Division that supports a finding that the Respondent became disabled between January 1, 2010, and November 2010. As a result, it is the Applicant's position that no hypothetical MQP date can be established for the purposes of determining entitlement to a disability pension. The Appeal Division finds merit to this argument.

[23] Section 19 of the CPP is interpreted as requiring that proration can only apply in the case of a triggering event, which in this case would be the onset of disability, during the respective prorated period. This has been upheld as the proper interpretation of section 19 of the CPP (see *Dowe v. Minister of Human Resources Development* (PAB) CP7736 (January 2000); and *Dowe v. Canada (Minister of Human Resources Development)*, 2001 FCA 284).

[24] Since the General Division found the Respondent to have become disabled in November 2006, as opposed to a date that falls within the proration period in 2010, the Appeal Division finds that the appeal has a reasonable chance of success.

CONCLUSION

[25] The Application is granted.

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

Meredith Porter
Member, Appeal Division