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

Citation: *D. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 251

Tribunal File Number: AD-16-654

BETWEEN:

D. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: May 30, 2017

REASONS AND DECISION

[1] This is an application for leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), issued on February 17, 2016, in which the General Division dismissed an appeal of the Respondent's reconsideration decision. Because the application for leave to appeal was filed late, I must also consider whether to grant the Applicant an extension of time to file the application.

BACKGROUND

[2] The Applicant has been receiving a Canada Pension Plan (CPP) retirement pension since February 2010. He applied for a CPP disability pension on March 1, 2013. On April 12, 2013, the Respondent advised him that his application was not approved because he had been receiving a retirement pension under the CPP since February 2010 and, under the CPP, he could not receive a disability pension more than 15 months after he had started receiving the retirement pension.

[3] In his application for reconsideration, the Applicant's submission was, in essence, that he did not know about the CPP disability pension when he applied for a retirement pension and that the Service Canada employee should have told him to apply for a disability pension instead. In his application for reconsideration, the Applicant stated (GD6-11):

> As these appeals are a long process and I was going further into debt I attempted a return to work in 2011 but was unsuccessful my medical conditions were severely aggravated I suffer chronic headaches, neck pain, sleep disturbance and occasional nose bleeds every day I feel pressure on my brain it affects every aspect of my life.
>
> I was never advised that I had entitlement to a CPP Disability Pension although I went to a Service Canada office and spoke to an employee about my accident and what difficulties I was having. I brought my spouse with me on the day I applied for my Early Retirement Benefit and I have enclosed a statement from my spouse confirming my experience [GD6-16]. At no time did the service advisor explain to me that the Disability Pension would be the appropriate benefit due to my medical conditions.
>
> I find this is an injustice that I was not advised by the service advisor to apply for my CPP Disability Benefit as I have significant and severely

> prolonged disability my prolonged recovery is due to overlying mood disorder and adjustment disorder and posttraumatic stress disorder.

[4] The Applicant's request for reconsideration was denied, the Respondent confirming its original decision that the Applicant did not meet the requirements under the CPP to withdraw his retirement pension in favour of a disability benefit. The Applicant appealed that decision to the General Division.

[5] As a result of her preliminary review of the appeal materials filed, in accordance with s. 22(1) of the *Social Security Tribunal Regulations* (SST Regulations), the General Division member gave notice to the Applicant of her intention to summarily dismiss the appeal. The Applicant was invited to make submissions in response to the notice. Tribunal staff subsequently advised the Applicant that, after receiving the Applicant's submissions, the member had decided not to summarily dismiss the appeal. Rather, the appeal was decided on the basis of the documents and submissions filed.

[6] In the materials filed with the General Division, the Applicant's representative, Ms. Huls, asserted that she had instructed the Applicant in 2009 to go to an Income Security Programs office to obtain a CPP disability application, which she intended to complete for him. She alleged that this did not occur because the Applicant "was assisted by someone in the Income Security Offices with an early retirement application" (GD9-3).

[7] Included in the materials filed with the General Division, was a declaration, signed by the Applicant and his wife, which stated:

> My wife & I went to Service Canada to apply for my early CPP benefit as due to my accident we short of money. We told the government employee the nature of my workplace accident described my head injury head pain sore brain etc. Tried to work but had to stop due to injure's. At no time did employee tell me it would interfere with my CPP disability. Otherwise would not have fill out early C.P.P. [all *sic*]" (GD4-1).

[8] Before the General Division, the Applicant's representative submitted that the General Division had jurisdiction under s. 66(4) of the CPP to provide a remedy for erroneous advice or an administrative error made by the Respondent's employees. The Applicant's representative further submitted that, even if the General Division did not have remedial jurisdiction, it should

make a finding that there had been erroneous advice or an administrative error, and remit the matter back to the Respondent for appropriate remedial action.

[9] The General Division determined that it did not have jurisdiction to grant the request. Specifically, the General Division concluded that it had no authority to decide whether an administrative error was made or whether erroneous advice was given, and it had no authority to remit the issue back to the Respondent or to interfere with the Respondent's discretion as to whether to take any steps to provide a remedy to the Applicant under s. 66(4) of the CPP (reasons, para. 30–31).

[10] The General Division found that the Applicant had made his application for disability benefits in March 2013, and consequently the earliest date he could be deemed to have become disabled was December 2011, i.e. after he began receiving his retirement pension. As a result, the Applicant was unable to cancel the retirement pension in favour of a disability pension in accordance with s. 66.1(1.1) of the CPP. Given this finding, the General Division did not consider whether the Applicant met the definition of disabled under s. 42(2) of the CPP. The appeal was dismissed.

EXTENSION OF TIME

[11] Because the application for leave to appeal was filed more than 90 days after the date the General Division's decision was communicated to the Applicant, I must consider whether to grant an extension of time to file the application for leave to appeal. For the reasons that follow, I grant the extension.

[12] Pursuant to s. 57(2)(*b*) of the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the General Division decision was communicated to an applicant. In this case, the General Division decision was issued on February 17, 2016. The Applicant states in his application for leave to appeal (AD1C-2) that he received the decision on February 20, 2016. Accordingly, the deadline for filing was 90 days later, i.e. May 20, 2016.

[13] The requirements as to form and content of an application for leave to appeal are set out in s. 40(1) of the SST Regulations. The Applicant filed an incomplete application for leave to

appeal on May 9, 2016. The Applicant completed his application for leave to appeal by filing further documentation on June 30, 2016. The application was considered to have been completed on July 4, 2016. This was 45 days after the May 20, 2016, deadline.

[14] Subsection 57(2) of the DESDA gives me the discretion to allow further time, of no more than one year after the day on which a decision is communicated to an applicant, within which a leave to appeal application may be made.

[15] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out four factors that should be considered and weighed in determining whether to grant an extension of time:

a) Did the person requesting the extension demonstrate a continuing intention to pursue the application or appeal;

b) Does the matter disclose an arguable case;

c) Is there a reasonable explanation for the delay; and

d) Is there any prejudice to the responding party in allowing the extension?

[16] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204, the Federal Court of Appeal agreed that these four questions are relevant to its exercise of discretion to allow an extension of time. The Court observed at para. 62:

> These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice [citation omitted]. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay" [citation omitted]. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served.

[17] Looking at the first of the four factors in the present case, the Applicant filed his (incomplete) application for leave to appeal on May 9, 2016, within the 90-day time limit from

the date the General Division decision was communicated to him. In response to a letter from Tribunal staff dated May 10, 2016, the Applicant filed further information on June 30, 2016, and his application was considered complete on July 4, 2016. I therefore accept that the Applicant has demonstrated a continuing intention to pursue the application for leave to appeal. Regarding the second factor, as discussed in the next section, I have concluded the Applicant has raised no arguable case on the proposed appeal. With respect to the third factor, the Applicant has not provided any explanation for the delay. Finally, with regard to the fourth factor, the Respondent has filed no materials on this application. In the absence of any argument from the Respondent otherwise, I find that granting the extension of time will cause no prejudice to the Respondent.

[18] Although the Applicant has provided no explanation for the delay, given that the (incomplete) application for leave to appeal was filed within the 90-day deadline, and given the relatively short delay of 45 days after the deadline to complete the application, I assess this as a neutral factor. The Applicant has demonstrated a continuing intention to appeal, and granting an extension will not cause any prejudice to the Respondent. As noted by the Federal Court of Appeal in *Larkman*, not all of the four factors need to be resolved in favour of the party seeking the extension: the overriding consideration is whether the interests of justice will be served by granting an extension. In the circumstances, even though the application for leave to appeal does not disclose an arguable case, given my overall assessment of the other factors, I believe the interests of justice are best served by allowing the extension of time.

LEAVE TO APPEAL

[19] Subsection 56(1) of the DESDA states, “An appeal to the Appeal Division may only be brought if leave to appeal is granted.” The requirement to obtain leave to appeal serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34. Furthermore, under s. 58(2) of the DESDA, leave to appeal will be granted only where the Applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in s. 58(1) of the DESDA: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at paras. 70–73. In this context, having a reasonable chance of success means “having some arguable ground upon

which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[20] Pursuant to s. 58(1) of the DESDA, there are only three grounds of appeal: first, a breach of natural justice; second, an error in law; and third, an erroneous finding of fact made by the General Division in a perverse or capricious manner or without regard to the material before it. The use of the word "only" in s. 58(1) of the DESDA means that no other grounds of appeal may be considered: *Belo-Alves*, at para. 72.

[21] In the application for leave to appeal, the Applicant's representative, Ms. Huls, makes no submissions relating to the General Division member's conclusion that s. 66.1(1.1) of the CPP precludes the Applicant from being able to cancel his retirement pension in favour of a disability pension under s. 66.1 of the CPP.

[22] Instead, the Applicant's representative focuses on three matters. First, she submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction by not recognizing that "since the Minister is always the Respondent [on an appeal to the General Division] – the Minister, in their [*sic*] role as Respondent – is able to provide a remedy under s. 66[(4)] as requested" (AD1-1). Second, the Applicant's representative submits that the General Division erred when it held that it had no jurisdiction to deal with the argument that it should grant a remedy under s. 66(4) of the CPP (AD1-2). Third, she submits that the General Division member breached the principles of natural justice by not seeking submissions from the Applicant on whether he was incapable of forming an intention under ss. 60(8) and (9) of the CPP (AD1-4). She also submits that erroneous findings of fact were made in relation to the issue of incapacity (AD1-2). In support of her assertion that the Applicant is incapacitated, the Applicant's representative has included a letter dated May 3, 2016, from the Applicant's family physician, Dr. S. Tully (AD1-6). In his letter, Dr. Sully describes the Applicant's medical situation and states his support of the Applicant's appeal "to have CPP disability and the early retirement reversed".

[23] As the Federal Court recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23, "In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing […]. They also do not consider new

evidence." (See also *Marcia v. Canada (Attorney General)*, 2016 FC 1367.) These principles apply at the leave to appeal stage as well as on appeal. There are narrow exceptions to the rule barring new evidence, such as to address a procedural fairness issue or to provide background information: *Daley v. Canada (Attorney General*), 2017 FC 297 at para.14.

[24] New evidence may be permitted on an appeal to the Appeal Division when it goes to the issue of an alleged procedural fairness, including a possible breach of the principles of natural justice. Here, the Applicant alleges the General Division breached of a principle of natural justice by not seeking submissions from the Applicant on the issue of incapacity. However, the record is clear that no such submissions were sought, and Dr. Sully's letter does not shed any light on this. Dr. Sully's letter is not background information; rather it goes to the merits of the issue. Accordingly, I find it is not admissible on this application.

[25] Moving to the arguments on the application, the first two arguments concern the allegation that the General Division should have provided a remedy under s. 66(4) of the CPP. Essentially, the Applicant's representative argues that the General Division had jurisdiction to apply s. 66(4) of the CPP and, because the Respondent was a party to the appeal before the General Division, the member "should have realized that the Minister could not be severed from a remedy that was favourable to the worker under s. 66 of the [CPP]." The representative argues it was an error of law for the General Division member to hold that there were limits to her jurisdiction and, in fact, the Tribunal has no "limitations on its jurisdiction" (AD1-4).

[26] There is no merit to these arguments. The General Division has no inherent jurisdiction and derives the entirety of its jurisdiction from s. 82 of the CPP and ss. 52 through 54 of the DESDA. Under s. 82 of the CPP, a party who is dissatisfied with a decision of the Minister made under s. 81 may appeal the decision to the General Division. Section 81 lists all the matters decided by the Minister that may be appealed to the General Division. The matters listed in s. 81 do not include decisions made by the Minister pursuant to s. 66(4) of the CPP. As for the DESDA, s. 54(1) of the DESDA sets out the powers of the General Division on an appeal. Nothing in the DESDA gives the General Division authority to review a decision of the Minister made under s. 66(4) of the CPP or to compel the Minister to take any action under s. 66(4) of the CPP.

[27] In *Canada (Attorney General) v. Dale*, 2006 FC 1364, the Federal Court, at paras. 41–44, held that neither the Review Tribunal nor the Pension Appeals Board (predecessors to the General Division and Appeal Division, respectively) had jurisdiction to entertain an appeal of the Minister's decision under s. 66(4) of the Act. In my view, it is clear that the General Division has no statutory or other authority to review a decision of the Minister under s. 66(4), and it does not have the authority to compel the Minister to take action under s. 66(4). I conclude that the argument that the General Division erred by refusing to exercise jurisdiction in relation to s. 66(4) of the CPP does not raise an arguable ground upon which the proposed appeal might succeed.

[28] Before leaving this aspect of the application for leave to appeal, I note that it would be open to a person who wished to challenge a decision made by the Minister under s. 66(4) to file an application for judicial review with the Federal Court: see, for example, *Bartlett v. Canada (Attorney General)*, 2007 FC 89. I also note that, based on the materials before me, the Applicant has not yet made such a request to the Minister under s. 66(4).

[29] The third issue raised by the Applicant's representative is that the General Division member did not seek submissions on the issue of incapacity, i.e. whether the Applicant was continuously incapable of forming an intention to apply for disability benefits.

[30] In her reasons, the General Division member reviewed the Applicant's health situation. In para. 14 of her reasons, the member noted:

> [T]he Appellant attended a day program assessment for head injury treatment from January 18 to February 4, 2010. He demonstrated good attendance and punctuality was adequate. He participated in work trial and educational modules daily from 9 a.m. to 3 p.m., and he demonstrated good performance on constructional tasks. He was able to follow written and verbal instructions on tasks of simple complexity and demonstrated good functional memory. He demonstrated the ability to complete tasks and required minimal cueing, encouragement and assistance. Work speed was fair, although it was dependent on headache pain and level of fatigue. On standardized testing for functional memory he scored below average on recall and within norms for others.

[31] The General Division member addressed the issue of incapacity in her reasons at para. 32, where she stated:

> Ms. Huls stated that the Appellant's failure to follow her instructions to apply for disability benefits showed the level of his cognitive dysfunction. Arguably this invoked the incapacity provisions set out in subsections 60(8) and (9) of the CPP, although the Appellant did not make a direct submission on this and the statement appeared to be more in the nature of evidence of the extent of his disability. In any case, the Appellant did not raise incapacity as an issue at the reconsideration level, and the reconsideration decision did not address it. Thus, the Tribunal does not have jurisdiction to consider whether the Appellant had the capacity to form or express an intention to make the disability application earlier than he did (McMaster v. Minister of Social Development 2005, CP 23010 (PAB)). The Tribunal notes that the test for incapacity is a very narrow one and that the evidence in the file does not suggest that the Appellant would meet it.

[32] The Applicant's representative argues that the General Division member ought to have requested submissions on the issue of incapacity and, by not inviting such submissions, she "breached the principles of administrative fairness and natural justice" (AD1-3). She also argues that erroneous findings of fact were made in relation to incapacity. I find no merit to these submissions.

[33] If incapacity is invoked pursuant to ss. 60(8) and (9) of the CPP, it is the Minister that is to be satisfied as to the incapacity of the person to form or express an intention to make an application under the CPP. If a decision is made by the Minister and an applicant is dissatisfied with the decision, the applicant may apply for reconsideration of the decision, as provided for by s. 81(1)(*b*) of the CPP. If the applicant remains dissatisfied, an appeal can then be made to the General Division under s. 82 of the CPP. However, it is important to note that there is no authority in the CPP or the DESDA for the General Division to decide on a person's incapacity to form or express an intention to make an application for a benefit until the Minister has made a decision under s. 81(1)(*b*) of the CPP. In other words, until a decision has been made by the Minister on reconsideration regarding whether an applicant can avail himself of the incapacity provisions in s. 60(8) or 60(9) of the CPP, no appeal lies on this issue to the General Division pursuant to s. 82 of the CPP.

[34] In the present case, even if the member had done what the Applicant's representative argues she should have done, i.e. sought submissions on incapacity, the submissions would have had no impact on the outcome as the member would have lacked jurisdiction to make a decision on incapacity, given that no ministerial decision has ever been made on the issue under s. 81(1)(*b*) of the CPP. (As noted above, the Applicant's submission on the request for reconsideration was effectively that he did not know about the CPP disability benefit when he applied for a retirement pension and Service Canada personnel ought to have advised him to apply for a disability benefit instead of a retirement pension. The issue of incapacity was not raised in the application for reconsideration.) I therefore conclude there is no basis to find that a principle of natural justice was breached by not seeking submissions on incapacity. Nor did the member improperly refuse to exercise her jurisdiction on this issue. Accordingly, this submission does not raise an arguable ground upon which the proposed appeal might succeed.

[35] With respect to the allegation that the General Division member made erroneous findings of fact in relation to incapacity, the member made no findings of fact on this matter as she concluded she had no jurisdiction to consider whether the Applicant had the capacity to form or express an intention to make a disability application earlier than he did. I find that this submission does not raise an arguable ground upon which the proposed appeal might succeed.

[36] On the issue of whether s. 66.1 of the CPP permitted the Applicant to cancel his retirement pension in favour of a disability pension, the General Division concluded that, because the earliest date the Applicant could be deemed disabled under the statute was December 2011, his retirement pension could not be cancelled because this date fell after February 2010, when the retirement pension became payable. The Applicant did not challenge this aspect of the decision in his application for leave to appeal.

CONCLUSION

[37] I conclude that the proposed appeal has no reasonable chance of success. The application for leave to appeal is therefore refused.

Nancy Brooks
Member, Appeal Division