



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. L. B.*, 2017 SSTADIS 286

Tribunal File Number: AD-16-252

BETWEEN:

Minister of Employment and Social Development

Appellant

and

L. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: December 8, 2016

DATE OF DECISION: June 19, 2017

REASONS AND DECISION

IN ATTENDANCE (via videoconference)

APPELLANT'S REPRESENTATIVE	Hasan Junaid (counsel)
RESPONDENT	L. B.
OBSERVERS	Justine Seguin (articling student) Natalia Strelkova (paralegal)

OVERVIEW

[1] Simply put, this case is about determining when the Respondent was found disabled and when a Canada Pension Plan disability pension started. The parties agree that these dates will determine the end of the Respondent's contributory period, for the purposes of calculating a Canada Pension Plan retirement pension.

BACKGROUND

[2] The Respondent was found disabled under the *Canada Pension Plan*. The Appellant is of the position that the Respondent was found disabled in November 1977 and that the effective date of payment of a disability pension began as of March 1978.

[3] The Respondent turned 65 in December 2012 and her disability pension was thereby automatically converted to a retirement pension. The Appellant calculated the monthly amount of the retirement pension using a contributory period of 79 months. The calculation was based in part on when the Respondent had begun receiving a Canada Pension Plan disability pension.

[4] The Respondent disputed the amount of the monthly retirement pension, arguing that the contributory period should be 75 months. The Appellant maintained its position, prompting the Respondent's appeal to the General Division.

[5] The General Division rendered a decision on the record on November 9, 2015. Based on a memorandum dated June 21, 2007, prepared on the Appellant's behalf, the

General Division found that the Respondent had been deemed disabled as of November 1977 and that the disability benefit became payable in February 1978¹. The General Division concluded that, pursuant to paragraph 44(2)(b) of the *Canada Pension Plan*, the Respondent's contributory period was 75 months. The Appellant sought leave to appeal this decision. I granted leave to appeal, on the ground that the General Division may have erred in law and that it may have also exceeded its jurisdiction in relying on paragraph 44(2)(b) of the *Canada Pension Plan*, rather than on section 49 of the *Canada Pension Plan*.

[6] At the outset, the Respondent advised that she calculates that the difference in the monthly retirement pension, depending upon whether the contributory period is 75 or 79 months, amounts to approximately \$2.

[7] The date on which the Respondent effectively began receiving a Canada Pension Plan disability pension is now the subject of some dispute. The Respondent alleges that, sometime in mid- to late 2016, she entered into an agreement with Canada Revenue Agency whereby the disability pension was retroactively paid commencing in November 1977, continuing through to and including February 1978. The Respondent further alleges that the Tax Court of Canada made an order to this effect.

[8] The Appellant argues that any evidence of this nature is beyond the jurisdiction of this Tribunal to consider, as it is new evidence that arose only after the General Division decision had been issued.

[9] The Respondent also disputes the calculation of her monthly retirement pension, but that issue was not before the General Division and, therefore, is not properly before me.

¹ See paragraph 8 of the General Division decision.

ISSUES

[10] The issues before me are as follows:

1. When was the Respondent found disabled?
2. Can I consider any new evidence if it was not before the General Division?
3. When did the contributory period end?

HISTORY OF PROCEEDINGS

[11] The Respondent had first applied for a disability pension in December 1977. At the time, she did not have sufficient earnings to meet the minimum qualifying period.

[12] The Respondent applied for a disability pension a second time, in October 2001. Following a Review Tribunal decision that her contributions for 1973 had fallen short by \$65, the Respondent provided the Appellant with additional information confirming that she had sufficient valid contributions for 1973. As such, the Respondent established a minimum qualifying period and thereby paved the way for a successful appeal before the Pension Appeals Board in June 2004. Upon a review of the medical evidence, the Pension Appeals Board was satisfied that the appeal should be allowed and that the Respondent be granted a disability pension. The Board wrote:

[9] For various health reasons she was forced to quit her work in November 1977 and has been unable to work since. She applied for and received long term disability which has continued to the present and will continue until age 65.

[. . .]

[18] We are however satisfied the Appellant was disabled within the meaning of Paragraph 42(2)(a) as of September 30, 1980 and remained so thereafter. We are also satisfied that the conditions now causing her disability were present prior to September 30, 1980.

[. . .]

[20] After considering all of the evidence, we are satisfied that the appeal should be allowed and the Appellant should be granted disability pension in accordance with the terms of the *Plan*.

[13] The Board found that the Respondent was disabled “as of September 30, 1980,” and that she has remained disabled since then. Although the Board was satisfied that the “conditions now causing her disability were present prior to September 30, 1980,” it did not expressly stipulate that she had been severely disabled before September 30, 1980. Indeed, the Board’s use of the word “now” suggested that her disability became severe as of September 30, 1980.

[14] At paragraph 9 of its decision, the Board wrote:

For various health reasons she was forced to quit her work in November 1977 and has been unable to work since then”. One cannot necessarily infer from this that the Board found that the Respondent has been severely disabled since November 1977, given that it also found that her condition worsened over time.

[15] In August 2004, the Appellant granted a disability pension with a date of onset of July 2000, a maximum of 15 months retroactivity from the date of the Respondent’s second disability application of October 2001, with approval of payment of a disability pension retroactive to November 2000.

[16] The Respondent sought a reconsideration of the amount of her monthly payment and the amount of retroactive payment, insisting that she should have been granted a disability pension in 1977 and that payment should be calculated in 1977 dollars. The Appellant confirmed its earlier decision, prompting the Respondent to request a review of her file under subsection 66(4) of the *Canada Pension Plan*, as she claims that the payment was too low and that this was because of an administrative error. The Appellant denied that there had been any administrative error, which led the Respondent to seek judicial review.

[17] The Federal Court granted the Respondent’s application for judicial review: *B. v. Canada (Attorney General)*, XXXX FC XX. The Appellant reconsidered the Respondent’s request under subsection 66(4) of the *Canada Pension Plan* and granted retroactive benefits on the basis of her first application.

[18] Although the Pension Appeals Board had found the Respondent disabled with a date of onset of September 30, 1980, it is clear that the Appellant was prepared to accept that the onset of the Respondent's disability had commenced before then, and that it was also prepared to provide payment retroactive to 1978. Otherwise, given an onset of disability of September 30, 1980, under section 69 of the *Canada Pension Plan*, payment of a disability pension would have commenced in January 1981.

[19] Section 69 of the *Canada Pension Plan* provides that "where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled. [...]"

[20] In a letter dated August 28, 2007, the Appellant provided a breakdown of the Canada Pension Plan disability pension payments from 1978 to 2007 and the amount the Respondent would be receiving (GD2-121 to 122). The Appellant's Payment Explanation Statement indicates that, for 1977, the Appellant did not pay any disability pension and, for the year 1978, it paid a disability benefit for 10 months: from March to December.

[21] In October 2007, the Respondent requested that the Appellant provide her with a cost-of-living increase from 1978 to 2007 and that it place her in the same position she would have been in had there been no administrative error in the first instance. Ultimately, she sought remedial action under subsection 66(4) of the *Canada Pension Plan* to be awarded interest on the retroactive payment of her disability benefits. The Appellant denied her request for remedial action.

[22] The Respondent sought judicial review of the Appellant's decision denying her request for remedial action. The Federal Court dismissed her application, finding that there was no statutory authority allowing for the payment of interest on retroactive benefits: *B. v. Canada (Attorney General)*, XXXX FC XXX.

[23] The Respondent appealed this decision to the Federal Court of Appeal. The Federal Court of Appeal allowed the appeal and returned the matter to the Appellant for a new determination. The Federal Court of Appeal found that the Appellant has the authority under subsection 66(4) of the *Canada Pension Plan* to take the remedial action it considered appropriate to place the Respondent in the position she would have been in under the

Canada Pension Plan had it not been for “an administrative error in the administration of that act”: *B. v. Canada (Attorney General)*, XXXX FCA XXX.

[24] The Federal Court of Appeal noted that the Respondent had expected retroactive payments to 1977, when her disability began and when she had applied for a disability pension. Although the Court did not specifically address the issue of when disability benefits should have commenced, in reviewing the history of the proceedings, the Court noted in several instances that the Respondent had received retroactive payments of a disability pension to 1978. The following passages, for instance, demonstrate this:

[13] [...] after reconsidering the matter in view of the judgment of the Federal Court, the Minister, acting under subsection 66(4) of the *CPP*, recognized the [Respondent’s] entitlement to *CPP* disability benefits retroactively to 1978, and issued her payments for the retroactive benefits.

The indexation or interest proceedings

[14] The documentation provided to the [Respondent] by the Minister was far from clear as to the manner in which the retroactive amounts had been calculated. It became subsequently apparent that the Minister had provided the amounts which would have been paid to the [Respondent] in each one of the concerned years from 1978 onward, without any adjustment for the loss of purchasing power of these amounts resulting from their late payment. Thus, the retroactive payments for 1978 and subsequent years were determined as the amounts which would have been paid to the [Respondent] in each concerned year, irrespective of the fact that these amounts, when paid in 2007, had substantially less purchasing power than had they been initially paid out in a timely fashion.

[. . .]

[54] In this case, faced with this situation where an adequate remedy could not be provided through the reconsideration and appeal process, the [Respondent] sought, and eventually obtained, additional retroactive payments back to 1978 through the operation of subsection 66(4) of the *CPP*.

[. . .]

[60] Consequently, it cannot be doubted that the appellant was not made whole when she received in 2007 the same nominal dollar amount of disability benefits as she would have received in 1978 and each year thereafter.

(My emphasis)

[25] I do not see any suggestion by the Federal Court of Appeal that payment of the Canada Pension Plan disability pension commenced in November 1977.

Issue 1: When was the Respondent found disabled?

[26] The Pension Appeals Board found that the Respondent “was disabled [...] as of September 30, 1980” and that she has remained so since. This should have been definitive of the onset of the Respondent’s disability. However, payments of a disability pension did not commence in January 1981, as one would have ordinarily expected under section 69 of the *Canada Pension Plan*. Rather, the payment of a disability pension commenced before that date.

[27] The Respondent claims that payment of a Canada Pension Plan disability pension effectively commenced as of November 1977, whereas the Appellant asserts that payments commenced four months later, in March 1978. This is significant because if the Respondent received a disability pension commencing effective November 1977, this would result in a contributory period of 75 months, rather than 79 months, and would also alter the calculation of the Respondent’s retirement benefit.

[28] In her oral submissions, the Respondent noted that she has consistently maintained that payment of a disability pension should have started and did indeed start in November 1977, rather than in March 1978.

[29] The Respondent claims that the Federal Court recognized that payment of a disability pension started in November 1977. I see no evidence of this, in either the 2007, 2011 or the 2012 decisions, other than a reference in the 2011 decision to a letter dated February 2, 2009, in which the Appellant advised the Respondent that she was being paid a disability pension that had started in November 1977. Apart from this solitary reference, I do not see any other supporting documentary evidence that payments started in November 1977. Indeed, as I have noted above, although the Federal Court of Appeal did not specifically address the issue of when disability benefits should have commenced, the Court noted in several instances that the Respondent had received payments of a disability pension retroactive to 1978.

[30] Paragraph 42(2)(b) provides that “in no case shall a person [...] 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.”

[31] Although an applicant can be deemed disabled 15 months before making an application, pursuant to paragraph 42(2)(b) of the *Canada Pension Plan*, one cannot be deemed disabled earlier than the actual date of onset of disability. For instance, if one’s disability began in January 2017, that person cannot be deemed disabled before

January 2017 and is not entitled to receive a disability pension before actually becoming disabled.

[32] Taking section 69 of the *Canada Pension Plan* into account, the Respondent is effectively arguing that she was found disabled in July 1977. If she had been found disabled in July 1977, then payment of a disability pension would have commenced in November 1977 under section 69 of the *Canada Pension Plan*. I do not find any support for any allegation that the Respondent was disabled in July 1977. The Pension Appeals Board found that the Respondent had been working up until November 1977 and that she had been capable regularly of pursuing a substantially gainful occupation until then. Neither the Appellant nor the Respondent has ever appealed this finding.

[33] The Respondent’s letter of July 13, 2016 indicates that the Appellant had deemed her disabled on October 31, 1977, and that payments were made retroactively to November 1, 1977 (AD3-2). However, I could find no evidence of any of this. Even so, this would be inconsistent with the requirements under section 69 of the *Canada Pension Plan*, had the Appellant indeed deemed the Respondent disabled in October 1977 and then commenced payments in November 1977. If she had been deemed disabled in October 1977, the earliest that payments could have commenced under section 69 of the *Canada Pension Plan* would have been February 1978.

[34] In this particular case, the Respondent cannot rely on the deeming provisions under paragraph 42(2)(b) of the *Canada Pension Plan* and be deemed disabled to July 1977, namely, before November 1977. After all, she was still working up until November 1977

and had been found to be capable regularly of pursuing a substantially gainful occupation until then.

[35] The Pension Appeals Board had found that the Respondent was disabled “as of September 30, 1980.” Arguably the Board could have also found that she was severely disabled as of November 1977, as she “has been unable to work since.” However, the test for a severe disability under the *Canada Pension Plan* is whether one is incapable regularly of pursuing a substantially gainful occupation, so it is not altogether evident that the Board found her disabled as of this date.

[36] Notwithstanding the Board’s decision, it is clear that the parties have nonetheless been prepared to accept that the Respondent was disabled at least as far back as November 1977. The Respondent effectively argues that she should be found disabled as early as July 1977, to warrant commencement of payments of a disability pension as of November 1977, but I find no merit to this argument, given the Board’s findings.

[37] The Respondent argues, alternatively, that the commencement of payments should coincide with the onset of her disability, but there is no authority under the *Canada Pension Plan* for this arrangement. Section 69 of the *Canada Pension Plan* mandates a short waiting period after an applicant becomes disabled before payment of the disability pension commences.

Issue 2: Can I consider any new evidence?

[38] The Respondent is nevertheless requesting that I enforce what she perceives are the terms of a settlement agreement with the Appellant made on a “without prejudice” basis in the context of Tax Court of Canada proceedings, to establish that payment of a Canada Pension Plan disability benefit had commenced in November 1977. The terms of and basis for the settlement agreement have not been and should not be disclosed, particularly because those issues are not germane to these proceedings and because they relate to tax issues in respect of a payment made to the Respondent in the 2013 taxation year.

[39] The Respondent produced a document titled “Appendix B,” showing a yearly breakdown of Canada Pension Plan disability and child benefits paid to her in 2013, relating

to the 1977 to 2012 tax years (AD3-12 to 13). Part of the breakdown suggests that payment of a disability pension might have commenced as early as November 1977. The Respondent argues that the Tax Court of Canada issued an order that reflects the fact that disability benefits had been paid to her for November and December 1977.

[40] The Appellant opposes any reliance on “Appendix B,” as it was not before the General Division, and as there was no evidence before the General Division to otherwise suggest that payment of a disability pension had been made commencing November 1977. The Appellant argues that the incontrovertible evidence before the General Division is that a Canada Pension Plan disability pension had been payable commencing March 1978.

[41] It has now become well-established that new evidence generally is not permitted on appeal or in an application for leave to appeal. In *Canada (Attorney General) v. O’keefe*, 2016 FC 503, at para. 28, the Federal Court of Canada stated that, unlike an appeal before the former Pension Appeals Board, which was *de novo*, an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in section 58 of the *Department of Employment and Social Development Act* (DESDA). In *Marcia v. Canada (Attorney General)*, 2016 FC 1367, the Federal Court held that, “new evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*.”

[42] I see no basis whereby I can consider any new evidence unless it falls within any of the exceptions to the rule. That is not the case here, although, to the extent that any judicial orders have been made, I do not see how I can ignore them. However, the Respondent has not provided me with any court orders from either the Tax Court of Canada or any other court to establish that she became disabled in July 1977 and that, pursuant to section 69 of the *Canada Pension Plan*, that payments therefore should commence in November 1977.

[43] I am mindful of the Respondent’s submissions that the Appellant paid her disability benefits for the years 1977 to 2012, as well as compensation in the form of interest for the late payment of benefits, based on payments from 1977 to 2012. She relies on documents – which reportedly represent the Appellant’s breakdown of payments – filed after the hearing of this appeal.

[44] If that evidence had been before the General Division, I would have expected the member to query how the Appellant arrived at its breakdown of payments starting in November 1977, in light of the Pension Appeals Board's findings that the Respondent had been working up until November 1977. I do not see how I can reconcile any purported payments that the Appellant made between November 1977 and February 1978, irrespective of whether that evidence was before the General Division. It may be that the Appellant inadvertently made an overpayment to the Respondent in respect of a disability pension, but such a payment does not unto itself thereby establish the date of onset of disability or the date of commencement of a disability pension and, for that matter, it does not form the basis for computing the end of the contributory period.

Issue 3: When did/does the contributory period end?

[45] The appeal centered on the commencement date of the payment of a disability pension to the Respondent. Although the commencement date of the payment of a disability pension is central to the calculation of the contributory period, the Respondent otherwise did not take any position with respect to the Appellant's submissions regarding the "formula" for calculating the contributory period.

[46] The Appellant submits that the calculation of a retirement pension is governed by sections 46 to 51 of the *Canada Pension Plan*, which require the contributor's contributory period to be determined for the purposes of calculating the retirement benefit. The Appellant asserts that the General Division treated the appeal before it as a disability case, rather than a retirement matter, an approach that resulted in it applying the wrong provisions of the *Canada Pension Plan*. The General Division applied paragraph 44(2)(b) of the *Canada Pension Plan*. The Appellant argues that the General Division should have applied paragraph 49 of the *Canada Pension Plan*.

[47] Whereas paragraph 44(2)(b) of the *Canada Pension Plan* defines the contributory period for the purposes of establishing the minimum qualifying period in the case of a disability pension, section 49 of the *Canada Pension Plan* defines the contributory period of a contributor for the purposes of calculating a retirement pension, death benefit, survivor's pension, or orphan's benefit. Section 49 reads:

49. Contributory period – The contributory period of a contributor is the period commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and ending

(a) where a benefit other than a disability pension commences before the end of 1986, when he reaches sixty-five years of age, or if he makes a contribution for earnings after he reaches sixty-five years of age, with the month for which he last made such a contribution, and in any case not later than the month in which he dies, or

(b) where a benefit other than a disability pension commences after the end of 1986, with the earliest of

(i) the month preceding the month in which he reaches seventy years of age,

(ii) the month in which he dies, or

(iii) the month preceding the month in which the retirement pension commences, but excluding

(c) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and

(d) in relation to any benefits payable under this Act for any month after December, 1977, any month for which he was a family allowance recipient in a year for which his unadjusted pensionable earnings were equal to or less than his basic exemption for the year.

[48] I accept the Appellant's submissions that the General Division erred in law in relying on section 44 rather than on section 49 of the *Canada Pension Plan* and in ultimately finding that the Respondent's contributory period had ended when she was deemed disabled in November 1977.

[49] Under subparagraph 49(b)(iii), the contributory ended in December 2012, "the month preceding the month in which the retirement pension commences."

[50] For the purposes of calculating the length of the contributory period, one must deduct periods of exclusion under paragraph 49(c), which in this case include months calculated under the child-rearing dropout provisions (CRDO) and months for which the Respondent received a disability pension.

Start of contributory period	January 1966
End of contributory period	<u>December 2012</u>
Subtotal	564 months
Less: periods of exclusion	
CRDO	67 months
Disability (March 1978 to December 2012)	<u>418 months</u>
Total months	<u>79 months</u>

[51] Therefore, the total number of months in the contributory period is 79.

CONCLUSION

[52] I find that the applicable contributory period for the purposes of calculating the retirement pension is 79 months. Accordingly, the appeal is allowed.

Janet Lew
Member, Appeal Division