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

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 310

Tribunal File Number: AD-17-417

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 30, 2017

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) that summarily dismissed the Appellant's appeal for the Canada Pension Plan (CPP) disability benefit because it determined that she could not cancel her retirement pension in favour of a disability pension if the disability onset date was prior to the commencement of her retirement pension. The General Division dismissed the appeal because it was not satisfied that it had a reasonable chance of success.

[3] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division.

[4] As I have determined that no further hearing is required, this appeal is proceeding pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SST Regulations).

OVERVIEW

[5] The Appellant applied for, and began receiving, a CPP retirement pension as of June 2012. The record indicates that the Respondent date stamped her application for CPP disability benefits on September 4, 2013. In her application, she complained of numerous medical conditions, including injuries to her back and right thumb suffered as a result of a fall, which had led her to leave her job as a set decorator in June 2011.

[6] The Respondent refused the application initially and on reconsideration because it was made more than 15 months after the Appellant began receiving her CPP retirement pension. On May 6, 2014, the Appellant appealed these refusals to the General Division. In a decision dated June 12, 2015, the General Division summarily dismissed the Appellant's appeal on the basis that the law does not allow a retirement pension to be cancelled in favour

of a disability pension more than six months after the commencement of the retirement pension.

[7] On July 2, 2015, the Appellant filed an appeal of the summary dismissal decision with the Tribunal's Appeal Division, alleging errors on the part of the General Division. In a decision dated October 22, 2015, the Appeal Division dismissed the appeal, finding that the General Division was correct in its application of the prevailing law to the available facts.

[8] The Appellant applied for judicial review at the Federal Court. In a judgement dated April 11, 2017, the Honourable Justice Michael Phelan found the Appeal Division's decision unreasonable. In his reasons, Justice Phelan wrote:

> [I]t developed through oral argument that a significant issue had not been canvassed in the earlier proceedings or even in this judicial review. That issue is the date on which Mason applied for her disability benefits. It had been taken as a given that the date was September 4, 2013; however, there is now considerable doubt on this point.

[9] Justice Phelan accepted the Appellant's evidence that she mailed her CPP disability application in mid-August 2013 from her local post office and noted that there was "no evidence of the timing of receipt or evidence that the application could not have been in the ESDC [Employment and Social Development Canada] mail system before the Labour Day weekend." Justice Phelan went on to criticize the Appeal Division for equating "receipt" to the "making" of the Appellant's application. Furthermore, he faulted the Appeal Division for failing to consider that "mailing was the method of communication chosen by the government and, having made that choice, whether the delivery to Canada Post as agent for Canada could constitute delivery to ESDC."

[10] Justice Phelan granted the application for judicial review and ordered the Appeal Division's decision quashed. He also ordered that the Appellant's application for disability benefits "be reconsidered *de novo* by a different official or officials."

[11] I have decided that an oral hearing is unnecessary and that the appeal will proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or no need for clarification

(b) This form of hearing respects the requirement under the SST Regulations to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

Department of Employment and Social Development Act

[12] Subsection 53(1) of the DESDA states that the General Division must summarily dismiss an appeal if satisfied that it has no reasonable chance of success. Under subsection 56(2), no leave to appeal is required to appeal a summary dismissal to the Appeal Division.

[13] Subsection 54(1) of the DESDA makes it clear that the General Division can take only an action that that the Minister should have otherwise taken. The General Division May dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given.

[14] Section 22 of the SST Regulations states that before summarily dismissing an appeal, the General Division must give the Appellant notice in writing and allow the Appellant a reasonable period of time to make submissions.

[15] 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.

Canada Pension Plan and Associated Regulations

[16] Under subsection 60(1) of the CPP, no benefit is payable to any person unless an application has been made and payment of the benefit has been approved. Under subsection 60(7), upon receiving an application, the Respondent must consider it and either approve the benefit and the amount, or determine that no benefit is payable.

[17] Under subsection 43(1) of the CPP Regulations, an application for a benefit shall be made in writing at any office of the Department of Employment and Social Development.

[18] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[19] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension. There is an exception to this provision, and it is found in section 66.1 of the CPP.

[20] Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[21] If a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled *before* the month the retirement pension first became payable (subsection 66.1(1.1) of the CPP).

[22] Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(*b*) of the CPP, which states that the earliest a person can be deemed to be disabled is 15 months before the date the Respondent receives the disability application.

[23] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favour of a disability pension where the disability application is made 15 months or more after payment of the retirement pension has started.

[24] According to section 69 of the CPP, payments start four months after the deemed date of disability.

ISSUES

[25] The issues before me are as follows:

(a) How much deference should the Appeal Division extend to decisions of the General Division?

(b) Did the General Division err in summarily dismissing the Appellant's claim for the CPP disability benefit because she was already in receipt of the CPP retirement pension?

SUBMISSIONS

[26] In her notice of appeal filed on July 2, 2015, the Appellant said that she was involved in a June 2011 work-related accident, in which she sustained various bodily injuries. She explained that she began receiving a CPP retirement pension in June 2012 and eventually accepted that she would not be able to return to work and therefore applied for a CPP disability pension. She noted that the Workers' Compensation Board (WCB) has recently assessed her at "78% total disability" but that as there are some outstanding claims, this disability award could increase. She also noted that she has qualified for a "100% Loss of Earnings" award. She wondered how her appeal could be dismissed in light of the fact that the WCB had recognized her disability. In August 2015, the Appellant submitted additional medical records documenting her condition.

[27] In submissions filed on August 17, 2015, the Respondent submitted that the General Division correctly stated and applied the law with respect to the cancellation of a retirement pension in favour of a disability pension under the CPP. The Respondent also defended the General Division's use of the summary dismissal process, under section 53 of the DESDA. Given the uncontested facts and the applicable law, there was only one possible conclusion. Since the appeal was "bereft of any chance of success," it was therefore properly summarily dismissed.

[28] In a letter dated June 8, 2017, the Respondent recommended, in view of the Federal Court's recent decision, that the matter be remitted to the General Division.

ANALYSIS

Degree of Deference Owed to the General Division

[29] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[1] In matters involving alleged errors of law or a failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing the factual evidence.

[30] The Federal Court of Appeal decision in *Canada v. Huruglica*[2] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

[31] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter May reflect legislative priorities other

[1] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[2] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

than the constitutional imperative of preserving the rule of law: "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[32] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> [T]he determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object […] The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[33] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations.

[34] The word "unreasonable" is nowhere to be found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it." As suggested in *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Summary Dismissal

[35] The General Division dismissed the Appellant's appeal because the Respondent had received her application for CPP disability benefits in September 2013. The General Division determined that, under paragraph 42(2)(*b*), the earliest the Appellant could be deemed to be disabled was June 2012—15 months before the application was submitted. As the Appellant's retirement pension also commenced in June 2012, the General Division found that it was

impossible for her to be deemed to be disabled *before* receiving the retirement pension. As a result, the General Division concluded there was no way under the law to allow the Appellant to cancel the retirement pension in favour of the disability pension.

[36] The decision that emerged from the recent judicial review indicates that the Federal Court had no issue with how the General Division interpreted the law governing the intersection of disability and retirement entitlement; rather, it criticized the General Division and my Appeal Division colleague for failing to consider the possibility that, by mailing her application for CPP disability benefits in August 2013, the Appellant thereby "made" her application earlier than September 4, 2013, which the Respondent stamped on the first page on receipt. The Federal Court declared that the case required a "re-think" and directed it to be returned to the Tribunal for a fresh determination to allow the Appellant "to better articulate the relevant circumstances."

[37] The Appeal Division has no mandate to conduct *de novo* hearings under subsection 58(1) of the DESDA. As such, I feel I have no choice but to return this matter to the General Division so that it can hear evidence on the question of precisely when the Appellant submitted her disability application to the Respondent.

CONCLUSION

[38] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. In this case, it is appropriate that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member.

Member, Appeal Division