



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. C. V.*, 2017 SSTADIS 357

Tribunal File Number: AD-16-1057

BETWEEN:

Minister of Employment and Social Development

Applicant

and

C. V.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Margot Ballagh

Date of Decision: July 24, 2017

REASONS AND DECISION

DECISION

[1] The application for leave to appeal is granted.

OVERVIEW

[2] On May 6, 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 and that payment of the pension should start as of January 2012. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 10, 2016. The Applicant expressly did not contest that the General Division granted the Respondent disability benefits with a date of onset of August 2011; however, the Applicant argues that the General Division erred when it determined that payment of the pension should commence in January 2012. More specifically, the Applicant argues that the General Division erred when it failed to properly apply section 69 and subsection 55.2(9) of the CPP to determine the effective date of payment of the disability benefit.

PRELIMINARY ISSUE

[3] First, I must decide whether the Application was brought on time in accordance with paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

[4] The Applicant claimed in the Application that it received communication of the General Division's May 6, 2016, decision on May 12, 2016. The Applicant filed the Application on August 10, 2016, within the prescribed period.

[5] Accordingly, and in the interests of justice, I find that the Application was brought on time.

ISSUE

[6] I must decide whether the appeal has a reasonable chance of success.

THE LAW

[7] According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[8] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[9] The only possible grounds of appeal as set out in subsection 58(1) of the DESD Act are as follows:

(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.

[10] Section 55.1 of the CPP allows for a possible division of unadjusted pensionable earnings (DUPE) for the sharing of CPP credits between former spouses after a separation or divorce.

[11] Subsection 55.2(9) of the CPP sets out when a benefit becomes payable where there is a DUPE as follows:

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. (underline added)

[12] Section 69 of the CPP provides that, where a 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.

SUBMISSIONS

[13] The Applicant submits that the General Division erred in law when it failed to consider subsection 55.2(9) of the CPP and the effect that the Respondent's DUPE or credit split had on her date of payment.

[14] The Applicant further submits that the General Division erred in its calculation of the effective date of payment of the disability pension by misapplying section 69 of the CPP and concluding that the effective date of payment was January 2012, which was five months (not four months) after it determined that the Respondent had become disabled, in August 2011.

ANALYSIS

[15] I can grant leave to appeal only if I am satisfied that the reasons for appeal fall within the specified grounds of appeal as set out in subsection 58(1) of the DESD Act (referred to above) and that the appeal has a reasonable chance of success. Direction in this regard was provided by the Federal Court in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

Failure to consider effect of Respondent's DUPE or credit split on date of payment

[16] The Applicant argues that leave to appeal should be granted on the ground that the General Division erred in law when it failed to consider the effect that the Respondent's DUPE had on her date of payment and incorrectly determined that the disability benefits should start to be paid as of January 2012.

[17] Subsection 55.2(9) of the CPP is clear that 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.

[18] I note that the Applicant's submissions to the General Division focus on the effect that the Respondent's CPP retirement pension had on her application for disability benefits but did not specifically identify an issue regarding the effect that the DUPE would have. It appears that the General Division addressed the issue of the retirement pension that was raised, but did not address the effect of the DUPE. In any event, the Record of Contributions was filed before the General Division and it identifies that a DUPE took place. It also may be that the disability pension would not have been payable in the absence of the division.

[19] The General Division decision did not mention whether a DUPE occurred or why the DUPE was not considered in determining the date of payment. The General Division decision concluded that the Respondent had a severe and prolonged disability in August 2011. The date of payment of January 2012 was determined with reference to section 69 of the CPP; however, the DUPE provisions in section 55.1 and subsection 55.2(9) of the CPP were not considered in the decision.

[20] Accordingly, I am satisfied that the reason for appeal falls within the specified grounds of appeal as set out in subsection 58(1) of the DESD Act, namely that the General Division may have committed an error of law in failing to consider the effect of the DUPE on the date of commencement of payment of the disability benefit. I am also satisfied that the appeal has a reasonable chance of success on this ground.

Misapplication of section 69 of CPP

[21] The Applicant also argues that the General Division erred in law when it misapplied section 69 of the CPP.

[22] The General Division found that the Respondent had a severe and prolonged disability in August 2011, and after referencing section 69 of the CPP, determined that payments would start as of January 2012.

[23] Accordingly, I am satisfied that the reason for appeal falls within the specified grounds of appeal as set out in subsection 58(1) of the DESD Act, namely that the General Division may have committed an error of law in failing to properly apply section 69 of the CPP to determine

the correct date of payment. I am also satisfied that this appeal has a reasonable chance of success on this ground.

CONCLUSION

[24] Leave to appeal is granted but only in relation to the application of subsection 55.2(9) and section 69 of the CPP.

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

Margot Ballagh
Vice-chairperson and Member, Appeal Division