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

Citation: *J. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 481

Tribunal File Number: AD-17-220

BETWEEN:

J. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 15, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) that found that he was entitled to a disability pension under the *Canada Pension Plan* (CPP) as of September 2012.

BACKGROUND

[2] The Applicant has applied for the CPP disability pension on three separate occasions: January 21, 2004; January 16, 2009; and August 19, 2013. The Respondent denied the first two applications on the first instance, and there is no indication in either case that the Applicant ever requested reconsideration before the specified deadlines. For the third and most recent application, the Respondent denied the Applicant's disability claim initially and again upon reconsideration. The Applicant then appealed the reconsideration decision to the General Division, which determined, in a decision dated January 19, 2017, that he was eligible for a CPP disability pension because his disability was "severe and prolonged" during the minimum qualifying period (MQP) ending on December 31, 2012.

[3] The General Division also found that the date of disability onset was October 2007, when he stopped working due to his prostate cancer diagnosis. Citing provisions of the CPP that limited retroactive pension payments, the General Division specified May 2012 as the deemed date of disability onset, with a first payment date of September 2012.

[4] On March 14, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division.

THE LAW

Canada Pension Plan

[5] Paragraph 42(2)(*b*) of the CPP provides for when an applicant can be deemed disabled:

> 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.

[6] The provision governing payment of the disability pension is found in section 69:

> Subject to section 62, 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, except that where the applicant was, at any time during the five year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan,
>
> (a) the pension is payable for each month commencing with the month next following the month in which the applicant became disabled as a result of which the payment is approved; and
>
> (b) the reference to "fifteen months" in paragraph 42(2)(b) shall be read as a reference to "twelve months."

[7] Once the Respondent has made an initial determination of disability, subsection 81(1) of the CPP imposes a 90-day time limit on applicants to request reconsideration. Under subsection 81(2), the Respondent must reconsider the initial determination without delay and communicate its reasons for either varying or upholding it in writing.

[8] Under section 82, a party who is dissatisfied with a decision of the Respondent made under section 81 may appeal the decision to the Tribunal's General Division.

Department of Employment and Social Development Act

[9] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), 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.

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

[11] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[12] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[13] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the applicant does not have to prove the case.

ISSUE

[14] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[15] In a brief accompanying the application requesting leave to appeal, the Applicant's representative made the following submissions:

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(a) In paragraph 86 of the decision dated January 19, 2017, the General Division found that the Appellant had a severe and prolonged disability in October 2007, when he stopped working due to his prostate cancer diagnosis.

(b) The General Division also noted that, for payment purposes, a person cannot be deemed disabled more than 15 months before the Respondent received the application for a disability pension. The General Division found that, as the application was received in August 2013, the Applicant was entitled to disability benefits only from May 2012, with a first payment date four months later.

(c) In paragraph 69(*c*) of the decision, the Respondent acknowledged that the Applicant first applied for CPP disability benefits in January 2004. This application was denied. The Applicant applied again in January 2009, and this application was also denied. In May 2013, the Applicant requested reconsideration, and the Respondent refused to do so, as more than four years had passed since the denial of the January 2009 application. Instead of spending excess time and resources disputing the limitation issue, the Applicant filed a new application in August 2013.

(d) The Applicant was self-represented in both his previous applications and could not seek legal advice from a lawyer because of his disability and financial problems. The Applicant seeks an order that the General Division's decision dated January 19, 2017 be amended to fix the deemed date of disability at October 2007 instead of May 2012.

ANALYSIS

[16] The decision whether to grant leave to appeal turns on whether the Applicant's third application can be considered an extension of the second. For the reasons that follow, I see no arguable case that it can.

[17] The second application was considered and rejected by the Respondent in the first instance on February 13, 2009, and was not subject to a reconsideration request until February 19, 2013, well beyond the 90-day deadline specified in subsection 81(1) of the CPP. Section 82 suggests that an appeal to the General Division is permissible only if the Respondent has made

a decision in response to a reconsideration request, and the record plainly indicates that never occurred here—even though he was advised that he had the right to do so. The General Division's decision appears to take it for granted that the first and second applications are dead letters—it mentions them only in passing.

[18] I see no error in fact or law in the General Division's finding that the 2009 application process came to an end with the Respondent's denial and the Applicant's failure to request consideration within the statutory timeline. The Applicant suggests that a subsequent application can retroactively trigger or breathe new life into a past application but, quite simply, there ceased to be an application to consider once the Applicant accepted the refusal and took no further steps to pursue his application. The process that was initiated in January 2009 ended in February 2009.

[19] This interpretation of the law has been reinforced by the Federal Court of Canada decision, *Canada v. Bannerman*,[3] which held that there is no direct right of appeal from an original determination of the Minister without having first applied for redetermination and having received a decision flowing from that request. A request for reconsideration under subsection 81(1) and a decision on the request for reconsideration are conditions precedent to the right of appeal. Only a decision on a reconsideration can be appealed to the Tribunal, and that did not occur here.

[20] The Applicant initiated a new application for CPP disability benefits in August 2013, and the General Division ultimately found him disabled. The legislative provisions, specifically paragraph 42(2)(*b*) of the CPP, state that the date of deemed disability commences no sooner than 15 months prior to the date of the application, in the Applicant's case, May 2012. I can find no authority that would allow the Applicant's disability period to be calculated retroactively. Indeed, the case law is clear on this issue. For example, in *Canada v. Galay*,[4] the Pension Appeals Board (PAB) held that the words "before the time of making the application" in paragraph 42(2)(*b*) refer to the time that the application was received by the Minister. In *Sarrazin v. Canada*,[5] the PAB expanded on its analysis of the retroactivity of paragraph

[3] *Canada (Attorney General) v. Bannerman*, 2003 FCT 208.
[4] *Canada (Minister of Social Development) v. Galay* (June 3, 2004) CP 21768 (PAB).
[5] *Sarrazin v. Canada (Minister of Human Resources Development)* (June 27, 1997), CP 05300 (PAB).

42(2)(*b*), stating that it "limits the retroactive time to 15 months before the later of (i) the time when a successful application for disability benefits was made, or (ii) when the amendments came into force in June 1992."

[21] Further, in *Baines v. Canada*,[6] the Federal Court of Appeal made it clear that,

> where the claimant's initial application was refused seven years before, the fact that a subsequent application was allowed for the same injury did not permit the tribunal to backdate the award beyond the 15-month statutory maximum to the date of the initial application. The Review Tribunal did not have jurisdiction to reopen the original file, and the PAB could only consider issues within the Review Tribunal's jurisdiction.

[22] The Applicant's fact situation is analogous with *Baines*, reinforcing my view that the General Division did not commit an error when it limited the retroactive payment of disability benefits to the 15 months immediately before the date of the third application, and applied the four-month waiting period required under section 69 of the CPP.

[23] The Applicant suggests that she should be granted relief on compassionate grounds, but the General Division was bound to follow the letter of the law, and so am I. If the Applicant is asking me to exercise fairness and to simply amend the General Division's decision, I lack the discretionary authority to do so and can exercise such jurisdiction only as granted by the Appeal Division's enabling statute. Support for this position may be found in *Pincombe v. Canada*,[7] among other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

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[6] *Baines v. (Minister of Human Resources Development)*, 2011 FCA 158 (CanLII).
[7] *Pincombe v. Canada (Attorney General)* [1995] FCJ No. 1320 (FCA).

CONCLUSION

[24] As the Applicant has not presented an arguable case on any ground, the application for leave to appeal is refused.

Member, Appeal Division