



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 497

Tribunal File Number: AD-17-41

BETWEEN:

A. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: September 27, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a Canada Pension Plan (CPP) disability pension in August 2014. He had turned 65 in July 2010.

[2] The Respondent denied the application initially and upon reconsideration.

[3] The Appellant appealed that decision to the General Division of the Social Security Tribunal of Canada (Tribunal) in June 2016.

[4] On December 5, 2016, the General Division summarily dismissed the appeal on the basis that the Appellant had not met the criteria to qualify for CPP disability, namely, to be under 65 years of age (CPP, paragraph 44(1)(b)).

[5] The Appellant filed an application to appeal the General Division decision on January 17, 2017, within the prescribed appeal period.

[6] The Appellant's reasons for appeal can be summarized as follows:

- a) He has had disability problems since September 20, 2000.
- b) He turned 65 on July 22, 2010, and began receiving a CPP retirement pension.
- c) He wants to receive disability pension from September 20, 2000, until July 22, 2010.
- d) This is his "insurance" that he paid into for 48 years.
- e) He had applied for CPP disability previously.

[7] The Respondent did not file submissions before the Appeal Division. The Respondent had denied the Appellant's application because a person can be found disabled only as early as 15 months prior to the date of application. In this case, the earliest date the Appellant could be considered disabled is May 2013. As at May 2013, the Appellant was over 65 years of age. Therefore, he did not meet the eligibility requirements for a disability benefit.

[8] This appeal proceeded on the basis of the record for the following reasons:

- a) The Appeal Division member had determined that no further hearing was required.
- b) The *Social Security Tribunal Regulations* require that the appeal proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUE

[9] The Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the General Division's decision.

LAW AND ANALYSIS

[10] The Appellant is appealing a decision dated December 5, 2016, whereby the General Division summarily dismissed his appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[11] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the DESD Act, as there is an appeal as of right when dealing with a summary dismissal from the General Division. Because no further hearing is required, this appeal before the Appeal Division is proceeding pursuant to paragraph 37(a) of the *Social Security Tribunal Regulations*.

[12] Subsection 58(1) of the DESD Act sets out the grounds of appeal 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.

[13] The relevant CPP provisions are paragraphs 44(1)(b) and 42(2)(b) of the CPP.

Legal Test for Summary Dismissal

[14] Subsection 53(1) of the DESD Act allows the General Division to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[15] Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or it may confirm, rescind or vary the General Division's decision in whole or in part.

[16] Here, the General Division correctly states the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 3 of its decision.

[17] However, it is insufficient to simply cite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act without properly applying it. After identifying the legislative basis, the General Division must correctly identify the legal test and then apply the law to the facts.

[18] At paragraph 2 of its decision, the General Division asks "whether the appeal should be summarily dismissed."

[19] The General Division decision does not state what legal test it applied to arrive at its conclusion to summarily dismiss the appeal.

The General Division's Decision

[20] While the General Division did not state the legal test it applied, it did explain the basis upon which it had summarily dismissed the appeal:

[11] The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the CPP.

[12] In the present case, it is technically impossible for the Appellant to qualify for a CPP disability pension. Under the CPP, one criterion to qualify for the CPP disability is to be under 65 years of age (CPP paragraph 44(1)(b)). The Appellant applied for a CPP disability in August 2014. The Appellant's submission did not suggest any mental incapacity to apply before that date. Under the CPP, the earliest he could be deemed disabled is 15 months before the application date. In this case, if found disabled, his earliest deemed date of disability is May 2013 (CPP paragraph 42(2)(b)). He was already over age 65 in May 2013.

[13] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

[21] Because the General Division member did not identify the legal test applicable to a summary dismissal and because he did not apply that legal test to the facts, the General Division decision is based on an error of law.

[22] The legal test applicable to a summary dismissal is the first question that needs to be answered. The question of whether there was an error in law (or another type of error) in the Respondent's decision on the specific issues would follow.

[23] Given the General Division's error of law on the preliminary question of the legal test applicable to summary dismissals, the Appeal Division is required to conduct its own analysis and decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the decision: *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, at paragraph 8, and subsection 59(1) of the DESD Act.

Application of Legal Test for Summary Dismissal

[24] Although the General Division erred by neither identifying nor applying the applicable legal test, paragraphs 11 and 12 of the General Division decision are correct, and I agree with the findings stated therein.

[25] The Appellant takes issue with not receiving six months of CPP disability benefits, which he feels are owed to him because he has had “disability problems” since 2000.

[26] Although “no reasonable chance of success” was not further defined in the DESD Act, for the purposes of the interpretation of subsection 53(1) of the DESD Act, it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.

[27] There appear to be three lines of cases in previous Appeal Division decisions that deal with appeals of summary dismissals by the General Division, namely:

- a) *J. S. v Canada Employment Insurance Commission*, 2015 SSTAD 715; *C. D. v Canada Employment Insurance Commission*, 2015 SSTAD 594; *M. C. v Canada Employment Insurance Commission*, 2015 SSTAD 237; and *J. C. v Minister of Employment and Social Development*, 2015 SSTAD 596. The following legal test was applied: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.
- b) *C. S. v Minister of Employment and Social Development*, 2015 SSTAD 974; *A. P. v Minister of Employment and Social Development*, 2015 SSTAD 973; and *A. A. v Minister of Employment and Social Development*, 2015 SSTAD 1178. In these decisions, the Appeal Division applied a differently articulated legal test: whether there is a “triable issue” and whether there is any merit to the claim using the language of “utterly hopeless” and “weak” case in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and as long as the outcome was not “manifestly clear,” then the matter would be inappropriate for a summary dismissal. A weak case would not be appropriate for a summary dismissal, as it necessarily involves assessing the merits of the case, examining the evidence and assigning weight to it.

c) *K. B. v Minister of Employment and Social Development*, 2015 SSTAD 929. In this decision, beyond citing subsection 53(1) of the DESD Act, the Appeal Division did not articulate a legal test.

[28] I find that the application of the two tests cited in paragraphs 27 *a*) and *b*) of this decision leads to the same result in the present case—the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a “weak” case but rather an “utterly hopeless” one, as it does not involve assessing the merits of the case or examining the evidence.

[29] Neither the Tribunal’s General Division nor its Appeal Division can vary the legislative provisions of the CPP.

[30] According to the CPP Act, one criterion to qualify for CPP disability is to be under 65 years of age. Because the Appellant applied in August 2014, the earliest date he could be deemed disabled is 15 months before the application date, namely, May 2013. He was already over the age of 65 in May 2013.

[31] The operation of paragraphs 44(1)(*b*) and 42(2)(*b*) is determinative of this appeal.

[32] After reviewing the Appellant’s notice of appeal, the parties’ submissions, the General Division’s record, its decision and the Appeal Division’s previous decisions relating to summary dismissals, as well as after applying the legal test applicable to a summary dismissal, I hereby dismiss the appeal.

CONCLUSION

[33] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division