



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 499

Tribunal File Number: AD-17-30

BETWEEN:

T. V.

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 disability pension under the *Canada Pension Plan* (CPP) in February 2016. He had been in receipt of a CPP retirement pension since July 2012.

[2] The Respondent notified the Appellant that he was not eligible to receive a CPP disability pension, because he applied 15 months after he started receiving a CPP retirement pension. The Appellant made a request for reconsideration. The Respondent maintained the original decision.

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

[4] On December 19, 2016, the General Division summarily dismissed the appeal on the basis that the Appellant does not meet the eligibility requirements of paragraph 44(1)(b) of the CPP; specifically, the Appellant was in receipt of a CPP retirement pension and could not be deemed disabled before he started receiving his retirement benefit. The General Division also noted that it is required to interpret and apply the provisions as they are set out in the CPP.

[5] The Appellant filed an incomplete application to appeal to the Tribunal's Appeal Division on January 10, 2017. The Tribunal asked him to complete his application by letter dated January 16, 2017. The Appellant provided further information on February 2, 2017, and his appeal was then considered complete. His reasons for appeal can be summarized as follows:

- a) The only thing holding back his CPP disability pension is “the time stipulation of 15 months.”
- b) This provision should not apply to his case, for the reasons mentioned in his previous letters.
- c) “Not being given the right to make a proper decision according to the information that was never provided is a basic form of discrimination.”
- d) If a person becomes disabled in his late 60s, he should still be entitled to receive disability benefits.

- e) It is wrong to deny his disability pension when he has provided medical documents to show that he is disabled.

[6] The Respondent did not file submissions before the Appeal Division. The Respondent's original decision and reconsideration decision stated:

- a) The CPP does not allow the payment of a disability pension and a retirement pension at the same time.
- b) The Appellant began receiving a retirement pension in July 2012.
- c) He made an application to cancel his retirement pension in favour of a disability pension more than 15 months after his retirement pension had commenced; therefore, he is ineligible for a disability pension according to the language of the CPP.

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

- a) The lack of complexity of the issue under appeal;
- b) The Appeal Division Member has determined that no further hearing is required; and
- c) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

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

LAW AND ANALYSIS

[9] The Appellant is appealing a decision dated December 19, 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.

[10] 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* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before the Appeal Division is proceeding pursuant to paragraph 37(a) of the *Social Security Tribunal Regulations*.

[11] 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.

[12] The Appellant does not dispute any of the factual findings made by the General Division. Rather, he alleges that the result is unfair because he paid into the disability fund, he was not given the proper information, and it is wrong to refuse him a CPP disability pension when he is disabled.

[13] The relevant provisions of the CPP are:

- a) Subsection 66.1(1.1), which states that a recipient can cancel the retirement pension in favour of the disability benefit only if the recipient is deemed to be disabled before the month the retirement pension became payable;

- b) Subsection 66.1(1.1) read with paragraph 42(2)(b), which states that the earliest a person can be deemed to be disabled is 15 months before the date the disability application is received by the Respondent; and
- c) Paragraph 44(1)(b), which 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.

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 confirm, rescind or vary the General Division decision in whole or in part.

[16] Here, the General Division correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 2 of its decision.

[17] However, it is insufficient to simply recite 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 apply the law to the facts.

[18] The General Division asked the question of “[...] whether the appeal should be summarily dismissed” at paragraph 2 of its decision.

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

General Division Decision

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

[17] Based on the evidence on file, the Appellant began receiving a retirement pension in July 2012 and the Appellant’s application for a CPP disability pension was received in February 2016. 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 (6) months after payment of the benefit has started. If a person does not cancel a benefit within six (6) 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 as provided by subsection 66.1(1.1) of the CPP which in this case is June 2012.

[18] However, 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 disability application is received by the Respondent.

[19] In this case, pursuant to paragraph 42(2)(b) of the CPP, the earliest the Appellant could be deemed to be disabled is November 2014, which is fifteen months before the disability pension application was made.

[20] Because the Appellant’s retirement pension started in July 2012 and because the earliest the Appellant could be deemed to be disabled is November 2014, it is not possible for the Appellant to be deemed to be disabled *before* receiving the retirement pension in July 2012 as provided by subsection 66.1(1.1) of the CPP. As a result, the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

[21] 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.

[22] 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 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. Whether there was an error in law or other error in the Respondent's decision on the specific issues would follow.

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

Application of Legal Test for Summary Dismissal

[24] Despite having erred in not identifying and applying the applicable legal test, paragraphs 17 to 21 of the General Division decision are correct, and I agree with the findings stated in them.

[25] 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, the Tribunal notes that it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.

[26] There appear to be three lines of cases in previous Appeal Division decisions on appeals of summary dismissals by the General Division:

- a) Examples AD-13-825 (*J. S. v. Canada Employment Insurance Commission*, 2015 SSTAD715); AD-14-131 (*C. D. v. Canada Employment Insurance Commission*, 2015 SSTAD594); AD-14-310 (*M. C. v. Canada Employment Insurance Commission*, 2015 SSTAD 237); AD-15-74 (*J. C. v. Minister of Employment and Social Development*, 2015 SSTAD 596). The legal test applied was: 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 *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.
- b) Examples AD-15-236 (*C. S. v. Minister of Employment and Social Development*, 2015 SSTAD 974); AD-15-297 (*A. P. v. Minister of Employment and Social Development*, 2015 SSTAD973); and AD-15-401 (*A. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178). The Appeal Division has 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 the outcome was not “manifestly clear,” then the matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.
- c) Example AD-15-216 (*K. B. v. Minister of Employment and Social Development*, 2015 SSTAD 929). The Appeal Division did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[27] I find that the application of the two tests cited in paragraph 26 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 an “utterly hopeless” one, as it does not involve assessing the merits of the case or examining the evidence.

[28] Neither the General Division nor the Appeal Division of the Tribunal can vary the eligibility requirements under subsection 44(1) of the CPP, no matter the circumstances.

[29] The Appellant’s main argument is that it is unfair that he has been denied a disability pension when he has provided evidence that he is disabled. He calls this combined with incomplete information in the process “discrimination.”

[30] Having reviewed the Appellant’s submissions and the record, I find that this ground of appeal is not a challenge of the CPP on the basis of the *Canadian Charter of Rights and Freedoms* but rather an assertion by the Appellant that denying him a disability pension because of the 15-month provision in the CPP (subsection 66.1(1.1) and paragraph 42(1)(b) of the CPP) is unfair and wrong.

[31] The operation of paragraph 42(1)(b) and subsection 66.1(1.1) of the CPP is determinative of this appeal.

[32] It is clear from the record that the Appellant has been in receipt of a retirement pension since July 2012 and that he made an application for a disability pension in February 2016. The CPP permits the cancellation of a retirement pension in favour of a disability pension only in very limited circumstances, and the Appellant’s situation does not fall within the circumstances set out in the legislation. The Tribunal cannot vary legal requirements set out in the CPP. Regardless of the evidence or arguments that could be presented at a hearing, the appeal on this issue is bound to fail.

[33] After reviewing the Appellant’s notice of appeal and submissions, the General Division record and decision, the previous Appeal Division decisions relating to summary dismissals, and by applying the legal test applicable to a summary dismissal, I hereby reject the appeal.

CONCLUSION

[34] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division