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

Citation: *Minister of Employment and Social Development v. A. M.,* 2017 SSTADIS 509

Tribunal File Number: AD-16-974

BETWEEN:

Minister of Employment and Social Development

Appellant

and

A. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Meredith Porter

DATE OF DECISION: October 2, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant seeks to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated April 27, 2016,which determined that a disability pension under the *Canada Pension Plan* (CPP) was payable.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on July 28, 2016, and leave to appeal was granted on May 23, 2017.

[3] This appeal proceeded On the Record for the following reasons:

a) Pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SSTR), the member has determined that no further hearing is required.

b) The requirement under the SSTR to proceed as informally and quickly as circumstances, fairness and natural justice permit.

c) The issues under appeal are not complex.

ISSUE

[4] The member must decide whether the General Division erred in finding that the Respondent had a minimum qualifying period (MQP) date of December 31, 2008.

[5] The member must also decide whether the General Division erred in interpreting and applying the proration provisions of the CPP such that the MQP date could be prorated to a later date of October 31, 2010.

[6] Finally, the member must decide whether the Respondent became disabled between January 1, 2010, and November 30, 2010, so as to "trigger" the proration of the MQP date to the later, and correct, proration date of November 30, 2010.

THE LAW

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), 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 that it made in a perverse or capricious manner or without regard for the material before it.

[8] Paragraphs 42(2)(*a*) and (*b*) of the CPP pertain to the issue of when a person is deemed to be disabled:

> (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
>
> > (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
> >
> > (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and
>
> (b) 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.

[9] Paragraph 44 (1)(*b*) sets out when a disability pension is payable under the CPP:

> (b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

> (i) has made base contributions for not less than the minimum qualifying period,
>
> (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or
>
> (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made.

[10] Paragraph 44 (2)(*a*) sets out the method for calculating the MQP for the purposes of a disability pension, and paragraph 44(2)(*b*) defines the contributory period for an applicant seeking a disability pension under the CPP.

[11] Finally, subsection 44(2.1) of the CPP contains provisions that set out when the MQP can be calculated on a prorated basis in the case of a late applicant, which pertains to the Respondent in this case:

> (2.1) For the purpose of determining the minimum qualifying period of a contributor referred to in subparagraph (1)(b)(ii), the basic exemption for the year in which they would have been considered to have become disabled, and in which the base unadjusted pensionable earnings are less than the relevant Year's Basic Exemption for that year, is an amount equal to that proportion of the amount of that Year's Basic Exemption that the number of months that would not have been excluded from the contributory period by reason of disability is of 12.

SUBMISSIONS

[12] The Appellant submits that the General Division made the following errors:

(i) The Appellant argues that the General Division erroneously found that the Respondent had a valid MQP date of December 31, 2008, because the Appellant did not have sufficient contributory years to establish an MQP date in December 2008.

(ii) The Appellant also submits that the General Division miscalculated a possible proration period from January 1, 2010, to October 31, 2010, when it was actually from January 1, 2010, to November 30, 2010.

(iii) The Appellant argues that the proration provisions contained within the CPP do not apply in this case as there was no "triggering event" within the proration period that would allow proration to be applied, thereby extending the MQP date.

(iv) Finally, the Appellant submits that the documents the Respondent had filed with the Tribunal following the granting of leave to appeal should not be admitted as they are new evidence that was not before the General Division. The new evidence should not be considered by the Appeal Division in determining whether the appeal is allowed.

[13] The Respondent submits that she had previously provided sufficient medical evidence of her disability. The documents filed following the decision granting leave to appeal were intended to support the Respondent's position that she should be found to suffer a severe and prolonged disability.

[14] The Respondent submits that the new evidence reflects the continued deterioration of her health condition.

STANDARD OF REVIEW

[15] It was previously accepted that the standard of review applicable to appeals before the Appeal Division were governed by the same standards of review as set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9. The applicable standards were, as set out by the Court in *Dunsmuir*, that, where there is an alleged error of law or a failure to observe a principle of natural justice, the applicable standard is that of correctness. The Appeal Division should demonstrate a lower threshold of deference to the General Division's findings. Further, the applicable standards were, as set out by the Court in *Dunsmuir*, that, where there is an alleged erroneous finding of fact, the standard is held to be reasonableness. This means that, where the General Division's findings fall within a range of possible, acceptable outcomes, the Appeal Division should be reluctant to intervene in the General Division's findings.

[16] The standards of review for administrative tribunals have changed since *Dunsmuir*. The Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, rejected the *Dunsmuir* approach and held that administrative

tribunals should not use standards of review that were designed to be applied by appellate courts:

> [47] The principles which guided and shaped the role of courts on judicial review of decisions made by administrative decision-makers (as set out in Dunsmuir at paras. 27-33) have no application here. Indeed, the role and organization of various levels of administrative decision-makers do not put into play the tension between the legislative intent to confer jurisdiction on administrative decision-makers and the constitutional imperative of preserving the rule of law.

[17] Instead, the Court in *Huruglica* held that administrative tribunals should first look to their home statutes for guidance in determining the applicable scope of review. The Court in *Huruglica* also stated that "[o]ne should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies." Alternatively, the Court stated that, when determining the scope of review for a decision of a lower level administrative tribunal, one should look first to the tribunal's governing legislation as "One must seek instead to give effect to the legislator's intent."

[18] I note that, although *Huruglica* deals with a decision of the Immigration and Refugee Board, it does have implications for other administrative tribunals.

[19] Following *Huruglica*, the Tribunal's Appeal Division should confine its enquiry to a determination of whether the General Division has breached any of the provisions of subsection 58(1) of the DESD Act without engaging in a discussion or analysis of the principles or standards applied in the context of "judicial review." One of the standards, either reasonableness or correctness, will apply only if those words are specifically contained in the founding legislation and they are not found in subsection 58(1) of the DESD Act.

[20] The Appellant in this case has argued that the General Division erred in law and that it based its decision on an error of fact. As a result, I must consider the appropriate standard of review for paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[21] On reading paragraph 58(1)(*b*) of the DESD Act, I see that this provision permits the Appeal Division to intervene where the General Division has erred in law. There is no qualification restricting the Appeal Division's intervention when such errors are alleged. There

is no indication that the Appeal Division should show any deference to the General Division's findings.

[22] Paragraph 58(1)(*c*) deals with erroneous findings of fact. According to this provision, the Appeal Division may intervene only where the erroneous finding of fact is "perverse or capricious" and "without regard for the material before it." Those words must be interpreted in light of their legislative intent, which, when plainly read, reflects that the Appeal Division should intervene only when the General Division has based its decision on a flagrant error of fact or on a factual finding that is at odds with the evidentiary record.

ANALYSIS

Submission of new evidence

[23] The Respondent filed additional medical records including:

- physiotherapy receipts dated June 1 and June 28, 2017;
- a report from Dr. Hassan dated September 16, 2014;
- laboratory test results from Dr. Noetzel dated September 15, 2014;
- a legal research prepared by Trevor Leech dated November 23, 2016;
- two fax cover sheets for X-rays from Dr. Reid dated November 8, 2012, and Dr, Kaid dated June 1, 2017;
- a confirmation sheet that the Respondent had consulted rheumatologist Dr. Fidler, and had her ear checked with Tara Spicer; and,
- a report from rheumatologist Dr. Fidler dated April 16, 2014.

[24] The Appellant submits that the new documents filed with the Appeal Division should not be considered in deciding whether the appeal is allowed as these documents were not before the General Division for consideration when it rendered its decision.

[25] The Respondent submits that the new evidence is relevant to highlighting the current state of her health condition and the development of additional health conditions since the General Division rendered its decision.

[26] The documents submitted by the Respondent were not before the General Division for consideration. Appeals before the Tribunal's Appeal Division are not *de novo* proceedings. This means that new evidence that was not before the General Division cannot be filed with the Appeal Division and cannot be considered in determining whether an appeal is allowed. Additionally, in paragraph 7 above, I have set out the grounds of appeal as prescribed in subsection 58(1) of the DESD Act. Under that subsection, the submission of new evidence is not an enumerated ground for which appeals can be allowed *(Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). As a result, the Appeal Division cannot consider the new documents filed by the Respondent in its decision on whether to allow the appeal.

Calculation of the MQP date

[27] Pursuant to paragraph 44(2)(*b*) of the CPP, the Appellant has argued that the contributory period during which the Respondent could have made valid contributions commenced in 1977, when the Respondent turned 18 years old. The contributory period ended either when the Respondent was determined to have become disabled, or when the Respondent was deemed to have become disabled. The General Division determined that the Respondent became disabled when she stopped working at Walmart due to chronic back, hip and foot pain, which was attributed to a work-related injury in 2006. A review of the Respondent's Record of Earnings showed that she did not meet the contributory requirements at any point during her contributory period to establish an MQP (paragraph 44(2)(*a*) and subparagraph 44(1)(*b*)(ii) of the CPP), without applying the proration provisions of the CPP.

[28] The Respondent, if found disabled or if deemed to have become disabled, after January 1, 1998, would have to have made valid contributions for at least four of six calendar years within the contributory period (which is determined pursuant to paragraph 44(2)(*b*) of the CPP). The contributory period in this case commenced the year in which the Respondent turned 18 years old, which is 1977, and ended the month in which the Respondent is determined to have become, or is deemed to have become, disabled.

[29] Although the Respondent in this case submits that she became disabled in 2006 as a result of a workplace accident, paragraph 42(2)(*b*) of the CPP provides that "in no case shall a person be deemed to have become disabled earlier than 15 months before the time of the making of any application." The Respondent made her application in February 2013. As a result of her application date, she cannot be deemed disabled any earlier than November 2011.

[30] Turning to the issue of calculating her contributory period for the purposes of calculating her MQP, I have already found that her contributory period commences in 1977 when she turned 18 years old. The period ends the month in which she is determined to have become, or is deemed to have become, disabled. In this case, that month is November 2011. On review of her Record of Earnings, the last six years of her contributory period include the 2006 to 2011 timeframe. In those years, she only has two valid years of contributions, which are 2006 and 2008. In order to establish a valid MQP date, she would have to have four years of valid contributions. In fact, at no time during her contributory period did she establish four years of valid contributions.

[31] I find that the General Division's determination that she had a valid MQP date of 2008 is an erroneous finding of fact, pursuant to paragraph 58(1)(*c*) of the DESD Act, as it cannot be supported by the evidence in the record.

Application of CPP proration provisions

[32] The General Division incorrectly found that the Respondent had an MQP date of 2008; however, the General Division was also aware that she may have a possible prorated MQP date pursuant to subsection 44(2.1) of the CPP.

[33] The CPP provides that the MQP date may be prorated under certain circumstances. The Appellant has argued that the prorated MQP date determined by the General Division is both incorrect and not applicable under the circumstances of this case.

[34] The General Division determined that the Respondent's MQP was from January 1, 2010, to October 2010, based on a proration of her earnings. Relying on both section 19 and subsection 44(2.1) of the CPP, the Appellant argues that this prorated MQP was incorrectly calculated by the General Division and should properly be from January 1, 2010, to November

30, 2010. The Appellant offers the following calculation of the possible proration period at paragraph 31 of the application requesting leave to appeal:

> […] To determine the prorated basic exemption for the year of disability that Year's Basic Exemption is divided by 12 and then multiplied by the total number of months before and including the month of disability. If the contributor's earnings for that year are equal to or greater than this prorated Year Basic Exemption amount, then the contributor could be entitled to a disability pension.

[35] Correctly calculated, based on the Respondent's valid contributions in 2010, she last met the MQP for a disability pension (with proration for 11 months of that year) on November 30, 2010, as opposed to October 2010 as found by the General Division.

[36] However, the incorrect calculation of the prorated MQP date is not the substantive issue on which the Appellant has made submissions. The General Division determined that the Respondent was disabled as of November 2006 and went on to find that she was eligible for a CPP disability pension because she continued to be disabled **during** the prorated period in 2010. The Appellant argues that this was an error of law because, in order for the proration provisions to properly apply, the Respondent must have been found to have **become** disabled within the prorated period of January 2010 to November 2010. It is not enough for the Respondent to be disabled during the prorated period.

[37] The Appellant relies on the Tribunal decision *G.T. v. Minister of Human Resources and Skills Development*, CP 28158, February 13, 2014. In that case, the Appellant argues, the correct test is whether the disability occurred during the prorated period. The Appellant made the further argument that in finding the Respondent disabled as of November 2006, the General Division misapplied paragraph 42(2)(*b*) of the CPP as well as the proration provisions of the CPP, as November 2006 falls outside of the prorated period.

[38] There is case law that supports the Appellant's position. In *MSD v. Gorman* (August 1, 2006), CP 22414 (PAB), the Pension Appeals Board (PAB) concluded that in order for a claimant to be eligible for disability benefits, a claimant would have to be found to be disabled within the meaning of the CPP during the extended or prorated period. Section 19 of the CPP is interpreted as requiring that proration can only apply in the case of a "triggering event," which

in this case would be the onset of disability, during the respective prorated period. This has been upheld as the proper interpretation of section 19 of the CPP (see *Dowe v. Minister of Human Resources Development* (January 10, 2000), CP7736 (PAB); and *Dowe v. Canada (Minister of Human Resources Development)*, 2001 FCA 284 (CanLII)).

[39] Although a PAB decision is not binding upon the Tribunal it can be of persuasive value. The Appeal Division is also not bound by its prior decisions. However, I am persuaded that both *Gorman* and *G.T. v. Minister of Human Resources and Skills Development* are accurate interpretations of the law regarding proration. I find that the General Division was obliged to find that the Respondent had become disabled during the prorated period, and it could not as there was no evidence in the record to support such a finding. The General Division found that the Respondent had become disabled prior to the prorated period, and continued to be disabled during the prorated period. I find that this was an error of law on which the appeal succeeds.

CONCLUSION

[40] The appeal is allowed.

Meredith Porter
Member, Appeal Division