



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of G. F. v. Minister of Employment and Social Development*,
2017 SSTADIS 537

Tribunal File Number: AD-17-284

BETWEEN:

The Estate of G. F.

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: October 16, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The late G. F., a contributor to the *Canada Pension Plan* (CPP), passed away in April 2015. The Applicant in this proceeding is his estate, which is represented by his widow, L. F. She seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal). Having reviewed the existing documentary record, the General Division determined that the Applicant was ineligible for a disability pension, because it found that the deceased contributor's disability was not "severe" prior to December 1, 2013, the date on which he began receiving his CPP retirement pension.

[2] On April 3, 2017, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Tribunal's Appeal Division, detailing alleged grounds for appeal.

OVERVIEW

[3] Mr. G. F., the deceased contributor, was born in November 1953 and had a long work history, with more than 40 years of valid earnings and contributions under the CPP. The hearing file indicates that he began receiving an early CPP retirement pension as of December 2013, just after he turned 60. On November 5, 2014, he applied for a CPP disability pension, claiming that he had become disabled from his work as a transport truck owner and operator as of July 2014, when he began to experience severe back and pelvic pain, subsequently diagnosed as a symptom of metastatic cancer. He subsequently requested withdrawal of his retirement pension in favour of a CPP disability pension.

[4] In its initial denial letter dated November 14, 2014, the Respondent advised the deceased contributor that he did not qualify for a disability pension because the CPP does not allow a person to receive both an early retirement pension and disability benefits at the same

time. The Respondent also cited a lack of evidence that he had suffered from a severe and prolonged disability prior to December 1, 2013.

[5] On January 30, 2015, the deceased contributor requested reconsideration but, in a letter dated April 13, 2015, the Respondent again denied the claim. The Applicant appealed this denial to the General Division on January 26, 2016.

[6] In a decision dated January 10, 2017, the General Division dismissed the Applicant's appeal. Having reviewed the medical evidence, it was not satisfied, on a balance of probabilities, that the deceased contributor suffered from a severe disability within the CPP criteria during or before November 2013.

THE LAW

Canada Pension Plan

[7] Paragraph 44(1)(b) of the CPP 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 (MQP).

[8] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or reapply, at any time, for a disability pension. There is an exception to this provision, and it is found in section 66.1 of the CPP.

[9] Section 66.1 of the CPP and section 46.2 of the *Canada Pension Plan Regulations* (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 months after payment of the benefit has started.

[10] If a person does not cancel a benefit within six 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 (subsection 66.1(1.1) of the CPP).

[11] 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 fifteen months before the date the disability application is received by the Respondent. According to section 69 of the CPP, payments cannot start until four months after the date of disability.

[12] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favour of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

Department of Employment and Social Development Act

[13] 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.

[14] 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.

[15] 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;
- (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 made in a perverse or capricious manner or without regard for the material before it.

[16] 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

[17] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the 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

[18] Does this appeal have a reasonable chance of success?

SUBMISSIONS

[19] The Applicant is represented by the deceased contributor's widow. In the application requesting leave to appeal, Mrs. L. F. submits that the General Division did not follow the rules set out on the CPP disability website,³ which says:

If you are aged 60-64 and you think you might qualify for a CPP disability benefit, you may also want to apply for a CPP retirement pension. While you cannot receive both at the same time, you may qualify to begin receiving a retirement pension while you wait for your CPP disability benefit application to be assessed, which usually takes longer.

If you are already receiving a CPP retirement pension when your application for a disability benefit is approved, we will switch your retirement pension to a disability benefit if:

- you are still under the age of 65;
- you were deemed to be disabled, as defined by the CPP legislation, before the effective date of your retirement;
- you have been receiving your CPP retirement pension for less than 15 months at the time you applied for your disability for your disability benefit; and

¹ *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (QL).

² *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

³ The Applicant is likely referring to this website: www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-disability-benefit/before-apply.html.

- you meet the minimum contributory requirements.

[20] The Applicant sees a contradiction between the information provided to the public and paragraph 44(1)(b) of the CPP:

[A]ccording to the website, you can be in receipt of the CPP retirement pension and the CPP disability pension especially if you apply for both at the same time... My husband was under the age of 65, he was disabled, my husband had cancer of the bone, brain and the lung (he didn't think that he might qualify) he was diagnosed by a surgeon after he had an MRI on October 7th, 2014.

[21] The Applicant notes that the deceased contributor met the minimum contributory requirements and had been receiving his CPP retirement pension for less than 15 months at the time he applied for his disability benefit. He was not sick in November 2013, when he applied for his CPP retirement pension. When he applied for the disability pension in November 2014, he said that he could no longer work as of July 28, 2014, although on that date, he did not know that he had cancer, for which he was not given a diagnosis until October 7, 2014. However, in July 2014, he had severe pain in his pelvis and could barely walk, sit or lie down. The General Division erred in implying that, because he was not sick prior to November 2013, his disability was not severe.

[22] The Applicant also argues that the CPP discriminates against seniors who take their retirement pension at 60. Mrs. L. F. submits that the CPP should be changed to allow greater scope to allow recipients to retroactively convert their early retirement pension to a disability pension in case they become seriously ill.

ANALYSIS

[23] While I acknowledge that the General Division's reasons were scanty and did not explicitly link its decision to dismiss to all relevant statutory provisions, I am satisfied that the outcome it prescribed was correct. The General Division dismissed the Applicant's appeal largely because the deceased contributor was still working as a full-time trucker driver on December 2013, the month he began receiving his CPP retirement pension. In his application for the disability pension, the late Mr. G. F. disclosed that he was able to work until July 2014, when symptoms from his then-undiagnosed cancer forced him to give up his job.

[24] I have examined the decision to determine whether it discloses a ground that might be successful on appeal and find no arguable case that the General Division breached a principle of natural justice or otherwise erred in fact or in law. The General Division assessed the available evidence and found nothing that prevented the deceased contributor from working during his period of coverage for the CPP disability pension, which ended on November 30, 2013. What is more, there was no indication that the deceased contributor cancelled his retirement pension in favour of a disability pension within the six-month time frame demanded by section 66.1 of the CPP and section 46.2 of the CPP Regulations.

[25] As provided by subsection 66.1(1.1), the deceased contributor could have been eligible for a disability pension only if he were deemed to be disabled before December 2013, the month his retirement pension first became payable. As discussed, the General Division found no evidence that the deceased contributor was disabled in that period. In my view, given the available medical evidence and Mr. G. F.'s work history, this is a defensible conclusion, and I see no reasonable chance of success on appeal for the grounds raised by the Applicant.

[26] Furthermore, under paragraph 42(2)(b), the earliest that the deceased contributor could have been deemed to be disabled was August 2013—15 months before his CPP disability application was submitted. Therefore, according to section 69 of the CPP, the earliest potential first payment date for any disability pension would have been December 2013—four months after the deemed date of disability. As it happens, December 2013 was also the first payment date for the deceased contributor's early retirement pension.

[27] The Applicant also suggests that the information on the government's website contradicts the legislative provisions governing the intersection between the CPP's retirement and disability regimes. As it happens, I do not agree, although I concede that the website does not capture the full complexity of the law, omitting, for instance, any mention of the six-month time limit, set out in section 66.1 of the CPP, to cancel a retirement pension in favour of a disability pension. The website says that the government "will switch your retirement pension to a disability benefit if [...] you were deemed to be disabled, as defined by the CPP legislation, before the effective date of your retirement." In this case, the Respondent, and later the General Division, found no basis in the evidence to deem the deceased contributor disabled prior to the

effective date of his retirement. In any event, whatever the contents of the website, it is not the law, but an informal guide for the public, and cannot be relied upon in negotiating the CPP claims process.

[28] The Applicant insisted that the deceased contributor met the legislative criteria for disability and pointed to the fact that he ultimately died of his terminal illness. It is clear that the Applicant disagrees with the provisions of the CPP that limit the ability of a recipient of an early retirement pension to cancel it in favour of a disability pension. However, the Tribunal—both the General Division and the Appeal Division—is bound to apply the law as it is written, however unfair it may seem. If the Applicant is asking me to exercise fairness and reverse the General Division’s decision, I must emphasize that 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*,⁴ 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.

CONCLUSION

[29] Subsection 66.1(1.1) of the CPP says that the cancellation of a retirement pension for a disability pension is possible only where the applicant can be deemed disabled *before* the retirement pension becomes payable. The Applicant has not disputed that the law required her to show that her late husband became disabled prior to December 1, 2013, nor has she introduced any evidence to show that that he cancelled his early retirement benefit within the requisite six months.

[30] The application for leave to appeal is therefore refused.



Member, Appeal Division

⁴ *Pincombe v. Canada (Attorney General)* (1995), 189 N.R. 197 (FCA).