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

Citation: *D. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 639

Tribunal File Number: AD-17-347

BETWEEN:

D. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: November 14, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On February 6, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 25, 2017.

GENERAL DIVISION DECISION

[3] The Applicant's minimum qualifying period ended on December 31, 2004. Para. 61 of the General Division's decision is as follows:

> The Tribunal finds that the Appellant had a severe and prolonged disability in 2002, when he left his long term position as an engineer with Petro Canada due to the limitations of his medical condition. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in November 2014; therefore the Appellant is deemed disabled in August 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of December 2013.

ISSUE

[4] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE LAW

Leave to Appeal

[5] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an applicant may bring an appeal to the Appeal Division only if the Appeal Division grants leave to appeal. The Appeal Division must either grant or refuse leave to appeal.

[6] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[7] According to s. 58(1) of the DESDA, the following are the only grounds of appeal:

(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.

Deemed Disability under the CPP

[8] At s. 42(2)(*b*), the CPP contains two important pieces of information. First, it provides the general rule that the CPP deems a person to be disabled when he or she actually becomes disabled. Second, it states that in no case shall the CPP deem a person to be disabled earlier than 15 months before a person makes an application for a CPP disability pension. This second piece is sometimes referred to as the "maximum retroactivity" rule, because it sets out the maximum period of retroactivity for eligibility for disability pension.

[9] In terms of payment date, s. 69 of the CPP states that where a disability pension is approved, the CPP pays starting with the fourth month after the month in which the person became disabled.

SUBMISSIONS

[10] The Applicant submits that the General Division erred in law in its application of s. 42(2)(*b*) of the CPP. He argues that his eligibility for the disability pension should have begun

in March 2002, the date his disability began in the sense that he required the CPP disability pension. He states that the general rule is that a person is deemed to have become disabled at the time when the person became disabled, and that the "maximum retroactivity provision" operates as an exception to the general rule.

[11] The Applicant also cites *Kerth v. Canada (Minister of Human Resources Development)* [1999] FCJ No. 1252 (QL).

ANALYSIS

[12] The Applicant argues that the General Division erred under s. 58(1)(*b*) of the DESDA in its interpretation of s. 42(2)(*b*) of the CPP when it identified the date of deemed disability and the date of payment. He interprets s. 42(2)(*b*) of the CPP to mean that the general rule is that a person is deemed to have become disabled when the person actually became disabled, and that the "maximum retroactivity provision" operates as an exception to the rule.

[13] The Appeal Division is not satisfied that the Applicant has raised an arguable case that the General Division erred in law in its application of s. 42(2)(*b*) of the CPP. The Applicant's submission focuses only on the first part of s. 42(2)(*b*) (i.e. "a person is deemed to have become disabled at the time that is determined to be the time when the person became disabled"). The Applicant ignores the rest of that provision, which states that "in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application." The wording of s. 42(2)(*b*) is clear: it does not allow a person to be considered to have become disabled more than 15 months before the date of the application. That maximum retroactivity rule applies to the Applicant. His application was received in November 2014, which was more than 15 months from the date the General Division found him to have become disabled in 2012. As such, the earliest the Applicant could be deemed to have become disabled under the CPP is August 2013.

[14] *Kerth* was not a decision about a late application or the application of a deemed date of disability. It stands for the principle that at the leave to appeal stage, the Applicant does not have to prove his or her case. The threshold for demonstrating a reasonable chance of success is low. However, the Appeal Division requires an applicant to provide an arguable ground on

which the application might succeed. The argument should be a reasonable argument, that is, one that has a realistic chance of success [see *Zavarella v. Canada (Attorney General)*, 2010 FC 815, and *Kermenides v. Canada (Attorney General)*, 2009 FC 429]. Reading s. 42(2)(*b*) of the CPP to mean that the deemed disability date is the date a person becomes disabled and that maximum retroactivity is an exception to that rule is not reasonable and has no realistic chance of success.

CONCLUSION

[15] The Application is refused.

Kate Sellar
Member, Appeal Division