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

Citation: *H. W. v. Minister of Employment and Social Development*, 2017 SSTGDIS 203

Tribunal File Number: GP-16-3943

BETWEEN:

H. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Carol Wilton

DATE OF DECISION: December 31, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant first applied for a *Canada Pension Plan* (CPP) disability benefit on September 14, 2005 (RA1C-48 ff.). The application was denied at the initial level on January 18, 2006 (RA5-29-30). There was no request for reconsideration.

[2] A second application was made for a CPP disability benefit, dated August 2009 (RA1C-71 ff.). The Respondent decided in the Appellant's favour, with maximum retroactivity to September 2008. The Appellant appealed the date of onset to a Review Tribunal (RT), asking that the benefit be payable effective January 2005 as he was dismissed from his job in early December 2004. The RT denied the appeal in June 2011 on the basis that the 2005 application was not before it, and the Tribunal did not have the authority to deem an appellant disabled more than 15 months before the receipt of an application, or to consider an application that was not before the Tribunal (RA1-5-10). Leave to appeal to the Pension Appeals Board (PAB) was denied in July 2011 (RA1-2).

[3] The Appellant seeks to re-open the 2005 application for CPP disability benefits by means of an application to rescind or amend. In the alternative, he wishes to appeal the 2006 decision of the Respondent to deny the 2005 application on initial determination, when he did not request reconsideration of the initial decision (late reconsideration request). The main issue on this appeal is whether the Tribunal has any authority to re-open the Respondent's determination made on the 2005 application.

[4] This appeal was heard on the basis of the documents and submissions filed for the following reasons:

a) The member has decided that a further hearing is not required.

b) This method of proceeding respects the requirement under the Social Security *Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] The Tribunal has decided that neither the Respondent nor the Tribunal can re-open the determination made on the 2005 application.

PRELMINARY ISSUE

[6] The Tribunal wrote the parties on September 5, 2017, stating that the decision would be made on the basis of the documents and submissions filed. Any additional documents or submissions were to be filed by October 5, 2017, and the response period ended on November 4, 2017. No further submissions or documents were received.

EVIDENCE

[7] On July 13, 2012, the Respondent wrote in response to correspondence from the Appellant that it was not possible to re-open his previous application and change the effective date of his benefit. The reason was that his second application had been granted, and he was given maximum retroactivity. That was a final decision, and there was no authority for the Respondent to re-open a previous decision (GD1-5-6). The Respondent's letter to the Appellant dated October 22, 2012, reiterated that it was not possible to re-open the previous application and change the effective date of the benefit. The RT dismissed an appeal about the date of onset on the basis that a person cannot be deemed to be disabled more than 15 months before the date the disability application was received. In the case of the second application, that date was August 24, 2009. The Appellant was deemed disabled in May 2008 and his disability pension started in September 2008, which was the maximum retroactivity allowed (GD1-7-8; RA5-5-10).

[8] On December 18, 2014, the Respondent wrote that the Appellant's disability application would not be reopened and the decision of the Pension Appeals Board was final (GD1-9).

[9] In a letter that the Respondent initially treated as the Notice of Appeal, received on May 12, 2016, the Appellant stated that he was appealing letters from the Respondent dated July 13 and October 22, 2012, and December 18, 2014, and was asking that his file be re-opened back to the time of his first application in 2005. The basis for this request was that he had been disabled since August 22, 2003. In support of this contention, the Appellant provided a copy of a letter from the Canada Revenue Agency dated December 13, 2010, stating that he was eligible for the Disability Tax Credit for the 2003 to 2014 tax years (GD1-2-3, 10-11).

[10] On September 14, 2016, the Respondent wrote to the Appellant stating that the decision of the PAB was final, and he had no recourse regarding his 2005 application (RA1C-101).

[11] In correspondence received on November 9, 2016, the Appellant asked the Respondent to rescind and amend the decision of January 18, 2006, pursuant to s. 84(2) of the CPP Act. The Appellant wrote that the Review Tribunal decision of June 24, 2011, did not indicate that there was authority to reopen a former application based on new facts. He stated that new facts were provided as part of his August 2009 application (RA1-1).

[12] On January 26, 2017, the Appellant's representative wrote to the Tribunal, stating that in 2012 the Appellant requested a reconsideration of his 2005 application, and this request was rejected. He had sought to appeal this rejection of his request to reconsider by letter (RA1B).

[13] On May 4, 2017, the Tribunal received a Notice of Appeal from the Appellant's lawyer. It contained a copy of the 2005 application for CPP disability benefits (RA1C-8-11). Schedule "A" to the Notice of Appeal requested leave to appeal the decision of January 18, 2006 that denied the Appellant's initial application for a CPP disability pension (RA1C-15). The basis for this request was the assertion that the Review Tribunal had stated that the 2005 application was not before it, only the 2009 application. Further, the reason that the Appellant had not requested reconsideration in 2006 was that he was advised not to by an agent of the Respondent (RA1C-19). The Appellant was seeking a determination that he was eligible for CPP benefits earlier than he received them, and that he was entitled to retroactive benefits to December 2004. If the only barrier to this result was the Appellant's 2009 application, the Appellant would undertake to withdraw the later application on condition that he receive benefits pursuant to the 2005 application (RA1C-20).

[14] In correspondence to the Tribunal received on May 10, 2017, the Appellant's lawyer wrote that, "as no reconsideration has been completed … the timeline has not begun to run pursuant to s. 52 of the *Department of Employment and Social Development Act* (DESD Act)." He was happy to amend the appeal to request the Respondent to provide a reconsideration decision "as relief sought." He concluded: "realistically, it seemed to be more sensible to proceed on the substantive issue of whether the 2005 application should have been granted rather

than to force the matter upon a party that does not intend to provide a reconsideration decision" (RA2).

SUBMISSIONS

[15] The Appellant submitted that he had been disabled since 2003. He noted that he had not requested reconsideration of the January 2006 denial letter on the advice of an agent of the Respondent, and requested receipt of CPP disability benefits retroactive to 2004. He suggested the following means to accomplish that end:

a) The initial denial decision of January 2006 should be rescinded or amended under subsection 84(2) of the CPP (now section 66 of the DESD Act);

b) In the alternative, the 2005 application should be re-opened and he should be permitted to request reconsideration of the Respondent's initial denial decision of January 2006; or

c) The Tribunal should direct the Respondent to provide a reconsideration of the initial denial decision of January 2006.

[16] In correspondence with the Appellant, the Respondent submitted that the Appellant does not qualify for a disability pension because:

a) The Appellant was granted maximum retroactivity in response to his 2009 application for CPP disability benefits;

b) The Respondent did not have the authority to re-open the previous application; and

c) The decision of the PAB was final.

[17] In Submissions received on June 27, 2017 (RA5-1-7), the Respondent submitted that the Tribunal did not have the authority to re-open the Minister's determination made on the Appellant's 2005 application for CPP disability benefits for the following reasons:

a) The Tribunal does not have the authority to consider the 2005 application under section 66 of the DESD Act, which only allows the Tribunal to rescind or amend its own decisions;

b) The 2009 application was granted and received the maximum retroactivity. There is no jurisdiction to go beyond the statutory limits for retroactive payments;

c) The PAB dismissed an appeal;

d) There is no authority for either the Respondent or the Tribunal to re-open or revisit the decision on the first application as there is a final decision on the second application by an RT;

e) Case law indicates that the Respondent cannot review a prior decision after the granting of a second application because that would mean allowing a collateral attack against an otherwise final decision; and

f) The Appellant did not request reconsideration of the decision to deny his 2005 application. Instead, he submitted a second application more than three years after the decision to deny his first application. It was not until after his second application was granted that he requested the date of onset be determined with reference to his 2005 application. However, the Respondent did not have either the discretion or the jurisdiction to extend the retroactive payments.

ANALYSIS

[18] The Appellant must prove, on a balance of probabilities, that either the Respondent or the Tribunal has the legislative or discretionary authority to re-open the determination made on the 2005 application.

Collateral Attacks on Interrelated Decisions

[19] There is case law that is binding on this Tribunal indicating that, after a final decision has been made on a second application, it is not possible to re-open a decision to deny a previous application, particularly when there was no request for reconsideration of the initial decision. In *Dillon v. Canada (Attorney General*), 2007 FC 900, the Federal Court found as follows:

a) When there has been no timely request for reconsideration of the initial decision, and where a final decision has been given on the second application, the matter is *res*

judicata, which means that the matter has clearly been decided, and it is no longer possible to request a late reconsideration;

b) It is not possible for the Respondent to review the initial decision when the application to rescind and amend was not pursued until after the granting of the second application;

c) The Respondent did not have jurisdiction to go beyond the statutory limits for retroactive payments as such course of action was statute-barred;

d) To re-open the question would be to mount a collateral attack on the second decision, which is final.

[20] Moreover, in *Hiltz v. Canada (Human Resources Development Canada, Canadian Pension Plan Disability)*, 2009 FC 508, the Court stated that:

> As in *Dillon*, there is here a subsequent final and binding decision of the Review Tribunal on the applicant's second application which is binding on the parties. In order to succeed, the applicant must demonstrate that the Minister has the authority to reopen her decision on the first application pursuant to subsection 84(2) of the CPP even though a subsequent final and binding decision has been made on the issue of disability by the RT. The case law is clear that no such authority exists (at para. 23).

[21] Further, the Federal Court of Appeal stated in *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, at para. 21) that "collateral attacks against decisions that are final ought to be precluded in the public interest since such attacks encourage conduct contrary to the statute's objectives and tend to undermine its effectiveness."

[22] The over-riding principle of the applicable case law is that, after a final decision has been made on a second application, it is not possible to revive the first application, either by obtaining a late reconsideration, or by means of an application to rescind or amend.

[23] A collateral attack on the second decision is not permitted. Thus neither the Respondent nor the Tribunal has the authority to re-open the determination on the 2005 decision.

Late Reconsideration Requests

[24] The procedure governing late requests for reconsideration is provided in the CPP and the *Canada Pension Plan Regulations* (Regulations). Section 81 of the CPP allows a dissatisfied claimant 90 days to request a reconsideration after receiving notification of a decision or determination. Subsection 74.1(3) of the Regulations states that the Minister "may allow a longer period to make a request for reconsideration of a decision … if the Minister is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration." Subsection 74.1(4) of the CPP Regulations states that, if the request for reconsideration is received more than 365 days after the claimant received written notification of the decision, "the Minister must also be satisfied that the request for reconsideration has a reasonable chance of success, and that no prejudice would be caused to the Minister by allowing a longer period to make the request."

[25] The decision of the Minister to grant or refuse a late reconsideration request is considered a discretionary decision. Case law indicates that the Minister's discretion must be exercised judicially (*Canada (Attorney General) v. Uppal* 2008 FCA 388).

[26] Pursuant to (*Canada (Attorney General) v. Purcell*, [1996] 1 FCR 644), a discretionary power is not exercised "judicially" if it can be established that the decision-maker:

- acted in bad faith,
- acted for an improper purpose or motive,
- took into account an irrelevant factor,
- ignored a relevant factor, or
- acted in a discriminatory manner.

[27] In denying the late request for reconsideration in June 2011, the Respondent properly took into account the fact that there was a final decision on the second application, which meant that it was not possible to re-open the first application. There is no indication that the Respondent acted in bad faith, acted for an improper purpose or motive, took into account an irrelevant factor, ignored a relevant factor, or acted in a discriminatory manner. The Tribunal therefore finds that the Respondent exercised its discretion in a judicial manner in arriving at its decision to deny a late request for reconsideration of the Respondent's 2006 decision.

[28] In addition, 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) of the CPP). In the present case, the Appellant received maximum retroactivity from the date the second application was received. There is no basis in law for either the Tribunal or the Respondent to increase the amount of the retroactive payment. Nor is there any basis in law for the Tribunal to order the Respondent to reconsider its 2006 initial denial.

Tribunal's Power to Rescind or Amend Decisions

[29] The Tribunal cannot rescind or amend the Respondent's 2006 initial denial of the Appellant's first application, since under section 66 of the DESD Act the Tribunal can only rescind or amend one of its own decisions. The Tribunal does not have the legislative authority to rescind or amend the Minister's decisions. The Tribunal's jurisdiction is limited by powers granted to it by statute. Moreover, the Tribunal cannot exercise any form of equitable power in respect of any appeals coming before it (*MSD v. Kendall* (June 7, 2004), CP 21690 (PAB, a decision that is not binding on this Tribunal, but that is persuasive). Therefore the Tribunal does not have jurisdiction to rescind or amend the Respondent's 2006 initial denial of the Appellant's first application.

Erroneous Advice

[30] The Appellants stated that he had not requested reconsideration in 2006 because an agent of the Respondent advised him against this course of action.

[31] Subsection 66 (4) of the CPP Act provides that cases of erroneous advice, leading to the denial of a benefit to which a person is entitled, must be addressed by the Minister. The Tribunal does not have the legislative authority to take remedial action on such matters.

[32] Having reviewed all of the evidence contained in the file, the Tribunal finds, on a balance of probabilities, that neither the Respondent nor the Tribunal can re-open the determination made on the 2005 application.

CONCLUSION

[33] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security