



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *L. H. v. Minister of Employment and Social Development*, 2018 SST 119

Tribunal File Number: AD-17-573

BETWEEN:

L. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: February 2, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

BACKGROUND

[2] The Applicant believes that she has been the victim of several medical errors. She argues that her family physician ignored a letter that was sent to him in 1995 by a specialist that could have led to the detection of a tumour. Instead, the cancerous tumour in question was not removed until 1998. The Applicant claims that after the operation, she felt well, but that she then underwent chemotherapy and radiation therapy, which had been recommended as essential treatments to prevent her illness from recurring.

[3] The Applicant asserts that she was unable to complete her treatments, but that these treatments still caused permanent damage to her intestines. As a result, she has never been able to return to work and she has to take up to 240 Tylenol with codeine over a three-week period to soothe the feeling of intense burning in her rectum. Furthermore, she claims to have learned in 1999 that the chemotherapy and radiation therapy treatments that she had received were not necessary. The Applicant attempted to bring legal action against her doctors in civil court, but she never had the resources to do so.

[4] On June 12, 1998, the Applicant filed a claim for a disability pension under the *Canada Pension Plan* (CPP). The Applicant was deemed disabled as of December 1997, and a disability pension was paid to her from April 1998 to March 2016, the month and year when she reached the age of 65.

[5] In 2013, it would seem that the Applicant had exhausted her savings, and that she contacted Service Canada to indicate that her benefits were no longer sufficient for her needs (GD5-17 and 22). Since then, there has been significant and regrettable confusion.

[6] Service Canada agents (agents of the Respondent, the Minister of Employment and Social Development) calculated and recalculated the benefits to which the Applicant was

entitled under the CPP in order to ensure that she was receiving the maximum amount (GD5-15, 18, and 36). The Applicant, however, explained on several occasions that she had received the maximum payable benefits under the CPP, but that she wanted to have her medical records reviewed. Based on my understanding of the Applicant's letters requesting that her medical records be reviewed, she was asking to have someone determine whether she had been the victim of a medical error and, if so, whether she was entitled to additional damages that would increase her disability pension (GD5-5, 20, and 39).

[7] Unfortunately, this last question is outside the jurisdiction of Service Canada, the Minister, and the Tribunal. As a result, I must refuse the Applicant's application for leave to appeal.

[8] With regard to damages for potential medical errors, the Applicant must contact a lawyer or a legal aid office.

Appeal to the Tribunal

[9] In my opinion, there are several factors that contributed to the confusion in this case:

- a) The letters from Service Canada dated August 20, 2014, and September 3, 2014, can both be considered reconsideration decisions produced by the Minister (GD5-36 and GD5-43);
- b) The letter dated September 3, 2014, introduced an additional question into this already-complex situation—the date of onset of the Applicant's disability (GD5-43);
- c) Furthermore, this letter indicated to the Applicant that an appeal of the decision should be directed to the Appeal Division, while the postal address provided listed the General Division instead (GD5-43).

[10] The Applicant appealed to the General Division, writing the following (GD1):

[translation]

I am writing to you to ask you to review the payment date of my disability benefits. The date of onset of my disability was December 1997, and the date of the first payment was April 1, 1998.

[11] However, the Applicant would later change the matter under appeal when she reapplied to have her medical records reviewed. The Applicant recognized that the amount of her pension depended on her contributions and specified that she was actually requesting compensation for the irreparable damage done to her intestines (GD1C-1 to 3). Moreover, this point was clarified on several subsequent occasions (e.g. GD1D, GD1F, GD1G, GD2, GD9, GD16, and GD17). In her letters to the Tribunal dated May 17, 2015, and January 5, 2016, the Applicant asked that her oncologists be held responsible (GD2 and GD6). In her letter dated February 22, 2016, she asked whether the Tribunal had lawyers, doctors, or specialists to assess whether a medical error had occurred (GD7).

[12] In a letter to the Tribunal dated March 15, 2016, the Applicant expressed the following (GD8-2 to 3):

[translation]

At the Social Security Tribunal of Canada, you have lawyers and doctors. And I want my records reviewed by specialists. I want to know for sure whether I needed chemo and radiation treatments.

[...]

I hope that with all I've done, in the end, I will know this for sure and I want it on paper.

[13] Unfortunately, the General Division does not seem to have picked up on this change in the form of relief sought, and the matter is not discussed in its decision.

[14] The General Division first examined the summary dismissal of the appeal on the grounds that the Applicant's disability pension had been paid as of the fourth month following the month in which the Applicant became disabled, as provided for by the CPP (GD0). But in

the end, the General Division dismissed the appeal on the basis of documents submitted by the parties (GD0A and GD0B). More specifically, the General Division concluded that the Applicant had received the maximum amounts to which she was entitled under the CPP (AD1B).

[15] In August 2017, the Applicant requested leave to appeal to the Appeal Division (AD1). In support of her application, she argues that 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.

[16] Once again, the Applicant repeats that the Service Canada agent insisted on recalculating the monthly amount of her benefits, regardless of the fact that her application was, in fact, to have her medical records reviewed. The Applicant expresses the following complaint on page AD1-2: “And the error still continues.”

[17] The notice of hearing to the Appeal Division continues as follows (AD1-5 and 7):

[translation]

L. Losier in Fredericton told me that in order to review my medical records, I had to contact the Social Security Tribunal in Ottawa. I asked her to give me the address, and this is how I came to your tribunal in Ottawa.

You have specialists, and it is up to you to tell me whether I needed the treatments. I have had no quality of life since I had these treatments. And I will suffer for the rest of my days because of these treatments.

[...]

I hope that this time you will consider my application and that I will receive justice for the damage that they did to my intestines with chemo and radiation.

[18] Based on my understanding of Ms. Losier’s letter dated September 3, 2014, the Applicant was supposed to contact Service New Brunswick regarding any questions about damages due to a medical error (GD5-43).

ANALYSIS

Legislative framework

[19] The Tribunal was established by the *Department of Employment and Social Development Act* (DESD Act), which governs its operation. For example, the Appeal Division can amend a General Division decision only if one of the following errors (grounds of appeal) under subsection 58(1) of the DESD Act has been established:

- 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.

[20] Furthermore, the DESD Act provides for a two-step process for most appeals to the Appeal Division.

- a) Step 1: leave to appeal. This means that the process begins with seeking permission to appeal from an Appeal Division member. This preliminary step aims to eliminate appeals with no reasonable chance of success.¹ This first obstacle is an easier standard for the Applicant to meet than the second step of the process. At this point, the Applicant does not have to prove her case. Instead, the relevant question is as follows: is there an arguable ground on which the proposed appeal may have a reasonable chance of success?²
- b) Step 2: if leave to appeal is granted, an Appeal Division member will decide on the merits of the appeal, which means that the member must decide whether it is more likely than not that the General Division committed at least one of the errors outlined in the list of grounds of appeal above.

¹ DESD Act at subsection 58(2).

² *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Ingram v. Canada (Attorney General)*, 2017 FC 259.

[21] Given that this matter is at the first step, I must determine whether there is an arguable ground that may justify setting aside the decision under review. It is the Applicant's responsibility to prove that this legal threshold has been met.³

Questions presented by the Applicant outside of the Tribunal's jurisdiction

[22] In support of her application, the Applicant argues that the General Division did not answer her questions. She therefore argues that 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 (AD1).

[23] The General Division found that the Applicant had received the maximum amounts to which she was entitled under the CPP. It bears noting that the General Division decision is somewhat problematic. Nevertheless, even if an error under subsection 58(1) has been established, in order to continue with the second step of the appeal process, the applicant must still demonstrate that the appeal has a reasonable chance of success.⁴ This matter, however, is doomed to fail.

[24] In this case, the Applicant is claiming sums that go beyond the disability pension provided for under the CPP. Regardless of whether these sums are based on civil responsibility or a medical error, they are outside the Tribunal's jurisdiction.

[25] More specifically, the Tribunal's jurisdiction and powers are limited by the reconsideration decision and by subsections 64(1) and 64(2) of the DESD Act. In neither of the two possible reconsideration decisions did the Minister assess the Applicant's entitlement to benefits beyond the CPP. Furthermore, subsections 64(1) and (2) of the DESD Act provide for the following:

³ *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20.

⁴ *Canada (Attorney General) v. Thériault*, 2017 FC 405.

Powers of Tribunal

64(1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

Canada Pension Plan

(2) Despite subsection (1), in the case of an application relating to the Canada Pension Plan, the Tribunal may only decide questions of law or fact as to:

a) whether any benefit is payable to a person or its amount;

[Underlining added]

[26] Neither the DESD Act nor the CPP provides for benefits for victims of medical error, and, as a result, the Applicant's questions thoroughly exceed the Tribunal's jurisdiction.

CONCLUSION

[27] As a legislative entity, the Tribunal has only the powers attributed to it by the law. The Applicant's questions regarding damages, medical error, and civil responsibility are outside the Tribunal's jurisdiction. I am therefore of the opinion that the appeal has no reasonable chance of success.

[28] It is with great sympathy for the Applicant that I refuse her application for leave to appeal. Unfortunately, the Tribunal cannot answer the questions for which she is desperately seeking answers.

Jude Samson
Member, Appeal Division