



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. K. v. Minister of Employment and Social Development*, 2018 SST 144

Tribunal File Number: AD-17-452

BETWEEN:

K. K.

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: February 12, 2018

REASONS AND DECISION

INTRODUCTION

[1] On March 31, 2017, the General Division of the Social Security Tribunal of Canada dismissed the Applicant's challenge to the date of payment (December 2007) for his disability pension under the *Canada Pension Plan* (CPP). The General Division found that the Applicant did not prove he was incapable of forming or expressing an intention to apply for the disability pension prior to September 2007, when the Respondent had date stamped his application for the disability pension.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on June 13, 2017.

ISSUE

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

THE LAW

Leave to Appeal

[4] 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 leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[5] 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

[6] According to s. 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 that it made in a perverse or capricious manner or without regard for the material before it.

CPP (Capacity and Date of Payment)

[7] According to s. 42(2)(b) of the CPP, a person cannot be deemed disabled for payment purposes more than 15 months before the Respondent received the application for a disability pension.

[8] Subsections 60(8) and 60(10) of the CPP set out the requirements for incapacity:

- (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
- (10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[9] Section 69 of the CPP states that a disability pension is payable from the fourth month after the applicant became disabled.

SUBMISSIONS

[10] The Applicant alleges that the General Division made a series of errors of fact and errors of law in its decision. For the purpose of considering leave to appeal, the Appeal Division will focus on one particular argument. The Applicant argues that the General Division failed to decide the most likely date of the onset of his disability and that, as a result, in the “worst case scenario,” he was deprived of 15 months of retroactive benefits available under the CPP. This may amount to an allegation of an error of law under s. 58(1)(b) of the DESDA. However, it could also be an allegation that the Tribunal failed to exercise its jurisdiction to make a decision under s. 58(1)(a) of the DESDA about the disability onset date separate and apart from the question as to whether the Applicant lacked capacity prior to August 2007.

ANALYSIS

[11] The General Division did not determine (as a stand-alone issue, apart from the question of his incapacity), whether the Applicant’s disability onset date was earlier than August 2007. It is arguable that the failure to consider that question was an error under either s. 58(1)(a) or (b) of the DESDA.

[12] The Applicant applied for benefits in September 2007, indicating he became disabled as of August 2007. The Minister approved his claim and found that he was disabled as of August 2007, and his payments started in December 2007. The submissions before the General Division (GD6) state that the Applicant’s “application was granted by the Minister at Initial determination; providing a date of onset of August 2007, the full 15 months retroactivity allowable under the legislation and notably his date [*sic*] stopped work and disability claim date” (GD6-2). The Minister seems to state that the Applicant received 15 months of retroactive payments, but those same submissions cite the Minister’s reconsideration letter of August 5, 2015 (GD2-7), which confirms the Applicant’s date of payment as December 2007 and upholds the August 2007 disability onset date.

[13] The Applicant’s arguments in support of his claim of incapacity from 2003 to 2007 that he raised on reconsideration may also necessarily amount to a claim that the disability onset date was incorrect, regardless of the outcome of any incapacity analysis.

[14] There is at least some support in the record for the argument that the disability onset date was at issue in this case separate and apart from the capacity question. While the Applicant's request for reconsideration date stamped April 22, 2015 (GD2-11), seems to be focussed on the question of his incapacity, the letter is titled "Application for re-consideration: Sub: your denial of retroactive CPP benefits," which suggests it could be a challenge to the disability onset date. In the notice of appeal to the General Division (GD1-2), the Applicant provided supporting documentation from the Canada Revenue Agency about his eligibility for the disability tax credit, which would, on its face, be relevant to the question of disability onset date in addition to incapacity.

[15] Given this, there is an arguable case on the basis that the General Division committed an error of law in identifying the issue more narrowly to include only the question of incapacity in its decision. As the Applicant has identified a possible error under s. 58(1) of the DESDA, the Appeal Division does not need to consider any other grounds raised by the Applicant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The Applicant is not restricted in his ability to pursue the grounds raised in his application.

CONCLUSION

[16] The application for leave to appeal is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division