



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. S. J.*, 2018 SST 204

Tribunal File Number: AD-17-879

BETWEEN:

Minister of Employment and Social Development

Appellant

and

S. J.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: March 1, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed. Pursuant to s. 59 of the *Department of Employment and Social Development Act* (DESDA) and s. 69 of the *Canada Pension Plan* (CPP), the Respondent's disability pension is payable for each month commencing with December 2013.

OVERVIEW

[2] This appeal concerns the question of when an application for disability benefits is "made" for the purpose of calculating the deemed disability date and the effective payment date of a disability pension under the CPP.

[3] The Minister of Employment and Social Development appeals a decision of the General Division that granted the Respondent, S. J., a disability pension. The General Division decided that the pension was payable starting in May 2013. The Minister does not contest the General Division's decision granting the Respondent's application for disability benefits. Rather, the Minister contends that the General Division erred by finding that a medical report submitted by S. J.'s physician to Human Resources and Skills Development Canada (ESDC)¹ constituted her application for disability benefits. The Minister also contends that the General Division erred in basing the calculation of the deemed date of disability and the effective date of payment on the date the medical report was received by ESDC.

[4] The Minister submits that S. J.'s application for disability benefits was actually made when she completed and sent a signed application form, which was received by ESDC on November 18, 2014. The Minister says the correct deemed disability date is August 2013 and the correct effective payment date for the disability pension is December 2013.

[5] I have decided to allow the appeal.

¹ Human Resources and Skills Development Canada has since been renamed Employment and Social Development Canada, and is referred to as ESDC in this decision.

ISSUE

[6] The only issue on this appeal is whether the General Division based its decision regarding the effective payment date of the Respondent's disability pension on an erroneous finding of fact—i.e. that the medical report constituted the Respondent's application for disability benefits—that it made in a perverse or capricious manner or without regard to the material before it.

BACKGROUND

[7] The Respondent's physician, Dr. Kim Weisgerber, completed ESDC form ISP-2519 "Medical Report", and signed and dated it on April 16, 2014.² The General Division found that Dr. Weisgerber submitted the medical report to ESDC, which date-stamped it as received on April 23, 2014.

[8] ESDC wrote to the Respondent on May 27, 2014,³ stating that it had received the medical report, but that it had not yet received the Respondent's completed application for a CPP disability benefit. In its letter, ESDC advised the Respondent that it required the Respondent's completed disability application within 30 days. She was provided with a 1-800 number to call "if you need a Disability application". She was also told, "if the application has been mailed, please advise us when it was mailed".

[9] ESDC wrote to the Respondent again on July 7, 2014,⁴ stating "To date we have not received a reply to our letter dated May 27, 2014 requesting your application". ESDC advised that if it did not hear from her within 21 days, it would assume she did not wish to apply for a CPP disability benefit. The Respondent was advised that in order to apply, she must complete the requisite forms.

[10] The Respondent completed form ISP-1151, "Application for Disability Benefits Canada Pension Plan", signed the form and dated it November 10, 2014.⁵ The Respondent also completed form ISP-2507, "Questionnaire for Disability Benefits Canada Pension Plan", signed

² GD2-29 to GD2-32.

³ GD2-28.

⁴ GD2-27.

⁵ GD2-19 to GD2-23.

the form and dated it November 11, 2014.⁶ Both forms were date-stamped as received by ESDC on November 18, 2014.

[11] On May 11, 2015, ESDC wrote to the Respondent stating, “This is further to your Disability application received on November 18, 2014. I regret to inform you that Canada Pension Plan (CPP) cannot pay you disability benefits”. The Respondent’s request for reconsideration of this decision was denied. She then appealed to the General Division.

[12] In his decision allowing the appeal, the General Division member found that the Respondent’s disability was severe and prolonged within the meaning of the CPP. He determined that her disability pension payments should start as of May 2013. In this regard, the member stated⁷:

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). The application was received in April 2014. The Appellant is deemed disabled in January 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of May 2013. [underlining added]

[13] The General Division decision was issued on August 16, 2017. The Appellant wrote to the Tribunal on September 8, 2017,⁸ to request that a *corrigendum* be issued to correct errors that the Appellant contended were made by the General Division member concerning the effective payment date of the disability pension. In his letter, the Appellant’s representative stated:

In its decision, the SST-GD determined that the Appellant became disabled within the meaning of the *Canada Pension Plan (CPP)* on or before her Minimum Qualifying Period of December 2013. The Respondent is not contesting the SST-GD’s determination that the Appellant is disabled.

The SST-GD decision incorrectly noted the date of application as being April 2014, as a result, the deemed date of disability and the effective payment date will need to be re-calculated.

⁶ GD2-70 to GD2-76.

⁷ Reasons, para. 81.

⁸ GD13-1.

Accordingly, the Respondent requests that the SST-GD issue an amended decision (in other words, a *corrigendum*) to correct the date of application, the deemed date of disability and the effective payment date.

For greater certainty, the Respondent submits that the correct date of application is **November, 2014**. After applying section 42(2)(b) of the *CPP*, the Appellant is deemed disabled in **August 2013**. Pursuant to section 69 of the *CPP*, payments would commence four months later, in **December, 2013**. [bold text in original]

[14] The General Division member refused to make the requested *corrigendum*. In a letter dated September 28, 2017, the Tribunal advised the parties as follows:

The Tribunal member assigned to the above-noted file has decided that no correction(s) will be made to the decision for the following reason(s):

The Tribunal decision determined the date of application as being April 23 2014 based upon the date of receipt of a medical report for CPP disability benefits. The Respondent [the Appellant on the within appeal] set out in its request that the correct date of application is November 18 2014.

In this case the Appellant [the Respondent on the within appeal] sent in a medical report containing much of the personal and identifying information required for an application (sections 43, 52, 60 and 68 CPP Regulations). In a letter dated May 27, 2014, the Respondent sent a letter to the Appellant setting out that it required a completed disability application within 30 days. This identified the medical report as initiating a request for a disability benefit.

The Respondent sent out two further correspondences on July 7, 2014 and October 31, 2014 allowing the Appellant to file the required information which she filed.

The recent case of *Mason v. Canada (Employment and Social Development)*, 2017 FC 358 sets out that the meaning of the provision with respect to “making” an application must be considered against the purpose of the provision and the legislation, which is to be given a fair and generous reading.

The making of an application set out in Section 60 of the CPP must be given a fair and generous reading. In the circumstances of this case it is reasonable to conclude that the making of an application occurred with receipt of the medical report. [underlining added]

[15] The Minister applied for leave to appeal the General Division's decision. In his application, the Minister did not contest the aspect of the General Division's decision granting the Respondent's application for disability benefits, but he took the position that the General Division erred in using the date the medical report was received by ESDC as the date the Respondent's application for disability benefits was made.

[16] On the application for leave to appeal, I concluded the proposed appeal has a reasonable chance of success and granted leave on December 20, 2017.

ANALYSIS

Did the General Division err regarding the date the application for disability benefits was made?

[17] I have concluded that the General Division based its decision that the Respondent's disability pension was payable as of May 2013 on an erroneous finding that the day the medical report was received by ESDC was the date the Respondent's application for disability benefits was made. This finding of fact was made in a perverse or capricious manner or without regard to the material before it. The appeal is allowed on this ground.

Statutory scheme

[18] Section 60 of the CPP states that no benefit is payable to any person unless (a) an application has been made by him or on his behalf, and (b) the benefit has been approved under the CPP. Therefore, the making of an application is a mandatory step.

[19] Subsection 60(6) states: "How application to be made—An application for a benefit shall be made to the Minister in prescribed manner and at the prescribed location".

[20] Subsection 43(1) of the *Canada Pension Plan Regulations* (CPP Regulations) stipulates that an application for a benefit "shall be made in writing at any office of the Department of Human Resources Development or the Department of Employment and Social Development".

[21] Sections 52 and 68 of the CPP Regulations set out the prescribed information that must be provided as part of the application for a benefit. Forms ISP-1151 (Application for Disability

Benefits) and ISP-2507 (Questionnaire for Disability Benefits) elicit the information listed in s. 52 and s. 68 of the CPP Regulations.

[22] Subsections 60(8) and 60(9) of the CPP permit an application to be made on behalf of a person if the Minister is satisfied, on the basis of evidence provided, that the person was incapable of forming or expressing an intention to make an application. Section 44 of the CPP Regulations mirrors s. 60(8) and 60(9) and stipulates that where the Minister is satisfied on the evidence that a person, by reason of infirmity, illness, insanity or other cause, is incapable of managing his or her own affairs, an application for a benefit may be made on that person's behalf by someone else.

[23] The cumulative effect of the above statutory and regulatory provisions is that, except where the Minister accepts that a person is incapable by reason of infirmity, illness, insanity or some other cause, of making his or her own application for a benefit, the person must make the application himself or herself, in writing at any ESDC office.

Respondent's application for benefits

[24] In the present case, there is no question that the Respondent was capable of making her own application for disability benefits. Dr. Weisgerber was not making an application on her behalf. Therefore, under the statutory and regulatory regime, the Respondent herself was required to make an application for a disability benefit in writing to ESDC. She was required to provide the prescribed information.

[25] The General Division member stated in his reasons for refusing the *corrigendum* that the letter dated May 27, 2014, "identified the medical report as initiating a request for a disability benefit". In my view, this misconstrues what the letter said. The May 27, 2014, letter certainly referred to ESDC having received the medical report. But every other aspect of the letter made it clear that the Respondent was required to submit an application. The follow-up letter of July 7, 2014, restated that her application was required. But however these letters were drafted, they could not change the statutory requirement that an application had to be made by the Respondent containing the information prescribed by the CPP Regulations, and she did not do so until November 2014.

[26] In refusing to issue a *corrigendum*, the General Division member relied on the Federal Court's decision in *Mason v. Canada (Attorney General)*.⁹ The issue before the Court in that case was whether the applicant's application for disability benefits was received in time to permit her to cancel her CPP retirement pension in favour of a disability pension. The Court held that the date-stamp on the applicant's application for disability benefits was not determinative of when she had "made" an application for disability benefits. The Court stated that a "fair and generous reading" must be given with respect to "making" an application.

[27] I have no hesitation in finding the decision in *Mason* is distinguishable from the case before me. In *Mason*, the Court was considering whether the date-stamp should be taken as the date the application was "made". Here, the issue is what constitutes the making of an application. Moreover, the Court's statement that a "fair and generous reading" must be given with respect to "making" an application cannot be taken to oust the unambiguous statutory provisions that require an applicant to make the application at an ESDC office and provide the prescribed information as part of the application.

[28] The Appellant relies on the Pension Appeals Board decision in *Minister of Social Development v. Somani*,¹⁰ and submits that the decision is persuasive in this matter. Decisions of the Pension Appeals Board are not binding upon me; however, I may look to such decisions for guidance. The facts in *Somani* bear a striking resemblance to the facts in the present case: in both cases a medical report was received and, after several reminder letters, the claimant filed a completed application. The Board rejected the argument that the medical report constituted the application for disability benefits and stated that the medical report filed by the claimant "[did] not begin to meet the requirements of an application for disability benefits in a 'prescribed manner' as stipulated in subsection 60(6) of the [CPP]. It does not provide the important, personal information required by sections 43, 52 and 68 of the Regulations". I agree with the reasoning of the Board and make the same finding in this case: the medical report did not constitute the Respondent's application for benefits. The General Division member made an erroneous finding of fact when he determined the medical report was the Respondent's application for benefits.

⁹ *Mason v. Canada (Employment and Social Development)*, 2017 FC 358.

¹⁰ CP23329 (PAB) August 8, 2005.

[29] A decision that is inconsistent with the evidentiary record or that is based upon evidence not appropriately considered will be one made in a perverse or capricious manner.¹¹ Here, the General Division member stated that ESDC's May 27, 2014, letter "identified the medical report as initiating a request for disability benefit". From there, he concluded the medical report itself constituted the application for disability benefits. With respect, in my view, this is inconsistent with the evidentiary record. As noted earlier in these reasons, in its May 27, 2014, letter, ESDC advised that it required the Respondent's completed disability application within 30 days. The Respondent was provided with a 1-800 number to call "if you need a Disability application". She was also told, "if the application has been mailed, please advise us when it was mailed". ESDC again wrote to the Respondent on July 7, 2014,¹² stating "To date we have not received a reply to our letter dated May 27, 2014 requesting your application". Furthermore, prescribed information was not contained in the medical report. This evidence does not support a finding that the medical report constituted the application for disability benefits.

[30] A factual error in and of itself will not ground an appeal under s. 58(1)(c) of the DESDA: the General Division must have based its decision on the error. Here, the General Division member based his decision concerning the start date for payment of the Respondent's disability benefits on his erroneous finding regarding the medical report. I conclude the General Division's error fell within the scope of s. 58(1)(c) of the DESDA.

CONCLUSION

[31] The appeal is allowed.

[32] Pursuant to s. 59 of the DESDA, I have authority to give the decision that the General Division should have given.

[33] The Respondent's application for disability benefits was made on November 18, 2014. Applying s. 42(2)(b) of the CPP, the earliest deemed date of disability was August 2013 (15 months prior to November 2014). Pursuant to s. 69 of the CPP, the Respondent's disability

¹¹ *Canada (Attorney General) v. Hoffman*, 2015 FC 1348, at para. 39.

¹² GD2-27.

pension shall be made payable monthly starting in December 2013 (the fourth month following August 2013).

Nancy Brooks
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
PARTIES AND REPRESENTATIVES:	Minister of Employment and Social Development, Appellant Penny Brady, Counsel for the Appellant S. J., Respondent Allison Schmidt, Representative of the Respondent