



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *B. B. v. Minister of Employment and Social Development*, 2018 SST 523

Tribunal File Number: AD-18-173

BETWEEN:

**B. B.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Neil Nawaz

DATE OF DECISION: May 10, 2018

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] The Appellant, B. B., is appealing a decision of the Social Security Tribunal's General Division to summarily dismiss her claim for disability benefits under the *Canada Pension Plan* (CPP).

[3] The Appellant has a lengthy history of earnings and contributions to the Canada Pension Plan (CPP). In June 2013, she applied for an early CPP retirement pension and began receiving it as of December 2013, the month after she turned 60. In August 2015, she was told that she might have lung cancer, a diagnosis that was later confirmed. The following month, she applied for the CPP disability pension, claiming to be disabled from substantially gainful employment.

[4] The Respondent, the Minister of Employment and Social Development (Minister), refused her disability application initially and on reconsideration because it was made 15 or more months after the Appellant began receiving her CPP retirement pension. In January 2018, the Appellant appealed these refusals to the General Division. In a decision issued on February 27, 2018, the General Division summarily dismissed the appeal on the grounds that the law does not allow a retirement pension to be cancelled in favour of a disability pension more than six months after the beginning of the retirement pension.

[5] The Appellant has now appealed the summary dismissal to the Appeal Division, alleging that the General Division had breached a principle of natural justice by failing to fully consider the following factors:

- She is a Canadian citizen and has paid Canadian taxes for 40 years;
- When she applied for her CPP retirement pension, no one from the government ever advised her that, in doing so, she was risking her entitlement to a CPP disability pension;

- At the time, she did not foresee that she would become disabled, and it is not reasonable to expect anyone to make such a calculation; and
- She now finds herself in financial need yet receiving a smaller pension than what she believes is her due.

[6] I have decided that an oral hearing is unnecessary and that the appeal will proceed on the basis of the documentary record because (i) there are no gaps in the file and there is no need for clarification and (ii) this form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

## ISSUES

[7] I must decide the following issues:

Issue 1: Did the General Division apply the correct test for a summary dismissal?

Issue 2: Did the General Division commit any errors in rendering its decision?

## ANALYSIS

### **Issue 1: Did the General Division apply the correct test for summary dismissal?**

[8] I am satisfied that the General Division used the appropriate mechanism to dispose of the Appellant's appeal. In paragraphs 3, 4, and 13 of its decision, the General Division invoked s. 53(1) of the *Department of Employment and Social Development Act (DESDA)*, correctly stating the provision that permits it to summarily dismiss an appeal having no reasonable chance of success. However, I acknowledge that it is insufficient to simply cite legislation without properly applying it to the facts.

[9] The decision to summarily dismiss an appeal relies on a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed. In *Fancy v. Canada*,<sup>1</sup> the Federal Court of Appeal determined that a reasonable

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<sup>1</sup> *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

chance of success is akin to an arguable case at law. The Court also considered the question of summary dismissal in the context of its own legislative framework and determined that the threshold for summary dismissal is high.<sup>2</sup> It must be determined whether it is plain and obvious on the record that the appeal is bound to fail. The question is not whether the appeal must be dismissed after considering the facts, the case law, and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of the evidence or arguments that might be submitted at a hearing.

[10] Under ss. 44(1)(b) and 70(3) of the CPP, a person cannot receive CPP retirement and disability pensions at the same time, although one can cancel the former in favour of the latter, subject to a six-month time limitation. Since the Appellant applied for the CPP disability pension in September 2015, it was already too late for her to cancel her retirement pension under s. 66.1 of the CPP and s. 46.2 of the *Canada Pension Plan Regulations*.

[11] In finding that it was not possible under the law for the Appellant to receive a disability pension, the General Division applied an appropriately high threshold. In the absence of any recourse to equity, the General Division was within its jurisdiction to summarily dismiss the appeal. In my view, it was plain and obvious on the record that the Appellant's arguments were bound to fail.

## **Issue 2: Did the General Division err in rendering its decision?**

[12] Although the General Division did not arrive at the Appellant's preferred conclusion, I am satisfied that the General Division did not breach any principle of natural justice or commit an error of fact or law in rendering its decision. The General Division assessed the record and concluded that the Appellant, as a recipient of the CPP retirement pension, was effectively barred from receiving CPP disability benefits. The General Division saw no arguable case on any ground that the Appellant had raised, and I see no reason to interfere with its reasoning.

[13] Under s. 42(2)(b) of the CPP, the earliest that the Appellant could have been deemed disabled was June 2014—15 months before her CPP disability application was submitted. Under

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<sup>2</sup> *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.

s. 69 of the CPP, her first payment date would have been no earlier than October 2014—four months after the deemed disability date. As the Appellant’s retirement pension started in December 2013, it was not possible for her to be deemed disabled *before* she started receiving her retirement pension.

[14] The Appellant could not have foreseen her medical problems and was undoubtedly unaware of the implications of taking an early CPP retirement pension, but I see no recourse available to her. The General Division was bound to follow the letter of the law, and so am I as a member of the Appeal Division. In her notice of appeal, the Appellant stated that she could no longer work, but the issue here is not whether she has a severe and prolonged disability, but whether she is statute-barred from receiving the disability pension because she is already receiving a CPP retirement pension.

[15] The Appellant also argues that she was misled by the Minister’s officials when she applied for the retirement pension and that, in general, the government offers the public inadequate guidance about entitlements. These submissions may be valid, but neither the General Division nor the Appeal Division have jurisdiction to provide a remedy. If the Minister provided the Appellant with erroneous advice but has not, in its discretion, seen fit to take appropriate remedial action, then it is not the Social Security Tribunal’s role to step in and vary that decision. The Appellant is in effect asking me to ignore the legislation and simply grant her a retroactive disability pension or convert her retirement pension into a disability pension. Unfortunately, I have no discretion to simply order what I think is right and can only exercise such jurisdiction as is granted to me by the Appeal Division’s enabling statute. Support for this position may be found in *Canada v. Tucker*,<sup>3</sup> among many other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

## **CONCLUSION**

[16] As noted, even if the Appellant could prove that she was disabled, the earliest month, under s. 42(2)(b) of the CPP, in which she could have qualified for disability benefits was June 2014, which was after her CPP retirement pension had begun. The Appellant has not introduced

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<sup>3</sup> *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.

any evidence to show that she cancelled her early retirement pension within the requisite six-month time limitation, nor has she demonstrated how the General Division incorrectly applied the law.

[17] The appeal is therefore dismissed.



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Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVE:	B. B., self-represented