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

Citation: *D. L. v. Minister of Employment and Social Development*, 2018 SST 982

Tribunal File Number: AD-18-582

BETWEEN:

D. L.

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: October 10, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] In June 2000, the Applicant, D. L., applied for a disability pension under the terms of the *Canada Pension Plan* (CPP). According to his application, he stopped working in July 1999 due to complications arising from HIV. In November 2001, the Respondent, the Minister of Employment and Social Development, granted his application.

[3] Not long after this favourable decision, however, the Applicant returned to work without informing the Minister that he had done so. Indeed, the Minister appears to have been unaware of this fact until December 2012, at which time it suspended his disability pension and began a review of his file. Later, the Minister decided that the Applicant was not entitled to the CPP disability payments that he had received from May 2002 to December 2012—an amount of over $90,000—and demanded that he repay this entire sum.

[4] The Applicant asked the Minister to reconsider its initial decision, but the Minister maintained its position. The Applicant then appealed the Minister's decision to the Tribunal's General Division, but it dismissed his appeal. In short, the General Division concluded that the Minister had proved its case: there was ample evidence showing that the Applicant had ceased to be disabled within the meaning of the CPP as of April 2002.

[5] The Applicant now wants to challenge the General Division decision to the Tribunal's Appeal Division, but he requires leave (or permission) for the file to move forward. Unfortunately for the Applicant, I have concluded that the appeal has no reasonable chance of success. As a result, leave to appeal must be refused.

ISSUES

[6] When reaching this decision, I focused on the following questions:

a) Is there an arguable case that the General Division committed an error of law by concluding that it had no power to remedy administrative errors?

b) Did the General Division arguably overlook or misconstrue relevant evidence?

ANALYSIS

The Appeal Division's Legal Framework

[7] The Tribunal has two divisions that operate quite differently from one another. At the Appeal Division, the focus is on whether the General Division might have committed one or more of the three errors (or grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). Generally speaking, these errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

c) 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.

[8] There are also procedural differences between the Tribunal's two divisions. Most cases before the Appeal Division follow a two-step process: the leave to appeal stage and then the merits stage. This appeal is at the leave to appeal stage, meaning that permission must be granted for it to proceed. This is a preliminary hurdle aimed at filtering out cases that have no reasonable chance of success.[1] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the appeal might succeed?[2] Applicants must show that this legal test has been met.[3]

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[1] DESD Act, s 58(2).
[2] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[3] *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 31.

Issue 1: Is there an arguable case that the General Division General Division committed an error of law by concluding that it had no power to remedy administrative errors?

[9] I have concluded that the Applicant's only argument does not amount to an arguable ground on which the appeal might succeed.

[10] The Applicant now recognizes that he should have informed the Minister of his return to work, but says that he did not come to this realization earlier because his illness has caused neurocognitive dysfunction. In addition, because he had been awarded a CPP survivor pension and a CPP disability pension, both of which were deposited directly into his account in a monthly lump sum, he never even realized that he was receiving a disability pension.

[11] Throughout this process, therefore, the Applicant has consistently argued that the Minister should shoulder some of the responsibility for allowing this situation to continue for so long. The Applicant submits that this is particularly true because he reported his complete income to the Canada Revenue Agency (CRA) on an annual basis and because he was audited by the CRA three times during the relevant period. The Applicant alleges that the Minister missed numerous opportunities to make him aware of the overpayment because it failed to properly integrate its systems with those of the CRA.

[12] As a result of the Applicant's request for relief, the Minister's review of his file proceeded on two levels:

a) Did the Applicant cease to be disabled within the meaning of the CPP and, if so, when? and

b) Should some portion of the Applicant's debt be waived because he was the victim of an administrative error?

[13] On the first question, the Minister's initial decision is found in a letter dated August 7, 2014, and its reconsideration decision is found in a letter dated October 24, 2016.[4] In both cases, the Minister found that the Applicant's entitlement to a disability pension ended in April 2002. The Applicant was also informed that if he disagreed with the reconsideration decision, he had

[4] GD2-119 and GD2-215.

the right to appeal it to the Tribunal's General Division, which he did and which is how the case has come before me.

[14] On the question of an administrative error, the Minister's decision is contained in a letter dated July 6, 2016.[5] In that letter, the Minister concluded that his officials had not committed an administrative error and informed the Applicant that if he disagreed with the decision, he had 30 days to file an application for judicial review with the Federal Court, something the Applicant does not appear to have done.

[15] Regardless of the distinction made in the letters described above, in his appeal to the General Division, the Applicant continued to press for some relief from the $90,000 overpayment because of the Minister's administrative error and because of his deteriorating health and reduced life expectancy.

[16] The General Division acknowledged that the Applicant had raised valid questions as to why it took the Minister over 10 years to flag this file for review when the Applicant was faithfully reporting his income from all sources to the CRA. Nevertheless, the General Division concluded that it neither had the jurisdiction to remedy allegations of administrative error nor the power to reduce overpayments on medical grounds. Rather, the General Division concluded that the scope of its jurisdiction was limited to determining whether the Applicant had lost his entitlement to a CPP disability pension as of April 2002, and on that question, the answer was clearly yes.

[17] Now, in his application requesting leave to appeal, the Applicant argues that his whole case was about whether an administrative error occurred and that the General Division committed an error of law when it concluded that it had no jurisdiction over this issue. Unfortunately, however, the Applicant has not cited any legal authority in support of his argument, and I am not aware of any.

[18] In support of its conclusion that it had no jurisdiction over administrative errors, the General Division relied on section 66(4) of the CPP. That reference appears to be incorrect, however, since section 66(4) refers to claimants who are denied a benefit due to erroneous advice

[5] GD2-18 to 19.

or administrative error. In this case, the Applicant was not denied a benefit, but was paid benefits to which he was not entitled. Instead, the correct provision is section 66(3)(d) of the CPP. This is the provision that the Minister refers to in its letter of July 6, 2016;[6] it deals with the remission of overpayments caused by erroneous advice or administrative error.

[19] It is often problematic when the General Division relies on the wrong legislative provision in its decision; however, the Federal Court has held that such an error might not justify granting leave to appeal when the outcome of the case would be the same regardless of the provision that was applied.[7] In my view, that is the case here. The General Division's error is immaterial; the General Division would have come to the same conclusion regardless of whether it had referred to section 66(3)(d) or to section 66(4) of the CPP.

[20] Critically, the challenge that the Applicant faces is that sections 81 and 82 of the CPP make plain that not all of the Minister's decisions can be appealed to the Tribunal. Rather, there are some highly discretionary decisions that the CPP allows only the Minister to make, without risk of review by the Tribunal. The Minister's decisions relating to erroneous advice or administrative error—whether under section 66(3) or 66(4) of the CPP—do indeed fall into this category of decisions that the Tribunal has no power to review.

[21] This interpretation is clear, based on the terms of the CPP, and has been confirmed by court decisions that the Tribunal is bound to follow.[8] This also explains why, in the Minister's letter denying that an administrative error had been committed, the Applicant's appeal rights were to the Federal Court and not to the Tribunal.

[22] As a result, I have concluded that the Applicant's argument has no reasonable chance of success: the General Division had no power to interfere with the Minister's decision denying the Applicant's request for relief because of an alleged administrative error.

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[6] *Ibid.*
[7] *Canada (Attorney General) v Leer*, 2012 FC 932 at paras 18–19.
[8] *Pincombe v Canada (Attorney General)*, [1995] F.C.J. No. 1320 (Fed CA); *Canada (Attorney General) v Dale*, 2006 FC 1364 at paras 37–44; *Raivitch v Canada (Minister of Human Resources Development)*, 2006 FC 1279 at para 11; *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.

Issue 2: Did the General Division arguably overlook or misconstrue relevant evidence?

[23] Regardless of the conclusion above, I am mindful of Federal Court decisions in which the Appeal Division has been instructed to go beyond the four corners of the written materials and consider whether the General Division might have misconstrued or failed to properly account for any of the evidence.[9] If this is the case, then leave to appeal should normally be granted regardless of any technical problems that might be found in the request for leave to appeal.

[24] After reviewing the documentary record and examining the decision under appeal, I am satisfied that the General Division neither overlooked nor misconstrued relevant evidence. The question within the General Division's jurisdiction was whether the Minister had shown that the Applicant ceased to be disabled, within the meaning of the CPP, by the end of April 2002. On this question, the General Division summarized the relevant evidence and found that it clearly supported the Minister's position. Indeed, there now appears to be little controversy on this point.

CONCLUSION

[25] The Minister is demanding that the Applicant repay a very significant sum, and it is understandable that he might have difficulty doing so. Indeed, like the Applicant, I too have trouble understanding how this situation was able to continue for so long without his file being flagged for review. Nevertheless, I have concluded that his appeal has no reasonable chance of success. As a result, I must refuse his application for leave to appeal.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	D. L., self-represented

[9] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.