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

Citation: *R. F. v Minister of Employment and Social Development*, 2020 SST 503

Tribunal File Number: AD-20-661

BETWEEN:

R. F.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: June 16, 2020

Canada

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Claimant is a former delivery driver and cryogenic specialist who was diagnosed with a severe tremor and conversion disorder in 2008. He left his job two years later, hoping that he would eventually recover and return to work.

[3] He did not recover. In October 2018, he applied for a Canada Pension Plan (CPP) disability pension. The Minister approved the application with a first payment date of November 2017, which it determined was the maximum period of retroactivity permitted under the law.[1]

[4] The Claimant appealed the Minister's determination of his pension's start date to the General Division of the Social Security Tribunal. He argued that the pension should have been backdated to November 2010, when he actually became disabled.

[5] Following a hearing on the matter, the General Division dismissed the appeal.[2] The General Division found that section 42(2)(b) of the *Canada Pension Plan*, read in conjunction with section 69, effectively barred any claimant from receiving more than 11 months of retroactive disability pension payments. The General Division also found no indication that the Claimant was incapacitated from making a disability application any earlier than when he finally did so.

[6] The Claimant is now seeking leave to appeal the General Division's decision.[3] He argues that the General Division erred in law by failing to recognize that, since he became disabled in November 2010, his pension should have been payable to him effective four months later, as of March 2011.

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[1] Minister's reconsideration decision letter dated January 3, 2019, GD2-12.
[2] General Division's decision dated April 24, 2020.
[3] Claimant's leave to appeal application and submissions dated June 2, 2020, AD1.

[7] I have reviewed the General Division's decision against the record. I have concluded that the Claimant has not raised any arguments that will have a reasonable chance of success on appeal.

ISSUE

[8] There are three grounds of appeal to the Appeal Division. A claimant must show that the General Division (i) did not follow procedural fairness or made an error of jurisdiction; (ii) made an error of law; or (iii) made an important error of fact.[4]

[9] An appeal can proceed only if the Appeal Division first grants leave to appeal.[5] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[6] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[7]

[10] I had to decide whether the Claimant has raised an arguable case that falls under one or more of the permitted grounds of appeal.

ANALYSIS

[11] To succeed at the Appeal Division, a claimant must do more than simply disagree with the General Division's decision. A claimant must also identify specific errors that the General Division committed in coming to its decision and explain how those errors, if any, fit into the one or more of the three grounds of appeal permitted under the law.

[12] The Claimant argues, as he did at the General Division, that the law limiting retroactive pension payment is ambiguous and full of gaps. I do not see how this argument can succeed.

[13] Section 42(2)(b) of the *Canada Pension Plan* says:

> A person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) - be deemed to have become disabled earlier

[4] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[5] DESDA, sections 56(1) and 58(3).
[6] DESDA, section 58(2).
[7] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

> than fifteen months before the time of the making of any application in respect of which the determination is made.

A plain reading of this passage means that, with one exception, a claimant will be found to have become disabled as of the date he could no longer work. However, the exception is a big one, and it occurs if a claimant submits his disability application more than 15 months after the actual date of the onset of his disability. Thus, there is a limit to how far back a claimant can be "deemed" disabled.

[14] This provision, read in combination with section 69 of the *Canada Pension Plan*, also limits the extent to which pension payments can be backdated. Section 69 says:

> Subject to section 62, where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled, except that where the applicant was, at any time during the five year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan,
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> (a) the pension is payable for each month commencing with the month next following the month in which the applicant became disabled as a result of which the payment is approved; and
>
> (b) the reference to "fifteen months" in paragraph 42(2)(b) shall be read as a reference to "twelve months."

Section 69 deals with several things. First, it provides for a four-month delay, after a claimant is disabled, before he can begin receiving disability benefits. Second, it says that the four-month delay does not apply to a claimant seeking CPP disability benefits who had been previously receiving disability benefits within five years of his application.

[15] The Claimant found ambiguity between sections 42(2)(b) and 69 because, "nowhere in section 69 is there any reference to the date when a person is 'deemed to have been disabled.'" This is a misreading of section 69(b), which does refer to section 42(2)(b), if only to vary it for claimants who had been previously receiving disability benefits. Read as a whole, it is clear that section 69 recognizes the ordinary 15-month limit on when a claimant can be deemed disabled.

Read with section 42(2)(b) of the *Canada Pension Plan*, it is clear that section 69 is intended to limit the retroactive payment period, whether that period be fifteen or twelve months.

[16] The Claimant's submissions rely on two precedent cases, but neither supports his case—in fact, they do the opposite. The Claimant cites *Canada v S.L.*, a decision of the Appeal division from several years ago,[8] and, in fact, several pages of his submissions are a word-for-word reproduction of that decision, with some cosmetic revisions. However, the reasoning in *S.L.* counters the point that the Claimant is trying to make. The claimant in *S.L.*, like the Claimant in this case, was seeking payment of a disability pension retroactive to his actual date of disability, rather than the deemed date. The General Division agreed with him, but the Appeal Division later overturned its decision, finding that it had erred in law by misreading sections 42(2)(b) and 69 and by failing to apply the 15-month limit.

[17] The remainder of the Claimant's submissions are essentially lifted, again with minor alterations, from another case, this one from the now-defunct Pension Appeals Board (PAB). In *Canada v Zicarelli*,[9] which involved another claimant who argued that section 42(2)(b) did not limit retroactivity, the PAB held that, "we do not agree that the use of the word 'deemed' in Paragraph 42(2)(b) somehow created an ambiguity between that section and section 69."[10] *Zicarelli*, contrary to what the Claimant may think, directly opposes his argument.

[18] It appears that the Claimant adopted the claimants' arguments in *S.L.* and *Zicarelli* while losing sight of the fact that both parties ultimately lost their cases. Having reviewed the written reasons for these cases, I have no difficulty concluding that the Claimant lacks an arguable case.

CONCLUSION

[19] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

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[8] *Canada (Minister of Employment and Social Development) v S.L.*, 2016 SSTADIS 332.
[9] The claimant did not cite the case, but it closely mirrors *Canada (Minister of Social Development) v Zicarelli* (December 7, 2004) CP 21971 (PAB).
[10] *Zicarelli*, paragraph 11.

Member, Appeal Division

REPRESENTATIVE:	K. L., representative for the Claimant