



Citation: *Minister of Employment and Social Development v TL*, 2022 SST 664

Social Security Tribunal of Canada Appeal Division

Decisions

Appellant: Minister of Employment and Social Development
Representative: Joshua Toews

Respondent: T. L.
Representative: H. L.

and

Appellant: T. L.
Representative: H. L.

Respondent: Minister of Employment and Social Development
Representative: Joshua Toews

Decision under appeal: General Division decision dated August 8, 2021
(GP-20-885)

Tribunal member: Neil Nawaz
Type of hearing: Teleconference
Hearing date: July 14, 2022
Hearing participants: Joshua Toews
T. L.
H. L.

Decision date: July 20, 2022
File numbers: AD-21-388 and AD-22-145

Decision

[1] I am allowing the Minister's appeal but dismissing T. L.'s appeal. I am giving the decision that the General Division should have given by granting T. L. a Disabled Contributor's Child's Benefit (DCCB) from January to February 2019 and September to October 2019.

Overview

[2] The parties are cross appealing a decision to award a partial DCCB to an apprenticed student.

[3] T. L. is the claimant in this matter. In February 2019, his mother, H. L., applied for a Canada Pension Plan (CPP) disability pension. The Minister approved the application and commenced payment of the pension as of March 2018. At the time of approval, T. L. was 20 years old and a student at the Southern Alberta Institute of Technology (SAIT).

[4] T. L. applied for the DCCB in December 2019. The Minister refused the application because T. L. was enrolled in an apprenticeship program that did not require full-time attendance at all times. The Minister said that the program's periods of classroom training were too short to make T. L. eligible for the DCCB. The Minister relied in part on a policy that deemed full-time attendance to be least 12 weeks of in-class instruction over a 15-week timeframe.

[5] T. L. appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by way of written questions and answers and, in a decision dated August 8, 2021, allowed the appeal in part. Declaring itself unbound by Ministerial policy, the General Division found that T. L. was eligible for the DCCB for the months when he was receiving in-class instruction: September to October 2017, January to March 2018, January to February 2019, and September to October 2019.

[6] Both parties are appealing the General Division's decision, although for different reasons.

Submissions

[7] On November 10, 2021, the Minister requested permission to appeal from the Appeal Division. The Minister alleged that the General Division committed an error of law by disregarding a provision of the *Canadian Pension Plan* that prevents the DCCB from being paid retroactively for more than 11 months before the month the DCCB application is received. This provision, argued the Minister, meant that T. L. was ineligible for the DCCB from September to October 2017 and from January to March 2018.

[8] On December 3, 2021, the Appeal Division held a settlement conference in an attempt to resolve the Minister's appeal. The conference ended without an agreement, but T. L. indicated that he had his own objections to the General Division's decision. The Appeal Division suspended proceedings to give T. L. an opportunity to apply for permission to appeal, and he did so on February 23, 2022. In his application requesting permission to appeal, he argued that he was entitled to the DCCB during his school breaks.

[9] Since both applications had the same parties, shared common facts, and involved related legal provisions, I thought it appropriate to deal with them jointly, as permitted under section 13 of the *Social Security Tribunal Regulations*. In taking this action, I was satisfied that no injustice would be likely caused to either party.

[10] In a decision dated March 29, 2022, I granted both parties permission to appeal because I thought each had raised an arguable case.

Issues

[11] There are four grounds of appeal to the Appeal Division. An appellant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or

- based its decision on an important error of fact.¹

[12] In this appeal, I had to decide the following questions:

- Did the General Division ignore a rule that prevents payment of more than 11 months of retroactive DCCB?
- Did the General Division improperly exclude T. L.'s school breaks from his DCCB entitlement?

Analysis

[13] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the General Division did make an error—the one alleged by the Minister but not the one alleged by T. L. I agree with the Minister that the General Division's decision must be overturned.

The General Division ignored a rule limiting retroactive DCCB

[14] The Minister alleges that the General Division disregarded a provision of the *Canada Pension Plan*, which she says prevents the DCCB from being paid retroactively for more than 11 months before the month in which an application for the benefit is received.

[15] I agree with the Minister on this point.

[16] Section 74(2) of the *Canada Pension Plan* says:

[W]here payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with, (a) in the case of a disabled contributor's child's benefit, the later of (i) the month commencing with which a disability pension is payable to the contributor under this Act... **but in no case earlier than the twelfth month preceding the month following the month in which the application was received** [emphasis added].

¹ See *Department of Employment and Social Development Act*, (DESDA), section 58(1).

[17] This provision appears to limit T. L. to DCCB payments that go back no further than December 2019—the month in which he applied for the DCCB. However, the Minister’s representative allowed that T. L.’s eligibility date was, in effect, March 2018, because his mother indicated her intention to apply for the DCCB in her February 2019 CPP disability application.²

[18] I am willing to accept this finding, but it still means that T. L. is ineligible for DCCB payments earlier than March 2018.

The General Division did not err by excluding T. L.’s school breaks

[19] T. L. notes that other students receive the DCCB year-round—even during their breaks. He argues that the General Division ignored the fact that his courses do not follow a traditional September-to-April school calendar. He insists that the General Division failed to appreciate SAID’s declarations of attendance at a school or university.

[20] On these points, I am satisfied that the General Division did not base 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.³

[21] As the General Division correctly noted, a claimant who is between the ages of 18 and 25 can receive a DCCB only if they are “in full-time attendance at a school or university.”⁴ The *Canada Pension Plan* does not precisely define “full-time attendance,” nor does it make any explicit allowance for the varying forms that apprenticeship programs can take. The *Canada Pension Plan Regulations* say that a claimant “shall be deemed to be or to have been in full-time attendance at a school or university during an absence by reason of a normal period of scholastic vacation.”⁵

² See H. L.’s CPP Disability Benefits Application, received February 6, 2019 at GD2-21 of AD-22-167. In the signature portion of the application, H. L. wrote, “I hereby apply for a disability benefit and, if applicable, a child’s benefit...”

³ This is the precise wording of the legal standard required to prove a factual error under section 58(1)(c) of the DESDA.

⁴ *Canada Pension Plan*, section 42(1).

⁵ See *Canada Pension Plan Regulations*, section 66(1).

[22] The file contained three declarations of attendance at school or university showing that T. L. was enrolled as a full-time student at SAIT during the following periods:

- September 6, 2017 to October 28, 2017;
- January 2, 2018 to March 3, 2018; and
- January 2, 2019 to October 25, 2019.⁶

[23] The first declaration covers a period that, as discussed above, is wholly excluded by section 74(2) of the *Canada Pension Plan*. The second declaration covers a period that is almost entirely out of the maximum period of retroactive payment, except for the first three days of March 2018. I note that two of those days were a weekend.

[24] That leaves the third declaration, which covers a 10-month period that is entirely within the maximum period of retroactive payment. In the declaration, SAIT's office of the registrar affirmed that T. L.'s course load between January 2, 2019 and October 25, 2019 met or exceeded the minimum requirement to be considered a full-time student."

[25] Even so, the General Division did not take this declaration at face value. It excluded February to September 2019 from T. L.'s DCCB eligibility period based on T. L.'s explanation that the seven-month period was not occupied by in-class instruction.⁷ It also based the exclusion on a memo prepared by a Service Canada investigator, who wrote:

I contact [*sic*] Southern Institute of Technology (SAIT) at 403-284-7248 and selected apprenticeship on the menu selection and spoke with Kristi. Kristi was able to confirm that the Heavy Equipment Technician program offers 4 in class periods of instruction, which are 8 weeks in duration for each period. I confirmed that the period completed on the school declaration on December 12, 2019 for January 2, 2019 to October 25, 2019

⁶ The three declarations of attendance at school or university for the Claimant can be found at GD2-23, GD2-26, and GD2-31. All were completed on December 12, 2019 by "Jazmyne B.," a customer service representative at the Office of the Registrar, SAIT.

⁷ See General Division decision, paragraph 19. The General Division referred to T. L.'s description of his training program at a "hearing," which I presume was a pre-hearing conference held by telephone on July 13, 2021. This pre-hearing conference was apparently not recorded.

would not represent in class instruction since each period is only 8 weeks of in class instruction [emphasis added].⁸

[26] It is the General Division's job to make findings of fact. In doing so, it is entitled to some leeway in how it chooses to weigh the available evidence.⁹ In this case, the General Division made what strikes me as a full and genuine attempt to understand the unique features of T. L.'s apprenticeship program. It provided clear reasons for excluding the seven-month period between February and September 2019 from T. L.'s period of entitlement. T. L. plainly disagrees with these findings, but that does not mean the General Division improperly considered the evidence.

[27] As noted, the *Canada Pension Plan* requires the DCCB to be paid only for periods of full-time attendance at a school or university, except when a student is absent by reason of a "normal period of scholastic vacation." This last phrase is not defined by either the Plan or its regulations and has rarely been the subject of consideration in previous cases.¹⁰

[28] In this legal vacuum, the General Division weighed the available evidence and found that the seven-month period between February and September 2019 contained no in-class instruction but was instead reserved for on-the-job training. For that reason, the General Division concluded that, despite SAIT's third declaration, the seven-month period did not qualify as either full-time attendance or a normal period of scholastic vacation. The General Division also decided that it didn't matter if T. L. was unable find a job placement in the Alberta's depressed employment market during the seven months—the period still didn't count as a vacation. I am unable to see an error of law or fact in this analysis. For that reason, I see no reason to second-guess the General Division's conclusions.

⁸ See Service Canada telephone call memorandum by Carolyn Wilson dated June 8, 2021, GD3-1.

⁹ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

¹⁰ One of the few cases to have specifically addressed its meaning is *Minister of Social Development v Boser* (November 30, 2005), CP 21995 (PAB), in which the Pension Appeals Board found that working for an accounting firm from May to September did not qualify the claimant to receive the DCCB for a "normal period of scholastic vacation."

Remedy

[29] As we have seen, the General Division made an error by not considering the limit on retroactive DCCB payment set out in section 74(2) of the *Canada Pension Plan*.

When the General Division makes an error, the Appeal Division can fix it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.¹¹

[30] At the hearing, both parties indicated that, in the event I found an error, they were content to have me substitute my decision for the General Division's. The Tribunal is required to proceed as quickly as fairness permits. The parties had ample opportunity to make their respective cases at the General Division, so there is enough material on file to allow me to make an informed decision. The General Division's error involves its failure to consider one aspect of the law, so there is no reason for me not to decide T. L.'s DCCB start date myself.

[31] Having reviewed the case file, I am satisfied that, if the General Division had properly considered section 74(2) of the *Canada Pension Plan*, it would have permitted retroactive DCCB payments no sooner than 11 months before T. L.'s date of application. Since his mother's February 2019 CPP disability application date has also been deemed his DCCB application date, T. L.'s first payment date can't be earlier than March 2018. As noted, T. L. had, at most, one day of in-class instruction for that month. After that, the evidence shows that he had four months of in-class instruction: January to February 2019 and September to October 2019.

¹¹ See DESDA, section 59(1).

Conclusion

[32] For the reasons discussed above, I am allowing the Minister's appeal and dismissing T. L.'s appeal. The General Division erred by ignoring a provision of the *Canada Pension Plan* that limits retroactive DCC payments to one year before the date of application. However, it did not err by excluding the seven months between February and September 2019 from T. L.'s payment period.

[33] I have decided to give the decision that the General Division should have given and grant T. L. retroactive DCCB payments for January and February 2019 and for September and October 2019.



Member, Appeal Division