



Citation: *SP v Minister of Employment and Social Development*, 2022 SST 561

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: S. P.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated February 25, 2022
(GP-20-1963)

Tribunal member: Neil Nawaz

Decision date: June 22, 2022

File number: AD-22-297

Decision

[1] Leave to appeal is refused. I see no basis for this appeal to go forward.

Overview

[2] The Claimant is a Canadian writer living in the United States. Her husband, a contributor to the Canada Pension Plan (CPP), passed away in 2008.

[3] However, it was not until December 2019 that the Claimant applied for a CPP survivor's pension. The Minister approved the application effective January 2019—11 months before the application date, and the maximum period of retroactivity usually allowed under the law. Later, the Minister changed the start date to January 2018.

[4] The Claimant appealed the start date to the Social Security Tribunal's General Division. She wanted her survivor's pension to start as of March 2008, the month of her husband's death. She claimed that she had not applied for the pension earlier because she did not know about it. She also claimed that a series of personal and financial reversals left her emotionally devastated.

[5] The General Division held a hearing by teleconference and dismissed the appeal. It found insufficient evidence to show that the Claimant was incapable of forming or expressing an intention to make an application before January 2019. It also found no legal basis for the Minister's subsequent decision to push the start date back one year. The General Division found that, although the Claimant had medical problems related to the death of her husband and to the toxicity of her house, they did not prevent her from applying for the survivor's pension sooner.

The Claimant's reasons for appealing

[6] The Claimant is now requesting permission to appeal from the Appeal Division. She maintains that she was previously incapacitated from applying for the survivor's pension. She claims to suffer from multiple debilitating medical conditions, including brain damage, memory loss, post-traumatic stress disorder, depression, and chemical sensitivities. She also alleges that the General Division committed the following errors:

- It ignored the fact that her family physician diagnosed the Claimant with encephalopathy and ataxia—diseases that affect the brain—and described her condition as “very serious”;
- It never contacted her family physician, even though she made it clear that she was willing to discuss the Claimant’s injuries;
- It failed to take into account the fact that, as a resident of the United States, the Claimant had limited means of knowing whether she was entitled to Canadian benefits; and
- It ignored her testimony that, following her husband’s death, she assigned power of attorney to a trusted advisor to handle her real estate affairs.

Issue

[7] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.¹

[8] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.² At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.³ This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.⁴

[9] What does this mean? I have to decide whether the Claimant has raised an arguable case that falls under one or more of the permitted grounds of appeal.

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

² See DESDA, sections 56(1) and 58(3).

³ See DESDA, section 58(2).

⁴ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Analysis

[10] 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 Claimant does not have an arguable case.

The Appeal Division does not hear rearguments

[11] The Claimant comes to the Appeal Division making many of the same arguments that she made at the General Division. She insists that she was incapacitated from making a survivor’s pension application between March 2008 and December 2019. She says that her incapacity resulted from series of psychologically traumatizing events, including the loss of her health after being exposed to chemicals in her house, a failed lawsuit against the developers of that house, the subsequent suicide of her husband, and an eventual bankruptcy that wiped out her fortune.

[12] Unfortunately for the Claimant, the Appeal Division is not a place to present material that has already been submitted to the General Division. My authority as a member of the Appeal Division only permits me to consider whether the General Division committed one or more specific types of error. In short, an Appeal Division hearing is not meant to be a “redo” of the General Division hearing.

There is no arguable case that General Division ignored the Claimant’s medical evidence

[13] The Claimant alleges that the General Division disregarded some of the evidence supporting her incapacity claim. In particular, she says that the presiding member did not properly consider her family physician’s evidence, which disclosed diagnoses of encephalopathy and ataxia—conditions that can affect mental functioning.

[14] I don’t see an arguable case for this allegation. The Claimant submitted several reports prepared by Dr. Erica Elliott, a specialist in environmental medicine. The Claimant first saw Dr. Elliott in 2004, when she and her late husband consulted her about the toxins in their home. In a letter from June 2020, Dr. Elliott documented the Claimant’s many medical conditions:

S. P. suffered multiple injuries, including damage to her lymphatic system resulting in severe swelling of her lower limbs, graded as Stage 4 Lymphedema. The massive swelling in her knees made it difficult for her to walk. The condition has persisted to the present, but sadly the patient has not been able to afford any kind of treatment. In addition, S. P. suffered neurological and immunological damage, resulting in Chronic Fatigue Immune Dysfunction Syndrome, ataxia, memory loss, depression, allergies and multiple chemical sensitivities.⁵

The General Division explicitly referred to this letter in its decision and found that the Claimant likely had a disability. However, the General Division went on to say that “having a disability is not the same as being incapable to form or express an intention to make an application.”⁶

[15] This statement accurately reflects the law.⁷ Many factors other than a claimant’s medical diagnoses go into a finding of incapacity, including evidence surrounding their everyday activities. The Claimant might well be disabled and might well have neurological and psychological conditions such as encephalopathy, ataxia, depression, and memory loss. However, none of that necessarily means she met the relatively strict standard for incapacity.

[16] One of the General Division’s roles is to establish facts. In doing so, the General Division is presumed to have considered all the evidence before it.⁸ In this case, the General Division considered Dr. Elliott’s letters, but it also took into account other factors:

- Dr. Elliott found that the Claimant did **not** meet the standard for incapacity,⁹ despite her previous letters of support;
- No doctor has ever found the Claimant incompetent to manage her affairs;

⁵ See Letter dated June 26, 2020 by Dr. Erica Elliott, family physician and environmental medicine specialist, GD2-10.

⁶ See General Division decision, paragraph 22.

⁷ See *O’Rourke v Canada (Attorney General)*, 2018 FC 498.

⁸ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

⁹ See physician’s declaration of incapacity by Dr. Elliott dated October 5, 2021, GD9-200.

- While the Claimant may not have carried on writing books after 2008, she continued to sell her old books from her personal inventory; and
- The Claimant acknowledged that a reason she did not apply for the CPP survivor's pension earlier was that she was unaware of it.

[17] The Claimant plainly disagrees with the General Division's conclusions, but that alone is not enough to overturn its decision. The Claimant has to also identify specific errors in that decision. In its role as finder of fact, the General Division is entitled to some leeway in how it weighs evidence.¹⁰ The Claimant may believe that Dr. Elliott's letter proved her case, but it was just one of many factors that the General Division had to consider. As such, I see no reason to second-guess the General Division's findings.

There is no arguable case that General Division should have contacted the Claimant's physicians

[18] The Claimant alleges that the General Division erred by not doing more to learn about her medical history:

No one from the Tribunal phoned Dr. Elliott or any of my medical witnesses. Had [the General Division member] called Ann Morgan (phlebotomist for Dr. Pfau, Massage Therapist who came weekly to my house for years) he would have learned that I was taken on a 72 Hour Psychiatric Lockdown to a local hospital in 2008.¹¹

[19] This line of argument has no reasonable chance of success on appeal.

[20] The onus was on the Claimant, and not anyone else, to prove her incapacity. The General Division was under no obligation to actively seek out evidence supporting her claim. Indeed, if it had done so, it would have ceased to fulfil its role as an independent arbitrator. The Claimant was free to call witness evidence to help make her case. She chose not to do so.

¹⁰ See Simpson, note 8.

¹¹ See Claimant's application requesting leave to appeal dated May 23, 2022, AD1-12.

There is no arguable case that the General Division failed to make allowances for her U.S. residence

[21] As noted, the Claimant admits that one reason for the delay in her application was the fact that she has lived in the United States for many years. She says that information about Canadian benefits was hard to come by where she was living.¹² She testified that she was told in error that the “widow’s allowance” no longer existed (in fact, it was reformed and renamed the survivor’s pension).¹³

[22] Again, I don’t see an arguable case here.

[23] It is up to claimants to inform themselves about benefits to which they may be entitled. Ignorance of the law is no excuse for failing to make a timely application. More to the point, mere ignorance of the law falls short of the test for capacity, which requires, not just lack of knowledge, but an inability to express or form an intention to make an application.

[24] The Claimant testified that she applied as soon as she learned that the pension was still in place.¹⁴ However, as the General Division noted, it is not enough to show that the idea of applying did not occur to the Claimant.¹⁵

There is no arguable case that the General Division ignored the Claimant’s power of attorney

[25] The Claimant alleges that the General Division disregarded her testimony that she gave power of attorney to R. F. to handle her real estate affairs following her husband’s death.

[26] I don’t see an arguable case for this submission.

[27] As noted, the General Division is presumed to have considered all the evidence before it. In any case, a power of attorney by itself does not mean a person is

¹² See Claimant’s application requesting leave to appeal, AD1-12.

¹³ See General Division’s account of the Claimant’s testimony, paragraph 24 of its decision.

¹⁴ See General Division decision, paragraph 6.

¹⁵ See General Division decision, paragraph 16.

incapacitated. In this case, the Claimant appears to have given power of attorney to an individual for the narrow purpose of executing real estate transactions. Moreover, there is no evidence on the record as to whether that individual actually used the power of attorney for its intended purpose.

Conclusion

[28] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, permission to appeal is refused.



Member, Appeal Division