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

Citation: *K. K. v. Minister of Employment and Social Development*, 2018 SST 1119

Tribunal File Number: AD-17-452

BETWEEN:

K. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: October 31, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] K. K. (Claimant), applied for a disability pension under the *Canada Pension Plan* in 2007, and his application was granted by the Minister. He began to receive the disability pension in December 2007.

[3] The Claimant challenged the date his payments started. He claimed that he was not capable of forming or expressing an intention to apply for the Canada Pension Plan (CPP) disability pension from 2003 to August of 2007.

[4] The Minister denied the Claimant's appeal both initially and upon reconsideration. The General Division of this Tribunal denied his appeal in March 2017, deciding that the Claimant had not proven that he was incapable of forming or expressing an intention to apply for the disability pension under the *Canada Pension Plan* before September 2007.

[5] The Appeal Division granted leave to appeal the General Division's decision, finding that it was arguable that the General Division made an error either of law or of jurisdiction in failing to determine (as a stand-alone issue, separate from the question of his incapacity) whether the onset date of the Claimant's disability was earlier than August 2007.

[6] The Appeal Division must decide whether the General Division made any errors under the *Department of Employment and Social Development Act* (DESDA) such that an appeal should be granted.

[7] The Appeal Division dismisses the appeal. Although there was an arguable case that the General Division's failure to decide whether the Claimant had proven an earlier date of onset for his disability was an error of jurisdiction, there is no such error on a balance of probabilities. The Claimant's other arguments do not amount to any error under the DESDA in the General Division's decision.

ISSUES

[8] These are the issues for the Appeal Division to decide on:

1. Did the General Division make an error of jurisdiction by failing to determine (as a stand-alone issue, separate from the question of the Claimant's incapacity) whether the onset date of the Claimant's disability was earlier than August 2007?
2. Did the General Division make errors of fact related to the Claimant's ability to work from 2003 to 2006 and related to his earnings in 2005?
3. Did the General Division make an error of fact by misconstruing evidence of small improvements in the Claimant's mental health from treatment notes?
4. Did the General Division make an error of fact or law by failing to consider the Claimant's overall medical condition?
5. Did the General Division make an error of fact by ignoring evidence that the Claimant experienced delusions that he could return to work?
6. Did the General Division make an error of fact by failing to appreciate that there was no evidence that the Claimant applied for any long-term benefits?

ANALYSIS

Appeal Division's review of the General Division's decision

[9] The Appeal Division does not provide an opportunity for the parties to reargue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division's decision to determine whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.

[10] The DESDA says that a factual error occurs when the General Division bases 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.[1] For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.

[11] By contrast, the DESDA simply says that a legal error occurs when the General Division makes an error of law, whether or not the error appears on the face of the record.[2]

***Canada Pension Plan* (Capacity and Date of Payment)**

[12] A person cannot be deemed disabled for payment purposes more than 15 months before the Minister received the application for a disability pension.[3]

[13] On incapacity, the *Canada Pension Plan* states:[4]

> **(8)** Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
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> […]
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> **(10)** For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

Issue 1: Did the General Division make an error of jurisdiction by failing to determine (as a stand-alone issue, separate from the question of the Claimant's incapacity) whether the

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[1] DESDA, s 58(1)(*c*).
[2] DESDA, s 58(1)(*b*).
[3] *Canada Pension Plan*, s 42(2)(*b*).
[4] *Ibid*., ss 60(8) and 60(10).

onset date of the Claimant's disability was earlier than August 2007?

[14] In this case, the General Division was not required to determine (as a stand-alone issue, separate from the question of his incapacity) whether the onset date of the Claimant's disability was earlier than August 2007. There is no failure to exercise jurisdiction as described in section 58(1)(*a*) of the DESDA because there was no reconsideration decision on the issue of the date of onset.

[15] Parties are able to appeal reconsideration decisions relating to CPP benefits to the General Division, and the General Division provides a new hearing (*de novo*).[5] The General Division has the jurisdiction to decide "any question of law or fact that is necessary for the disposition of any application" made under the DESDA.[6] In CPP cases, the General Division may only decide questions of law or fact as to whether any benefit is payable to a person or its amount.[7] The General Division may dismiss the appeal or confirm, rescind, or vary a decision of the Minister in whole or in part or give the decision that the Minister or the Commission should have given.[8]

[16] The General Division did not decide (as a stand-alone issue, separate from the question of the Claimant's incapacity) whether the Claimant's severe and prolonged disability started earlier than August 2007. At the leave to appeal stage, the Appeal Division found that it was arguable that the General Division's failure to consider that question was either an error of law[9] or a failure to exercise its jurisdiction.[10]

[17] The Claimant applied for benefits in September 2007, stating that he became disabled as of August 2007. The Minister approved his application and found that he was disabled as of August 2007, and his payments started in December 2007. The submissions before the General Division[11] state that the Claimant's "application was granted by the Minister at Initial

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[5] *Grosvenor v Canada (Attorney General)*, 2018 FC 36, para. 7; *Stevens Estate v Canada (Attorney General)*, 2011 FC 103, paras. 66 to 75, discusses that the Review Tribunal (as it then was) held *de novo* hearings; *Canada Pension Plan* ss 81 and 82 explain that it is the reconsideration decision that is appealed to the General Division.
[6] DESDA, s 64(1).
[7] DESDA, s 64(2)(*a*).
[8] DESDA, s 54(1).
[9] DESDA, s 58(1)(*b*).
[10] DESDA, s 58(1)(*a*).
[11] GD6.

determination; providing a date of onset of August 2007, the full 15 months retroactivity allowable under the legislation and notably his date [*sic*] stopped work and disability claim date."[12]

[18] The Claimant contacted the Minister in January 2015, alleging incapacity in relation to his 2007 application for a disability pension. The Minister denied his claim of incapacity initially, in a decision dated April 14, 2015,[13] and on reconsideration, in a decision dated August 5, 2015.[14]

[19] The Applicant's arguments in support of his claim of incapacity from 2004 to 2007 that he raised on reconsideration may also amount to a claim that the disability onset date was incorrect, regardless of the outcome of any incapacity analysis.

[20] As noted in the leave to appeal decision, there is support in the record for the argument that the Claimant disagreed with the date of onset, in this case separate from the capacity question. While the Claimant's request for reconsideration (date-stamped April 22, 2015[15]) seems to focus on the question of his incapacity, the letter is titled "Application for re-consideration: Sub: your denial of retroactive CPP benefits," which suggests it could be a challenge to the disability onset date.

[21] Later, in the notice of appeal to the General Division,[16] the Claimant provided supporting documentation from the Canada Revenue Agency about his eligibility for the disability tax credit, which would appear to be relevant to the question of disability onset date in addition to incapacity.

[22] However, the Minister argues that the General Division had no jurisdiction to consider an earlier date of onset of the Claimant's disability. The Minister argues that the Claimant never submitted a reconsideration request to the Minister about his date of onset and that the

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[12] GD6-2. Note: in fact, the maximum retroactivity would have been June 2006. The Minister seems to state that the Applicant received 15 months of retroactive payments, but those same submissions cite the Minister's reconsideration letter of August 5, 2015, which confirms the Applicant's date of payment as December 2007 and upholds the August 2007 disability onset date.
[13] GD2-14 to 15.
[14] GD2-7 to 9.
[15] GD2-11 to 13.
[16] GD1-2.

reconsideration request he did submit was only about incapacity. The Minister acknowledges that the subject line of the Claimant's reconsideration request may lead to confusion, but the Minister notes that the body of the letter "clearly points to wording from the denial dated April 14, 2015 of the [Claimant's] Incapacity Declaration."[17] The Minister then notes that the reconsideration denial dated August 5, 2015, deals only with the incapacity declaration request and not whether the Claimant was able to receive retroactive benefits and the reasons why he did not meet the incapacity provision.

[23] The Minister argues that, because the reconsideration request and the reconsideration decision were only about incapacity, the Minister's authority to decide any further on the question of the date of onset (as a separate question from incapacity) had ended.[18]

[24] The General Division did not make an error of jurisdiction in failing to address and decide on the question of the date of onset of the disability, separate from the question of the Claimant's capacity.

[25] When the General Division received the appeal from the Claimant arguing that he was incapacitated before the date of payment and that he should alternatively be granted 15 months of retroactive pension benefits because he was disabled before August 2007, the General Division, in this case, did not have jurisdiction to hear both issues.

[26] The General Division did not have jurisdiction over the question of the date of payment because there was no reconsideration decision from the Minister on that question. There must be a reconsideration decision for the General Division to have jurisdiction on an issue, and, in this case, there was none, so is the General Division had no jurisdiction.

[27] Additionally, if the Claimant was attempting to challenge the date of onset when he requested the reconsideration, he was outside the 90-day limit to appeal the Minister's decision on the question of the date of onset. The Claimant would have needed to request a longer period of time to make his request for reconsideration, and the Minister would have had to apply section

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[17] AD3-8.
[18] When that authority ends, it is sometimes referred to in law as being "*functus officio*."

74.1 of the *Canada Pension Plan Regulations* to exercise discretion to either grant or deny a longer period to make the request.

[28] Ideally, the Minister would confirm with claimants who raise an incapacity claim whether they are also challenging the date of onset and, if they are, advise them of what information is required to do so, if they are past the 90-day limit. The Claimant challenged his date of payment by raising facts about his disability that meant he was disabled long before August 2007. Whether that disability rose to the level of incapacity, or whether the disability was severe and prolonged within the meaning of the *Canada Pension Plan*, requires the application of different legal tests. From the Claimant's perspective, the facts matter and they have an impact on when he is paid. In at least some cases, claimants who appeal their date of payment on the basis of incapacity will not meet the legal test for incapacity, but the same underlying facts they provide do support an earlier date of onset of a severe and prolonged disability. It is important the rights of those individuals are met in a fair and just process with due regard to the need for clear explanations in plain language. The Minister's failure to take that approach, however, does not result in a jurisdictional error by the General Division.

Issue 2: Did the General Division make errors of fact related to the Claimant's ability to work from 2003 to 2006 and related to his earnings in 2005?

[29] The General Division did not make an express finding of fact that the Claimant was "able to work" from 2003 to 2006. The General Division may have misstated the Claimant's earnings in 2005, but that possible mistake did not have an impact on the General Division's decision about whether the Claimant had the capacity to apply during those years, so it is not an error of fact under the DESDA.

[30] The Claimant submits that the General Division made several errors of fact, contrary to section 58(1)(*c*) of the DESDA. The Claimant argues that the General Division misstated that he was able to work from 2003 to 2006. However, the General Division's decision simply acknowledged Dr. Johnston's notes that referenced the Claimant working during those years.[19]

[19] General Division decision, para. 33.

The finding the Claimant alleges the General Division made is not in the decision, and, therefore, there is no error of fact.

[31] The Claimant further argues that the General Division misstated his 2005 earnings in the decision. It does appear that the earnings for 2005 listed in the decision are different from the earnings listed in the Minister's Medical Adjudication document that the Claimant references in the record.[20]

[32] However, the General Division did not base its decision about the Claimant's capacity solely on the Claimant's earnings from that year. The General Division also based its decision about the Claimant's capacity on the benefits that the Claimant claimed during the period in question;[21] a lawsuit the Claimant was involved in;[22] and the medical evidence that showed the Claimant was actively participating in his treatment throughout the claimed period of incapacity.[23] The General Division did not base its decision about the Claimant's capacity solely on a factual finding about his earnings in 2005, so the alleged error is not material, and, therefore, there is no error of fact under the DESDA.

Issue 3: Did the General Division make an error of fact by misconstruing evidence of small improvements in the Claimant's mental health from treatment notes?

[33] The General Division did not make an error of fact by misconstruing evidence of small improvements in the Claimant's mental health from treatment notes.

[34] The Claimant argues that the General Division misconstrued evidence of small improvements in his mental health from treatment notes. The General Division did note these improvements in the evidence section of its decision,[24] but there is no support in the analysis component of the decision that the General Division based its decision that the Claimant did not have the capacity to form or express an intention to apply for the disability pension because he had made minor improvements in his mental health. Because the alleged error of fact is not material, it cannot be an error of fact under the DESDA.

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[20] General Division decision, para.16.
[21] *Ibid*., para. 34.
[22] *Ibid*., para. 35.
[23] *Ibid*., para. 32.
[24] *Ibid*., paras. 20, 21, and 25.

Issue 4: Did the General Division make an error of fact or law by failing to consider the Claimant's overall medical condition?

[35] The Claimant argues that the General Division failed to consider his "overall medical condition." This could amount to an allegation that the General Division made an error of fact by ignoring evidence about his medical condition in determining whether he had the capacity to form the intention to apply. However, the Claimant has not pointed to a specific piece of evidence that the General Division ignored (and the Appeal Division has not identified one either), so there is no error of fact. To the extent that the Claimant may be arguing that the General Division made an error of law in failing to consider his condition in its totality, the General Division did not make this error because it considered the available medical evidence as well as evidence about his activities, which is what is required by law.

[36] In determining whether a claimant had the capacity to form an intention to apply for the Canada Pension Plan disability pension, the General Division considers both medical evidence and evidence about the Claimant's activities during the claimed period of incapacity.[25]

[37] In determining whether the Claimant met the test for incapacity, the General Division considered the available medical evidence as well as the evidence about his activities,[26] as is required by law. There is no error of law that arises from the General Division's approach in that regard.

[38] The Claimant did not identify, and the Appeal Division does not see, any other piece of evidence in the record about the Claimant's overall medical condition that the General Division failed to consider in reaching its decision.

Issue 5: Did the General Division make an error of fact by ignoring evidence that the Claimant experienced delusions that he could return to work?

[39] The Claimant argues that the General Division ignored evidence that he had delusions that he could go back to work. The General Division did not ignore this evidence, and there is no error.

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[25] *Atkinson v Canada (Attorney General)*, 2014 FCA 187.
[26] General Division decision, paras. 31 to 36.

[40] The medical evidence detailed in the General Division decision did not make the connection between delusions and the Claimant's belief that he could go back to work. That connection came from the Claimant's submissions. He took the position that he had believed he could continue his education and work and that his situation was similar to that in another case, called *Weisberg v Canada (Minister of Social Development)*.[27] In *Weisberg*, the Claimant was incapable of appreciating his own deficits, even when told what they were, which rendered him incapable of forming the intent to apply for a disability pension.

[41] The General Division distinguished the Claimant's situation by noting that, unlike *Weisberg*, the Claimant did have the ability to communicate his symptoms, he was actively involved in making decisions about his health, and he was able to apply for sick benefits.[28] The General Division did not make an error of fact in ignoring evidence about the Claimant's delusions.

[42] The Claimant argues that legally the General Division is required to consider medical determinations, and then where medical determinations are not clear, daily living, and that it failed to take that approach and, therefore, committed a legal error. There is some authority for that approach;[29] however, that authority is not binding on the General Division. The Federal Court of Appeal has been clear that both medical evidence and activities can be and are considered.[30] There is no binding authority for the premise that the analysis must follow the order of precedence the Claimant has provided, and, therefore, there is no error of law.[31]

Issue 6: Did the General Division make an error of fact by failing to appreciate that there was no evidence that the Claimant applied for any long-term benefits?

[43] The General Division did not make an error of fact by ignoring any lack of evidence in the record about the Claimant failing to apply for long-term disability benefits.

[44] The Claimant argues that the General Division failed to appreciate that there was no evidence that he applied for any long-term benefits. The General Division expressly referenced

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[27] *Weisberg v Canada (Minister of Social Development)*, 2004, CP21943 (PAB).
[28] General Division decision, para. 37.
[29] *Morrison v Canada (Minister of Human Resources Development)* (May 4, 1997), CP04182 (PAB), at 5 to 6.
[30] *Grosvenor v Canada (Attorney General)*, 2018 FC 36.
[31] *Sedrak v Canada (Social Development)*, 2008 FCA 86; *Slater v Canada (Attorney General)*, 2008 FCA 375; and *Canada (Attorney General) v Danielson*, 2008 FCA 78.

the Claimant's argument about not applying for any long-term benefits in its decision. The General Division determined that, even though he did not apply for long-term disability benefits, there was evidence that the Claimant was able to:[32]

> communicate his symptoms and was actively involved in making decisions about his health and treatment. His ability to appreciate his deficits is also evident in his application for sick benefits and his decision to sue to TTC. The Tribunal therefore does not accept that he was incapable of appreciating his own deficits.

The General Division did not ignore the Claimant's evidence about not having applied for long-term disability benefits; it simply weighed that evidence along with the other evidence and came to a conclusion with which the Claimant does not agree. That does not amount to an error of fact.

CONCLUSION

[45] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	K. K., Appellant Minister of Employment and Social Development, Respondent Stéphanie Pilon, Representative for the Respondent

[32] General Division decision, para. 37.