



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. K. v Minister of Employment and Social Development*, 2019 SST 1466

Tribunal File Number: AD-19-816

BETWEEN:

W. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: December 20, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] W. K. (Claimant) worked as a meat cutter until August 30, 2017 when he could no longer work because of an aneurysm and hydrocephalus. He started to receive his *Canada Pension Plan* (CPP) retirement pension in July 2017, when he was 60 years old. The Minister received the Claimant's application for the CPP disability pension in May 2018. The Minister denied the application for a CPP disability pension initially and on reconsideration.

[3] The Claimant appealed the reconsideration decision to this Tribunal. The General Division decided that the Claimant was not eligible for a disability pension under the CPP because he did not have a severe and prolonged disability by June 2017.

[4] The Claimant appealed the General Division decision to the Appeal Division.

[5] I must decide whether there is an arguable case that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) that would justify granting the Claimant permission (leave) to appeal.

[6] There is no arguable case for an error that would justify granting the Claimant permission to appeal. The application for leave to appeal is refused.

ISSUE

[7] Did the General Division member fail to provide a fair process to the Claimant or otherwise make an error about whether the Claimant is entitled to a disability pension?

ANALYSIS

Reviewing General Division Decisions

[8] The Appeal Division does not give the Minister or the Claimant the chance to re-argue their case in full again at a new hearing. Instead, the Appeal Division is focussed on reviewing the General Division's decision to decide whether there are errors. The only errors that allow the Appeal Division to grant leave to appeal are those that are listed in the DESDA. These errors are referred to as the "grounds of appeal."

[9] The DESDA says that it is an error when the General Division fails to observe the principles of natural justice, or acts beyond or refuses to exercise its jurisdiction.¹

[10] The principles of natural justice focus on the fairness of the process. What fairness requires in each case will depend on a variety of factors.²

[11] The General Division only has the powers that are set out in the laws it applies. If a General Division member decides something that they do not have the authority legally to decide, that is acting beyond jurisdiction. If the General Division fails to make a decision that it was required legally to make, that is refusing to exercise jurisdiction.

[12] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.³ To meet this requirement, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.⁴ That is a low test to meet.

Cancelling a Retirement Pension to Start a Disability Pension Instead

[13] The CPP provides a path for claimants to cancel a benefit after they have already started receiving it.⁵ However, the CPP also says that there is an exception to this rule that allows for cancelling a benefit. A claimant cannot cancel a retirement pension in order to start a disability

¹ DESDA, s 58(1).

² The Supreme Court of Canada explained this in a case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

³ DESDA, s 58(2).

⁴ The Federal Court described this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁵ *Canada Pension Plan*, s 66.1(1).

pension if the person was considered (deemed) to be disabled for the purpose of the disability pension in or after the month that they started receiving the retirement pension.⁶ In other words, you can cancel your retirement pension for a disability pension if your disability was already severe and prolonged when you started receiving your retirement pension. If you did not have a severe and prolonged disability when you started your retirement pension, you cannot cancel your retirement pension in favour of a disability pension.

Did the General Division make an error about whether the Claimant is entitled to a disability pension?

[14] There is no arguable case that the General Division member made an error about fair process or about what she can decide (jurisdiction) when she refused to allow the Claimant to cancel the retirement pension and receive a disability pension instead.

[15] The General Division member decided that the Claimant cannot cancel his retirement pension in favour of a disability pension. To do that, a claimant has to be disabled before the retirement pension was payable. The Claimant started receiving his CPP retirement pension in July 2017. If he wanted to cancel his retirement pension to access a disability pension instead, he had to show that he had a severe and prolonged disability on or before June 30, 2017. But the Claimant testified and agreed that he did not have a disability by June 30, 2017.⁷ He had a brain aneurysm in August 2017 and hydrocephalus in 2018. He was working in June and July of 2017.

[16] Understandably, this is a difficult outcome for the Claimant to accept. He paid into CPP. He has a disability. He would prefer to have his retirement pension cancelled so that he can receive the disability pension instead. If he had not applied for the retirement pension at all, he would have had the chance to prove that he had a severe and prolonged disability on or before the end of his minimum qualifying period (MQP)⁸, which ended on December 31, 2020.⁹ Instead, he applied for the retirement pension. Only later he learned that he could ask to cancel it and apply instead for a disability pension. He found out he needed to ask to make the change within 15 months of starting his retirement pension, and he met that deadline.

⁶ *Canada Pension Plan*, s 66.1(1.1).

⁷ General Division decision, para 9.

⁸ The MQP is calculated based on the claimant's contributions to the Canada Pension Plan.

⁹ GD2-29.

[17] But because he was cancelling a retirement pension in favour of a disability pension, the exclusion in the CPP applied. He had to show that he had become disabled by the end of June 2017, that is, before he started receiving his retirement pension. He cannot meet that test because his evidence shows that his disability became severe and prolonged in August 2017, the month after he started his retirement pension.

[18] The Claimant argues that all of this is unfair because of course he had no control over when he became disabled, and he did not think he would be eligible for the disability pension when he applied for the retirement pension. The Claimant argues that the fact that the General Division does not seem to be able to exercise any discretion (or choice) to apply the rules differently in his case amounts to an unfair process, or a violation of natural justice.¹⁰ It is especially difficult to accept the outcome here because the Claimant became disabled so soon after he applied for the retirement pension.

[19] In my view, the Claimant has no reasonable chance of success on appeal. The General Division only has the powers set out for it in the law. The fact that the General Division cannot apply the rules differently for the Claimant does not amount to an unfair process. In fact, exercising discretion where there is none in law would amount to an error under the DESDA by acting beyond jurisdiction.

[20] I have reviewed the record. I am satisfied that the General Division member did not ignore or misunderstand the evidence about when the Claimant became disabled or when he applied for the retirement pension and then the disability pension. The General Division applied the law to the Claimant's situation and decided that he cannot cancel his retirement pension in favour of a disability pension. The Claimant has no reasonable chance of success on appeal on this issue.

¹⁰ AD1-1.

CONCLUSION

[21] The application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	W. K., self-represented
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