



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JM v Minister of Employment and Social Development*, 2020 SST 884

Tribunal File Number: AD-20-799

BETWEEN:

J. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: October 15, 2020

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] J. M. (Claimant) began to receive a Canada Pension Plan disability pension in 1995 because he has HIV and AIDS. The Minister of Employment and Social Development (as it is now called) later investigated and decided that the Claimant ceased to be disabled on September 1, 2006, and stopped payment of this pension. The Claimant appealed this decision, and in 2017, his last appeal on the issue of whether he ceased to be disabled by September 1, 2006, was dismissed. Therefore, the decision that the Claimant was not disabled as of September 1, 2006, is final.

[3] The Claimant also appealed the Minister's decision regarding whether he was disabled after that time to the Tribunal.

[4] The Claimant's minimum qualifying period (MQP – the date by which a claimant must prove that they are disabled in order to receive the disability pension) ended on December 31, 2007. Therefore, the Tribunal's General Division had to decide whether the Claimant became disabled between September 1, 2006, and December 31, 2007. It decided that he did not and dismissed the Claimant's appeal.

[5] Leave to appeal the General Division's decision that the Claimant did not become disabled between September 1, 2006, and December 31, 2007, is refused. The appeal does not have a reasonable chance of success on the basis that the General Division made any reviewable error.

ISSUES

[6] Does the appeal have a reasonable chance of success because the General Division based its decision on at least one of the following important factual errors

- a) The General Division did not have regard for Dr. Labrie's report, or further ask for evidence about this medical appointment?
- b) Regarding the Claimant's absences from work and accommodations required?
- c) That the Claimant's receipt of employment insurance (EI) benefits demonstrated a capacity to work?

[7] Does the appeal have a reasonable chance of success because the General Division failed to consider that the Claimant had a hearing attack in 2019?

[8] Does the appeal have a reasonable chance of success because the General Division failed to provide a fair process by its delay in dealing with the matter?

ANALYSIS

[9] An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only decide whether the General Division:

- a) Failed to provide a fair process;
- b) Failed to decide an issue that it should have, or decided an issue that it should not have;
- c) Made an error in law; or
- d) Based its decision on an important factual error.¹

[10] However, a claimant must first obtain leave (permission) to appeal. Leave to appeal to the Appeal Division must be refused if the appeal does not have a reasonable chance of success.² Therefore, to be granted leave to appeal the Claimant must present at least one ground of appeal (reason for appealing) that the Appeal Division can consider and on which the appeal has a reasonable chance of success.

¹This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*

² *Department of Employment and Social Development Act* s. 58(2)

Failure to provide a fair process

[11] The Tribunal must provide parties with a fair process. This means that every party who appears before the Tribunal must have the opportunity to present their legal case, to know and answer the other party's legal case, and to have a decision made by an impartial decision maker based on the law and the facts.

[12] The Claimant says that the General Division failed to provide a fair process because of delay in finalizing his matter. Approximately ten years has elapsed since the Minister investigated and decided that he was not disabled. However, many legal steps have been taken during this time. The Claimant has launched appeals, and they have been heard.

[13] The Claimant's notice of appeal for this appeal was filed with the Tribunal on June 11, 2019. The regulations that govern this Tribunal state that parties then have 365 days to prepare their appeal, or they can file a Notice of Readiness if they can proceed sooner. The Claimant did not file a Notice of Readiness. The parties were given notice of the hearing date and time in a document dated June 11, 2020.³ The hearing was scheduled approximately one month after that. This does not point to any undue delay.

[14] In addition, there is no requirement that appeals before this Tribunal be heard within a specific time.

[15] Therefore, the appeal does not have a reasonable chance of success on this basis.

Important factual errors

[16] The Claimant also says that the appeal should be allowed because the General Division based its decision on a number of important factual errors. To succeed on this basis on appeal the Claimant will have to prove three things:

- a) that a finding of fact was erroneous (in error);

³ GDO

- b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) that the decision was based on this finding of fact.⁴

[17] The first findings of fact that the Claimant says were made in error are regarding Dr. Labries's evidence and the Tribunal's failure to obtain further evidence from him. However, the decision states that the Claimant refused to provide consent for the Minister to obtain further medical information regarding the time period in question.⁵ Without this, the General Division could not determine if the Claimant's medical conditions prevented him from working during the relevant time. That the General Division did not consider evidence that the Claimant refused to present does not point to it having made any error.

[18] Similarly, the failure of the General Division to ask the Claimant about a meeting with Dr. Labrie does not point to it having based its decision on an important factual error. It is not for the Tribunal to elicit evidence from parties; it is for each party to present their evidence so that the Tribunal can make a decision.

[19] Therefore, the appeal does not have a reasonable chance of success on this basis.

[20] The Claimant also says that the General Division based its decision on an important factual error regarding his absences from work and accommodations that he required there. It is true that the General Division decision does not refer to this. However, it is not necessary for the General Division to refer to each and every piece of evidence that is presented to it. It is presumed to have considered all of the evidence.⁶ The failure to specifically refer to this evidence does not point to the General Division having made an important factual error. Therefore, the appeal does not have a reasonable chance of success on this basis.

[21] Finally, the Claimant says that the General Division based its decision on an important factual error that he received regular EI when in fact he received sick EI and so was not required to be ready and able to work at that time. The General Division decision states that a person who

⁴ *Department of Employment and Social Development Act* s. 58(1)(c)

⁵ General Division decision at para. 11

⁶ *Simpson v. Canada (Attorney General)*, 2012 FCA 82

receives regular EI benefits is ready and willing to work.⁷ However, the decision was not based on this. It was based on the Claimant's entire work record during the relevant time. This included part-time work cleaning airplanes and delivering food to planes. It also considered his attendance at these jobs, including his ability to work extra hours when requested.

[22] Therefore the appeal does not have a reasonable chance of success on this basis

CONCLUSION

[23] Leave to appeal is refused for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVE:	J. M., Self-represented
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⁷ General Division decision at para. 24