



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *VK v Minister of Employment and Social Development*, 2021 SST 67

Tribunal File Number: AD-21-29

BETWEEN:

V. K.

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: February 22, 2021

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] V. K. (Claimant) completed high school and earned a number of professional designations, including financial planner, and chartered life underwriter. He was in a very serious car accident in 2014. In January 2017, the Claimant applied for a Canada Pension Plan disability pension. The Minister of Employment and Social Development granted the application, and awarded the Claimant the maximum retroactivity of payment possible based on the date he applied for the pension.

[3] The Claimant appealed the decision regarding when payment of the pension began to the Tribunal. The Tribunal's General Division dismissed the appeal. The Claimant appealed this decision to the Tribunal's Appeal Division. The Appeal Division returned the matter to the General Division for reconsideration because the General Division had failed to provide a fair process.

[4] The General Division again dismissed the appeal. The decision states that further retroactive payment could only be made if the Claimant was incapable of forming or expressing an intention to make the application before he did so.¹ It decided that the Claimant was not so incapable.

[5] The Claimant now requests leave (permission) to appeal this General Division decision to the Tribunal's Appeal Division. He says that the General Division was biased, and that it based its decision on a number of important factual errors. Leave to appeal is refused because the appeal does not have a reasonable chance of success.

¹ See section 60 of the *Canada Pension Plan*

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) That the Claimant could drive and kept his driver's licence;
- b) That the Claimant was driven places and attended to by a friend;
- c) That the Claimant did not require a Power of Attorney;
- d) That there was no evidence that the Claimant could not make medical decisions;
- e) That the Claimant saw Dr. Siddiqui and Dr. Chue against his wishes;
- f) That it took a long time to convince the Claimant to attend specific therapies;
- g) That no medical doctor has said that Claimant is capable of forming or expressing an intention to make an application;
- h) That the General Division put limited weight on a particular medical assessment, and greater weight on other medical assessments;
- i) That the Claimant was mistaken when he said that someone else was the primary caretaker for his children;
- j) That the Claimant was not able to function after the accident due to sleep deprivation;
or
- k) That the General Division placed no emphasis on his headaches, tinnitus or other physical injuries.

[7] Does the appeal have a reasonable chance of success because the General Division was biased?

ANALYSIS

Legal issue in this appeal

[8] The *Canada Pension Plan* disability pension begins to be paid after a claimant is disabled. A claimant cannot be deemed to have become disabled more than 15 months before the time they applied for the pension.² However, there is an exception to this rule. A claimant may be deemed to be disabled earlier if they were incapable of forming or expressing an intention to make the application for a continuous period before they did so.³ This is a difficult legal test to meet. It is set out correctly in the General Division decision.⁴ The General Division decided that the Claimant did not meet this test. The Claimant now seeks leave to appeal this decision.

Grounds of appeal

[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.⁵

[10] However, a claimant must first obtain leave (permission) to appeal. The Appeal Division must refuse leave to appeal if the appeal does not have a reasonable chance of success.⁶ This is

² Section 42(2)(b) of the *Canada Pension Plan*

³ Sections 60(8) to 60(10) of the *Canada Pension Plan*

⁴ General Division decision at para. 10

⁵ This paraphrases the grounds of appeal set out in section 58(1) of the *Department of Employment and Social Development Act*

⁶ Section 58(2) of the *Department of Employment and Social Development Act*

an easier legal test to meet than what is required at the hearing of the appeal. The Claimant need not prove that it is more likely than not that his appeal will succeed, only that there is a reasonable chance that it will do so.

Important factual errors

[11] The Claimant says that the appeal has a reasonable chance of success because the General Division based its decision on a number of important factual errors. To succeed on this basis on the merits of the appeal, the Claimant will have to prove three things for each factual error. They are that

- a) the finding of fact was erroneous (wrong);
- b) the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) the decision was based on this finding of fact.⁷

[12] A number of the findings of fact that the Claimant says are wrong are correct, and based on the Claimant's evidence. They are as follows:

- a) The Claimant was able to drive.⁸ The Claimant does not dispute this, but argues that he chose not to drive, and had others take his places. However, if the Claimant kept his licence, he was able to drive. This finding of fact was not made in error.
- b) The Claimant was attended to by a friend. The General Division decision acknowledges this. The decision states that the Claimant required help with cooking, housekeeping, and grocery shopping.⁹ In addition, for at least 5 months after the accident the Claimant had full-time help from a friend.¹⁰ Therefore, no error was made regarding this finding of fact.

⁷ Section 58(1)(c) of the *Department of Employment and Social Development Act*

⁸ General Division decision at para. 16

⁹ General Division decision at para. 16

¹⁰ General Division decision at para. 15

- c) The Claimant did not require a Power of Attorney. This finding of fact is correct. The Claimant acknowledges this in the application to the Appeal Division. He states that although he had this document it was not relied on.¹¹

Because these findings of fact were not wrong, the appeal has no reasonable chance of success on these bases.

[13] The Claimant also argues that errors were made with respect to some of the medical evidence. They are

- a) That there was no medical evidence that the Claimant could not make medical decisions. The General Division analyzed the evidence about this. For example, the decision refers to the Claimant's documents that list his numerous symptoms, as well as medical reports penned by doctors who treated him and were hired by the insurance company. There is an evidentiary basis for the finding of fact that the Claimant directed his medical care and made medical decisions.¹² Therefore, this finding of fact was not wrong.
- b) The Claimant says that the medical evidence should have been weighed differently. For example, he argues that Dr. Siddiqui and Dr. Chue were consulted as part of an insurance claim and so their reports should have less weight. He also disagrees with the weight given to the declaration of incapacity that Dr. Khan prepared.¹³ However, disagreement with the weight that the General Division gave to evidence is not a ground of appeal that the Appeal Division can consider. It is for the General Division to accept the evidence from the parties, weigh it, and make a decision based on the law and the facts. It is not for the Appeal Division to reweigh the evidence to reach a different conclusion.¹⁴ This ground of appeal does not point to any important factual error.

¹¹ ADN1-3

¹² General Division decision at para. 24

¹³ General Division decision at para. 19

¹⁴ *Simpson v. Canada (Attorney General)*, 2012 FCA 82

[14] The Claimant also says that the General Division's finding of fact that he told Service Canada that someone else was the primary caregiver for his children was an error. However, the decision was not based on who primarily cared for the children. Rather, it was based, in part, on the fact that the Claimant was able to have contact with Service Canada and provide relevant information. The General Division made no error about this.

[15] Finally in this regard, the Claimant argues that the General Division based its decision on errors regarding his sleep deprivation, and failed to consider his other physical conditions. The General Division found as fact that Claimant has physical and sleep conditions, and that they impact his cognition.¹⁵ By raising this ground of appeal, the Claimant is asking the Appeal Division to reweigh the evidence to reach a different conclusion. This is not a ground of appeal that the Appeal Division can consider.

[16] I have read the General Division decision and the written record. The General Division does not overlook or misconstrue any important information.

[17] For these reasons, the appeal does not have a reasonable chance of success on the basis that the General Division based its decision on an important factual error.

Bias

[18] The General Division must provide a fair process. This means that each party must have the opportunity to present their case and answer the other party's legal case. It also means that the decision maker must be independent and unbiased. The Claimant says that the General Division was biased, and was predisposed to find against the Claimant.

[19] Decision makers are presumed to be unbiased.¹⁶ The presumption can be rebutted. The legal test for bias is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide

¹⁵ General Division decision at para. 14

¹⁶ *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369

fairly".¹⁷

[20] The mere allegation of bias is not enough. There must be some evidence to support the allegation. The Claimant says that the factual errors made in the decision show that the General Division was biased. However, the appeal does not have a reasonable chance of success on the basis that the General Division made any important factual errors. Since this is the basis of the Claimant's argument that the General Division was biased, this ground of appeal also fails to have a reasonable chance of success.

[21] There is no suggestion that the General Division made an error in law.

CONCLUSION

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

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVE:	Loretta Edlund, Counsel for the Applicant
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¹⁷ *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369