



Citation: *HL v Minister of Employment and Social Development*, 2022 SST 584

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: H. L.

Respondent: Minister of Employment and Social Development
Representative: Rebekah Ferriss

Decision under appeal: General Division decision dated December 15, 2021
(GP-21-1653)

Tribunal member: Neil Nawaz

Type of hearing: Teleconference

Hearing date: June 14, 2022

Hearing participants: Appellant
Respondent
Respondent's representative

Decision date: July 4, 2022

File number: AD-22-167

Decision

[1] The appeal is dismissed.

Overview

[2] The Claimant is a 56-year-old former accounts receivable clerk. She had a series of back injuries in the 1990s and has since been diagnosed with a wide range of medical conditions. She applied for a CPP disability pension in February 2019. The Minister approved the application starting March 2018 — 11 months before the application date and the maximum retroactive payment usually allowed by the law.

[3] However, the Claimant thought that her disability pension should have started earlier. She appealed to the Social Security Tribunal's General Division, claiming that she had been previously incapacitated from applying for the pension. In particular, she claimed that she was incapacitated from October 2014, the last time she worked, to February 2019, when she ultimately did make the application. She cited back and abdominal pain as the causes of her incapacity, as well as a cancer diagnosis and subsequent surgery. She also cited the effects of medications that she was taking for these conditions.¹

[4] The General Division saw no reasonable chance of success for the Claimant's appeal. It summarily dismissed her appeal because it found no evidence that she was "incapable of forming or expressing an intention to make an application"² during the nearly four year period between October 2014 and February 2019.³

[5] The Claimant is now appealing the summary dismissal to the Tribunal's Appeal Division. She complains that the General Division did not give her a hearing. She

¹ See Claimant's notice of appeal to the General Division dated July 21, 2021, GD1. See also her reply dated November 25, 2021 (GD4) to the General Division's notice of intent to summarily dismiss.

² This quotes the standard for incapacity found in section 60(9) of the *Canada Pension Plan*.

³ In paragraph 8(c) of its decision, the General Division suggested that the Claimant was claiming that her period of incapacity ended in October **2017**, rather than October **2019**. Since the General Division demonstrated elsewhere that it was aware the Claimant applied for the disability benefit in October 2019, I am satisfied that its misstatement of the year was no more than a typographical error.

alleges that the General Division misapplied the *Canada Pension Plan's* incapacity provision.

[6] Last month, I held a hearing by teleconference to discuss the Claimant's allegations. Now that I have considered submissions from both parties, I have concluded that the Claimant's allegations do not justify overturning the General Division's decision.

Issues

[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 use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.⁴

[8] As I see them, the issues in this appeal are as follows:

- Did the General Division apply the correct test for summary dismissal?
- Did the General Division misinterpret the incapacity provision?
- Did the General Division provide sufficient reasons for its decision?

[9] 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 General Division did not make any errors.

Analysis

The General Division applied the correct test for summary dismissal

[10] The General Division disposed of the Claimant's appeal in the appropriate way. In its decision, the General Division correctly stated that it could summarily dismiss an

⁴ See *Department of Employment and Social Development Act* (DESDA), section 58(1).

appeal if it had no reasonable chance of success.⁵ I am satisfied that the General Division understood the legal test and properly applied it to the facts.

[11] The threshold for summary dismissal is high.⁶ It is not enough to consider the merits of a case in the parties' absence and then find that the appeal cannot succeed. A decision-maker must determine whether it is **plain and obvious** on the record that the appeal is bound to fail.⁷ The question is **not** whether the decision-maker must dismiss the appeal after giving full consideration to the facts, the case law, and the parties' arguments. Rather, the question is whether the appeal is **destined to fail**, regardless of whatever evidence or arguments might be submitted at a hearing.

[12] In this case, the General Division dismissed the Claimant's appeal because:

- The test for incapacity goes to a claimant's mental, rather than physical, condition; and
- None of the Claimant's conditions affected her mental functioning.

[13] In doing so, the General Division correctly applied a high threshold, concluding that the appeal had "no reasonable chance of success." For reasons that I will explain in more detail, it was plain and obvious on the record that the Claimant was bound to fail.

The General Division did not misinterpret the capacity provision

– The test for incapacity is strict

[14] Under the *Canada Pension Plan*, disability and incapacity are two different concepts. One is an inability to regularly pursue a substantially gainful occupation; the other is an inability to form or express an intention to make an application for benefits. The second is generally much harder to prove than the first.

⁵ See General Division decision, paragraph 3, citing DESDA section 53(1).

⁶ See *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; *Breslaw v Canada (Attorney General)*, 2004 FCA 264.

⁷ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[15] The *Canada Pension Plan's* incapacity provision is precise and focused. It does not require consideration of the capacity to make, prepare, process, or complete an application for benefits but only the ability to make or communicate a decision to do so.⁸ Capacity is to be considered in light of the ordinary meaning of the term and determined based on the medical evidence and on the claimant's activities. That capacity is similar to the capacity to form or express an intention with respect to other life choices that present themselves to a claimant.⁹

– ***Blue* does not apply to the Claimant**

[16] At the hearing, we discussed a recent Federal Court of Appeal case called *Blue*, which involved a claimant who was functional in many ways (for instance, she was raising her young daughter as a single mother) yet was still found to be incapacitated for CPP purposes.¹⁰ The Claimant argued that she was no less incapacitated than Ms. Blue, but in my view the two cases differ in a key aspect. Ms. Blue introduced specific psychiatric evidence that the very thought of having to formally document her mental health issues before a government authority sent her into a paralyzing dissociative state. The Claimant in this case has no comparable evidence.

[17] The Court made it clear that *Blue* was exceptional:

Before concluding, it must be noted that this is a most unusual case. In many cases, the ability of an individual to carry on ordinary life activities may well be indicative of their capacity to formulate or express the intent to apply for a disability pension. However, in this case, Ms. Blue's disability, while severe, is narrowly focussed, with both her trauma and her mental health issues arising out of or relating to engagement with hospitals, the medical profession and persons in authority.¹¹

[18] As if to reinforce that point, the Federal Court of Appeal soon issued a decision in a case called *Walls* that upheld a finding of capacity even though the claimant suffered

⁸ See *Canada (Attorney General) v Danielson*, 2008 FCA 78.

⁹ See *Sedrak v Canada (Social Development)*, 2008 FCA 86.

¹⁰ *Blue v Canada (Attorney General)*, 2021 FCA 211.

¹¹ See *Blue* at paragraph 45.

from physical and mental impairments that put him into a “vegetative zombie-like mental state.”¹² In that case, the Court found that Mr. Walls, unlike Ms. Blue, did not produce the kind of psychological evidence needed to discount his day-to-day activities during his claimed period of incapacity.

[19] In my view, *Blue* has no bearing on the Claimant’s case.

– **There was no evidence that any of the Claimant’s medical conditions affected her mental functioning**

[20] It was up to the Claimant to prove that she was incapacitated.¹³ She also had to show that the period of claimed incapacity was continuous.¹⁴ The Claimant’s original application for disability,¹⁵ prepared before her pension start date became an issue, reveals much about her capacity to form or express an intention to make an application. In the application, the Claimant declared she was unable to work because of the following medical conditions:

- Degenerative disc disease, resulting in neck and back pain;
- Pelvic pain;
- Crohn’s disease;
- Endometriosis;
- Stomach hernia;
- Liver enlargement; and
- Uterine cancer.

[21] In November 2017, the Claimant was diagnosed with a stage 1A adenocarcinoma of the endometrium, for which she underwent a hysterectomy. Cancer is a serious diagnosis but, like the other conditions listed in the Claimant’s application, it is essentially physical. It does not by itself affect mental functioning — certainly not to the extent that it would prevent a person from forming an intention to seek out

¹² See *Walls* (note 13) at paragraph 12.

¹³ See *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

¹⁴ See *Canada Pension Plan*, section 60(10).

¹⁵ See Claimant’s application for benefits dated February 6, 2019, GD2-23.

government benefits. There is ample case law suggesting that incapacity is strongly associated with a mental or psychiatric condition.¹⁶

[22] The Claimant told the General Division that she was incapacitated by stress and anxiety related to her medical conditions, particularly her cancer. She also said that her medications impaired her ability to focus.¹⁷ However, none of that proves she was incapacitated. The Claimant may have experienced psychological trauma from her health problems and from side effects related to her drugs, but the General Division had good reason to doubt that they continuously prevented her from forming or expressing an intention to apply for benefits between October 2014 and February 2019.

[23] In her application for benefits, the Claimant disclosed that she was taking university courses as late as May 2017.¹⁸ Her medical records contain no suggestion that she has ever suffered from cognitive deficits. She has consulted many medical specialists over the years but has never seen a psychiatrist or neurologist.¹⁹ Her family physician, Dr. Toor, prepared a summary of the Claimant's medical history, but she did not mention any mental or psychological issues.²⁰

[24] Dr. Toor's office notes provide a detailed narrative of the Claimant's symptoms, diagnoses, and treatments in 2016 and 2017, but they contain no suggestion of incapacity as defined by the *Canada Pension Plan*. In April 2016, Dr. Toor noted that the Claimant was "well oriented to time and place."²¹ In August 2016, Dr. Toor noted that the Claimant was "tired" and had "no energy," but the family physician did not say anything about her patient's stress levels, nor did she suggest that she was incapable of managing her affairs.²² Dr. Toor's files also contain a letter from a general surgeon, in

¹⁶ See for example *Canada (Attorney General) v Poon*, 2009 FC 654; *Hussein v Canada (Attorney General)*, 2016 FC 1417; and *Walls v Canada (Attorney General)*, 2022 FCA 47.

¹⁷ See Claimant's reply to notice of intent to summarily dismiss, November 25, 2021, GD4-2.

¹⁸ See Claimant's application for benefits, GD2-40.

¹⁹ In her application for benefits, the Claimant indicated that she had received intermittent psychological and mindfulness counselling since 2017. See GD2-30.

²⁰ See letter dated September 10, 2019 by Dr. Namrata Toor, family physician, GD2-71.

²¹ See Dr. Toor's office note dated April 28, 2016, GD2-92.

²² See Dr. Toor's office note dated August 30, 2016, GD2-89.

which there is a clear indication that the Claimant consented to an invasive medical procedure: “The usual risks of infection, bleeding and scarring were discussed.”²³

[25] Moreover, the Claimant has never explained how, if she was incapacitated, her period of incapacity ended. The Claimant eventually did submit an application for disability benefits, but it is not clear from the medical record what led to her recovery. Did she experience a sudden upturn in her mental condition? If so, why? Given the Claimant’s medical history, it is far more likely that the Claimant was not incapacitated but simply unaware of the CPP disability pension until February 2019.

The General Division provided sufficient reasons for its decision

[26] The General Division’s reasons are admittedly brief. Even so, I am satisfied that they sufficiently explain why the General Division reached the conclusion that it did.

[27] According to the Supreme Court of Canada, decisions must be (i) based on an internally coherent and rational chain of analysis, and (ii) justified in relation to the facts and law.²⁴ In this case, the General Division correctly stated the legal test for incapacity (“inability to form or express an intention to apply”²⁵) and then highlighted two essential points:

- Capacity involves a much more stringent legal test than disability: and
- The test involves the mental, rather than physical, ability to apply.

[28] The Claimant’s medical conditions were almost entirely physical in nature. There was no medical evidence about her mental or psychiatric history. As such, the General Division’s rationale for its decision can be readily inferred from the record.²⁶ The General Division did not need to analyze the available medical evidence in detail because most of it had little bearing on the issue at hand. For that reason, the General Division’s reasons were no longer than they needed to be.

²³ See letter dated September 6, 2017 by Dr. John Kortbeek, general surgeon, GD2-125.

²⁴ See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 85.

²⁵ See General Division decision, paragraph 9.

²⁶ See *Vavilov*, paragraph 98.

Conclusion

[29] The Claimant has not shown that the General Division erred in finding that she was not incapacitated from October 2014 to February 2019.

[30] The appeal is therefore dismissed.



Member, Appeal Division