



Citation: *DS v Minister of Employment and Social Development*, 2022 SST 1358

Social Security Tribunal of Canada Appeal Division

Decision

Applicant (Claimant):
Representative:

D. S.
J. S.

Respondent:

Minister of Employment and Social Development

Decision under appeal:

General Division decision dated October 19, 2022
(GP-22-1068)

Tribunal member:

Kate Sellar

Decision date:

November 22, 2022

File number:

AD-22-778

Decision

[1] I am granting leave (permission) to appeal. I am also allowing the appeal. The General Division made errors. To fix the errors, I will give the decision that the General Division should have given by granting the Claimant's extension of time. The matter then returns to the General Division for a hearing on the issue of whether the Claimant was incapable of forming an intention to apply for the *Canada Pension Plan* (CPP) disability pension earlier than he did.

Overview

[2] D. S.(Claimant) has had a lot of trauma in his life.

[3] The Claimant qualified for a disability pension because he proved that his disability was severe and prolonged on or before December 31, 2017 (the last day of his coverage period).

[4] No matter when the Claimant's disability actually started, the earliest that payments for a disability pension can start is 11 months before the month the Claimant applied (the 11-month rule). The Claimant applied on January 7, 2021. That means the earliest his payments can start is 11 months before then, which is February 2020.¹

[5] The Claimant appealed the Minister's decision granting his disability pension. He explained to the General Division of this Tribunal that he wanted his payments to start back to 2017.

[6] The General Division decided that the Claimant's appeal was late. The General Division had a pre-hearing conference (a meeting). At that meeting, the General Division talked about an exception to the 11-month rule, which happens when a person does not have the capacity to form or express an intention to apply earlier.² The General Division did not have a hearing on that issue. The General Division decided

¹ The 11 months I'm talking about comes from combining two rules. One rule is that a person can't be considered disabled under the CPP any earlier than 15 months before they made their application for the disability pension. The second rule is that payments always start 4 months after the person is considered disabled under the CPP.

² See section 60(8) of the *Canada Pension Plan* (CPP).

that the Claimant couldn't have an extension of time to appeal because he did not have an arguable case on appeal. That means he had no reasonable chance of succeeding in his appeal to make the disability payments start earlier than February 2020.

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

The parties agree on the outcome of the appeal

[8] I invited the parties to settlement conference. At the settlement conference, the parties agreed that:

1. The Claimant **did** have an arguable case on appeal.
2. I should give the Claimant permission to appeal.
3. I should allow the Claimant's appeal.
4. I should give the decision that the General Division should have given by doing two things:
 - **First**, I should grant the Claimant the extension of time to appeal to the General Division because the Claimant had an arguable case.
 - **Second**, I should return the appeal to the General Division on the remaining issue of whether the Claimant was incapable of forming or expressing the intention to apply for the CPP disability pension earlier than January 2021.

I accept the proposed outcome

[9] I accept fully the proposed outcome.

[10] The parties did not have an agreement about what error the General Division made, so I will need to provide my reasons about that issue.

[11] In my view, the General Division made an error by failing to provide a fair process, and they made an error of fact.

– **Fair process error**

[12] First, the General Division failed to give the Claimant a fair process. The General Division invited the Claimant to a pre-hearing conference because the General Division had concerns about the Claimant's case. More specifically, it appeared that the Claimant already received the disability pension payments on the earliest date possible given that he applied in January 2021 (based on the 11-month rule). The invitation to the pre-hearing conference did not mention the exception to that rule in terms of incapacity.

[13] During the pre-hearing conference, the General Division member did give some explanation about incapacity. The Claimant did not have a representative with any legal training. The General Division member didn't make it sufficiently clear to the Claimant how incapacity fit into the pre-hearing conference and the wider steps in the appeal.

[14] What fairness requires depends on the circumstances.³ In this case, the Claimant did not have a legal representative. He was at a pre-hearing conference about the late appeal.

[15] In my view, the General Division didn't clearly explain to the Claimant what his options were if he was arguing that he was incapable of forming or expressing the intention to apply for the disability pension earlier. Was the General Division accepting arguments during the pre-hearing conference about whether the Claimant had an arguable case on the issue of incapacity? Would the General Division allow the Claimant more time (an adjournment) to provide evidence on that question before the General Division made its decision on the extension of time?

[16] In my view, the Claimant communicated an interest in making those arguments during the pre-hearing conference. It wasn't clear what his process options were, given the existence of the incapacity exception in the law that the General Division had just told him about. The General Division made an error by failing to provide a fair process.

³ The Supreme Court of Canada explained this in a case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699.

– **Error of fact : ignoring evidence**

[17] Second, the General Division made an error of fact by ignoring some of the Claimant's evidence from his psychologist that was important to the question of incapacity.

[18] To follow the law when it comes to errors of fact, I must assume that the General Division considered all of the evidence, even if the General Division didn't discuss it all in the decision.⁴ However, the Claimant overcomes that assumption here because this evidence was so important that not discussing means I assume the General Division ignored it.⁵

[19] In the decision on the extension of time, the General Division said that the medical evidence in the file does not show incapacity under the CPP.⁶ But General Division did not mention the letter from the Claimant's psychologist, which says:⁷

- His diagnostic profile, taken in totality, is debilitating
- It is my clinical impression he experienced cognitive decline secondary to his diagnosis.
- He frequently experiences suicidal ideation.
- There is extremely poor memory and concentration.
- In addition to his debilitating psychological profile, he has significant medical issues which I am sure are well documented.
- He struggles to function daily.
- His wife has most of the responsibility for household and family needs.

⁴ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

⁵ See *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

⁶ See paragraph 13 in the General Division decision.

⁷ See GD2-111.

- He is markedly restricted in performing the mental function necessary for everyday life 100% of the time.

[20] It was an open question whether this medical document from the psychologist was medical evidence that was relevant as to whether the Claimant had an arguable case for incapacity under the CPP. It spoke directly to the Claimant's mental function for everyday life. The fact that the General Division didn't mention it in the discussion about whether the Claimant had an arguable case on appeal leads me to infer that the General Division ignored it.

Fixing the error

– Giving the decision on the extension of time

[21] I grant the Claimant's extension of time. I adopt the General Division's analysis about all of the factors for granting an extension of time except for the analysis about whether the Claimant had an arguable case.

[22] In my view, the Claimant has an arguable case. The Claimant had some evidence in the record about his mental state from the psychologist. The "arguable case" requirement is a low bar, and the Claimant met it. The psychologist's letter showed that the Claimant had an argument to make on appeal about whether he was capable of the mental functions in everyday life, which could include applying for CPP disability benefits.

[23] In my view, the arguable case is the most important factor in this file for deciding the extension of time. It is in the interests of justice to grant the extension of time this appeal.

– Returning the question about capacity to the General Division

[24] When the General Division makes an error about fair process, usually the way to fix that is to allow the Claimant to have a "do-over" on the part of the process that was unfair.

[25] Now that I have granted the extension of time, the fix (remedy) is to allow the Claimant the chance to get ready for and then have a full hearing at the General Division about incapacity.

[26] The parties know that the General Division can:

- Accept testimony from the Claimant and from his wife about what kinds of activities he was (and was not) capable of doing before he applied for the disability pension.
- Consider the medical evidence they already have from the psychologist.
- Allow the psychologist to testify.
- Allow the psychologist to provide more evidence about the Claimant's capacity on the Service Canada form if he wants to.⁸

Final Note

[27] The Claimant is a person with a severe and prolonged disability. His psychologist's letter says his disability is debilitating. The letter talks about how his disability affects his ability to think, remember, concentrate, and function.

[28] It seems to me that the Claimant hasn't found the Tribunal's process particularly easy to handle or understand.

[29] The Claimant agreed to have his appeal go back to the General Division next. It was important to him to be clear that this doesn't mean he lost his appeal. It means he agreed to have a chance to give the Tribunal **all** the evidence necessary to decide whether he was able to form or express the intention to apply for the disability pension earlier.

⁸ The parties know that the Certificate of Incapability OAS/CPP ISP3505CPP form is available online.

[30] This Tribunal works hard to make our process both easy and fair for people who have had a lot of trauma in their lives. If the Claimant needs anything at the next step of the appeal that will make it easier for him to prepare for the hearing and then to participate in the hearing, I hope he will let the Tribunal know. He has some supportive people in his life who are helping him with this appeal which is great.

[31] Given the challenges I just described, I want to thank the Minister's representative and the Claimant for the work they did together to reach an agreement at the Appeal Division.

Conclusion

[32] I granted permission to appeal. I allowed the Claimant's appeal because the General Division made errors. I gave the decision that the General Division should have given: the Claimant has an arguable case and therefore the extension of time to appeal at the General Division is granted. The case goes back to the General Division now to decide whether the Claimant was incapable of forming or expressing the intention to apply for CPP disability benefit sooner than he did.

Kate Sellar
Member, Appeal Division