



Citation: *DS v Minister of Employment and Social Development*, 2023 SST 1276

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: D. S.

Representative: J. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated May 30, 2023
(GP-22-1928)

Tribunal member: Kate Sellar

Decision date: **September 15, 2023**

File number: AD-23-752

Decision

[1] I'm refusing leave (permission) to appeal. The appeal will not proceed. These are the reasons for my decision.

Overview

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

[3] No matter when the Claimant's disability 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.

[4] The exception to the 11-month rule applies when a claimant can show that they were incapable of forming or expressing the intention to apply for the disability pension earlier.¹ In that case, the General Division deems the application to have been made when the incapacity started.

[5] At the General Division, the Claimant argued that he was incapable of forming or expressing an intention to apply any sooner than he did. The General Division dismissed the Claimant's appeal.

Issues

[6] The issues in this appeal are:

- a) Could the General Division have failed to provide the Claimant with a fair process?
- b) Could the General Division have made an error of fact that would justify giving the Claimant permission to appeal?

¹ See section 60 in the *Canada Pension Plan* (CPP).

- c) Does the application set out evidence that wasn't presented to the General Division?

I'm not giving the Claimant permission to appeal

[7] I can give the Claimant permission to appeal if their application raises an arguable case that the General Division:

- didn't follow a fair process;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- made an error of fact; or
- made a mixed error of law and fact.²

[8] I can also give the Claimant permission to appeal if their application sets out evidence that wasn't presented to the General Division.³

[9] Since the Claimant hasn't raised an arguable case and hasn't set out new evidence, I must refuse permission to appeal.

The Claimant hasn't raised an arguable case that the General Division failed to provide a fair process.

[10] The Claimant argues generally that the General Division proceeded in a way that was unfair.⁴

[11] What fairness requires will depend on the context.⁵ Claimants have the right to be heard on every fact or factor likely to impact the outcome of the decision.⁶

² See sections 58.1(a) and (b) in the *Department of Employment and Social Development Act (Act)*.

³ See section 58.1(c) in the Act.

⁴ See ADN1-2.

⁵ See *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

⁶ See *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).

[12] The Claimant argues that the decision is unfair because it fails to acknowledge the following:

- The Claimant lacked insight into his incapacity until after he started treatment with his current psychiatrist.
- The Claimant didn't know about the disability pension, so he couldn't have applied sooner.

[13] In my view, these are arguments about the facts the General Division relied on in its reasoning, and the fairness of the **result**. Since the Claimant isn't challenging whether the **process** the General Division provided was fair, I cannot grant permission to appeal on a lack of fair process. The Claimant hasn't raised any specific examples of a failure to provide him with the chance to be heard.

The Claimant hasn't raised an arguable case for an error of fact.

[14] The Claimant points out the following:⁷

- He's been both mentally and physically incapacitated over the years. He and his family have come to understand that better because of his current psychiatrist.
- The General Division wasn't in a good position to decide whether he was incapacitated. The General Division member doesn't observe the Claimant day-to-day to understand what he and his family have been through.
- The Claimant didn't know that he could apply for a CPP disability pension any earlier than he did.

[15] The Claimant hasn't raised an arguable case for an error of fact.

[16] There's no arguable case that the General Division ignored or misunderstood the evidence from the Claimant's psychiatrist.⁸ The General Division discussed the

⁷ See ADN1-2, 3, and 5.

⁸ See paragraphs 25 and 26 and paragraphs 24 to 28 in the General Division decision.

psychiatrist's evidence in some detail, noting that it didn't explain how the Claimant's symptoms would make him incapable of forming or expressing an intention to apply for benefits. The Claimant hasn't identified any way in which the General Division may have mischaracterized his psychiatrist's evidence.

[17] The General Division had to decide, based on all the evidence, whether the Claimant was incapable of forming or expressing the intention to apply for the disability pension any earlier. The General Division can only decide based on the information before it, so no error can arise from the General Division not having access to more or better information.

[18] There's no support for the idea that the General Division ignored or misunderstood the Claimant's position that he didn't know about the CPP disability pension benefit sooner. The General Division took note of that argument and explained that it's not relevant to the test for incapacity.⁹

The Claimant hasn't provided any new evidence.

[19] The Claimant hasn't provided any new evidence in support of this appeal. So new evidence cannot be a reason for giving the Claimant permission to appeal.

I reviewed the documents.

[20] I've reviewed the documents in the Claimant's appeal. I'm satisfied that the General Division didn't ignore or misunderstand the evidence.¹⁰

[21] The General Division reviewed the medical evidence about incapacity from the Claimant's psychiatrist, the other medical evidence in the appeal file, and the Claimant's activities during the period of incapacity. The General Division's conclusion was not the one the Claimant had hoped for, but I don't see any argument that the General Division's decision lacks support in the record.

⁹ See paragraph 18 in the General Division decision.

¹⁰ This kind of review is consistent with the Appeal Division's role as the Federal Court described it in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

[22] The Claimant has a disability. I understand what he says about the impact his disability has had him and on his family.

[23] The General Division found that the Claimant wasn't incapable of forming or expressing an intention to make his CPP disability pension application earlier. This is a separate question from whether the Claimant has a severe disability under the CPP (that question was already answered: he does). I don't have a reason to justify giving the Claimant permission to appeal the General Division decision about incapacity.

Conclusion

[24] I've refused to give the Claimant permission to appeal. This means that the appeal will not go ahead.

Kate Sellar
Member, Appeal Division