Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *The Estate of K. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 235

Tribunal File Number: AD-16-1301

BETWEEN:

The Estate of K. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: May 25, 2017

Canada

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are granted.

INTRODUCTION

[1] In a decision dated July 31, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) found that there was insufficient evidence to show that the Applicant, who is now deceased, was incapacitated earlier than April 2012. As a result, the General Division determined that the Applicant was not eligible to receive the Guaranteed Income Supplement (GIS) retroactive to the 2009-10 payment year under section 28.1 of the *Old Age Security Act* (OAS Act).

[2] The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on November 16, 2016, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

BACKGROUND

[3] The Applicant was born in China in either 1923 or 1926. She immigrated to Canada in 1974 and lived in Canada until she passed away in June 2015. In July 2009, her GIS benefits were terminated because an income tax return for 2008 had not been filed with the Canada Revenue Agency. In September 2012, the Applicant's nephew and representative submitted four applications (covering the payment periods for 2009-10, 2010-11, 2011-12 and 2012-13) for the GIS on behalf of K. L. in his capacity as her attorney for property.

[4] In October 2012, the Respondent advised the Applicant that her GIS would be reinstated effective October 2011, the maximum period of retroactivity permitted under the law. The Respondent also informed the Applicant that it could not approve her GIS applications for the 2009-10 and 2010-11 payment periods because the applications for those periods were received too late.

[5] The Applicant's representative requested reconsideration of this determination, claiming that his aunt could not have applied earlier because she was incapacitated. The Respondent upheld its decision and, on November 24, 2014, the Applicant's representative appealed to the General Division. Following a hearing by videoconference on May 12, 2016, the General Division found that there was insufficient evidence to show that Ms. K. L. was incapacitated before April 2012.

ISSUE

[6] I must decide whether an extension of time to make the application for leave should be granted.

THE LAW

DESDA

[7] Pursuant to paragraph 57(1)(*b*) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the Applicant.

[8] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

(a) The Applicant must demonstrate a continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) The matter discloses an arguable case; and

(d) There is no prejudice to the other party in allowing the extension.

[9] The weight to be given to each of the *Gattellaro* factors may differ in each case and, in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada v. Larkman.*[2]

[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

[10] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[11] According to subsection 58(1) of the DESDA, the only grounds of appeal are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[12] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[13] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada v. Hogervorst*[3]; *Fancy v. Canada.*[4]

OAS Act and Associated Regulations

[14] Under section 3 of the OAS Act, a person must have resided in Canada for at least 40 or more years after his or her 18th birthday in order to receive a full Old Age Security (OAS) pension. To receive a partial pension, an applicant must have resided in Canada for at least 10 years if he or she resides in Canada on the day before the application is approved.

---

[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.
[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[15] The GIS is an income-tested monthly benefit that is paid to individuals who receive the OAS pension and who have little or no other income.

[16] Once a person meets the eligibility requirements for the OAS pension and GIS, there are rules governing payment of the benefits. According to subsection 8(2) of the OAS Act, and paragraph 5(2)(*a*) of the OAS Regulations, the maximum retroactivity of OAS pension payments is 11 months before the month in which the Respondent received the OAS pension application. According to paragraph 11(7)(*a*) of the OAS Act, the maximum retroactivity of GIS payments is 11 months before the month in which the Respondent received the GIS application. According to paragraph 11(7)(*b*) of the OAS Act, no GIS may be paid to a pensioner for any month for which no OAS pension may be paid to the pensioner.

[17] Section 28.1 of the OAS Act provides an exception to the maximum retroactivity rules respecting payment of benefits under the OAS Act. This provision allows an application to be deemed to have been made earlier than when it was actually made, provided it can be shown that the person to whom the application relates was incapable of forming or expressing an intention to apply for the benefit. Subsections 28.1(1) to (3) set out the requirements for incapacity:

> (1) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later…
>
> (3) For the purposes of subsections (1) and (2), a period of incapacity must be a continuous period except as otherwise prescribed.

APPLICANT'S SUBMISSIONS

[18] The application requesting leave to appeal was submitted to the Tribunal on November 16, 2016, after the requisite 90-day filing deadline and 106 days after the General Division's decision was mailed to the Applicant's representative on August 2, 2016. In his request for leave, the Applicant's representative declared that he did not receive the decision until August 22, 2016, because he was travelling outside of the country. In support of this claim, he enclosed

hotel confirmations and statements indicating that he was in Washington, D.C. and Philadelphia from August 13, 2016 to August 21, 2016.

[19] The Applicant's representative also appended a 19-page brief offering reasons for his appeal. However, much of it merely recapitulated material that, from what I can gather, was already presented to the General Division. The thrust of his submissions was to reiterate his position that his late aunt, K. L., was incapacitated from forming or expressing an intention to make GIS applications after 2008.

[20] In my view, these kinds of broad allegations do not signify how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the decision of the General Division, nor is it enough to express their continued conviction that they were incapable during the relevant period.

[21] While the General Division did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) of the DESDA and whether any of them have a reasonable chance of success.

[22] That said, the Applicant's submissions did contain a number of specific allegations, which I will address below under the heading, "Arguable Case."

ANALYSIS

[23] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the General Division's decision was mailed to the Applicant's authorized representative at his address of record on August 2, 2016. According to paragraph 19(*a*) of the *Social Security Tribunal Regulations*, a decision is deemed to have been communicated to a

party 10 days after the date on which it was mailed. The Applicant's representative submitted his request for leave to appeal on November 16, 2016—six days after the presumptive deadline had elapsed.

[24] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[25] The record shows that the Applicant's representative has generally pursued his late aunt's claim for retroactive GIS benefits with assiduity since submitting the applications in 2012. I also note that the record shows the Applicant contacted the Tribunal as early as October 28, 2016 (prior to the deadline), seeking information on the steps required to make an appeal. As not a great deal of time had passed between the lapse of the 90-day appeal period and the late submission of the application requesting leave to appeal, I am willing to give the Applicant's representative the benefit of the doubt on this factor and find that he had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[26] The Applicant's representative stated that he did not receive the General Division's decision until August 22, 2016. He was asked to explain why he failed to submit his application for leave on time, and he responded by citing a trip to the United States from August 13, 2016 to August 21, 2016. As the Tribunal mailed the General Division's decision on August 2, 2016 and, keeping in mind the presumed 10-day delivery period, it is plausible that the Applicant's representative narrowly missed the Tribunal's package as he was preparing to depart.

Prejudice to the Other Party

[27] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

Arguable Case

[28] It must be noted that the test in section 28.1 of the OAS Act is strict: An applicant is required to prove not just that he lacked the capacity to apply for benefits, but that he lacked the capacity *to form or express an intention* to apply. The examination must be focused not on an applicant's capacity to make, prepare, process or complete an application for disability benefits but only on his capacity to form or express an intention to make an application (*Canada v. Kirkland*[5]; *Canada v. Danielson*[6]).

The General Division Failed to Consider the Applicant's Submissions

[29] The Applicant's representative alleged that the General Division breached a principle of natural justice by refusing to admit documents into evidence after the hearing had concluded.

[30] I see no reasonable chance of success on this ground. The General Division afforded the Applicant's representative an opportunity to make submissions on whether to accept Ms. K. L.'s Power of Attorney for Personal Care and Power of Attorney for Property and, after applying the criteria set out in *Murray v. Canada*[7], it concluded that her estate's interests would not be prejudiced if they were excluded. The General Division's decision contained a lengthy discussion on this issue, noting that the Applicant's representative was given ample opportunity to submit documentation prior to the hearing and, in any case, he was permitted to "read in" salient details from the documents during the proceedings, leaving it unlikely that their subsequent admission would have any bearing on the outcome of the appeal. Having reviewed the record, I do not see an arguable case that the General Division breached any rule of procedural fairness, nor do I see where it misapplied the law or committed a factual error.

The General Division Made a Medical Assessment it was not Qualified to Give

[31] The Applicant alleged that the General Division made a series of findings in paragraphs 33 to35 of its decision, in which it, in effect, substituted its own medical view for those of

[5] *Canada (Attorney General) v. Kirkland*, 2008 FCA 144.
[6] *Canada (Attorney General) v. Danielson*, 2008 FCA 78.
[7] *Murray v. Canada (Attorney General)*, 2013 FC 49.

Ms. K. L.'s family physician and geriatric specialist. The General Division was unqualified to make any implicit findings about the Applicant's medical and mental condition.

[32] Again, I see no arguable case here. The paragraphs in question contain a brief analysis of Dr. Cheung's April 2012 report, which I reproduce here in full:

> [33] As a whole, there has not been much medical evidence filed in support of this appeal, particularly for the period before April 2012. In April 2012, Dr. Cheung examined Ms. K. L. and reported that Ms. K. L. was completely unable to draw the clock and scored 14/29 on the MMSE (that was done in Cantonese). The Respondent accepted that Dr. Cheung's findings showed that Ms. K. L. was incapacitated at the time of the exam. The Tribunal does not disagree with this finding. The question is whether Ms. K. L. became incapacitated before April 2012 and, if so, at what date.
>
> [34] The Appellant's representative submits that Ms. K. L. did not *become* incapacitated in April 2012, being the date of Dr. Cheung's consult. While this may well be true, the difficulty for the Tribunal is that there is very little medical evidence on record for the period of time before April 2012.
>
> [35] Dr. Cheung described Ms. K. L. as an 88-year old woman who had approximately three years of cognitive changes, likely BPSD – behavioural and psychiatric manifestations of dementia. While this indicates that Ms. K. L. was likely exhibiting symptoms of dementia for some time, it does not necessarily mean that Ms. K. L. was incapacitated for the three years prior to the April 2012 consult. The fact that a person may have symptoms and signs of dementia or even have a diagnosis of dementia does not mean that the person was also incapacitated as that term is defined in the OAS Act.

[33] This passage indicates that the General Division accepted that Ms. K. L. was incapacitated as of April 2012, but was unwilling to find that she was incapacitated any earlier owing to a lack of medical evidence. It must be kept in mind that, in this context, incapacity is a legal term, defined by section 28.1 of the OAS Act and interpreted and refined by jurisprudence. For the purposes of an OAS application, incapacity is not a medical term, and Dr. Cheung's opinion on whether the Applicant was incapacitated did not decide the matter, but was just one of many factors that the General Division would have considered in determining whether Ms. K. L. was "incapable of expressing or forming an intent" to make an application.

[34] As a consequence, I would disagree with the suggestion of the Applicant's representative that the General Division made a "medical" assessment when, from what I can determine, it was doing nothing more than attempting to apply the law while taking into account the available medical evidence. That said, I think there is an argument that the General Division

may have based its decision on an erroneous finding of fact: Having accepted Dr. Cheung's diagnosis of incapacity as of April 2012, was it "perverse" or "capricious" for the General Division to, in effect, deem the Applicant capable in the period leading up to that point? In other words, was it reasonable for the General Division to find that the Applicant had capacity to "form or express an intention" right up until the moment a physician said that she did not? I think this is a question worthy of further investigation.

The General Division Imposed a Higher Standard of Proof on the Applicant than the Law Demands

[35] The Applicant's representative alleged that the General Division unfairly refused to accept medical reports and opinions that consistently demonstrated his late aunt's incapacity, chief among them the Declaration of Incapacity, completed by Ms. K. L.'s family physician in January 2013. The Applicant's representative submitted that this refusal, in effect, imposed a higher burden of proof on the Applicant than the "balance of probabilities" demanded by the law. The Applicant also claimed that the General Division erred in law by disregarding *Morrison v. Minister of Human Resources and Development*,[8] in which the Federal Court of Appeal stated that it was necessary to look both at the medical evidence and at an applicant's activities, in deciding whether he or she meets the test for incapacity.

[36] I see no arguable case on this ground, which does no more than repeat the representative's prior argument that the General Division did not give certain medical reports the weight and interpretation that he would have preferred. The existing case law is clear that the burden of proof rests with persons seeking to obtain a benefit under the OAS Act.[9] It is not the job of the Respondent or the General Division to prove that the Applicant was incapacitated and thus entitled to further retroactive GIS payments; the onus rests with the Applicant's representative to prove that she is.

[37] The standard of proof is a separate matter. In *F.H. v. McDougall*,[10] the Supreme Court of Canada determined that the failure of a trial judge to apply the correct standard of proof in

---

[8] *Morrison v. Minister of Human Resources and Development*, CP 4182, March 7, 1997.
[9] *De Carolis v. Canada (Attorney General)*, 2013 FC 366.
[10] *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53

assessing evidence constituted an error of law. Such a failure might be manifested in an express misstatement of the standard of proof, in which case it would be presumed that the incorrect standard was applied. Alternatively, where the trial judge expressly stated the correct standard of proof, or was silent on the matter, it would be presumed that the correct standard was applied.

[38] The same principle applies to an administrative tribunal. I note that the General Division's decision contained no explicit statement of the standard of proof it applied, which creates a presumption that it correctly decided the Applicant's case on a balance of probabilities. The Applicant's representative seems to be suggesting that this presumption is rebutted given what he submits is overwhelming evidence that his aunt was incapacitated butthis is merely a variant of an argument previously presented to the General Division. As mentioned, the Appeal Division's mandate is to adjudicate specific errors committed by the General Division, not to relitigate the evidence. In this case, it is evident that the General Division was cognizant of the correct standard, in that it actively analyzed the evidence, weighed the Applicant's submissions against the Respondent's and considered both the strengths and weakness of their respective cases. I saw no indication that the General Division rejected the Applicant's claim on the basis of "reasonable" doubt, but rather applied the correct standard by finding a preponderance of doubt.

[39] As for *Morrison*, I must note that it is not, as the Applicant's representative asserts, a decision of the Federal Court of Appeal, but of the now-defunct Pension Appeals Board, the predecessor body to the Appeal Division. As such, I am not bound by it, although I do agree that incapacity must be viewed through the lens of an applicant's everyday activities.[11] If that is the case, I do not see how the General Division erred in law, given its examination of the Applicant's time spent alone in 2012.

The General Division Omitted Material Background Facts with Regard to the Applicant's Capacity to Live Alone

[40] In paragraph 39, the General Division noted that in early 2012, the Applicant's representative and his spouse were required to travel to Hong Kong, during which time his aunt

[11] This principle was most authoritatively enunciated in *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

stayed on her own in X, "albeit with a family friend checking in on her every few days." The General Division inferred from this that Ms. K. L. must have possessed "some" cognitive functioning. The Applicant's representative alleges that, with this statement, the General Division indulged in malicious speculation and omitted key information that would have placed events in context. What the General Division did not say was that he and his spouse had less than one day's notice to rush to the death bed of his 84-year-old mother in Hong Kong, where they stayed for her funeral and memorial service. Although this information was presented to the General Division, it failed to take it into account.

[41] I see no arguable case on this ground. As discussed, an administrative tribunal is presumed to have considered all the evidence, and I see no evidence that the General Division failed to take into account the circumstances under which the Applicant was left alone for an extended period—indeed, it observed that the Applicant's family did not leave willingly, but was "required" to travel to Hong Kong, and mentioned that they made sure Ms. K. L. was subject to at least some supervision. I also note that the Applicant's representative has not pointed to any specific factual error; rather, he objects to the General Division's inference, drawn from the evidence before it, that his aunt had some capacity to manage daily life unassisted. In my view, this inference was not "perverse," "capricious" or "without regard for the record" and was reasonable given the established facts: Ms. K. L. was able to live by herself for a limited time, despite her advanced age, with periodic outside assistance. A trier of fact is entitled to weigh the evidence as it sees fit and draw defensible conclusions from it; in this instance, I see no reason to interfere with the General Division's findings.

The General Division Mischaracterized the Circumstances Surrounding the Execution of the Applicant's Power of Attorney

[42] In paragraph 40, the General Division wrote:

> The Appellant's representative submitted that Ms. K. L. was likely incapacitated in June 2008, when she expelled his wife (Stella) from the home. The Tribunal cannot accept this argument. First, there is evidence that Ms. K. L. signed a will and power of attorney documents before a lawyer in July 2008, and the lawyer would have had to be satisfied that she possessed the requisite capacity to execute those documents.

[43] The Applicant's representative noted that the Applicant had previously assigned power of attorney for personal care to a friend in X, but she passed away. In May 2008, on the Applicant's return to Canada after colon surgery in Hong Kong, her family became concerned that she was no longer able to care for herself and manage financial matters as she had in years past. The Applicant's representative states that he then took steps to have a lawyer prepare a will and power of attorney for health care and for property, adding:

> It was clear to all concerned that there was never any suspicion that the Appellant was being taken advantage or her will would be compromised in any form. It is well understood that the intention of the Power of Attorney was used to facilitate routine healthcare and banking related matters, particularly in view of her ailing condition ... Such action did not take her much mental capacity to form or express her intention in the execution of these documents. It was all done solely for her care and benefits, as she was definitely incapable as we knew well by now.

[44] The Applicant's representative submitted that the General Division erred in fact and law by engaging in speculative deduction about the Applicant's state of mind when she signed her power of attorney.

[45] In my view, this argument would have no reasonable chance of success on appeal. The Applicant's representative sought to establish that his aunt signed a will and powers of attorney in 2008, and it was logical and reasonable for the General Division to draw an inference from these acts, given the requirement that lawyers executing such documents must satisfy themselves that executants are of sound mind. The Applicant's representative took offence to the General Division's inquiries about the Applicant's state of mind at the time, but I saw no indication that it was imputing some nefarious purpose to his having had his aunt sign such instruments. I do not agree that the General Division was engaging in "speculation" when it wondered how an individual who was purportedly incapable of forming or expressing an intent to apply for benefits also had the capacity to execute legal documents with far-reaching financial implications.

The General Division Engaged in Groundless Speculation About Why the Applicant did not File Tax Returns

[46] In paragraph 41 of its decision, the General Division wrote:

> The Tribunal considered the Appellant's Representative's argument that Ms. K. L.'s failure to file her income taxes from 2008 to 2010 was attributed solely to her dementia. The evidence does not indicate that Ms. K. L. lacked the capacity to file her income taxes as early as April 2009 (which is when her 2008 income tax would have been due).

[47] The Applicant's representative suggested that the above argument is entirely groundless and speculative, and he submitted email correspondence from the Applicant's former tax accountant to demonstrate that she had difficulties as early as June 2009.

[48] The Applicant's representative also took issue with the General Division's statement, in the same paragraph, that there was another possible explanation for why Ms. K. L. did not file her income taxes—having signed a power of attorney for property in July 2008, she may have been under the assumption that her attorney was filing her taxes on her behalf. He submitted that this statement was purely speculative and without any basis in fact.

[49] As discussed, I have no mandate, as a member of the Appeal Division, to reconsider evidence on its merits or to consider newly submitted evidence. As such, I cannot accept the email exchanges between the Applicant's representative and his aunt's tax accountant.

[50] On this particular point, I do agree with the Applicant's representative that the General Division indulged in a form of speculation, but I do not think it was purposeless or constituted an error under one of the permitted grounds of subsection 58(1) of the DESDA. As the Applicant's representative argued (in paragraph 49 of the decision) that dementia was the only possible explanation for his aunt not filing an income tax return after 2008, it was open to the General Division to counter this theory, which it did by proposing a plausible alternative. It was neither capricious nor perverse to suppose that someone who had recently ceded authority over her financial affairs might assume that her attorney was already managing those affairs.

CONCLUSION

[51] As the Applicant has fulfilled all four *Gattellaro* factors, I have determined that this is an appropriate case in which to allow an extension of time to appeal beyond the 90-day limitation pursuant to subsection 57(2) of the DESDA.

[52] Furthermore, given the history of proceedings and the considerations above, I am satisfied that the Applicant has an arguable case on appeal that the General Division may have based its decision on an erroneous finding that the Applicant, having been deemed incapable as of April 2012, was also capable in the period leading up to that point. I will permit the appeal to proceed on this question only.

[53] I invite the Respondent to submit its position on this appeal. The parties are also free to make submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[54] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Member, Appeal Division