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 654

Tribunal File Number: AD-16-1301

BETWEEN:

The Estate of K. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: October 19, 2017

DATE OF DECISION: November 17, 2017

Canada

DECISION AND REASONS

PERSONS IN ATTENDANCE

Appellant	T. L., nephew of the late K. L. and executor of her estate
Representative for the Respondent	Nathalie Pruneau, Department of Justice

S. L., Mr. T. L.'s wife, and Dale Randall, a representative of the Minister of Employment and Social Development, observed the hearing.

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The subject of this appeal is the level of proof required to make a finding of incapacity, for the purpose of the *Old Age Security Act* (OASA), particularly where an applicant may be afflicted with a condition, such as dementia or Alzheimer's disease, for which there is no clearly demarcated date of onset.

[3] K. L., the subject of this appeal, was born in China in either 1923 or 1926. She immigrated to Canada in 1974 and resided here until she passed away in June 2015. As of 1991, she began receiving the Old Age Security (OAS) pension and Guaranteed Income Supplement (GIS).

[4] In 2008, Ms. K. L. was diagnosed with colon cancer. She travelled to Hong Kong to receive treatment, and Mr. T. L., with his family, later moved to Canada to take care of his aunt. In July 2009, Ms. K. L.'s GIS was terminated, because no income tax return had been filed on her behalf for 2008. In September 2012, Mr. T. L., in his capacity as his aunt's attorney for property, submitted four GIS applications (covering payment periods from 2009-13) to the Respondent, the Minister of Employment and Social Development (Minister).

[5] In October 2012, the Minister informed Mr. T. L. that his aunt's GIS would be reinstated effective October 2011, the maximum period of retroactivity permitted under the law. The Minister also informed Mr. T. L. that it could not approve the GIS applications for the 2009-10 and 2010-11 payment periods because they were received too late.

[6] Mr. T. L. appealed this determination to the General Division of the Social Security Tribunal (Tribunal), claiming that his aunt could not have applied earlier because she was incapacitated. Following a May 2016 videoconference hearing, the General Division found that there was insufficient evidence to show that Ms. K. L. was incapacitated earlier than April 2012.

[7] In November 2016, Mr. T. L. submitted to the Tribunal's Appeal Division an application requesting leave to appeal, alleging numerous errors on the part of the General Division. In my decision granting leave to appeal, I found that none of the grounds of appeal advanced by Mr. T. L.—save one—had a reasonable chance of success; I allowed leave on the sole ground that the General Division may have erred in finding insufficient evidence to show that the late Ms. K. L. had become incapacitated any earlier than April 2012. Now, having considered the submissions of both parties, I have come to the conclusion that Mr. T. L.'s appeal cannot succeed.

ISSUES

[8] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division show to decisions of the General Division?

Issue 2: Did the General Division base its decision on an erroneous finding of fact when, having deemed Ms. K. L. incapable as of April 2012, it failed to infer that she must have also been incapable in the period leading up to that point.

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. According to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or vary the General Division decision in whole or in part.

[10] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[1] In matters involving alleged errors of law or a failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[11] The Federal Court of Appeal decision *Canada v. Huruglica*[2] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing statute: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]"

[12] The implication here is that neither the standard of reasonableness nor the standard of correctness will apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*)

[1] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[2] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it." As held in *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Issue 2: Did the General Division, having found Ms. K. L. incapable as of April 2012, err in failing to infer that she must have become incapable during the preceding period?

[13] This is a case in which an elderly woman, who had been independent to an advanced age, appears to have entered a period of gradual mental decline. The Minister, influenced by Dr. Cheung's April 2012 diagnoses of dementia and Alzheimer's disease, conceded that Ms. K. L. was incapacitated according to the definition set out in section 28.1 of the OASA, but denied there was sufficient evidence to support such a finding any earlier than that date. The General Division agreed.

[14] Having carefully considered Mr. T. L.'s submissions and reviewed the underlying evidentiary record, I am not convinced that the General Division erred in law or based its decision on an erroneous finding of fact that it made perversely, capriciously or without regard for the record.

[15] In this case, aside from the particulars of his aunt's situation, Mr. T. L. had a steep mountain to climb. First, the burden of proof lay with him to show that his aunt was incapacitated during the relevant time[3]; the onus did not rest with the Respondent to prove that she was *not* incapacitated.

[16] Second, the test in section 28.1 of the OASA is strict: An applicant is required to prove not just that they lacked the capacity to apply for benefits, but that they 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

[3] *Canada (Attorney General) v. Hines*, 2016 FC 112.

their capacity to form or express an intention to make an application (*Canada v. Kirkland*[4]; *Canada v. Danielson*[5]).

[17] Third, dementia is a progressive disease, yet the General Division, as finder of fact, was obliged to determine a fixed date for the onset of Ms. K. L.'s incapacity. This was made all the more difficult by the absence of a discrete event that might have marked a sudden deterioration in Ms. K. L.'s mental state. Although her nephew pointed to her 2008 cancer surgery as a turning point, the evidence over the following four years was at best contradictory and did not point to an obvious date of onset.

[18] It may seem contrary to logic that someone afflicted with a progressive disease such as dementia can be found incapacitated as of a particular date, yet not a year or even a month earlier. Nonetheless, a single date had to be chosen, and it was open to the presiding General Division member to follow the facts where they led her, provided that she put forth intelligible reasons for preferring certain items of evidence over others. My review of its decision indicates that the General Division made a genuine attempt to come to terms with the evidence as a whole. It considered Mr. T. L.'s submissions that his aunt was incapable and weighed them against his attempts to qualify evidence suggesting that she possessed agency prior to April 2012. Still, the overall picture remained murky:

- The power of attorney executed on July 3, 2008, was a doubled-edged sword. The fact that it was signed shortly after Ms. K. L.'s cancer treatment suggests that there may indeed have been a diminishment in her capacity but, as the General Division noted, lawyers do not usually permit such instruments to be executed unless they are satisfied that the signee is mentally competent.
- Mr. T. L. introduced evidence that his mother's health crisis precipitated an emergency trip to Hong Kong in February 2012 that left him with no choice but to leave his aunt in Burlington. The General Division took those circumstances into account when it assessed the significance of Ms. K. L.'s time alone, but the fact remains that she did manage to survive by herself, even if she did so with the help of a friend, who periodically checked on her.

[4] *Canada (Attorney General) v. Kirkland*, 2008 FCA 144.
[5] *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

- Much of the medical evidence offered limited assistance because, as one might expect, it was not prepared with a view to assessing when Ms. K. L. became incapable according to the precise definition set out in section 28.1 of the OASA. On this question, the reports were retrospective and imprecise: In April 2012, Dr. Cheung, a geriatrician who had not previously examined Ms. K. L., referred to three years of cognitive changes but offered no hint as to whether those changes rendered her "incapable of forming or expressing an intention" to apply for a benefit. In December 2012, Dr. Wu, the family physician, wrote that Ms. K. L. was incapable of making financial decisions, but he did not say when this impairment might have begun, nor did he relate it to the section 28.1 test for incapability. In January 2013, Dr. Wu completed a declaration of incapacity explicitly stating that Ms. K. L. was incapable of forming or expressing an intention to make an application and specified an onset date of September 2011.

[19] The Appellant argued that the General Division erred in finding "not much" evidence to support incapability, but my review suggests this is a defensible conclusion. The General Division was careful to state that there was little medical evidence "particularly for the period before April 2012," and a case can be made that this was indeed true, given the absence of any report prepared earlier than that date.

[20] As for the declaration of incapacity, the General Division offered an extended explanation for why it decided to discount this document, in particular, Dr. Wu's estimate of the date of onset:

> [37] In response to this question, Dr. Wu wrote "Dementia." He did not provide a copy of the relevant clinical findings that would establish the necessary evidentiary link between the diagnosis of dementia and the opinion that Ms. K. L. was incapacitated. Similarly, although Dr. Wu indicated that Ms. K. L.'s incapacity began on September 29, 2011 he did not provide any explanation for why the incapacity began on that date. As a result, the Tribunal is left to wonder what it was about Ms. K. L.'s condition on September 29, 2011 that led Dr. Wu to conclude that she met the test for incapacity on that date. Without knowing more, the Tribunal is unable to accept September 2011 as the date of incapacity.

[21] Are these valid criticisms of what would otherwise be an important piece of evidence in the Appellant's favour? I note that the declaration of incapacity form, which is produced and distributed by the Minister, does not demand "relevant clinical findings," and while it asks the attending physician to supply a date of incapacity onset, it does not require an explanation for why a given date was chosen. That said, the General Division rightly noted that September 2011 seemed arbitrarily selected, and there was nothing in Ms. K. L.'s history to suggest that the date had any real significance.

[22] It is important to bear in mind that the purpose of a hearing before the Appeal Division is not to reassess the evidence on its merits. The issue is not whether I agree with the General Division's interpretation of the available evidence, but whether the conclusions drawn from it were defensible.

[23] In *Simpson v. Canada*,[6] the claimant identified a number of medical reports that, she said, the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held that assigning weight to evidence, whether oral or written, is the province of the trier of fact: "Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…"

[24] It was open to the General Division, as trier of fact, to sift through the facts and weigh them as it saw fit, provided that it did so within the parameters established by subsection 58(1) of the DESDA. In this case, I am satisfied that the General Division carried out its obligation to

[6] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

CONCLUSION

[25] The appeal is dismissed.

Member, Appeal Division