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

Citation: *G. G. v. Minister of Employment and Social Development*, 2018 SST 137

Tribunal File Number: AD-17-724

BETWEEN:

G. G.

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: February 8, 2018

Canada

DECISION AND REASONS

DECISION

Leave to appeal is refused.

OVERVIEW

[1] The Applicant, G. G., was born in August 1950 and is a widower. In April 2014, he applied for an Allowance for the Survivor (Allowance) under the *Old Age Security Act* (OASA). The Respondent, the Minster of Employment and Social Development Canada (Minister), approved the application with a first payment date of May 2013, which it said was the maximum period of retroactivity permitted under the law. Mr. G. G. requested a reconsideration of the Minister's determination of the first payment date, claiming that he had been incapacitated by the effects of a stroke, which had prevented him from submitting an application earlier.

[2] The Minister refused to allow additional retroactive allowance payments, and Mr. G. G. appealed this decision to the General Division of the Social Security Tribunal. In July 2017, having held a hearing by teleconference, the presiding member found that Mr. G. G. had failed to show that he was, on balance, incapable of forming or expressing an intention to apply for the Allowance earlier than when he actually submitted the application for it.

[3] In October 2017, Mr. G. G.'s authorized representative submitted an application requesting leave to appeal from the Appeal Division, alleging various factual and legal errors on the part of the General Division.

[4] Having reviewed the General Division's decision against the underlying record, I have concluded that Mr. G. G. has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[5] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[1] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[6] I must determine whether Mr. G. G. has an arguable case on the following questions:

Issue 1: Did the General Division ignore the affidavit of Dr. Michael James dated April 6, 2017?

Issue 2: Did the General Division base its decision on an erroneous finding that the individual referred to in paragraph 13 was Mr. G. G.'s "common law spouse"?

Issue 3: Did the General Division base its decision on an erroneous finding that Mr. G. G. called Service Canada of his own volition rather than at the behest of his daughter?

Issue 4: Did the General Division disregard Mr. G. G.'s testimony that, while he did not receive professional help for his depression between 2009 and 2014, he handled it on his own?

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[1] DESDA at subsections 56(1) and 58(3).
[2] *Ibid*. at subsection 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

Issue 1: Did the General Division ignore Dr. James' affidavit?

[7] The record shows that, three months before the hearing, Mr. G. G. submitted an affidavit sworn by his former family physician. Mr. G. G. alleges that the General Division failed to consider what he apparently sees as a material item of evidence.

[8] I am not convinced there is an arguable case on this ground. First, it is a truism of administrative law that a decision-maker is presumed to have considered all the evidence before it[4] and need not refer in its decision to each and every item in the documentary record. Second, even if the General Division did disregard the affidavit, I doubt that such an omission was material. I note that the information in it essentially mirrors the contents of Dr. James' April 2014 Certificate of Incapability, to which the General Division referred repeatedly in its decision.

Issue 2: Did the General Division mischaracterize Mr. G. G.'s friend as a "common law spouse"?

[9] Mr. G. G. takes issue with the General Division's description of his friend, in paragraph 13 of its decision, as a "common law spouse."

[10] I also fail to see an arguable case for this submission. Under subsection 58(1) of the DESDA, a factual error by itself is insufficient to overturn a decision; the General Division must have also *based* its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it." In other words, the error must be material *and* egregious.

[11] Even if the General Division had incorrectly assumed that a woman residing with Mr. G. G. was in a conjugal relationship with him, I do not see it as a material error. It is clear that the outcome of the decision did not depend on a finding that Mr. G. G. had entered into a common-law relationship. In fact, the General Division took Mr. G. G.'s entitlement to the Allowance for granted, considering only the question of *when* that entitlement commenced.

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

Issue 3: Did the General Division err in finding that Mr. G. G. contacted Service Canada on his own initiative?

[12] Mr. G. G. alleges that the General Division erred when it found that, despite his claimed incapacity, he called Service Canada about his Allowance in 2011. Mr. G. G. insists that he would not have made those calls had his daughter not instructed him to do so.

[13] Paragraph 33 reads in its entirety:

> The Appellant further testified that between 2009 and 2014, his daughter and common law spouse would take care of his mail and the bills. However, despite their assistance, it was the Appellant who in August 2011 and in November 2011, called a Service Canada Center regarding his Allowance.

This is clearly a material finding, as the General Division appears to have inferred competence from Mr. G. G.'s interactions with Service Canada at a time when he was supposedly incapacitated. The question is whether there was any evidence that Mr. G. G.'s daughter pushed him to make contact and, if so, whether the General Division ignored that evidence.

[14] The General Division apparently relied on notes[5] by departmental staff indicating that Mr. G. G. had made at least two telephone calls in 2011 seeking assistance with the application process. However, General Division's decision indicates that it also took note of Mr. G. G.'s testimony about the circumstances surrounding those calls:

> [14] In August 2011, he called a Service Canada Center regarding his survivor's Allowance but he did not apply until April 2014 although he had received the forms. He explained that he could not concentrate and his daughter was not able to help him in 2011 to fill out the forms, however, she was the one who asked him to make the calls but he could not carry through with the application.

[15] This passage tells me that the General Division was cognizant of Mr. G. G.'s claim that his daughter had urged him to call for assistance, although it ultimately found that the very act of speaking to a Service Canada representative suggested competence. While Mr. G. G. may not agree with the General Division's finding on this point, it is open to an administrative

[5] Found in the hearing file at GD2-16.

tribunal, as trier of fact, to weigh the evidence as it sees fit, so long as it arrives at a defensible conclusion.

[16] I do not see an arguable case here.

Issue 4: Did the General Division disregard Mr. G. G.'s testimony about how he managed his depression?

[17] In paragraph 32 of its decision, the General Division seemingly drew an adverse inference from the fact that Mr. G. G. did not see a mental health professional from 2009 to 2014. Mr. G. G. concedes that this was true but alleges that the General Division should have also considered his evidence of self-treatment.

[18] I fail to see an arguable case on this point, because it amounts to no more than disagreement with how the General Division assessed the evidence. Mr. G. G. is correct to say that an examination of daily activities may shed light on whether a claimant was "incapable of forming or expressing an intention to make an application," but I see nothing to indicate that the General Division neglected to do so in this instance. Indeed, paragraph 32 mentions the very facts that Mr. G. G. alleges the General Division ignored: In noting that Mr. G. G. "handled his depression on his own, day by day," the General Division accurately relayed his oral evidence at the hearing. If Mr. G. G. is suggesting that the General Division had no authority to make an inference about his competence from his lack of treatment, I must disagree. It is well established in jurisprudence that medical evidence, or lack of it, must be the basis for any assessment of an incapability claim.[6]

CONCLUSION

[19] Since Mr. G. G. has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

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

Member, Appeal Division

REPRESENTATIVE:	Sommer Blackman, for the Applicant