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

Citation: *D. D. v. Minister of Employment and Social Development*, 2018 SST 555

Tribunal File Number: AD-17-957

BETWEEN:

D. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: May 22, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is denied.

OVERVIEW

[2] The Applicant, D. D., turned 65 and became eligible for her Old Age Security pension (OAS pension) in X 2010. However, her application for this pension was not submitted until November 2013. The Respondent, the Minister of Employment and Social Development (Minister), approved her application but concluded that, based on her date of application and the provisions of the *Old Age Security Act* (OAS Act), payment of the pension could only start as of December 2012.

[3] The Applicant asked that her OAS pension be paid retroactively to her 65th birthday, saying that a period of incapacity had prevented from applying any earlier. The Applicant's request was denied by the Minister and her appeal from the Minister's decision was dismissed by the Tribunal's General Division.

[4] Before this appeal can proceed, the Applicant requires leave (permission) to appeal. For the reasons below, I have concluded that the appeal has no reasonable chance of success and that leave must be refused.

PRELIMINARY MATTERS

[5] As part of her application for leave to appeal, the Applicant filed new medical documents.[1] She appears to recognize that the Appeal Division does not usually accept new documents, but provided them anyway to explain why her appeal was potentially late and incomplete. In the end, however, the Tribunal considered her application to have been received on time, meaning that those documents need not be taken into account.[2]

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[1] AD1–16 to 21.
[2] Though the General Division decision is dated September 8, 2017, the envelope was postmarked September 13, 2017 (AD1–2).

[6] Prior to issuing this decision, the Tribunal asked the Applicant to expand on the reasons why she was seeking leave to appeal and it granted her request for an extension of time to respond to that letter. Ultimately, a response to the Tribunal's letter was provided by the Atira Women's Resource Society; the Tribunal is grateful for the assistance that they provided to the Applicant in this case.[3]

ISSUES

[7] The Applicant did not always link her arguments to the grounds of appeal recognized in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act). As a result, I have recharacterized her arguments somewhat to bring them within the Tribunal's legal framework.

[8] Is there an arguable case that the General Division:

a) committed an error of fact or law by giving too little weight to the medical evidence or failing to give reasons for discounting it;

b) committed an error of fact by misunderstanding the medical evidence;

c) committed an error of law by misapplying the correct legal test or making incorrect findings about what could be considered a "relevant activity" when making an incapacity assessment;

d) committed an error of fact by making inconsistent findings on the question of the Applicant's incapacity;

e) committed an error of fact or law by ignoring evidence concerning what triggered the Applicant's application for an OAS pension;

f) committed an error of fact or law when it failed to conclude that the Applicant was a victim of erroneous advice; or

[3] The Tribunal received the Applicant's initial response on March 2, 2018, because the Tribunal had not yet decided on her request for an extension of time (AD1D). A slightly modified version of the Applicant's response was received on April 3, 2018, after the Tribunal had granted her requests both for an extension of time and to amend and resubmit the original response (AD2 and AD3).

g) overlooked or misconstrued any of the evidence?

ANALYSIS

The Tribunal's legal framework

[9] The Tribunal has two divisions that operate quite differently from one another. At the Appeal Division, the focus is on whether the General Division might have committed one or more of the three reviewable errors (or grounds of appeal) set out in s. 58(1) of the DESD Act. Generally speaking, these reviewable errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

c) 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.

[10] In particular, this case raises possible errors of law and fact. The General Division could have committed an error of law if, for example, it applied the wrong legal test or if it failed to consider evidence that the law requires it to consider. Similarly, the General Division could have made an erroneous finding of fact if, for example, it made a finding for which there was no evidence or if it ignored important evidence that contradicted its finding.

[11] There are also procedural differences between the Tribunal's two divisions. The Appeal Division's process normally involves two steps: the leave to appeal stage, followed by the merits stage. This appeal is at the leave to appeal stage, meaning that permission must be granted before it can proceed. This is a preliminary hurdle that is intended to filter out cases that have no reasonable chance of success.[4] The legal test that applicants need to meet at this stage is low: is there any arguable ground upon which the appeal might succeed?[5]

[12] While the Applicant has the responsibility of showing that this legal test has been met, I am not limited to the precise grounds of appeal that she has raised in her written materials.

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[4] DESD Act, at s. 58(2).
[5] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at para. 16.

Rather, if important evidence has arguably been overlooked or misconstrued, then leave to appeal should normally be granted, regardless of any technical problems that might be found in those materials.[6]

The OAS Act and its "incapacity provision"

[13] In granting the Applicant's application for an OAS pension, the Minister awarded her the maximum period of retroactivity that is normally allowed under the OAS Act, based on her date of application.[7] Relying on that Act's incapacity provision, however, she asked the Minister to deem that her application had been received at an earlier date. If the Minister had agreed to do so, the Applicant would, in turn, be eligible for more back payments.

[14] Section 28.1 of the OAS Act—the so-called "incapacity provision"—is designed to protect claimants who are unable, for specific reasons, to apply for their OAS pension in a timely way. In particular, this provision allows the Minister to deem that an OAS pension application was made as of an earlier date if the Minister is satisfied that the claimant was continuously incapable of forming or expressing an intention to make the application before the day on which it was actually made.

[15] The legal test that applies for determining whether a person is incapacitated under the terms of the OAS Act is the same as the one that applies under the *Canada Pension Plan* (CPP).[8] In this context, the Federal Court of Appeal concluded that the capacity needed to form the intention to apply for benefits is similar to the capacity needed to form an intention with respect to other choices that present themselves in life.[9] As a result, when assessing whether a person meets the definition of incapacity, the Tribunal looks to the medical evidence, of course, but also to any activities that the person might perform during the relevant period and that might shed light on his or her capacity.[10]

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[6] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at para. 20; *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para. 10.
[7] OAS Act, at s. 8(2)(*a*).
[8] CPP, at ss. 60(8) to (10); *Canada (Attorney General) v. Poon*, 2009 FC 654.
[9] *Sedrak v. Canada (Social Development)*, 2008 FCA 86, at para. 3.
[10] *Canada (Attorney General) v. Danielson*, 2008 FCA 78; *Slater v. Canada (Attorney General)*, 2008 FCA 375; *McDonald v. Canada (Attorney General)*, 2013 FCA 37.

[16] The Federal Court of Appeal has described the incapacity provision as precise and focused. Indeed, people are not entitled to take advantage of the incapacity provision just because they were unable to make, prepare, process, or complete an application for benefits on their own. Rather, the incapacity provision will only apply to claimants who can show that they did not even have the capacity to form or express an intention of applying for the benefit.[11]

Issue 1: Did the General Division commit an error of fact or law by giving too little weight to the medical evidence or failing to give reasons for discounting it?

[17] In my view, this argument does not amount to an arguable ground on which the appeal might succeed.

[18] The Applicant argues that the medical evidence in this case was overwhelming, strong, and consistent and that the General Division should have either given it more weight or should have given reasons for not accepting it. In particular, the Applicant's family physician, Dr. Hathorn, declared that the Applicant was incapable of forming or expressing the intention to make an application because of major chronic depression, lupus erythematosus, chronic fibromyalgia, generalized arthritis, and a left ankle fracture in 2010.[12] According to Dr. Hathorn, the Applicant's incapacity started in January 1999 and was ongoing at the date of his declaration in March 2014.

[19] As mentioned above, when assessing the Applicant's incapacity, the General Division was entitled to consider both the medical evidence and the Applicant's relevant actions or activities during the alleged period of incapacity. In this case, the General Division acknowledged Dr. Hathorn's declaration of incapacity, but found it to be less persuasive in light of the Applicant's relevant activities and the fact that it was not supported by other medical documents on file. It is obvious, therefore, that the General Division gave reasons for discounting the medical evidence in this case.

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[11] *Danielson*, *supra* note 10, at para. 5.
[12] GD2–32.

[20] With respect to possible errors concerning the weight that the General Division gave to one piece of evidence over another, this argument does not, in fact, fall within any of the grounds listed under s. 58(1) of the DESD Act.[13]

Issue 2: Did the General Division commit an error of fact by misunderstanding the medical evidence?

[21] In my view, this argument has no reasonable chance of success.

[22] The Applicant takes issue with the General Division's observation, at paragraph 55 of its decision, that none of her health care professionals expressed concerns "about her ability to manage her affairs". In the Applicant's view, the role of her physicians involved managing her health rather than overseeing how she manages her affairs. As a result, the fact that the Applicant's doctors did not note any concern about her ability to manage her own affairs is not probative and should not have been considered by the General Division. In addition, the Applicant submits that the lack of these clinical notes is in no way inconsistent with Dr. Hathorn's declaration of incapacity.

[23] I disagree. To begin, the reference to paragraph 55 of the General Division decision is incomplete. Rather, the General Division wrote this: "[none of the] health care professionals the [Applicant] saw expressed any concern about her ability to manage her affairs, to give and receive information, or to understand medical advice and recommendations."

[24] The General Division's observation is plainly relevant. As stated above, the incapacity provision is precise and focused. The capacity needed to form the intention to apply for benefits is similar to the capacity needed to form an intention with respect to other choices that present themselves in life, including a patient's ability to independently seek and consent to treatment.[14] The General Division clearly embarked on a legitimate line of inquiry when it asked whether the Applicant was able to manage her own affairs. If there had been any concern about her ability to do so, this fact likely would have been reflected in the notes of her regular health care providers.

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[13] *Rouleau v. Canada (Attorney General)*, 2017 FC 534, at para. 42
[14] *Sedrak*, *supra* note 9; *Hussein v. Canada (Attorney General)*, 2016 FC 1417, at para. 37; *Danielson*, *supra* note 10, at paras. 9 to 11; *Grosvenor v. Canada (Attorney General)*, 2018 FC 36, at paras. 16 and 27 to 31.

[25] Indeed, in light of the relevant legal test, it is surprising that Dr. Hathorn declared in March 2014 that the Applicant had been incapacitated since January 1999, yet his notes do not reveal any concern about the Applicant's ability to manage her own affairs or consent to treatment.

Issue 3: Did the General Division commit an error of law by misapplying the correct legal test or making incorrect findings about what could be considered a "relevant activity" when making an incapacity assessment?

[26] In my view, the answer to this question is clearly no.

[27] In this portion of her submissions, the Applicant argues that the capacity required to form or express an intention to make an application for benefits is quite significant and that the activities relied on by the General Division in support of its conclusion did not reach that high threshold. More specifically, the General Division did recognize that the Applicant was only able to do the following activities with difficulty, but it refused to find that she had an incapacity since "she was nevertheless able to manage":[15]

a) the Applicant took "the initial steps required" to apply for an OAS pension in February through May 2010;

b) she was "generally able to look after herself and her finances"; and

c) "[s]he was able to travel and to attend most appointments with several different medical practitioners for differing conditions."

[28] The Applicant argues that these activities do not reveal a capacity to form an intention of applying for a government benefit, since completing government applications is known to be onerous and can involve gathering documentation, filling out forms, and acquiring signatures from other parties. Rather, the Applicant insists that many of the above activities, such as paying bills, were done poorly and could only be accomplished with the assistance of others.

[15] General Division decision, at para. 55.

[29] In support of her position, the Applicant relies on the Pension Appeals Board (PAB) decision in *Morrison v. Canada (Minister of Human Resources Development)*[16] to say that the Applicant's activities are most significant when the medical opinions "are of a general, varied or equivocal nature and perhaps not fully or adequately supported by medical evidence." In this case, however, the Applicant stresses that the medical evidence was not varied and that the Applicant's activities during the relevant period were therefore entitled to less weight.

[30] The Applicant's arguments do not amount to an arguable ground on which the appeal might succeed.

[31] Rather, the Applicant's arguments are clearly at odds with the teachings of the Federal Court of Appeal in cases such as *Danielson*,[17] where it concluded that a person can still be found to have capacity even if they are unable to complete an application for benefits themselves. Rather, they need only be able to form or express the intent of making an application.

[32] In addition, the Federal Court has confirmed that the scope of relevant activities that can be taken into account as part of an incapacity assessment is broad.[18] In my view, the activities relied on by the General Division were clearly relevant because they revealed the Applicant's ability to make choices with respect to the issues that presented themselves in her life.[19] The fact that the Applicant might have needed help to execute the decisions that she made is not particularly relevant.

[33] And finally, I am unpersuaded by the Applicant's arguments based on the *Morrison* decision. First, decisions of the PAB are non-binding. Second, the Federal Court of Appeal decisions that I highlighted above establish the relevance of considering a person's activities as part of an incapacity assessment. They do not indicate that those activities are only relevant in certain circumstances. And third, the General Division concluded that Dr. Hathorn's declaration of incapacity was unsupported by the balance of the medical evidence, which justifies its consideration of the Applicant's activities in any event.

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[16] *Morrison v. Canada (Minister of Human Resources Development)* (May 4, 1997), CP04182, at 5 to 6.
[17] *Danielson*, *supra* note 10, at para. 5.
[18] *Grosvenor*, *supra* note **Error! Bookmark not defined.**14.
[19] *Sedrak*, *supra* note 9.

[34] In summary, the Applicant's arguments suggesting that the General Division misapplied the law or made incorrect findings about the Applicant's relevant activities have no reasonable chance of success.

Issue 4: Did the General Division commit an error of fact by making inconsistent findings on the question of the Applicant's incapacity?

[35] Again, this argument does not amount to an arguable ground on which the appeal might succeed.

[36] In this part of her submission, the Applicant relies on the following paragraph from the General Division decision:

> [54] The Tribunal found the [Applicant and her roommate] to be honest and accepts their evidence that for many years the [Applicant] has had a debilitating mental and physical condition that prevents her from participating in many aspects of a normal lifestyle. She relies on the assistance of others, and when this is not available she is limited in what she can do.

[37] The Applicant argues that, based on this particular finding, the General Division should have concluded that she met the legal test for incapacity. Further, the General Division's conclusion in this paragraph to the effect that the Applicant was unable to participate in many aspects of normal life is inconsistent with its finding in the following paragraph that she was capable of managing her own affairs.

[38] I do not see the General Division's findings as being inconsistent with one another when the Federal Court of Appeal's interpretation of the incapacity provisions is properly understood. There is clearly no equivalence between being unable to participate in many aspects of a normal lifestyle and being incapacitated, as defined under the OAS Act.

Issue 5: Did the General Division commit an error of fact or law by ignoring evidence concerning what triggered the Applicant's application for an OAS pension?

[39] In my view, this argument has no reasonable chance of success.

[40] In making this argument, the Applicant relies on the following passage from the PAB's decision in *Morrison*:[20]

> Moreover, the question of what occurred to "trigger" the application when it was in fact and finally made, with the required capacity present, will be an interesting and significant one. What changed and why will be an important question.

[41] In this case, the Applicant argues that it was the assistance of her roommate that triggered the making of her application and that this proves that she was unable to form the intention of filing the application on her own.

[42] It is clear from the General Division decision that it inquired into what triggered the making of the Applicant's application for an OAS pension in November 2013.[21] Having gathered this evidence, the General Division was entitled to give it the weight it considered appropriate in all the circumstances of the case.

[43] Moreover, the evidence concerning the Applicant's need for assistance simply speaks to her ability to complete the application for an OAS pension on her own. It does not speak to her ability to form the intent of applying for that benefit. Indeed, it seems clear that once the Applicant became aware that she was not receiving a benefit to which she was entitled, she quickly formed the intention of applying for it, though she might have needed assistance in completing her application.

[44] Significantly, the Applicant appears to have formed the intent to apply for her OAS pension even earlier, because she started the process in February 2010, during her alleged period of incapacity, but subsequently encountered difficulties completing the process.[22]

Issue 6: Did the General Division commit an error of fact or law when it failed to conclude that the Applicant was a victim of erroneous advice?

[45] This argument has no reasonable chance of success either.

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[20] *Morrison, supra* note 16, at 6.
[21] General Division decision, at paras. 14 to 20.
[22] General Division decision, at para. 14.

[46] The Applicant argues that she received erroneous advice when, at the time of making her OAS pension application in November 2013, she was told that seeking back payments was the most she could do to recover as much of her pension as possible. Much later in the process, however, she learned that she would be entitled to receive a greater monthly amount if she voluntarily deferred receipt of her OAS pension until her 70th birthday (X 2015). Determining which approach would be more beneficial does, of course, depend on a variety of factors, including some that are unknown, such as the Applicant's longevity.

[47] In the alternative, therefore, the Applicant asked the General Division to find that she had been given erroneous advice and to deem that her OAS pension had been voluntarily deferred to March 2015.[23] Indeed, she alleges that the General Division committed an error of fact and law when it failed to conclude that she had been a victim of erroneous advice.

[48] In support of her position, the Applicant relies on s. 32 of the OAS Act, which says:

> ## Erroneous Advice or Administrative Error
>
> **Where person denied benefit due to departmental error, etc.**
>
> **32** Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or a portion of a benefit, to which that person would have been entitled under this Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.

[49] The key part of the General Division's response to this argument can be found at paragraph 72 of its decision, where it specifies that the Minister is the only one who is entitled to determine whether a person has been a victim of erroneous advice and, if so, to take the appropriate remedial action. The courts have consistently held that the Tribunal has no jurisdiction to investigate into these matters, nor does it have the power to review whatever discretionary decisions the Minister might make in the circumstances.[24]

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[23] GD6.
[24] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278; *Canada (Attorney General) v. Vinet-Proulx*, 2007 FC 99, at para. 12.

[50] It is abundantly clear, therefore, that the General Division made no error in this regard.

Issue 7: Did the General Division arguably overlook or misconstrue any of the evidence?

[51] Although I have concluded that none of the arguments raised by the Applicant amount to an arguable ground on which the appeal might succeed, I am mindful of Federal Court decisions in which the Appeal Division was instructed to go beyond the four corners of the written materials and consider whether the General Division might have misconstrued or failed to properly account for any of the evidence.[25]

[52] After reviewing the underlying record and examining the decision under appeal, I am satisfied that the General Division neither overlooked nor misconstrued relevant evidence. In my view, the General Division applied the relevant legal principles, accurately summarized key aspects of the evidence, and adequately explained why the Applicant cannot benefit from the OAS Act's narrow and focused incapacity provision.

CONCLUSION

[53] Although I have great sympathy for the Applicant, I have concluded that her appeal has no reasonable chance of success.

[54] The application for leave to appeal is refused.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	Casey St. Germain, for the Applicant

[25] *Griffin*, *supra* note 6; *Karadeolian*, *supra* note 6.