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

Citation: *K. V. v. Minister of Employment and Social Development*, 2018 SST 849

Tribunal File Number: AD-18-263

BETWEEN:

K. V.

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: August 29, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, K. V., was born in 1944. In 2009, he applied for a pension under the *Old Age Security Act* (OASA). On his application, he indicated that he wanted to apply for the Guaranteed Income Supplement (GIS). The Respondent, the Minister of Employment and Social Development (Minster), approved his Old Age Security (OAS) pension application and enclosed GIS application forms with its approval letter.

[3] The Applicant did not submit a GIS application until September 29, 2015. The Minister approved this application, with an effective date of October 2014—the maximum period of retroactivity permitted under the law.

[4] The Applicant asked the Minster to reconsider its decision, claiming that he had been incapacitated from applying for the GIS earlier. The Applicant submitted a Declaration of Incapacity form, completed by a physician, indicating that he was incapacitated from October 1, 2012, to October 4, 2012, when he was hospitalized following a heart attack.

[5] Upon reconsideration, the Minister maintained that it correctly determined the first payment date under the law, and it also found that the Applicant's evidence of incapacity did not meet the standard set out in s. 28.1 of the OASA.

[6] The Applicant appealed the Minister's decision to the General Division of the Social Security Tribunal. Following a hearing by teleconference, the General Division dismissed the appeal. In a decision dated January 25, 2018, the General Division found that the Minister had acted within the law by limiting the Applicant's retroactive GIS payments. It also found insufficient evidence of incapacity and declared that it had no authority to provide the Applicant with an equitable remedy.

[7] The Applicant has now submitted an application for leave to appeal to the Tribunal's Appeal Division, alleging that the General Division committed various errors in rendering its decision.

[8] Having reviewed the Applicant's submissions against the record, I have concluded that this is not a suitable case in which to grant leave to appeal.

APPLICANT'S SUBMISSIONS

[9] The Applicant submitted a lengthy brief in which he made the following points:

- In paragraph 7 of its decision, the General Division referred to a "notation" on the Applicant's September 2009 OAS application that he was sent the GIS application forms. He cannot recall whether he ever received such forms and asks how he could have been expected to remember that he had.
- The government does not adequately publicize the GIS and, like many Canadians, he was unaware that he might be eligible for it. In particular, he did not know about the 11-month limitation on retroactive payment. As a result, he was late in applying for the GIS, causing him to forfeit benefits to which he was otherwise entitled.
- There is no reason why the Canada Revenue Agency (CRA) cannot inform Canadians that they might qualify for the GIS, especially since the CRA already shares information with the Minister about GIS recipients whose income has risen above the maximum allowable amount.
- The "11-month rule" is merely an administrative provision that does not carry the force of Parliamentary law. It is meant to be a convenience for the Minister and his department, but it should not be used to disentitle Canadians from their benefits. The Applicant notes that, when the CRA is owed money, taxpayers do not benefit from a similar rule that waives the obligation to pay once a set period of time has passed.
- The Applicant suffered significant financial setbacks in 2013 and 2014 and, since he did not initially report them as business losses, he did not, on paper, qualify for

the GIS until 2015. Only after he adjusted his income tax returns for 2013 and 2014 (which then triggered a time-consuming audit) did it become apparent that he had been eligible for the GIS for those two years.

- In 2012, the Applicant was hospitalized following a heart attack, which affected his memory. As a result, any awareness that he had previously possessed of the rules governing the GIS vanished from his mind. It is well established that one possible consequence of a cardiovascular event is cognitive impairment, which in the Applicant's case, was compounded by the stress of losing his life savings.

[10] Included with the Applicant's submissions was an application to rescind or amend the General Division's decision (which has been adjudicated separately), as well as a large volume of supplemental material. This material included (i) CRA's Taxpayer Bill of Rights Guide; (ii) the *Constitution Act, 1982*; (iii) a Wikipedia entry on Canadian administrative law; (iv) the Social Security Tribunal Practice Directions; (v) assorted printouts from websites, such as WebMD and Healthline, on post-traumatic stress syndrome and the link between heart problems and dementia; (vi) the Concordia University handbook on the rules of natural justice; (vii) articles from the *Osgoode Hall Law Journal*; and (viii) a prior decision of the Appeal Division—*Minister of Employment and Social Development v. E. R.*, 2018 SST 99.

ISSUES

[11] Under 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] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[2] As the Federal Court of Appeal has determined, a reasonable chance of success is akin to an arguable case at law.[3]

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

[12] I must decide whether the Applicant has raised an arguable case on the following issues:

Issue 1: Did the General Division err in limiting the Applicant to 11 months of retroactive GIS payments?

Issue 2: Did the General Division err in finding that the Applicant was capable of making or expressing an intention to apply for the GIS prior to September 2015?

Issue 3: Did the General Division err in refusing to consider the extenuating circumstances that led to the delay in the Applicant submitting his application?

ANALYSIS

Issue 1: Did the General Division err in limiting the Applicant to 11 months of retroactive GIS payments?

[13] I do not see an arguable case that the Tribunal erred in law when it determined the Applicant's first payment date.

[14] Contrary to the Applicant's allegation, the restriction on retroactive payment is more than just an administrative convenience; it is mandated by the law. The General Division correctly noted that s. 11(7)(*a*) of the OASA limits payment of the GIS to no "more than eleven months before the month in which the application is received" by the Minister. It is irrelevant whether the Minister neglected to forward GIS application forms in 2009; the fact remains that he did not apply for the benefit until September 2015. As a result, he was statute-barred from receiving payment any earlier than as of October 2014, once his application was approved.

Issue 2: Did the General Division err in finding that the Applicant was capable of making or expressing an intention to apply for the GIS prior to September 2015?

[15] It must be said that the Applicant's submissions mirror arguments that were already presented to the General Division. They amount to a restatement of his claim that he did not submit a GIS application earlier because he was incapacitated from doing so. The Applicant has now submitted information from general interest medical websites in an apparent effort to show

that heart problems and/or stress can lead to dementia and, presumably, incapacity, as defined by the OASA. It does not appear that any of this material was before the General Division at the time of last January's hearing and, as such, it must be considered new evidence. However, under the narrow parameters of s. 58(1) of the DESDA, the Appeal Division has no mandate to reassess evidence or re-hear claims for OAS benefits on their merits. I am permitted only to determine whether any of the reasons cited fall within the specified grounds of appeal and whether any of them have a reasonable chance of success.

[16] Section 28.1 of the OASA reads as follows:

> 28.1(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 was 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 with 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.
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> […]
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> 28.1(3) For the purposes of subsections (1) and (2), a period of incapacity must be a continuous period, except as otherwise prescribed.

[17] This section indicates that the burden of proof lies on the Applicant to provide evidence that he or she was incapacitated. In this case, the General Division considered the evidence put forward by the Applicant in support of his claim and concluded that it was deficient. The standard of incapacity set out in s. 28.1 is high, requiring claimants to show that they were not only physically unable to make an application but also unable to form or express an intention to do so. With that in mind, the General Division noted, among other things, that:

- the Applicant's claimed period of incapacity was a four-day admission to hospital following a heart attack in 2012;
- the Applicant's affairs have not been managed under a power of attorney;

- the Applicant's activities after being in hospital suggested that, whatever his level of incapacitation, it was not continuous; and
- the Applicant's delay in applying for the GIS was partly due, by his own admission, to his lack of understanding of the law.

[18] In the absence of specific allegations of errors of law, I see no reason to overturn the General Division's assessment, where it has cited the correct legal test for incapacity and has taken into account relevant evidence. While the Applicant may not agree with the outcome, it emerges from what I believe is an attempt to address his submissions in good faith.

Issue 3: Did the General Division err in refusing to consider the extenuating circumstances that led to the delay in the Applicant submitting his application?

[19] The Applicant's remaining arguments amount to a complaint that the law is unfair and so is the way in which the Minister carried it out. The Applicant pleaded that he was in financial distress and did not know about the GIS because the government does little to publicize it. He pointed out what he saw as a double standard in the way the Minister shares information with the CRA when it suits them but not when it suits a potential claimant.

[20] As much as I may sympathize with the Applicant, my hands are tied by the OASA and the laws that govern the Tribunal. In its decision, the General Division considered whether it had the discretion to simply order a "fair" result; in the end, it decided that it did not, and I see no arguable case that it erred in arriving at this conclusion.

[21] As administrative tribunals, both the General Division and the Appeal Division are limited to the powers conferred by their enabling legislation—in this case, the DESDA. We lack the authority to simply ignore the letter of the law and order a solution that we think is just. This power, known as "equity," has traditionally been reserved for the courts, although they will typically exercise it only if there is no adequate remedy at law. *Canada v. Tucker*,[4] among many other cases, has confirmed that an administrative tribunal is not a court but a statutory decision-maker and, therefore, not empowered to provide any form of equitable relief.

[4] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278

CONCLUSION

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

Member, Appeal Division

REPRESENTATIVE:	K. V., self-represented