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

Citation: *C. L. v Minister of Employment and Social Development*, 2019 SST 997

Tribunal File Number: AD-19-648

BETWEEN:

C. 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: October 9, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, C. L., was born in May 1944. In December 2011, he applied for an Old Age Security (OAS) pension. In an accompanying note, he indicated that his application had been delayed due to a car accident and illness, and he wished to receive his pension retroactive to his 65th birthday.

[3] The Respondent, the Minister of Employment and Social Development (Minster), approved his pension with a first payment date of January 2011—the maximum period of retroactivity ordinarily permitted under the law.

[4] The Applicant asked the Minster to reconsider its decision, claiming that he had been unable to submit an application any earlier than December 2011. In April 2012, the Minister returned a blank Declaration of Incapacity form and asked the Applicant to have it completed by a physician.

[5] The Applicant did not return the completed Declaration of Incapacity until May 2015. In it, a general practitioner indicated that the Applicant became incapacitated in July 2010, following a car accident that had left him with neck and back pain, as well as depression.[1]

[6] Upon reconsideration, the Minister found that the Applicant's evidence of incapacity did not meet the standard set out in section 28.1 of the *Old Age Security Act* (OASA). It maintained that it had correctly determined the Applicant's first payment date under the law.

[7] The Applicant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division held an in-person hearing and, in a decision dated June 11, 2019, dismissed the appeal, finding that the Applicant was not entitled to additional

[1] Declaration of Incapacity completed by Dr. Thomas Van on July 18, 2012 (GD2-41).

retroactive OAS pension payments. It found insufficient evidence that the Applicant was incapable of forming or expressing the intent to make an application at any time after May 2009.

[8] The Applicant has now submitted an application for leave to appeal to the Tribunal's Appeal Division. He disagrees with the General Division's decision and submits that his 40 years of residence in Canada qualify him for a "full" pension.

[9] 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.

ISSUE

[10] Under section 58(1) 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.[2]

[11] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[3] As the Federal Court of Appeal has determined, a reasonable chance of success is akin to an arguable case at law.[4]

[12] My task is to determine whether any of the Applicant's reasons for appealing fall under the categories specified in section 58(1) of the DESDA and, if so, whether any of them raise an arguable case on appeal.

ANALYSIS

[13] I do not see an arguable case for the Applicant's submissions.

[14] The Applicant is essentially making the same argument that he made to the General Division. He is essentially restating his claim that he could not submit an OAS application any

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

earlier than when he actually did because he was incapacitated from doing so. However, under the parameters of section 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 Applicant's reasons for appealing the reasons cited fall within the specified grounds and whether any of them have a reasonable chance of success.

[15] The incapacity test in section 28.1 of the OASA places the burden of proof on claimants to show that they were incapacitated. In this case, the General Division considered the evidence supporting the Applicant's claim and concluded that it was deficient. The standard of incapacity set out in section 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 took into account the following factors:

- There was little medical evidence to support a finding of incapacity, other than a psychiatric report indicating that the Applicant had been treated for depression;
- The Declaration of Incapacity was completed by a general practitioner who was not treating the Applicant during the relevant time;
- In his Declaration of Incapacity, Dr. Van indicated that the period of incapacity was ongoing and had continued after December 2011—the month by which the Applicant himself admitted he had recovered;
- The Applicant's affairs have not been managed under power of attorney;
- The Applicant testified that he was able to manage his activities of daily living throughout the period of his claimed incapacity.

[16] As trier of fact, the General Division is entitled to a degree of deference in how it chooses to weigh the evidence.[5] 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 a good faith attempt to address his submissions.

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

CONCLUSION

[17] Since the Applicant has not identified any grounds of appeal under section 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:	C. L., self-represented