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

Citation: *A. A. v Minister of Employment and Social Development*, 2020 SST 253

Tribunal File Number: AD-20-61

BETWEEN:

**A. A.**

Appellant
(Claimant)

and

**Minister of Employment and Social Development**

Respondent
(Minister)

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Neil Nawaz

DATE OF DECISION: March 20, 2020

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] The Claimant, A. A., was married for 32 years. His wife died in September 2011, and he applied for a survivor's allowance under the *Old Age Security Act* (OASA) in March 2014. The Minister granted the application, but the Minister only paid the allowance from April 2013 to December 2014 and from June 2015 to October 2015.

[3] The Minister offered the following reasons for restricting payment to these periods:

- The allowance could not be paid before April 2013 because the OASA allows no more than eleven months of payments retroactive from the date the application was received;
- The allowance could not be paid from January to May 2015 because the Claimant was outside Canada from June 2014 to June 2015; and
- The allowance could not be paid after October 2015 because the Claimant turned 65 that month.

[4] The Claimant appealed the Minister's determination to the General Division of the Social Security Tribunal. He said that he applied late because he did not receive the application forms in time, and because he was unwell and had a difficult time for many years after his wife's death. He did not dispute that he was absent from Canada from June 2014 to June 2015 but said there were extenuating circumstances. He felt that payments had been unfairly denied to him on technical grounds, and that the decision defied the purpose of the OASA.

[5] In a decision dated September 4, 2019, the General Division summarily dismissed the Claimant's appeal on the basis that it had no reasonable chance of success.

[6] January 28, 2020, the Claimant submitted a notice of appeal to the Appeal Division. He acknowledged that his notice of appeal was "late" but noted that the General Division usually delayed its responses too. He also alleged that the General Division

- denied him an in-person hearing;
- displayed hostility and prejudice;
- prevented him from making and clarifying his arguments;
- failed to consider his health and state of mind; and
- ignored the fact that he could not afford legal representation.

[7] In a letter dated March 14, 2020, the Claimant explained that he had not applied for the allowance sooner because of health problems. He said that, despite his health, he travelled to India to care for his ailing mother. He repeated his allegation that the General Division was biased against him and suggested that the outcome had been "choreographed" in advance. He expressed dismay that the General Division explicitly put aside considerations of "equity" in coming to its decision.

[8] I have decided that an oral hearing is not necessary in this case. The appeal proceeded based on the written record because there were no gaps in the file and there was no need for clarification.[1]

[9] Having reviewed the record and the parties' written submissions, I have concluded that none of the Claimant's reasons for appealing justify overturning the General Division's decision.

**ISSUES**

[10] I must decide the following questions:

Issue 1: Was the Claimant's appeal filed late? If so, should the Claimant be given a time extension?

[1] Under section 53(3) of the *Department of Employment and Social Development Act* (DESDA), in this case does not require leave to appeal, because it involves a summary dismissal from the General Division.

Issue 2: Did the General Division act unfairly by summarily dismissing the Claimant's appeal?

Issue 3: Did the General Division display prejudice when it decided the Claimant's appeal?

Issue 4: Did the General Division fail to consider the Claimant's health and state of mind?

Issue 5: Did the General Division neglect to take into account the Claimant's lack of legal representation?

## ANALYSIS

### Issue 1: Was the Claimant's appeal filed late?

[11] The Claimant initiated his appeal by completing a form entitled, "Application to the Appeal Division – Income Security." The form contains a box inviting claimants to explain why their leave to appeal application was late.[2] As we will see, the Claimant was not required to fill out this box, although he did so anyway, noting that he was appealing from a summary dismissal. However, it seems that the Claimant *believed* that he was late since, elsewhere on the form, he excused his "delay" by pointing to the General Division's own delays.

[12] In fact, the Claimant was not late in submitting his appeal—but only because of a gap in the relevant legislation. Section 57(1) of the *Department of Employment and Social Development Act* (DESDA) imposes a 90-day time limit after the General Division issues a decision, but this section applies only to applications for leave to appeal to the Appeal Division. It is silent about any time limit for appeal to the Appeal Division from a summary dismissal decision.

[13] In the absence of any express provisions setting out a time limit for an appeal from a summary dismissal decision, I find that, although the Claimant's Appeal was filed more than 90 days after the General Division decision was communicated to him, his appeal was not late.

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[2] Box 6 of the Application to the Appeal Division – Income Security, AD1-4.

**Issue 2: Did the General Division act unfairly by summarily dismissing the Claimant's appeal?**

[14] Under the DESDA, there are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[3]

[15] The Claimant alleges that the General Division breached a principal of natural justice by choosing to dispose of his appeal by way of summary dismissal. He suggests that the General Division deprived him of an opportunity to explain in person why he was entitled to more allowance payments. For reasons that I will now explain, I see no merit in these submissions.

***(i) The General Division applied the correct test for summary dismissal***

[16] First, I am satisfied that the General Division used the appropriate mechanism to decide the Claimant's appeal. In paragraph 4 of its decision, the General Division cited section 53(1) of the DESDA, correctly stating that the provision permitted it to summarily dismiss an appeal that had no reasonable chance of success. However, I acknowledge that it is insufficient to simply cite legislation without properly applying it to the facts.

[17] The decision to summarily dismiss an appeal relies on a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed. In *Fancy v Canada*,[4] the Federal Court of Appeal determined that a reasonable chance of success is akin to an arguable case at law. The Court also determined that the threshold for summary dismissal is high.[5] It has to be "plain and obvious" on the record that the appeal is bound to fail. The question is *not* whether the appeal must be dismissed after considering the facts, the law, and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of what might be submitted at a hearing.

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[3] The formal wording for these grounds of appeal is found in section 58(1) of the DESDA.
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[5] *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v Canada (Attorney General)*, 2004 FCA 264.

[18] Here, the Claimant applied for a survivor's allowance in March 2014. The General Division correctly found that the allowance could not be paid before April 2013 because, under section 21(9)(a) of the OASA, there can be no more than eleven months of retroactive payments from the date the application was received.

[19] The Claimant also admitted that he was outside Canada from June 2014 to June 2015. The General Division correctly found that the allowance could not be paid from January to May 2015 because, under section 21(9)(b) of the OASA, payment stops if the recipient is outside Canada for more than six months.

[20] The Claimant turned 65 in October 2015. The General Division correctly found that the allowance could not be paid after that month because, under section 21(1)(a) of the OASA, the allowance is only payable to persons between the ages of 60 and 65.

[21] When making these findings, the General Division correctly applied a high threshold, concluding that the appeal had no reasonable chance of success. As the General Division noted, it had to follow the letter of the law, and it was within its jurisdiction to summarily dismiss the appeal. It was plain and obvious on the record that the Claimant's appeal was bound to fail.

### *(ii) The General Division did not act unfairly by denying the Claimant an oral hearing*

[22] The Claimant believes that justice was not served because the General Division did not give him an opportunity to clarify certain points of fact in person. I disagree. Under the law, the General Division has several methods available to it to deal with appeals. It can hold hearings orally—by telephone, videoconference or personal appearance—or it can call for written submissions and decide the matter based on a review of the existing file. It is up to the presiding General Division member to decide what method of hearing is appropriate under given circumstances, although such discretion must be exercise according to the rules of procedural fairness. As noted, there may be circumstances where the General Division concludes that a hearing of any kind is unnecessary because the appeal does not have a reasonable chance of success. In such a case, the General Division has the power to summarily dismiss the appeal, but here, too, the General Division must be sure that it does not act unfairly.

[23] In this case, the General Division was aware that it was denying the Claimant an opportunity to speak, and it took pains to justify what it was doing:

> I gave the Claimant notice in writing of my intention to summarily dismiss this appeal. In his response to the notice, he suggested I might be colluding with Service Canada because the notice was sent soon after the Minister had filed its submission requesting the same. He thought the whole process looked like it was "fixed" and that, rather than acting as a mouthpiece for the Government I should be helping him. He asked to be heard in person.
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> But the law says I have to summarily dismiss an appeal if it has no reasonable chance of success. That is the case here. There is no point in allowing the Claimant to waste his efforts on an appeal that is bound to fail. Nor was there any point in waiting to respond to the Minister's request to summarily dismiss the appeal. The Minister had the right to make the request. I saw no reason to delay acting upon it, as there is no basis on which the Claimant's appeal could succeed.[6]

The Claimant did not apply for the allowance until March 2014. He turned 65 in October 2015. Entry and exit stamps in his passport confirm his admission that he was out of the country from June 2014 to June 2015.[7] It is nearly impossible to conceive of any information or argument that the Claimant might have presented to the General Division at a hearing to challenge these facts.

**Issue 3: Did the General Division display prejudice when deciding the Claimant's appeal?**

[24] The Claimant alleges that the presiding General Division member was "hostile and adversarial" and prejudged his appeal.

[25] As we have seen, the Claimant made a similar allegation at the General Division when he learned that the member intended to summarily dismiss his appeal. However, I cannot agree that the General Division's decision to reject his claim, or the method it used to do so, indicated any bias toward the Minister.

[26] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. Bias denotes a state of mind that is in some way predisposed to a

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[6] General Division decision, paragraphs 13 and 14.
[7] GD2-58–59.

particular result that is closed with regard to particular issues. The Supreme Court of Canada has stated that test for bias is, "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[8] A real likelihood of bias must be demonstrated, with a mere suspicion not being enough.

[27] I reviewed the General Division's written reasons and saw nothing to suggest it was doing anything other than following the facts and the law as they led to their inevitable conclusion. The presiding member's decision was logical, reasoned, and measured. I am satisfied that she decided the Claimant's appeal impartially.

**Issue 4: Did the General Division fail to consider the Claimant's health and state of mind?**

[28] The Claimant alleges that the General Division ignored the impact of his physical and psychological condition on his claim for the OAS allowance. He notes that his wife of many years passed way in 2011, leaving him in a deep malaise. He said that he then developed Parkinson's disease and the beginnings of Alzheimer's disease. In 2013, he suffered a heart attack and had to undergo coronary bypass surgery. As a result, he says, he was unable to apply for the allowance sooner because he was uncharacteristically lethargic and prone to procrastination. He says that, even though he was in no shape to do so, he went to India in 2014 to care for his ailing mother in her final days.

[29] In my view, this reason for appealing cannot succeed. An appeal before the Appeal Division is not another opportunity for claimants to make arguments that they already made, or could have made, before the General Division. In this case, the record shows that the Claimant mentioned his state of mind following his wife's death, and his subsequent heart attack, in his notice of appeal to the General Division.[9] In its decision, the General Division explicitly referred to the Claimant's submissions:

> He said he applied late because he did not receive the application forms in time, and because he was unwell and had a difficult time for many years after his wife's death. He did not dispute that he was absent from Canada from June 2014 to June 2015, but said there were extenuating circumstances. He feels payments have been unfairly denied to him on

[8] *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.
[9] See notice of appeal dated November 6, 2018 (GD1-2) and enclosed letter dated July 18, 2018 (GD1-6).

> technical grounds, and that the decision defied the purpose of the OAS Act.[10]

However, the General Division found that the law did not permit it to take such extenuating circumstances into account:

> I agree with the Claimant that the OAS Act was intended to help seniors. However, it was written with limitations on how much help is available. I have to follow the law. That includes respecting and applying those limitations. I don't have the power to grant the Claimant greater retroactivity of his allowance, or to say he can receive it when he has been outside Canada for more than six months, or after he has turned 65. That is the case no matter the reasons for the Claimant's delay or his absence.[11]

I sympathize with the Claimant, but the General Division was bound follow the OASA and could not simply ignore the letter of the law. The Claimant finds it unfair that Canadians are sometimes denied benefits merely because they submitted their application late, often for genuine reasons, yet this is the outcome that Parliament prescribed when it enacted the OASA.

[30] The Claimant wonders why the General Division denied that it had "equitable jurisdiction" when it is supposed to be in the business of producing just results for Canadians. I can understand why the Claimant is confused. The General Division was not referring to "equity" as it is understood in everyday speech but to a legal concept that gives the courts broad powers to right wrongs. However, even courts typically exercise their equitable powers only if there is no adequate remedy at law. In *Canada v Esler*,[12] for example, the Federal Court reversed an attempt by the General Division's predecessor tribunal to extend retroactive OASA benefits beyond the legislative limitation. The Court wrote, "The Review Tribunal is a pure creature of statute and as such, has no inherent equitable jurisdiction which would allow it to ignore the clear legislative provision contained in subsection 8(2)[13] of the Act and use the principle of fairness to grant retroactive benefits in excess of the statutory limit."

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[10] General Division decision, paragraph 3.
[11] General Division decision, paragraph 12.
[12] *Canada (Minister of Human Resources Development) v Esler*, 2004 FC 1567.
[13] Section 8 of the OASA limits retroactive payment of the OAS pension to 11 months before the date of application.

**Issue 5: Did the General Division neglect to take into account the Claimant's lack of legal representation?**

[31] The Claimant cannot afford a lawyer and feels outmatched against the might of the federal government.

[32] Unfortunately for the Claimant, this argument does not fall under any of the permitted grounds of appeal. In any event, it is well established in case law that deficient or nonexistent legal representation does not justify overturning a decision.[14] As an aside, even if the Claimant had had access to legal counsel, I doubt that it would have made any difference to the outcome of his appeal.

## CONCLUSION

[33] The Claimant has not shown how the General Division acted unfairly or committed an error. I see no reason to interfere with the General Division's conclusion that the Claimant was not entitled to additional OASA benefits.

[34] The appeal is therefore dismissed.

Member, Appeal Division

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| METHOD OF PROCEEDING: | On the record |
| REPRESENTATIVE: | A. A., self-represented |

[14] See, for example, *Cornejo Arteaga v. Canada (Citizenship and Immigration)*, 2010 FC 868.