Citation: *AM v Minister of Employment and Social Development*, 2022 SST 499

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. M.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated December 23, 2021 (GP-21-251)

Tribunal member:	Neil Nawaz
Decision date:	April 20, 2022
File number:	AD-22-192

Decision

[1] Leave to appeal is refused. I see no basis for this appeal to go forward.

Overview

[2] The Claimant, A. M., is 77 years old. In November 2008, he applied for an Old Age Security (OAS) pension. The Minister approved his application, effective September 2009. At the same time, the Minister gave him information about how to apply for the Guaranteed Income Supplement (GIS), a benefit paid to low-income OAS pension recipients. The Minister eventually approved the Claimant's GIS, starting in January 2010—11 months before the application date and, according to the Minister, the maximum retroactive payment allowed by the law.

[3] However, the Claimant thought that his GIS should have started earlier. He insisted that he applied for the GIS in March 2010 and not, as the Minister determined, in December 2010. He asked the Minister to give him more retroactive GIS payments.

[4] The Minister refused the Claimant's request. It said that it had no record of receiving any application from the Claimant other than the one he submitted on December 31, 2010.

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal. He maintained that he had submitted a GIS application earlier than December 2010. He added that he had been incapacitated by a heart attack in August 2009. He also claimed that he had relied on the Minister's advice not to file another application for the GIS before December 2010.

[6] The Tribunal's General Division held a hearing by teleconference and dismissed the appeal. It found no evidence that the Claimant had submitted an application in March 2010 and it saw no indication that he was "incapable of forming or expressing an intention to make an application"[1] between August 2009 and December 2010. Finally,

[1] This is the standard for incapacity set out in section 28.1 of the *Old Age Security Act* (OASA).

the General Division decided that it lacked the authority to order a remedy arising from any administrative error or erroneous advice by the Minister.

[7] The Claimant is now asking the Appeal Division for permission to appeal. He alleges that the General Division committed the following errors:

- It ignored his testimony that a Service Canada agent filled out and accepted a GIS application on his behalf in March 2010; and
- It examined his claim of incapacity only through the lens of his heart attack, while ignoring the many other medical conditions that contributed to his inability to make an application.

Issue

[8] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

[9] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[3] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[4] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[5]

[10] I have to decide whether the Claimant has raised an arguable case that falls under one or more of the permitted grounds of appeal.

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[2] *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] DESDA, sections 56(1) and 58(3).
[4] DESDA, section 58(2).
[5] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Analysis

[11] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I don't see any basis for this appeal to go forward.

There is no arguable case that the General Division ignored the Claimant's testimony

[10] The Claimant comes to the Appeal Division making essentially the same arguments that he made at the General Division. He claims that the General Division disregarded his evidence. He maintains that, although he was incapacitated by a heart attack in August 2009, he nevertheless managed to submit a GIS application in March 2010. He insists that Service Canada lost or mishandled this application.

[11] I don't see an arguable case for these submissions. First, the Appeal Division does not rehear evidence that has already been heard at the General Division. Second, the General Division is presumed to have consider all the evidence before it.

– The Appeal Division does not rehear evidence

[12] To succeed at the Appeal Division, a claimant must do more than simply disagree with the General Division's decision. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal permitted under the law. It is not enough to present the same evidence and arguments to the Appeal Division in the hope that it will decide your case differently.

– The General Division is presumed to have considered all available evidence

[13] One of the General Division's jobs is to make findings of fact. In doing so, it is presumed to have considered all the evidence before it.[6] In this case, I don't see any indication that the General Division disregarded the Claimant's testimony. In fact, the

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

General Division discussed the Claimant's testimony at length in its decision. However, the General Division ultimately found that testimony less than convincing.

– **The General Division considered the Claimant's capacity**

[14] The General Division found that the Claimant was not incapacitated from applying for the GIS between August 2009 and December 2010. It came to this conclusion for the following reasons:

- The Claimant testified, in apparent contradiction to his claim of incapacity, that he submitted a GIS application in March 2010; and
- The available medical evidence did not suggest that the Claimant was "incapable of forming or expressing an intention" to make an application before December 2010:
  - → He completed a statement of estimated income on August 31, 2009—shortly after the heart attack that he claimed was the primary source of his incapacity;
  - → Dr. Phan's clinical notes from the relevant period did not disclose cognitive limitations and depicted a patient who was actively engaged in his medical care and capable of giving consent to treatment; and
  - → The declarations of incapacity on file were either incomplete (one, supposedly completed by Dr. Phan, was unsigned[7]) or unreliable (another, completed by Dr. Vale, affirmed that the Claimant was incapacitated by rheumatoid arthritis as long ago as 2007—well before Dr. Vale first saw him[8]).

[15] I see nothing to suggest that the General Division misapplied the law by taking into account the above factors. As the Federal Court of Appeal recently noted:

> The case law informs us that the applicable legal test is not whether the applicant has the capacity to make, prepare,

[7] Incomplete incapacity form dated July 25, 2016, IS15-17.
[8] Declaration of Incapacity completed by Dr. Noah Vale on July 8, 2016, IS15-23.

> process, or complete an application for disability benefits. That is, it does not depend on whether the applicant has the physical capacity to complete the application. Rather, it is whether the applicant has the **mental capacity**, quite simply, of forming or expressing an intention to make an application. This capacity is the same as forming or expressing an intention to do other things [emphasis added].[9]

[16] The Claimant notes that he previously received the Canada Pension Plan disability pension. However, disability and incapacity are two different concepts. One is an inability to regularly pursue a substantially gainful occupation; the other is an inability to form or express an intention to make an application for benefits. The second is generally much harder to prove than the first. While the Claimant submitted evidence of a heart condition, that does not mean that he met the relatively heavy burden of proving that he lacked an ability to form or express an intention to apply for the GIS.

– **The General Division considered the Claimant's first application**

[17] The General Division then turned to the Claimant's claim that he had applied for the GIS in March 2010. The General Division found insufficient evidence to support this claim for the following reasons:

- The Claimant did not have a receipt for his purported March 2010 application, and his copy of the application did not bear a date stamp;
- The Claimant did not produce a copy of his March 2010 application until December 2020—well into the claims process;
- The Claimant did not have a good explanation for why it took him so long to produce his March 2010 application; and
- The Claimant's November 2009 statement of estimated income did not amount to an application for the GIS.

[9] See *Walls v Attorney General of Canada*, 2022 FCA 47, at paragraph 36.

[18] The General Division concluded that, while the Claimant may have **intended to send** an application form in March 2010, that was not enough to meet the statutory requirement that the Minister **actually receive** the form.[10]

[19] Since the General Division is entitled to some leeway in how it chooses to weigh the evidence,[11] I see no reason to interfere with any of the above findings. In this case, the General Division meaningfully analyzed the information before it and came to a reasoned, defensible conclusion.

– **The General Division has to follow the law**

[20] The General Division had no choice but to follow the letter of the law. Without evidence of incapacity or a prior application, the General Division could not give the Claimant additional retroactive benefits. Nor was it permitted to consider any extenuating circumstances around the Claimant's application. However much the General Division might have sympathized with the Claimant, it could not simply ignore the explicit terms of the *Old Age Security Act* (OASA) and give him what he wanted.[12]

[21] Even if the Claimant had been able to show that the Minister mislaid his March 2010 application, the General Division would not have been able to do anything about it. As the General Division noted, the Tribunal has no authority over the Minister's administrative errors or erroneous advice. If Service Canada did commit such errors, the OASA makes it clear that any decision to remedy those errors would be at the Minister's discretion.[13]

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[10] Section 3(2) of the *Old Age Security Regulations* says that an application is "deemed to have to have been made only when an application form completed by or on behalf of an applicant is received by the Minister."
[11] See *Simpson*, note 6.
[12] See *Minister of Human Resources Development v Tucker*, 2003 FCA 278.
[13] See OASA, section 32.

There is no arguable case that the General Division erred by focusing on the Claimant's heart attack

[22] The Claimant alleges that the General Division based its capacity finding solely on his heart condition. He argues that, in doing so, the General Division ignored the multiple other diseases that contributed to his incapacity.

[23] I don't see a reasonable chance of success for this argument.

[24] As noted, the General Division is presumed to have considered all the evidence before it. In his correspondence, the Claimant has mentioned many other medical conditions beside heart disease, including rheumatoid arthritis, fibrosis, fibromyalgia, high blood pressure, diabetes, partial deafness and blindness, depression, inflammation of the tongue, eczema, hypogonadism, spinal tumours, gastritis, and somatization disorder. The Claimant's medical file was on the record,[14] and I see no indication that the General Division disregarded any significant information in it.

[25] In its decision, the General Division devoted attention to the Claimant's heart condition largely because the Claimant himself highlighted it. At the hearing, the Claimant and his spouse specifically attributed the delay in submitting his GIS application to the August 2009 heart attack and its after-effects. The General Division therefore cannot be blamed for taking time to address the impact of this event on the Claimant's capacity.

[26] The General Division looked beyond the Claimant's heart attack. It rightly recognized that a finding of incapacity depends on more than a diagnosis or a medical or condition; it requires an examination of what a claimant actually does on a day-to-day basis during the period of claimed incapacity.[15]

[27] The General Division looked at Dr. Phan's clinical notes between August 2009 and December 2010 and marked the following entries:

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[14] See IS15.
[15] See *Canada (Attorney General) v Hines*, 2016 FC.

- The Claimant expressed interest in Vitamin D and other herbal and mineral treatments;
- The Claimant asked for doctor's note excusing him from a traffic court date the following day;
- The Claimant injured his shoulder pain after going down a water slide; and
- The Claimant injured his head after running over a dog with his car.

[28] These incidents, along with the Claimant's active and continuing pursuit of his GIS claim, suggested to the General Division that the Claimant retained an ability to form or express an intention to apply for benefits. I don't see an arguable case that the General Division erred in coming to this conclusion.

Conclusion

[29] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, permission to appeal is refused.

Member, Appeal Division