

Federal Court



Cour fédérale

**Date: 20240607**

**Docket: T-2074-22**

**Citation: 2024 FC 874**

**Vancouver, British Columbia, June 7, 2024**

**PRESENT: Associate Chief Justice Gagné**

**BETWEEN:**

**SUKHDEV S. BAINS**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Mr. Sukhdev Bains applied for disability pension payments in February 2020 and was declared eligible with retroactive effect to March 2019; there is no doubt he is disabled. The question is whether the retroactive payments should go back to January 2016, when he became disabled.

[2] The General Division of the Social Security Tribunal found the Applicant has not been continuously incapable of forming or expressing an intention to make an application before January 2020. Therefore, he cannot benefit from retroactive payments beyond the 11 months provided for in paragraph 42(2)b) and section 69 of the *Canada Pension Plan*, RSC 1985, c C-8 [CPP]; the Appeal Division of the Social Security Tribunal denied leave to appeal.

[3] The Applicant filed for judicial review of the Appeal Division's decision and represented himself before the Court.

## II. Statutory Framework

[4] The CPP permits an increase to the 11-month limit on retroactive disability pension payments if a claimant can show they were continuously incapable of "forming or expressing an intention to make an application" from the date of onset of incapacity to the date they applied for the benefit.

[5] The question as to whether the Applicant was continuously incapable of forming or expressing an intention to make an application is distinct from and does not depend on whether the Applicant has the physical capacity to complete and submit an application (*Canada (Attorney General) v Danielson*, 2008 FCA 78 at para 5).

[6] The capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant (*Sedrak v Canada (Social Development)*, 2008 FCA 86 at para 3).

III. Decision under review

[7] An appeal from the General Division can only proceed if the Appeal Division grants leave.

[8] At the time the Appeal Division denied the Applicant's request for leave on April 6, 2022, appeals were governed by former subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [Act].

[9] The grounds of appeal were therefore as follows:

- a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c) The General Division 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] To grant leave, the Appeal Division must be satisfied that the appeal has a reasonable chance of success (subsection 58(2) of the Act).

[11] In this case, the Appeal Division considered and rejected several arguments made by the Applicant and found that he did not show an arguable case.

[12] First, the Applicant argued that the General Division based its decision on an error made by his physician on the July 2020 declaration of incapacity. The Appeal Division rejected that argument and found that the General Division did not base its decision on this error but on the fact that the Applicant's limitations were limited to physical disability.

[13] Second, the Applicant argued that the General Division erred by basing its decision on the absence of a power of attorney. The Appeal Division rejected this argument and agreed that this fact was relevant because it related to the Applicant's capability to understand, complete, and sign legal documents during the period he is alleging continuous incapacity.

[14] Third, the Applicant argued that the General Division overlooked key evidence. The Appeal Division dismissed this argument, finding that the General Division meaningfully analyzed the information available; it notes that the General Division is entitled to some leeway in how it chooses to weigh the evidence.

#### IV. Issue and Standard of Review

[15] The only issue raised by this Application is whether the Appeal Division has erred in denying leave to appeal.

[16] The Appeal Division's decision to deny leave is reviewable on the reasonableness standard (*Roy v Canada (Attorney General)*, 2022 FC 667 at para 15; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

[17] The Applicant argues that he was incapable of forming or expressing an intention to apply for disability pension between 2016 and 2020.

[18] The Applicant claims his incapacity stemmed from the use of narcotics and mental stability medications, multiple surgeries, and recovery problems. The Applicant claims this medication list altered his mind, rendering him incapable of applying for the disability pension.

[19] The Applicant argues that the medical evidence supports a finding of incapacity. Dr. Neumann and Dr. Chin state an extensive list of problems, surgeries, and medications and note his incapability of tending to daily activities. The doctors' notes detail extensive medical issues and the effects it has had on his mental health.

[20] The Applicant contests that the Social Security Tribunal gives more weight to certain evidence and doctors' notes and gives less weight to other doctors' notes. The Applicant argues that the Tribunal cannot "cherry pick" the evidence in this way.

[21] The Applicant highlights that the absence of a power attorney is irrelevant because when he is incapable of making a decision, that decision-making process is redirected to his next of kin, his wife and children.

[22] In conducting reasonableness review, the Court's task is to develop an understanding of the Appeal Division's reasoning process. The Court has to determine whether the decision to deny leave as a whole is reasonable, looking specifically at whether the decision is transparent, intelligible, and justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

[23] With respect to the legal constraints on the decision, the Appeal Division correctly identified the legal tests for leave to appeal under the Act and for a determination of incapacity under subsections 60(8) to 60(10) of the CPP (citing *Walls v Canada (Attorney General)*, 2022 FCA 47 at para 36).

[24] With respect to the factual constraints, The Appeal Division considered all of the Applicant's arguments and reasonably found that the Applicant had not met his burden.

[25] First, the Appeal Division considered the Applicant's argument that the General Division improperly based its decision on Dr. Neumann's omission from the July 2020 declaration of incapacity. The Appeal Division rightfully noted that the second declaration of incapacity, dated November 2021, included the previously omitted section and that both declarations of incapacity attributed the Applicant's mental and/or psychological incapacity to a purely physical impairment.

[26] In *Walls*, the Federal Court of Appeal confirmed that a finding of incapacity under subsection 60(8) of the CPP applies only in a very narrow set of circumstances (at para 31). The Court then stated:

[36] Thus, the case law informs us that the applicable legal test is not whether the applicant has the capacity to make, prepare, 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.

[27] In the present case, the Appeal Division summarized the key issue as follows: “While the [Applicant] suffered severe shoulder and back injuries that does not mean that he met the relatively heavy burden of proving that he had no ability to form or express an intention to apply for benefits.”

[28] It was reasonable for the Appeal Division to conclude that the Applicant had not presented an arguable case where the General Division would have erred in weighing the evidence or assessment of his capacity.

[29] The Appeal Division, as did the General Division, found that the evidence showed that the reason the Applicant did not apply for the disability payments earlier is because he did not know the program existed. This finding is reasonable in light of the evidence and in light of the fact that the Applicant confirmed before the Court that he did not know he could apply before he did in February 2020.

[30] Although this is quite unfortunate, it does not render the Appeal Division's decision unreasonable.

[31] The Appeal Division identified the proper legal tests and reasonably applied them to the facts of the Applicant's case. The decision as a whole is transparent, intelligible, and justified in relation to the relevant factual and legal constraints that bear on the decision.

VI. Conclusion

[32] Although I sympathize with the Applicant, he has not convinced me of any error on the part of the Appeal Division. His Application is therefore dismissed. The Defendant does not seek costs, and none will be granted.



**JUDGMENT in T-2074-22**

**THIS COURT'S JUDGMENT is that:**

1. This Application for judicial review is dismissed;
2. No costs are granted.

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"Jocelyne Gagné"  
Associate Chief Justice

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2074-22

**STYLE OF CAUSE:** SUKHDEV S. BAINS v THE ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MAY 30, 2024

**JUDGMENT AND REASONS:** GAGNÉ A.C.J.

**DATED:** JUNE 7, 2024

**APPEARANCES:**

Sukhdev S. Bains

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Dylan Edmonds

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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FOR THE RESPONDENT