

Citation: *M. G. v. Minister of Employment and Social Development*, 2015 SSTAD 413

Appeal No: AD-13-753

BETWEEN:

M. G.

Appellant

and

**Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)**

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision**

SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF HEARING: March 23, 2015

TYPE OF HEARING: In person

DATE OF DECISION: March 26, 2015

PERSONS IN ATTENDANCE

The Appellant	M. G.
Counsel for the Respondent	Hasan Junaid
Observer	D. G.

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] The Appellant worked as a high school teacher for over 30 years. After he retired from this he began to work at a call centre. While working at this job, he had a loud blast of noise in his ear from his headset. This caused pain, and has resulted in ongoing tinnitus in both ears that has not resolved. The Appellant has not returned to work. He applied for a *Canada Pension Plan* disability pension, and claimed that he was disabled by the tinnitus. The Respondent denied his claim initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. After a hearing, a Review Tribunal dismissed the Appellant's claim.

[3] The Appellant appealed to the Appeal Division of the Social Security Tribunal by letter dated July 15, 2013. He argued that the Review Tribunal did not give him the opportunity to present his case as one Member of the Review Tribunal interrupted him as he gave his evidence and questioned him in an aggressive and badgering manner. The Respondent argued because the Appellant did not complain about the conduct of the hearing at that time, he implicitly waived the right to make this objection on appeal. In addition, it argued that the Review Tribunal received and considered all of the relevant evidence, and reached a reasonable decision. The Respondent further submitted that the Review Tribunal reasonably inferred from the evidence that the Appellant was likely to have transferable skills.

[4] The appeal was heard in person on March 23, 2015. The hearing was conducted in person due to the nature of the Appellant's disability, the arguments advanced by the parties, the complexity of the issue under appeal, and the gaps in the information in the written documents.

STANDARD OF REVIEW

[5] The Appellant made no submissions regarding what standard of review should be applied to the Review Tribunal decision in his written materials. When asked at the appeal hearing, he submitted that the Review Tribunal hearing should have been procedurally fair and it was not. The Respondent filed detailed submissions on what standard of review should be applied to the Review Tribunal decision in this case. It submitted that on questions of fact and mixed fact and law the standard to be applied is reasonableness. On questions of natural justice, the standard of review is correctness.

[6] The leading case on this issue is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. On questions of natural justice, the standard to be applied is correctness. This reasoning was followed by the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)* 2014 FCA 187 which also concerned a *Canada Pension Plan* disability pension claim. Therefore, I must decide if the Review Tribunal breached the principles of natural justice in how the Review Tribunal hearing was conducted, applying the standard of correctness.

ANALYSIS

[7] The principles of natural justice are concerned with ensuring that parties to litigation are able to present their case properly, know the case against them, and have a decision made by an impartial decision maker based on all of the evidence. The concept of procedural fairness is part of natural justice, and is concerned with the procedures followed at a hearing. In this case, the Appellant argued, essentially, that the Review

Tribunal hearing was not procedurally fair and therefore the principles of natural justice were breached.

[8] The Respondent argued, first, that as the Appellant did not raise any issues regarding procedural fairness or natural justice as the hearing itself he was now prevented from doing so. He relied on the decision of *the Gill v. Canada (Attorney General)* 2011 FCA 195 to support this argument. In that case, the claimant raised issues regarding the accurate interpretation of her testimony at a disability hearing on an application for judicial review of the disability decision. The Federal Court of Appeal concluded that problems of interpretation should have been raised at the first opportunity to do so, and not in later proceedings. This conclusion was consistent with decisions of the Federal Court in other cases where it concluded that objections to procedural fairness should be raised at the first reasonable opportunity to do so.

[9] In this case, the Appellant complained about procedural fairness at the Review Tribunal hearing when he sought leave to appeal the Review Tribunal decision. This was done within 90 days of the Review Tribunal decision being rendered. He sought leave to appeal within the time required to do so, and this was the next logical step to take in these proceedings. In addition, the Review Tribunal hearing was held in February 2013, just before the Office of the Commissioner of Review Tribunals completed its work. Given this, it may not have been clear to the Appellant at that time what options were available to contest the way the hearing was conducted. I am satisfied that he raised his complaint at the first reasonable opportunity to do so. Therefore, this argument by the Respondent fails.

[10] There was no recording of the Review Tribunal hearing, nor any transcript from it. I agree with the Appellant that if there had been a recording or transcript it would have been much easier to determine whether there was any breach of natural justice at the hearing. In spite of this, however, I must be satisfied on the arguments and materials before me that the Appellant was denied a proper opportunity to present his case fully in order for this appeal to succeed

[11] The Appellant argued that tinnitus is a very subjective condition. This was supported by medical reports in the Review Tribunal hearing file. Accordingly, he argued

that it was important that he be given adequate opportunity to address the subjective nature of this condition at the Review Tribunal hearing. He claimed that he was not able to do so as one Member of the Review Tribunal interrupted him, and asked questions about his mental health treatment for tinnitus in an aggressive way. Although the Appellant expected that questions would be asked of him, the video produced by the Office of the Commissioner of Review Tribunals to assist claimants to prepare for a hearing showed that questions would be asked of parties in a much kinder fashion and he relied on this.

[12] I accept that the Appellant may have wanted to expand on the evidence he presented at the Review Tribunal hearing. I also accept that he was unhappy with the manner in which questions were asked of him at the hearing. However, these submissions, by themselves, are insufficient to persuade me that the Appellant could not adequately present his case.

[13] The Appellant confirmed in argument that his wife was able to present her evidence fully to the Review Tribunal. This included evidence regarding the subjective impact that tinnitus has had on the Appellant, his daily life and his relationships. In addition, he completed a Questionnaire when he applied for a *Canada Pension Plan* disability pension. In this document he also explained the subjective impact of tinnitus. He also wrote eloquently to the Office of the Commissioner of Review Tribunals to request reconsideration of the Respondent's initial decision to deny his claim. All of this was considered by the Review Tribunal along with his testimony at the hearing.

[14] Counsel for the Respondent pointed to specific paragraphs in the Review Tribunal decision which summarized the Appellant's testimony at the hearing. The decision also summarized the medical reports and Mrs. G.'s testimony. All of this evidence included statements regarding the subjective impact of tinnitus on the Appellant.

[15] The Federal Court of Appeal has decided that the Review Tribunal is presumed to have considered all of the evidence before it, including testimony and written material. Each and every piece of evidence need not be mentioned in the written decision of the Review Tribunal (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). In this case, while the Review Tribunal decision did not specifically set out each and every aspect of

the subjective effect of tinnitus on the Appellant I am satisfied, for the reasons set out above, that the Review Tribunal properly considered this when it made the decision.

[16] When asked what evidence he was not able to present at the hearing, the Appellant explained that he would have testified more about the impact of tinnitus on his daily life. He did not refer to any particular facts or effects of tinnitus that were not mentioned in the Review Tribunal decision or considered by it in making the decision in this case.

[17] The Respondent contended that the Review Tribunal must be given deference regarding how a hearing is conducted, and was permitted to ask relevant questions of the Appellant during the hearing. The Review Tribunal is required to listen to evidence, assess it and render a decision. To do this properly, it may question parties and witnesses. While some questions may not be asked in a kind or gentle fashion, that alone does not breach the principles of natural justice. Although the Review Tribunal could have questioned the Appellant in a different manner, I am not persuaded that the Review Tribunal in this case breached any principles of procedural fairness or natural justice by the manner in which it asked questions of the Appellant

[18] The Appellant, when questioned at the appeal hearing, stated that the Review Tribunal hearing was shorter than he had anticipated. The length of a hearing is not determinative of whether the principles of natural justice had been breached. This argument does not satisfy me that the Review Tribunal breached the principles of natural justice.

[19] The Appellant also contended that the Respondent's representative did not participate in the hearing, except to ask, briefly, also about his mental health treatment for tinnitus. This left him with the impression that his claim was not worth "bothering about" and should not be given serious consideration. A Review Tribunal cannot compel any party to participate in any hearing in a particular manner. None of the principles of natural justice are breached if a party chooses not to fully participate in a hearing. That party does so at their own peril. Therefore, this appeal cannot succeed on the basis that the Respondent's representative did not participate fully, or appear to consider the Appellant's claim seriously.

[20] Similarly, the Appellant contended that at the Review Tribunal hearing he felt that no one was representing his interests except himself. It would have been improper for the Respondent's representative to represent his interests as they were contrary to its own. It would have been a breach of natural justice if the Review Tribunal had been seen to represent the interests of any party before it. A Review Tribunal is to be an unbiased and impartial decision maker. Hence, the Review Tribunal made no error in this regard.

[21] Finally, the Respondent submitted that the Review Tribunal reasonably inferred that the Appellant likely had transferrable skills. The Appellant did not dispute that he obtained three university degrees, taught high school for over 30 years, and then worked for approximately 15 months at a call centre. I am satisfied that this factual basis supports the inference that the Appellant likely had transferrable skills. The Review Tribunal decision on this issue is therefore reasonable.

CONCLUSION

[22] For the reasons set out above, I am not satisfied that the Review Tribunal breached any of the principles of natural justice or procedural fairness in this case. Therefore the appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Exhibits

1. Review Tribunal File
2. Letter of Appeal Dated July 15, 2013
3. Submissions of the Respondent, filed for the Appeal
4. Amended Submissions of the Respondent, filed for the Appeal