Citation: *L. M. v. Minister of Employment and Social Development*, 2015 SSTAD 422

Appeal No. AD-15-59

BETWEEN:

L. M.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Valerie Hazlett Parker

DATE OF DECISION: March 26, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is refused.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan* disability pension. She claimed that she was disabled by physical restrictions and mental illness. The Respondent denied her claim initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. The matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a teleconference hearing and on December 17, 2014 dismissed the Appellant's claim.

[3] The Appellant sought leave to appeal from the Appeal Division of the Social Security Tribunal. She submitted that she was not able to present her case fully at the General Division hearing because the hearing was held by teleconference and not in person, and that her application contained an error regarding her educational achievement.

[4] On February 20, 2015 I requested answers to written questions and legal submissions from both parties. The Appellant answered these questions by letter and the Respondent filed written submissions within the time given to do so. The Respondent argued that leave to appeal should be refused in this case as the Appellant did not present a ground of appeal that had a reasonable chance of success on appeal.

ANALYSIS

[5] In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success*: Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

[6] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the *Act* sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division (the section is set out in the Appendix to this decision). Therefore, I must decide if the Appellant has presented a ground of appeal under section 58 of the *Act* that has a reasonable chance of success on appeal.

[7] The Appellant contended that her application for a *Canada Pension Plan* disability pension contained an error regarding her education. The application stated that she completed Grade 12 in Portugal. This form was completed on the Appellant's behalf by a friend, and was incorrect. She completed only Grade 4. She did not correct this at the General Division hearing. In the written questions, the Appellant was asked to explain why this error was not corrected at the General Division hearing. She responded that she did not do so as she was not mentally stable at the hearing. The Appellant did not contend, however, that she was unable to fully participate in the hearing.

[8] The General Division decision stated that the Appellant achieved a Grade 12 education. This was considered along with other personal characteristics including the Appellant's age, work history, language ability, etc. in reaching its decision. Although it was an error to state that the Appellant achieved Grade 12, I am not persuaded that this error of fact was made in a perverse or capricious manner, or without regard to the material that the General Division had before it. The Appellant contended that she did not correct this error as she was not mentally stable on the day of the hearing. I am not persuaded by this explanation. This argument is not a ground of appeal that has a reasonable chance of success on appeal.

[9] The Appellant also presented a copy of a document written in Portuguese that she claimed confirmed her educational achievement and a more recent letter from her psychiatrist. Section 58 of the *Act* does not permit parties to file new evidence with the Tribunal as a ground of appeal. Therefore, the presentation of this evidence does not assist the Appellant's claim.

[10] The Appellant also submitted that she could not present her case fully because the hearing occurred by teleconference and not in person. The Respondent argued that the General Division made no error in conducting the hearing in this fashion. Section 21 of the *Social Security Tribunal Regulations* provides that hearings may be held in writing, by teleconference, by videoconference or other means of telecommunication, or in person. In addition, section 28 of the *Regulations* provides that after all documents are filed with the General Division (or the time to do so has expired) the Income Security Section must make a decision on the basis of the documents and submissions filed, or if it determines that a further hearing is required, send a Notice of Hearing to the parties. From this it is clear that there is no entitlement to an in person hearing for any claimant.

[11] In addition, the Supreme Court of Canada dealt with the issue of procedural fairness in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. The decision stated clearly that a decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness is, however, variable and its content is to be decided in the specific context of each case. This decision then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute in question, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[12] In applying these factors to this case, I find the following: first, it is clear that a decision of the General Division on the merits of an appeal before it affects privileges of the claimant. A decision on the form that a hearing takes to determine these privileges, by extension, also affects them.

[13] Next, the nature of the decision in question in this case is procedural. The form of the hearing does not change the fact that an Appellant has the opportunity to present her case and answer the case of the Respondent.

[14] I accept that the issues in this matter are important to the Appellant.

[15] I place great weight on the nature of the statutory scheme that governs the Social Security Tribunal. This is a new Tribunal that was designed to provide for the most expeditious and cost effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the Tribunal the discretion to determine how hearings are to be conducted, whether in person, by videoconference or in writing, etc. The discretion to decide how each case will be heard should not be unduly fettered.

[16] Many court cases have discussed the concept of legitimate expectations. It is clear from these decisions that this concept refers to procedural expectations, not substantive ones. In other words, a party to an application before the Social Security Tribunal (SST) can expect certain procedural guarantees, but not a specific outcome to his or her case (see *Baker*, above). Recently, the Federal Court dealt with the issue of legitimate expectations in the context of an appeal before the Appeal Division of the SST in *Alves v. Canada (Attorney General)*, 2014 FC 1100. In that case, the Claimant sought judicial review of a decision of the Appeal Division of the SST. That claimant had appealed a decision to the Pension Appeals Board, which did not hear the case prior to the end of its mandate. The matter was transferred to the Appeal Division of the SST. The SST proceeded with the case on the basis of the legislation as it was before the SST began its work, because of the claimant's legitimate expectations when she filed the appeal. In its decision, the Federal Court stated that the doctrine of legitimate expectations is limited to the rules of procedural fairness. It concluded that the SST erred by proceeding in this fashion; the legislation that was in force when the hearing was held should have been applied, not what was in force when the application was filed with the Pension Appeals Board. The parties' legitimate expectations were limited only to procedural matters, not grounds of appeal.

[17] Finally, I must consider the choices of procedure made by the SST. The *Regulations* provide that a Tribunal Member is to determine the form a hearing will take. The *Regulations* do not provide any direction on how that is to be decided. It is a discretionary decision. The decision of the Member in each case is therefore to be given deference.

[18] After an examination of these factors, I am satisfied that simply because the General Division hearing was held by teleconference, procedural fairness was not breached in this case.

[19] The Appellant submitted that she could not present her case fully by teleconference because she was not mentally stable and was distracted. The Appellant did not, however, explain how any mental instability was affected by proceeding by teleconference instead of another means for the hearing. There was no argument that she did not understand the proceedings, or was not able to present her case to the General Division Member. The General Division decision summarized her testimony and the documentary evidence. There was no allegation that it made any error in doing so. For these reasons I am not persuaded that the Appellant was not able to properly and fully present her case so that she was deprived of procedural fairness. This argument is a not a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[20] The Application is refused as the Appellant has not presented a ground of appeal that has a reasonable chance of success on appeal.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.