

Citation: *S. A. B. v. Minister of Employment and Social Development*, 2015 SSTAD 848

Appeal No. AD-15-315

BETWEEN:

S. A. B.

Applicant

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: Janet LEW

DATE OF DECISION: July 6, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 13, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that he did not have a severe and prolonged disability on or before April 2009, the month before a retirement pension became payable.

[2] S. B., a paralegal, filed a letter dated May 25, 2015 with the Social Security Tribunal, confirming that her client, the Applicant, had not been provided with a hearing of the appeal. She sought an explanation as to why the Applicant had not been provided with a hearing date. She advised that an appeal would be forthcoming on this basis. On June 2, 2015, the Social Security Tribunal asked counsel when a formal leave application and submissions would be forthcoming.

[3] The Applicant completed an Application Requesting Leave to Appeal to the Appeal Division. His representative filed the leave application on June 17, 2015. The Applicant submitted that he had been deprived of the opportunity to have an in-person hearing with his representatives, despite previously having a scheduled in-person hearing in May 2012 (which was adjourned to allow him to retain counsel) and despite having waited some time for a second hearing, after the first was adjourned at his request. To succeed on this application, the Applicant must establish that the appeal has a reasonable chance of success.

ISSUE

[4] Does the appeal have a reasonable chance of success?

BACKGROUND and HISTORY OF PROCEEDINGS

[5] The Applicant submitted an application for CPP disability benefits on April 20, 2010. The application was completed and signed by his representative, his daughter “S. N. B.” of 100 X, Unit X, X, Ontario (Document GT1, pages 25 to 28).

[6] The Respondent denied the Applicant’s application for a CPP disability pension on September 24, 2010. The Respondent noted that the Applicant had been in receipt of a CPP

retirement pension since May 2009. The Respondent advised the Applicant that the *Canada Pension Plan* does not allow an individual to receive both an early CPP retirement pension and disability benefits at the same time. The Respondent advised the Applicant that his medical condition would have had to stop him from working in any job by April, the month prior to starting early CPP retirement pension. The Respondent concluded from a review of the information and documents on file that there was insufficient information to show that his limitations prevented him from doing some type of work (Document GT1, pages 12 to 14).

[7] On December 13, 2010, the Applicant sought a reconsideration of the decision of the Respondent. In a reconsideration decision dated April 1, 2011, the Respondent denied the Applicant's application for a disability pension. This time, the Respondent advised that it did not consider the Applicant to have a disability that was both severe and prolonged as defined under the *Canada Pension Plan* (Document GT1, pages 21 and 23).

[8] On May 12, 2011, the Applicant's representative sought an appeal of the reconsideration decision of the Respondent. An early appeal date was sought. The letter was written on the letterhead of "N.K. B. Legal Services (*sic*) at 100 X, Suite X, X, Ontario. The representative signed the letter as "N. (S.) B." (Document GT1, pages 5 and 6).

[9] On November 23, 2011, N. B. of the firm NK B. Legal Services (*sic*) wrote to the Office of the Commissioner of Review Tribunals with a change of address. The new address effective November 30, 2011 would be 2800 X, Suite X, X, Ontario. The representative signed the letter as "N. (S.) B." (Document GT1, page 149).

[10] On December 21, 2011, the Office of the Commissioner of Review Tribunals confirmed that a hearing before a Canada Pension Plan Review Tribunal had been scheduled for May 16, 2012.

[11] In early 2012, the Applicant's representative prepared a Memorandum which set out her submissions. She signed the Memorandum as "S. N. B." (Document GT1, page 118).

[12] On May 16, 2012, a hearing before a Canada Pension Plan Review Tribunal was held. However, the Review Tribunal adjourned the hearing, as the Applicant reportedly had

just retained new counsel. The Record of Adjournment indicates that the Applicant advised the Review Tribunal that his new counsel needed time to prepare for the hearing and to obtain missing documents (Document GT1, page 96).

[13] There is no record as to whether the Applicant provided the name and contact information for his new counsel at the hearing before the Review Tribunal on May 16, 2012.

[14] On April 1, 2013, the appeal was transferred to the Social Security Tribunal of Canada.

[15] On April 1, 2014, the Social Security Tribunal wrote to N. B. of N.K. B. Legal Services at 2800 X, Suite X, X, Ontario, advising as to the next steps in the appeal process. The Social Security Tribunal did not send a copy of its letter of April 1, 2014 directly to the Applicant. The letter indicated that the parties could continue to file new documents or submissions, until otherwise notified.

[16] The appeal was assigned to a General Division Member in July 2014.

[17] The General Division Member considered and decided to make its decision on the basis of documents filed. His reasons for proceeding in this manner were set out in the letter dated September 4, 2014. The Notice reads:

Having reviewed all documents filed by the parties in the above-mentioned appeal, the Tribunal Member intends to make a decision on the basis of the documents and submissions filed, for the following reasons:

- There is no contradictory evidence in the hearing file
- There appears to be no gaps in the information
- Credibility is not an issue
- No further evidence is required to make a decision
- The requirements under the SST Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit

FILING PERIOD

The parties have until **October 7, 2014** to file additional documents or submissions. A copy of any new documents received by the Tribunal will be provided to the other parties and the parties will be given an opportunity to respond.

RESPONSE PERIOD

The Filing Period is followed by a **Response Period**. The parties will have until **November 7, 2014** to respond to any documents filed during the Filing Period.

[18] The letter dated September 4, 2014 was addressed and delivered to the Respondent and to N. B. of NK B. Legal Services at 2800 X, Suite X, X, Ontario. The letter dated September 4, 2014 does not appear to have been directly delivered to the Applicant.

[19] The General Division decided the matter on the basis of the documents filed. The General Division rendered a decision on April 13, 2015. On April 14, 2015, the decision was sent to the Applicant, N. B. and the Respondent.

[20] Neither of the two parties filed any additional documents between September 4, 2014 and April 14, 2015.

[21] On May 25, 2015, S. B. of the law firm C. B. at 450 X, Unit X, X, Ontario, wrote to the Social Security Tribunal acknowledging the letter dated April 14, 2015. She confirmed that her client had not been provided with a hearing and that they would be appealing the decision on this basis. She also wrote, "I have followed on numerous occasions requesting a hearing date however the only response I have received was your aforementioned letter denying my clients (*sic*) claim". She requested an explanation as to why her client had not been provided with a hearing date. The Social Security Tribunal acknowledged receipt of this letter dated May 25, 2015, by sending a letter to the Applicant, S. B. at 450 X, Unit X, X, Ontario, and to the Respondent.

[22] The letter dated May 25, 2015, appears to be the first occasion that S. B. of C. B. communicated with the Social Security Tribunal. Other than the Applicant's oral submissions at the hearing before the Review Tribunal on May 16, 2012, there is no record in the file of the Social Security Tribunal that N. B. of N.K. B. Legal Services at 2800 X, Suite X, X, Ontario had ever ceased to act for the Applicant, or that S. B. of C. B. acted for the Applicant, until the letter of May 25, 2015.

[23] My review of the file of the Social Security Tribunal does not show any record of any correspondence or any communications from the Applicant, N. B. of N.K. B. Legal Services at 2800 X, Suite X, X, Ontario, or S. B. of C. B. between May 16, 2012 and May 25, 2015.

[24] The leave application was assigned to an Appeal Division Member. On June 2, 2015, the Social Security Tribunal wrote to S. B. of C. B., advising that the leave application was required to be made in the prescribed form and manner.

[25] On June 3, 2015, S. B. of C. B. again wrote to the Social Security Tribunal, requesting a response to her letter of May 25, 2015.

[26] On June 11, 2015, the Social Security Tribunal sent an e-mail to S. B. of C. B., in response to the enquiry as to the form of hearing before the General Division. The Social Security Tribunal attached a copy of the letter dated September 4, 2014, in which the General Division advised that it would be making a decision on the basis of the documents filed with the Social Security Tribunal. The Social Security Tribunal referred S. B. to the letter dated September 4, 2014. The Social Security Tribunal reminded S. B. that the leave application was required to be made in the prescribed form and manner.

[27] S. B. of C. B. immediately responded to the Social Security Tribunal by e-mail. She wrote:

The letter that was sent back in 2014 that you have attached is sent to a wrong address. I have never been located at that address so I am not sure why it was sent there thus not receiving that letter.

[28] S. B. of C. B. confirmed her address as 450 X, Unit X, X, Ontario. Otherwise, she did not address any of the substantive content of the letter dated September 4, 2014.

[29] On June 16, 2015, S. B. of C. B. wrote to the Social Security Tribunal. She enclosed a copy of an Application Requesting Leave to Appeal, completed by her client. She advised that the original application would be sent by mail. The Social Security Tribunal subsequently received the original application on June 18, 2015.

[30] In the Application Requesting Leave to Appeal, the Applicant handwrote his representatives' first names as "N. / D." and last names as "B. / C.", both of "C. B. Professional Corporation", at 450 X, Unit X, X, Ontario.

[31] Notwithstanding the Applicant's oral submissions before the Review Tribunal on May 16, 2012, that his new counsel would be obtaining additional documents, neither he nor his representative S. B. have ever filed any additional documents or records at any time.

SUBMISSIONS

[32] The Applicant and his counsel submit that the General Division failed to observe a principle of natural justice, as it deprived him of the opportunity to have an in-person hearing.

ANALYSIS

[33] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[34] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out the grounds of appeal as being limited to the following:

- (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.

[35] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

(a) Form of hearing

[36] In her letter of May 25, 2015, S. B. submits that the Applicant was “not provided with a hearing”. In the leave application, the Applicant submits that he was not provided with an opportunity to have an in-person hearing with his representatives. These submissions raise two questions: (1) did the Applicant have a hearing at all, (2) was the Applicant entitled to an in-person hearing before the General Division?

[37] Section 28 of the *Social Security Tribunal Regulations* stipulates that:

After every party has filed a notice that they have no documents or submissions to file – or at the end of the applicable period set out in section 27, whichever comes first – the Income Security Section must without delay

- (a) make a decision on the basis of the documents and submissions filed; or
- (b) if it determines that further hearing is required, send a notice of hearing to the parties.

[38] The words “further hearing” in subsection 28(b) suggests that, even if the General Division makes a decision on the written record, that that is considered a form of hearing.

[39] Assuming that the General Division determines that a further hearing is required, section 21 of the *Social Security Tribunal Regulations* provides the General Division with the opportunity to hold hearings by way of written questions and answers, teleconference or other means of telecommunication, or by the personal appearance of the parties. Provided that the General Division proceeds with a hearing in one of the forms contemplated under the legislation, it cannot be said that the Applicant was denied a hearing at all.

[40] S. B. submits that the Applicant was deprived of an in-person hearing, but makes no allegations or submissions that the Applicant was entitled to such a hearing as of right, or that the Applicant was somehow denied a fair hearing.

[41] Was the Applicant entitled to an in-person hearing before the General Division? There is no entitlement to an in-person hearing as of right under the legislation. An order regarding the form of hearing is a discretionary one that falls within the jurisdiction of the General Division. There is no dispute that the General Division is entitled to make these types of decisions.

[42] The Federal Court of Appeal has recently confirmed that to set aside a discretionary order, an appellant must prove that the decision-maker committed a palpable and overriding error: *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Décor Grates Incorporated*, 2015 FCA 100; *Horseman v. Twinn, Electoral Officer for Horse Lake First Nation*, 2015 FCA 122; and *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139.

[43] In *Budlakoti*, the Federal Court of Appeal referred to *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 (CanLII), 431 N.R. 286, where Stratas J.A. defined palpable and overriding error as one exacting a high standard:

“Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[44] The General Division Member considered and decided on the form of hearing. He considered a number of factors in deciding on proceeding with hearing the matter on the written record.

[45] S. B. made no submissions that the General Division committed any palpable or overriding errors in the exercise of its discretion, nor do I readily see any on the face of the record. I am not satisfied that the appeal has a reasonable chance of success on the basis that the Applicant was not afforded an in-person hearing.

(b) Notice of hearing

[46] Although neither the Applicant nor his representative has raised the matter, there may be an issue as to whether the Applicant was served with or learned of the letter dated

September 4, 2014, before the decision of the General Division was rendered, as the Social Security Tribunal sent the letter dated September 4, 2014 to “N. B.” of NK B. Legal Services at 2800 X, Suite X, X, Ontario. N. B., a paralegal, is the daughter of the Applicant. The Social Security Tribunal did not send a copy of the letter dated September 4, 2014 to the Applicant.

[47] As S. B. of C. B. does not appear to have ever communicated to the Social Security Tribunal that she was retained to act on behalf of the Applicant (until the leave application was filed), the Social Security Tribunal naturally did not provide her with a copy of the letter dated September 4, 2014 at her address of 450 X, Unit X, X, Ontario.

[48] The General Division determined that there was sufficient information to render a decision, based on the documents and submissions on file. While ultimately the General Division proceeded on the written record (i.e. there was no need for the personal attendance of any of the parties), the letter dated September 4, 2014 also set out a filing period of October 7, 2014. The parties had until this date to file any additional documents or submissions.

[49] If the Applicant and possibly his representative were unaware of the letter dated September 4, 2014, was the Applicant deprived of an opportunity to file additional records? There was certainly ample time and opportunity to file any additional documents or submissions. Three years had elapsed from the time of the hearing before the Review Tribunal in May 2012, to the date that the General Division rendered its decision. Neither the Applicant nor his representative(s) filed any records within those three years. Not only were no records or any submissions filed within three years, but there were no communications and no correspondence from the Applicant or his representative(s).

[50] This however overlooks the fact that the letter dated September 4, 2014 could have served as a reminder or trigger for the Applicant or his representative to obtain and secure documents, and to file them before October 7, 2014.

[51] Tellingly, despite being copied with the letter dated September 4, 2014 of September 4, 2014 by the Social Security Tribunal on June 11, 2015, S. B. did not raise any

objections that her client had been deprived of the opportunity to file documents or submissions, or that she or the Applicant had any additional documents or submissions to file. Notwithstanding the absence of submissions along these lines, it may well be that the Applicant did not have notice of the letter dated September 4, 2014 or of the filing period. This raises an arguable case and I am satisfied that the appeal has a reasonable chance of success on this point.

[52] Although I have granted leave, I feel compelled to make two observations:

- (i) the first is that, curiously, the signatures of S. N. B. (daughter/paralegal with former address of 100 X, Unit X, X, Ontario) on the Application for Disability Benefits (Document GT1, page 28) bear a remarkably striking resemblance to the signatures of S. B. of C. B. at 450 X, Unit X, X, Ontario (for instance, Documents AD1-1 and AD1A, page 1); and,
- (ii) secondly, the Law Society of Upper Canada's lawyer and paralegal directory does not list a "S. B." or "S. N. B.". The directory lists "N. K. B." as a paralegal of the firm C. B. Professional Corporation with a business address of 450 X, Unit X, X, Ontario. I note that the initials of "N. K." are the same as the initials of the legal firm "NK B. Legal Services".

APPEAL

[53] The parties may wish to address the following on appeal: based on the sole ground upon which leave has been granted, was there a breach of the principles of natural justice? If so, what is the applicable standard of review and what are the appropriate remedies, if any?

[54] I invite the Applicant and his representative to also address the following:

- (i) Did the Applicant receive or learn of the letter dated September 4, 2014 from the Social Security Tribunal, either through his daughter/representative(s)? If so, when did he receive a copy of the letter dated September 4, 2014 or otherwise learn that the General Division Member intended to decide the

matter on the record, on the basis of the documents filed with the Social Security Tribunal?

- (ii) If the response to [52](i) above is “no”, if the Applicant had received the letter dated September 4, 2014 or otherwise learned of the Filing Period (as defined by the Social Security Tribunal in the letter dated September 4, 2014), how would this have changed the outcome, given that the General Division proceeded on the basis of the filed documents?
- (iii) Is N. (S.) B. / S. N. B. of NK B. Legal Services (formerly at 100 X, Unit X, X, Ontario and as of November 30, 2011, at 2800 X, Suite X, X, Ontario) the same individual as S. B. / N. B. / N. K. B. of C. B. Professional Corporation at 450 X, Unit X, X, Ontario, as the documentation suggests?
- (iv) What evidence does S. B. / N. B. / N. K. B. of C. B. Professional Corporation at 450 X, Unit X, X, Ontario have that she either communicated or corresponded with the Office of the Commissioner of Review Tribunals and the Social Security Tribunal between May 16, 2012 and April 14, 2015? The Applicant or his representative should provide copies of any evidence of any communications or correspondence between these dates to the Appeal Division of the Social Security Tribunal.
- (v) The hearing before the Review Tribunal had been adjourned, to enable the Applicant’s new counsel an opportunity to obtain additional records. What additional records or documents were requested and received in support of the Applicant’s claim for a disability pension, after May 16, 2012?
- (vi) If the Applicant or his representative received any additional records or documents after May 16, 2012, did the Applicant or his representative endeavor to file them with the Office of the Commissioner of Review Tribunals or with the Social Security Tribunal? If so, when? The Applicant or his representative should provide evidence of these efforts to the Appeal Division of the Social Security Tribunal.

(vii) After May 16, 2012, did the Applicant or his representative(s) communicate or correspond with the Respondent, or copy the Respondent with any documents or submissions? The Applicant or his representative should provide copies of any supporting documentation to the Appeal Division of the Social Security Tribunal.

[55] Finally, I invite the parties to provide written submissions in respect of the form of hearing, and explain why the appeal before the Appeal Division should proceed other than on the written record, subject to any additional submissions which the parties may wish to make, including any in response to this leave decision.

[56] I must stress that the appeal is not a *de novo* hearing. By that, I mean that I will not be taking evidence or hearing from witnesses, or addressing any of the substantive issues before the General Division regarding the Applicant's claim for a disability pension.

CONCLUSION

[57] The Application is granted.

[58] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew

Member, Appeal Division