

Citation: *V. D. v. Minister of Employment and Social Development*, 2015 SSTAD 1027

Date: August 28, 2015

File number: AD-15-847

APPEAL DIVISION

Between:

V. D.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on August 28, 2015

DECISION

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

INTRODUCTION

[2] In a decision issued April 30, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION

[3] On the behalf of the Applicant, his Counsel submits that the General Division breached a principle of natural justice. Paragraph 58(1)(a) of the *Department of Employment and Social Development* (DESD) *Act* allows for an appeal on the basis that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

[4] Counsel for the Applicant submitted that the breach of natural justice occurred as a result of the failure to give the Applicant proper notice of the hearing. This failure resulted in neither the Applicant nor a representative attending the videoconference hearing of April 24, 2015. Furthermore, the Applicant was precluded from making submissions or having submissions made on his behalf. Counsel also argued that the Applicant was prejudiced by the absence of an interpreter fluent in the Vietnamese language at the hearing.

[5] As well, Counsel for the Applicant submitted that “taking into account the principles of natural justice, it would be a miscarriage of justice to render a decision of such importance to the Appellant without the Appellant having the opportunity to hear and respond to evidence; and to attend at the hearing and make submissions.”

[6] Finally, Counsel for the Applicant submitted that the Tribunal erred in law by failing to find the Applicant disabled within the meaning of the CPP.

ISSUE

[7] The issue in this application for leave to appeal is whether the appeal has a reasonable chance of success.

THE LAW

[8] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.¹ To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success². In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

ANALYSIS

[9] In order to grant leave to appeal the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that the Tribunal must first find that, were the matter to proceed to a hearing, (a) at least one of the grounds of the Application relate to a ground of appeal as set out in the DESD Act section 58.³ Further, there must be a reasonable chance that the appeal would succeed on this ground. For the reasons set out below the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

¹ Sections 56 to 59 of the DESD Act. Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal.”

² The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

³ **58(1) Grounds of Appeal –**

- 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.

The Alleged Breach of Natural Justice
Lack of Proper Notice of Hearing

[10] Counsel for the Applicant submitted that the hearing was held without proper notice being given to the Applicant. The Tribunal cannot agree with this submission. The Tribunal record indicates that on or about January 5, 2015, the Tribunal sent a Notice of Hearing to the Applicant. The Notice was sent by Xpresspost. The Canada Post receipt indicates that it was delivered to the Applicant's address at X X X Lane, X, Ontario, XXX XXX on January 5, 2015. A signature was required and the Canada Post receipt indicates that a R. J. G. signed for the document. There is no indication on file that the Applicant's address is anything other than a single family dwelling, thus the Tribunal finds that it is reasonable to infer that the Applicant did receive the Notice of Hearing.

[11] Secondly, the address, X X X Lane, X, Ontario, XXX XXX is the address on file for the Applicant. It has been the address on file at least since his reconsideration decision, which is dated June 11, 2012. **(GT1-05)** In fact, in an earlier communication to the Applicant dated November 4, 2014, the Tribunal used the same address. Indeed, this was the address that the Applicant used on his application for a CPP disability benefit.

[12] The Tribunal record does not indicate that there is a history of returned mail relating to this address. Thus, the Tribunal finds additional support for its position that the Applicant was provided with proper notice of the hearing date.

[13] The Tribunal record also shows that on April 10, 2015, an employee of the Tribunal telephoned the Applicant to remind him of the upcoming hearing date and to confirm his attendance at the hearing. A note is made that the Applicant's usual telephone number was out of service and that the caller had left a message on the Applicant's cellular telephone asking that he call back and confirm his attendance at the upcoming hearing. There is no record that he did call back, nonetheless, the Tribunal finds, on a balance of probabilities, that not only was the message left, but that it was left on the correct cellular telephone number. Thus, the Tribunal is also satisfied that the Applicant was provided proper notice of the hearing, but failed to attend. Accordingly, the Tribunal finds that no breach of natural justice arises in this regard.

The Appellant's Language Difficulty

[14] Counsel for the Applicant submits that the Applicant was prejudiced by the absence of a Vietnamese interpreter at the hearing. While acknowledging that the Applicant is originally from Vietnam and that at the time of his application for CPP disability benefits, he had been resident in Canada for 12 years, the Tribunal finds that nowhere in his application or other materials is there any reference to a language difficulty. On his application for disability benefits, the Applicant indicated that his preferred language of communication was English. There is no record of him requesting the services of a Vietnamese interpreter.

[15] In addition, there is no indication that the Applicant did not complete any of the application questionnaires himself or that he required assistance with the English language or had difficulty understanding English. His letter to the OCRT dated June 22, 2012, (GT1-73) in which he indicates his desire to appeal the reconsideration decision is written in the first person and is quite coherent. In all the circumstances of the case, the Tribunal is not persuaded that the Applicant was unfairly denied access to a Vietnamese interpreter. Thus, here too, the Tribunal finds that no breach of natural justice arises in this regard.

Did the General Division err by failing to find that the Applicant was disabled within the meaning of the CPP?

[16] The Tribunal finds that this submission amounts to no more than a statement of disagreement with the General Division decision. Outside of the bald submission, the Applicant has not shown how the General Division erred by finding that he was not entitled to a CPP disability benefit. The Applicant has not indicated what errors of law; or errors of fact; or errors of mixed fact and law were committed by the General Division. The Tribunal cannot be expected to guess at what these might be. For this reason, the Tribunal is not persuaded that the General Division finding of ineligibility for a CPP disability pension is a ground that would have a reasonable chance of success on appeal.

The Decision to proceed in the Applicant's absence

[17] The General Division decided the appeal on the basis of the material on file before it. The *Social Security Tribunal Regulations*⁴ permit the Tribunal to proceed with a hearing in absentia, provided that the Tribunal is satisfied that the party received notice of the hearing. While the General Division Member noted that the Applicant was not in attendance at the hearing, he did not indicate how he satisfied himself that the Applicant had been properly served with a Notice of the Hearing. The Tribunal notes that the Regulation does not require that a Member indicate in the decision what steps were taken in order for the member to be satisfied that the party had actually received the Notice of the Hearing. However, it would have been preferable for the Member to have done so. Nonetheless, it not being required by the Regulations, the failure to take this additional step, is not, overall, fatal to the decision.

CONCLUSION

[18] The Applicant submitted that the General Division breached natural justice by failing to give the Applicant proper notice of the hearing, thereby preventing him from giving “full answer and defence” as it were. Counsel also submitted that the Applicant was prejudiced because there was no interpreter fluent in the Vietnamese language at the hearing; and he submitted that the Tribunal erred in law by failing to find the Applicant disabled within the meaning of the CPP. For the reasons set out above the Tribunal is not persuaded that any of Counsel's submissions disclose a ground of appeal that would have a reasonable chance of success. Accordingly, the Application is refused.

Hazelyn Ross
Member, Appeal Division

⁴ *Social Security Regulations SOR12013-60 effective April 1, 2013, as amended by S.C. 2013, c. 40, s. 236. Section 12.*