

Citation: *D. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1141

Date: September 28, 2015

File number: AD-15-1003

APPEAL DIVISION

Between:

D. M.

Applicant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant claimed that he was disabled by physical injuries and chronic pain syndrome when he applied for a *Canada Pension Plan* disability pension. The Respondent denied this claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal 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 decided the appeal on the basis of the written record on June 15, 2015.

[2] The Applicant requested leave to appeal this decision to the Appeal Division of the Tribunal. He argued that the General Division failed to observe the principles of natural justice and fairness when it failed to hold an oral in hearing in this case, that it erred in law by failing to consider the Applicant's written submissions and ignored significant evidence that supported his claim, and that it made factual errors.

[3] The Respondent did not file any submissions regarding this appeal.

ANALYSIS

[4] 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 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.

[5] 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 (this is set out in the Appendix). Hence, I must decide if the Applicant has presented a ground of appeal that falls within section 58 of the Act that may have a reasonable chance of success on appeal.

[6] The Applicant first argued that the General Division failed to observe the principles of natural justice and fairness by not conducting an oral hearing in this case. Counsel for the Applicant argued that she had twice requested an oral hearing, stating that it was important in this case as the claimed disability was chronic pain syndrome, which is a largely subjective condition, and that credibility and the Applicant's testimony would be important for the General Division to properly decide the matter. She also contended that the Applicant had a legitimate expectation that the matter would be heard orally, and that this procedural step was required under the duty of fairness.

[7] The principles of natural justice are concerned with ensuring that parties to a legal proceeding have an adequate opportunity to present their case, know and meet the case against them, and have the decision made by an impartial decision-maker based on the law and the facts. It is clear from the *Social Security Tribunal Regulations* that the General Division has the discretion to decide how an appeal will be heard, whether in writing, by teleconference, videoconference or in person. However, this discretion must be exercised judiciously. It is not apparent from a review of the General Division decision if the General Division considered the Applicant's arguments when it decided what form the hearing would take. The General Division may not have observed the principles of natural justice in deciding this. This ground of appeal may have a reasonable chance of success on appeal.

[8] The Applicant submitted further that the General Division erred in not holding an oral hearing as the Applicant had a legitimate expectation that the matter would proceed in this fashion. 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 v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). 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 concluded that the SST erred to proceed as it did; 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.

[9] Similarly, in this case, I find that the Applicant's legitimate expectations do not extend to include a right to an oral hearing. This is not contemplated in the Act that governs the SST, nor is it contained in the Regulations. This was the law that was in force when the matter was heard. This ground of appeal does not have a reasonable chance of success on appeal.

[10] Counsel for the Applicant argued that the General Division also erred in law in making its decision as it did not consider or address his lengthy submissions, particularly with respect to the appropriateness of holding an oral hearing and the issue of credibility. It is not necessary for the decision to refer to each and every piece of evidence that is presented, or to each argument raised by a party in litigation. The decision maker is presumed to have considered all of this. However, reasons for decision should demonstrate that the decision maker has heard and considered the evidence and arguments of the parties and weighed them in reaching its decision. In this case, the General Division decision makes no reference to any of the Applicant's arguments regarding what form the hearing would take. Its summary of the Applicant's submissions similarly do not encapsulate most of the arguments advanced on behalf of the Applicant. These arguments are nowhere considered or analysed in the decision. Accordingly, the presumption that the General Division heard and considered all of the evidence and submissions of both parties in this matter may be rebutted. This ground of appeal also may have a reasonable chance of success on appeal.

[11] Counsel for the Applicant also argued that credibility was an important factor to be determined in this case because of the nature of the disability, and relied on a decision of the Pension Appeals Board to support this argument. The General Division decision stated that no finding of credibility was made. This ground of appeal may also have a reasonable chance of success on appeal for the same reasons set out above.

[12] In addition, the Applicant submitted that the General Division did not consider evidence that supported his claim. In *R v. Sheppard*, 2002 SCC 26 the Supreme Court of Canada stated that reasons must be given for findings of fact made on disputed evidence and upon which the decision is dependent. The General Division decision did not address any evidence that did not support its conclusion. This argument therefore also points to an error of law in the General Division decision. This ground of appeal may have a reasonable chance of success on appeal.

[13] Finally, counsel for the Applicant argued that the General Division decision contained errors of fact. The decision stated that the Applicant stated both that he had not worked since 1999 and that he worked that he worked after this time delivering flyers. In addition, counsel submitted that the General Division cited the incorrect date for when the Applicant stopped working.

[14] In order for factual errors to be a ground of appeal within section 58 of the Act, they must have been made in a perverse or capricious manner or without regard to the material that was before the General Division. The contradictory nature of the factual statements made about when the Applicant stopped work may be perverse. Therefore this ground of appeal may have a reasonable chance of success on appeal.

[15] I am not satisfied that the error regarding the date that the Applicant stopped work was made perversely, capriciously or without regard to the material before it. This error was also not material to the decision reached. This ground of appeal does not have a reasonable chance of success on appeal.

CONCLUSION

[16] The Application is granted as the Applicant has presented at least one ground of appeal that may have a reasonable chance of success on appeal

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[18] The parties are invited to make submissions on what form of hearing may be appropriate for the hearing of this appeal as well as the merits of the appeal. Videoconference hearings are not available in the area where the Applicant resides.

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.