Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: ***C. S. v. Minister of Employment and Social Development,*** **2016 SSTADIS 2**

Date: January 4, 2016

File number: AD-15-1180

APPEAL DIVISION

Between:

C. S.

Appellant

and

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

Respondent

Leave to Appeal

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

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

INTRODUCTION

[2] On July 30, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision refusing the Applicant's appeal of a reconsideration decision that denied him payment of a *Canada Pension Plan,* (CPP), disability pension. The Applicant seeks leave to appeal this decision.

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that the General Division committed the following:

> 1) Breached a principle of natural justice, in that the hearing process was flawed and the Member hearing the appeal appeared to have prejudged the outcome of the appeal;
> 2) 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.

PRELIMINARY ISSUE

[5] The Application appears to be filed late. On October 15, 2015 the Tribunal received an application for leave to appeal from the Applicant. It was incomplete. Paragraph 57 (1)(b) of the *Department of Employment and Social Development (DESD) Act* sets out the time limit for bringing an application for leave in the case of decisions from the Income Security section of the Tribunal. Thus, in the case of a decision made by the Income Security Section, an application for leave to appeal must be made to the Appeal Division in the prescribed form and

manner and within 90 days after the day on which the decision is communicated to the appellant.[1]

[6] For the following reason, the Appeal Division finds that the Application should be considered as having been filed within the 90-day time limit.

[7] While the Applicant did submit an incomplete application for leave, the Tribunal did advise him that if he were to complete the Application before December 8, 2015, it would consider his application as having been filed on October 15, 2015. The Applicant filed the missing material on December 7, 2015, thereby meeting the deadline that had been set by the Tribunal. Accordingly, the Appeal Division finds that it is not necessary to decide the question of whether the time for filing ought to be extended.

THE LAW

[8] Appeals of a General Division decision are governed by sections 56 to 59 of the DESD Act. Subsection 56(1) makes leave to appeal a decision of the General Division of the Tribunal a preliminary step to an appeal before the Appeal Division.[2] The grounds of appeal, of which there are only three, are set out in section 58 of the DESD Act.[3]

---

[1] Section 19 of the *Social Security Tribunal Regulations*[1]governs the deemed date of communication of a decision.

19. *When decision deemed communicated* – **(1**) A decision made under subsection 52(1), 54(1) 58(3), 59(1)or 66(1) of the Act is deemed to have been communicated to a party,
(a) if sent by ordinary mail, 10 days after the day on which it is mailed to the party:
(b) if sent by registered mail or courier, on
(i) The date recorded on the acknowledgement of receipt, or
(ii) the date it is delivered to the last known address of the party; and
(c) if sent by facsimile, email or other electronic means. the next business day after the day on which it is transmitted.
(2) Other documents sent by Tribunal – Subsection (1) also applies to any other document sent by the Tribunal to a party.

[2] Subsections 56(1) and 58(3) of the DESD Act govern the granting 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." 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; The General Division erred in law in making its decision, whether or not the

[9] In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court set out its view of the jurisdiction of the Appeal Division on an application for leave. The Federal Court stated, "in contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success." Thus the Appeal Division was required only to decide whether there had been a potential breach of any of the enumerated grounds of appeal.

[10] The task of the Appeal Division is to identify a yardstick by which it could determine whether an appeal has a reasonable chance of success, based only on the statutory provision. In *Bossé v. Canada (Attorney General)* 2015 FC 1142 the Federal Court appeared to accept "plain and obvious" as the appropriate test for determining whether an appeal has no reasonable chance of success.[4] Members of the Appeal Division have articulated the test for summary dismissal as "whether it is plain and obvious on the face of the record that an appeal is bound to fail." *M.C. v. Canada Employment Commission,* 2015 SSTAD. The Appeal Division also finds it helpful to adopt the approach approved by the Federal Court of Appeal in *Villani v. Canada (Attorney General)* 2001 FCA 248.

[11] For its part, the Appeal Division also finds it helpful to identify what is meant by "reasonable chance." In *Villani*[5] Isaacs, J. A. specifically approved the approach taken by the Pension Appeals Board, (PAB), in Barlow, wherein the PAB applied the dictionary definition of the words "regularly; pursuing; substantial; gainful; and occupation" to assist its determination of Ms. Barlow's eligibility for a CPP disability pension. The Appeal Division takes a similar approach to determining whether or not the appeal would have a reasonable chance of success. The Oxford Dictionary[6] defines "reasonable' variously as fair, sensible or fairly good or

---

error appears on the face of the record; or 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.

[4] 44. …"because, upon reading the reasons of the Appeal Division Member for refusing leave to appeal, it is necessary to understand that this case , in fact, concerns a summary dismissal of the appeal. It was "plain and obvious" that the applicant's appeal had no reasonable chance of success."
[5] *Villani v. Canada (Attorney General)* 2001 FCA 248.
[6] The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971.

average. Ironically, the on-line version of the dictionary gives the following example of usage: "I am not satisfied that the appellant has any reasonable chance of success if allowed to proceed with the appeal."

[12] Thus, the Appeal Division finds that, in order to grant the Application, it must be satisfied that the appeal has a fairly good or average chance of being successful. The Appeal Division does not have to be satisfied that success is certain.

ANALYSIS

Did the General Division breach a principle of natural justice? Was the hearing process flawed?

[13] The Applicant submitted that the hearing process was flawed and resulted in a breach of natural justice. He submitted that because the hearing was held by teleconference the General Division Member did not have the benefit of an in-person hearing. Therefore, it could not properly assess his credibility.

[14] This submission presupposes both that the Applicant's credibility was in issue; and also that an in-person hearing is the only reliable means of assessing credibility. The Appeal Division is not persuaded by these submissions. Section 21 of the *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 23,* and (the Regulations) provides that the hearing of an appeal may take place by teleconference, videoconference or other means of telecommunication. Section 21 also provides for an in-person hearing.

Indeed, the Respondent had requested that the hearing proceed on the basis of the materials before the General Division.

[15] Prior to the General Division hearing the Appellant made no submission in regard to the form of hearing. He did not object to the hearing taking place by teleconference. Neither did he

raise he objection at the hearing itself, all of which he could reasonably have been expected to do if he had the concerns that the form of hearing would not be to his benefit.[7]

[16] Credibility and the need for oral testimony were discussed in *MHRD v. Duhra,* (January 21, 1998) CP 5021 (PAB). In its decision, the PAB observed that it was difficult to make an assessment of credibility based on documentary evidence alone.

[17] At the time that the PAB made this statement the use of 'telecommunication devices as a means of conducting a hearing was limited. Since then greater use is made of both teleconferences and videoconferences. In the Applicant's case, the General Division Member stated that the decision to hold a teleconference was predicated, in part, on the fact that the Applicant's credibility was not a prevailing issue. Indeed, the decision appeared to turn not on issues involving credibility but rather on the fact that all avenues of treatment had not been foreclosed; that the Applicant had not complied with recommended treatment; and that he retained work capacity. It is not that the General Division did not accept that the Applicant could not return to his previous employment, rather it was that he had not made any attempt to find other work or to retrain. The Appeal Division is not persuaded that an in-person hearing would have significantly impacted the conclusions of the General Division. Therefore, the Appeal Division finds that the Applicant was not prejudiced by the teleconference hearing.

Did the Member prejudge the outcome of the hearing or otherwise demonstrate bias toward the Applicant?

[18] The Applicant submitted that the General Division Member appeared to have prejudged the outcome of the hearing. He charged that the Member ignored the contexts in which he made his submissions; appeared to have heard only what she wanted to; and had made up her mind before the hearing had begun. As proof of his allegations, the Applicant charged that the General Division Member misconstrued his attachment to various soccer teams in 2011 and 2012. He asserted that the Member ignored his oral testimony that he had limited involvement with the soccer teams, "likely playing at least one time with all of them." (AD 1B-2) The

[7] The Tribunal's Notice of Hearing setting out the form of the hearing and the reasons for proceeding by teleconference was sent to the Applicant by letter dated April 8, 2015.

Applicant also charged that the General Division Member misconstrued his reason for declining paid work as a referee. Finally, the Applicant charged that he had been involved with the person to whom this statement was made for less than five minutes. Therefore the General Division ought not to have placed reliance on her statement. Furthermore, the Applicant submitted that the General Division Member ought to have known that his anxiety made him a poor candidate for a job as a referee.

[19] The General Division Member summarised the evidence and submissions that were made at the hearing. She appeared to have done so fulsomely. With respect to the Applicant's claims concerning whether or not he declined work as a referee. The Appeal Division notes that the impugned statement is contained in a report made jointly by Sarah Warden, a psychiatric resident then under the supervision of Dr. Jitender Sareen, a psychiatrist. The General Division noted that, contrary to the Applicant's claim, he attended not one, but five session with them. (decision at para. 11) The Appeal Division infers that the Applicant had more than a passing consultation with Dr. Warden. Further, while the Applicant denied declining a position as a referee, this denial is undermined by the underlined statement in the report of Dr. Warden, dated November 12, 2012, namely:

> Over the four sessions, citalopram was discontinued and venlafaxine was initiated and titrated to a dose of 112.5 mg daily. C. S. reported improvements in sleep, mood, energy level, and anxiety. He discontinued his Dexedrine based on an assumption that he only needed to take the venlafaxine. When this miscommunication was corrected, he chose to remain off Dexedrine, as he did not believe it was providing any benefits. He denies any worsening in-attention, hyperactivity, or impulsivity after discontinuing this medication. He increased his participation in sports, adding a number of new soccer teams to his schedule, and was even offered the opportunity to become a referee; he declined, as his busy sports schedule conflicted with the work schedule. C. S. consistently minimized his level of distress and impairment, stating that he was reasonably satisfied with the improvements associated with venlafaxine and did not wish to work on any goals in therapy. He is in agreement with returning to your care for further medication prescribing and monitoring. (GD2-32) (Emphasis mine)

[20] Further, the General Division Member made no findings concerning the Applicant's refusal of paid work as a referee, thus, there is no issue that his reasons for declining the position had been misconstrued.

[21] While the Appeal Division was concerned that it was not clear from the decision when the Applicant was offered work as a referee, ultimately, the Appeal Division concluded that given the stated basis for the decision, it was irrelevant that this might have occurred prior to the end of the Applicant's MQP, as that fact, in and of itself would not provide a sufficient basis to ground the appeal. This is because the General Division decision was based on the following factors:

- The Applicant had failed to follow recommended treatments, namely, he did not use a C-PAP machine to address his sleep issues; and failed to address his anxiety as counselled by Dr. Wallbridge.
- That further treatment options were available to the Applicant to address his anxiety;
- The Applicant testified that if he has a commitment his anxiety does not prevent him from doing it.
- The Applicant had not mitigated his damages i.e. he made no attempt at obtaining and maintaining employment despite the post-MQP recommendation of Dr. Warden; as well
- In 2012, the Applicant regularly attended soccer practice and games, which was after the end of his MQP.

[22] The General Division did not base its decision solely on the Applicant's refusal of the referee position. In fact, the Member made no finding in relation to whether the Applicant had declined paid work, which was a submission of the Respondent.

[23] Accordingly, the Appeal Division finds that there is no factual basis for the allegation that the General Division Member had prejudged the appeal and had demonstrated bias against the Applicant. The Appeal Division also finds that there was nothing in the decision that could support a finding that there had been a breach of natural justice?

Did the General Division base 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?

[24] The Applicant also submitted that the General Division decision is based on an erroneous finding of fact. To support this allegation, he cited what he stated was the Member's omission to refer to his testimony that players, officials and facility employees made "comments that he was consistently yawning with an extreme lack of energy." The Applicant also

complained the Member failed to mention that he had registered in all of the soccer themes as a way of dealing with his social anxieties. The Appeal Division is not persuaded that either submission points to an erroneous finding of fact on the part of the General Division. It has been held time and again that a decision-maker need not refer to every piece of evidence that was before them. The Appeal Division is of the view that given the General Division's reasons for its conclusions, these omissions are insufficient to impeach the decision.

[25] The Applicant made the further claim that the General Division statements that he did not fully participate in the STAT[8] programme or pursued treatment with ADAM[9] were erroneous findings of fact. He stated that he had, in fact, been fired from the STAT programme, and he had joined all of the soccer teams after the ADAM programme advised him to "go out and meet people."

[26] Dr. Warden addressed the Applicant's involvement in the STAT programme noting that, "C. S. has been tried on multiple medications in the past, many of which he found effective initially, but which lost their effectiveness over time. He was followed for a short time in the STATprogramme, although his reluctance to participate in groups eventually led to discontinued involvement." (GD2-35) The Appeal Division is not satisfied that by stating that the Applicant didnot fully participate in the ADAM programme, the General Division committed an error of fact. Regardless of how that separation came about, the fact is that it did. The objective evidence appears to indicate that the separation from the ADAM programme occurred because the Applicant wasapparently reluctant to participate in group therapy. The Appeal Division finds no error of fact in the General Division's statement.

[27] With respect to the General Division findings concerning ADAM, while the Applicant challenged Dr. Wallbridge's statement, the General Division Member noted that the Applicant didnot present any evidence to support his belief that the opinion of Dr. Wallbridge was incorrect. Therefore, the Appeal Division finds no error on the part of the General Division in this respect.

---

[8] STAT – the programme is referred to in the report of Drs. Warden and Sareen dated September 19, 2012. The term is not defined.

[9] Anxiety Disorders Association of Manitoba (ADAM).

CONCLUSION

[28] The Applicant submitted that the General Division committed breaches of natural justice as well as based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. On the basis of the foregoing, the Appeal Division is not satisfied that the appeal would have a reasonable chance of success.

[29] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division