

[TRANSLATION]

Citation: *J. C. v. Minister of Employment and Social Development*, 2015 SSTAD 1473

Date: December 24, 2015

File number: AD-15-1188

APPEAL DIVISION

Between:

J. C.

Applicant

and

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

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

DECISION

[1] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal (the Tribunal).

INTRODUCTION

[2] On August 30, 2015, the Tribunal's General Division (GD) rendered a decision on the record and dismissed the Applicant's appeal. The GD concluded that the Applicant's disability was not severe before December 31, 2004, the minimum qualifying period (MQP), or the prorated date of January 31, 2005.

[3] On October 27, 2015, the Applicant filed an application for leave to appeal with the Appeal Division (Application). He was notified in a letter dated September 1, 2015, that an appeal from the decision had to be filed no later than 90 days after receiving the GD's decision.

[4] The Application was received by the Tribunal within the prescribed time limit.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW AND ANALYSIS

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, "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."

[7] Subsection 58(2) of the *Department of Employment and Social Development Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[8] In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, 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 or order, whether or not the error appears on the face of the record; or

(c) the General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[10] The Tribunal will grant leave to appeal if it is satisfied that one of the aforementioned grounds of appeal has a reasonable chance of success.

[11] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction whose response might justify setting aside the decision under review.

[12] The Applicant pointed out that:

(a) An in-person hearing had been scheduled for October 21, 2014;

(b) He called the Tribunal before the hearing time to ask where he should go, as he had lost his notice to appear;

(c) When he arrived at the hearing location, the GD member was not present;

(d) He called the Tribunal again to explain the situation and was instructed to send an explanatory document;

(e) On October 22, 2014, he sent a facsimile to the Tribunal explaining why he had been late and missed his hearing. He requested the opportunity to explain his situation; and

(f) On August 30, 2015, the GD rendered a decision without hearing the Applicant.

[13] Subparagraphs [12](a) to (f) are arguments to the effect that the GD failed to observe a principle of natural justice, namely, the *audi alteram partem* principle of hearing the parties to the appeal. They are related to paragraph 58(1)(a) of the *Department of Employment and Social Development Act*.

[14] The GD's decision states that:

[Translation]

[2] The appeal was initially planned to be held in person. The Appellant did not appear at the scheduled time. The Tribunal later learned that he had been confused as to the time and place of the hearing. He went to the hearing location the next day and submitted a request for adjournment. The Tribunal denied the request. The hearing will proceed on the basis of the documents filed.

[15] However, the Applicant went to the hearing location on the day of the hearing, not the next day, and submitted a request for adjournment on October 22, 2014, the following day.

[16] On March 17, 2015, the Tribunal denied the request for adjournment for the following reasons:

- *The adjournment was requested to be able to file additional documents; however, these documents are neither relevant nor important.*
- *The Appellant's MQP is December 31, 2004, and thus all additional evidence useful to that date should have been submitted before the hearing.*

The conclusion regarding the request was as follows: [translation] "The personal appearance hearing (i.e., in-person hearing) took place as originally scheduled."

[17] The Tribunal's file shows that the adjournment was requested to give the Applicant the opportunity to attend his own hearing in person. Between October 22, 2014, the date on which the adjournment was requested, and March 17, 2015, the date on which the adjournment was denied, the Applicant called the Tribunal (on October 28 and 30, 2014, and March 16 and 17, 2015) to ask whether another hearing would be scheduled, and filed a new document (on November 19, 2014).

[18] The Tribunal's file also shows that, on the morning of October 22, 2014, the GD member was notified that the Applicant had called the 1-800 number on October 21, 2014, prior to the time of his hearing to indicate that he did not know where to go. On October 22, 2014, the GD member spoke with the Applicant and asked for a written explanation.

[19] On October 22, 2014, the Applicant sent his written explanation to the Tribunal.

[20] The reasons provided by the GD for denying the adjournment are not consistent with the reasons submitted by the Applicant in his request for adjournment. The time lapse between the request for adjournment and the refusal of the request is also curious.

[21] This denial resulted in the Applicant not having the opportunity to be heard at a hearing.

[22] After reviewing the appeal docket, the GD's decision and the arguments in support of the Application, the Tribunal concludes that the appeal has a reasonable chance of success. The Applicant raised a question of natural justice whose response might justify setting aside the decision under review.

CONCLUSION

[23] The Tribunal grants leave to appeal before the Tribunal's Appeal Division.

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

[25] I invite the parties to provide submissions on the type of hearing, on whether a hearing is appropriate, as well as on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division