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

Citation: *B. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 29

Date: January 15, 2016

File number: AD-16-104

APPEAL DIVISION

Between:

B. R.

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 she was disabled by shoulder and neck injuries, chronic pain, liver problems, cancer, cardiac problems, mental illness and other conditions when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her application 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 held a teleconference hearing and on September 25, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. She argued that leave to appeal should be granted because the General Division breached the principles of natural justice by holding a teleconference hearing, that it based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it, and that it made errors in law.

[3] The Respondent filed no submissions.

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 can be considered to grant leave to appeal a decision of the General Division (reproduced in the Appendix to this

decision). I must decide if the Applicant has presented a ground of appeal that falls under section 58 of the Act and that may have a reasonable chance of success on appeal.

[6] First, the Applicant argued that leave to appeal should be granted as the General Division failed to observe the principles of natural justice when it held the hearing by teleconference rather than an in-person hearing. She relied on two decisions of the Pension Appeals Board that stated that the only way to truly ascertain the effect on a disability on a claimant was through hearing their testimony and assessing their credibility. Counsel for the Applicant contended that this could not be done by telephone. She also argued that the Applicant had a legitimate expectation of an in-person hearing as this is what she was entitled to when she appealed her claim to the Office of the Commissioner of Review Tribunals.

[7] Decisions of the Pension Appeals Board are not binding on this Tribunal. Unlike this Tribunal the Pension Appeals Board only held hearings by personal appearance. On that basis the decisions that the Applicant relied on can be distinguished from the matter at hand. I am also not persuaded by their reasoning as each case must be decided on its own facts. Nothing before me suggests that the General Division was not able to receive the Appellant's evidence and weigh it properly because the hearing was held by teleconference.

[8] In addition, the *Social Security Tribunal Regulations* (section 21) provide that hearings may be held in writing, by teleconference, by videoconference or other means of telecommunication, or in person. Section 28 of the Regulations provides that after all documents are filed with the General Division (or the time to do so has expired) the Income Security Section must make a decision on the basis of the documents and submissions filed, or if it determines that a further hearing is required, send a Notice of Hearing to the parties. On the plain reading of this provision it is clear that there is no entitlement to an in person hearing for any claimant.

[9] This ground of appeal relates to the issue of procedural fairness. The Supreme Court of Canada dealt with this issue in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. That decision stated clearly that a decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness is, however, variable and its content is to be decided in the

specific context of each case. This decision then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute in question, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[10] In applying these factors to this case, I find the following: first, it is clear that a decision of the General Division on the merits of an appeal before it affects privileges of the claimant. A decision on the form that a hearing takes to determine these privileges, by extension, also affects them.

[11] Next, the nature of the decision in question in this case is procedural. The form of the hearing does not change the fact that an Applicant has the opportunity to present her case and answer the case of the Respondent.

[12] I accept that the issues in this matter are important to the Applicant.

[13] I place great weight on the nature of the statutory scheme that governs the Social Security Tribunal. This Tribunal that was designed to provide for the most expeditious and cost effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the Tribunal the discretion to determine how hearings are to be conducted, whether in person, by videoconference or in writing, etc. The discretion to decide how each case will be heard should not be unduly fettered.

[14] 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 Tribunal can expect certain procedural guarantees, but not a specific outcome to his or her case (see *Baker*, above). 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 Tribunal. 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 Tribunal. The Tribunal proceeded with the case on the basis of the legislation as it was before the Tribunal began its work, because of the claimant's legitimate expectations when she filed the appeal. In its decision, the Federal Court stated that the doctrine of legitimate expectations is limited to the rules of procedural fairness. It concluded that the Tribunal erred by proceeding 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. Similarly, in this case, I find that the Applicant's legitimate expectations do not extend to include a right to an in person hearing. This is not contemplated in the Act that governs the Tribunal and was in place when the matter was not heard, nor is it contained in the Regulations.

[15] Finally, I must consider the choices of procedure made by the General Division. The Regulations provide that a Tribunal Member is to determine the form a hearing will take. The Regulations do not provide any direction on how that is to be decided. It is a discretionary decision. The decision of the Member in each case is therefore to be given deference.

[16] The Applicant requested that this matter be heard in person prior to the General Division decision to proceed by teleconference hearing. In the application that requested leave to appeal she did not allege that the General Division did not consider her request, that it considered irrelevant factors or failed to consider relevant factors in making this decision.

[17] For all of these reasons, I am not satisfied that the General Division failed to observe the principles of natural justice when it held a teleconference hearing in this matter.

[18] The Applicant also submitted that the General Division erred in law by not providing reasons for not accepting her testimony regarding her limitations, and that the General Division should not have discounted her testimony without providing reasons for not accepting it. The General Division decision summarized the Applicant's testimony regarding her conditions and limitations. It did not reject this testimony, but rather weighed it along with the other evidence before it in making its decision. This ground of appeal does not have a reasonable chance of success on appeal.

[19] The Applicant argued, in addition, that the General Division erred in law as it relied on the incorrect burden of proof in this case. In paragraph 31 the General Division decision stated that the Applicant had to prove on a balance of probabilities that she was disabled. This was correct. Paragraph 35 of the decision states, "the medical evidence on file leaves some doubt as to the severity of her symptoms …" Counsel argued that this suggested that the General Division, when deciding whether the Applicant was disabled, held her to a higher standard of proof than what was required in law. When the decision is read as a whole it may not be clear whether the General Division applied the correct standard of proof in this case. This is a ground of appeal that may have a reasonable chance of success on appeal.

[20] The Applicant also argued that the General Division erred when it concluded that her ability to attend at a retraining program indicated that she had capacity to work, and reminded the Tribunal that she required accommodations in this program. With this argument, she essentially asks this Tribunal to reevaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact. The Tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the Tribunal which made the findings of fact (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). Therefore, this argument does not raise grounds of appeal that may have a reasonable chance of success on appeal.

[21] In addition, the Applicant argued that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it. In particular, she argued that the decision stated that the Applicant required assistance with typing when in fact she was provided with a note-taker in classes. Also the General Division stated that she had an excellent education and was bilingual when she had limitations in oral and written English, needed tutoring to complete high school equivalency and accommodations to complete a college program.

[22] The General Division decision stated that the Applicant required assistance with typing and noted that she required accommodations in the college program. Although this description may not have been completely accurate, I am not satisfied that any error was made in a perverse

or capricious manner or without regard to the material before it as it was based on the evidence presented.

[23] Regarding the Applicant's bilingualism, the decision noted her limitations in English so made no erroneous finding of fact in that regard.

[24] I appreciate that the Applicant disagrees with the General Division description of her education as "excellent"; however, the evidentiary basis for this finding of fact was set out in the decision. Mere disagreement with it is not a ground of appeal under the Act.

[25] Finally, the Applicant argued that the General Division erred as it relied on speculative comments in medical reports regarding a possibility of retraining as evidence that she was not severely disabled. The General Division decision referred to medical reports penned at the relevant time that stated that the Applicant could be retrained if her symptoms did not improve, and that she could retrain for a job within her physical restrictions. This evidence was considered with the other medical reports and the Applicant's testimony to reach the decision in this matter. I am not persuaded that the General Division made any error in considering this evidence. This argument is not a ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[26] The Application for leave to appeal is granted as the Applicant has presented a ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal.

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

[28] The parties are invited to make submissions on what form the appeal hearing should take with their submissions on the merits of this appeal.

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.