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

Citation: *R. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 98

Date: March 1, 2016

File number: AD-15-300

APPEAL DIVISION

Between:

R. K.

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

Canada

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] In a decision dated June 19, 2015 the Appeal Division of the Social Security Tribunal, (the Tribunal), granted the Appellant leave to appeal the decision of the General Division of the Tribunal that found she was not eligible for a *Canada Pension Plan*, (CPP), disability pension.

GROUNDS OF THE APPEAL

[3] Leave to appeal was granted on the narrow ground that the General Division may have committed a breach of natural justice in respect of its view of certain aspects of the Appellant's testimony.

[4] The Appellant submitted that the General Division demonstrated bias in its decision-making in that the General Division had described her as being somewhat exaggerative in her testimony. If established, this would constitute a breach of natural justice.

ISSUE

[5] The issues before the Appeal Division are: -

Did the General Division display bias, thereby committing a breach natural justice, when it described the Appellant's testimony as "somewhat exaggerative"?

THE LAW

[6] Appeals of a General Division decision are governed by sections 56 to 59 of the Department of Employment and Social Development (DESD) Act. The grounds of appeal, of which there are only three, are set out in section 58 of the DESD Act.[1] This appeal is brought under subsection 58(1), namely, that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

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[1] **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.

SUBMISSIONS

[7] As provided for by section 42 of the *Social Security Tribunal Regulations*[2] the parties were allowed forty-five days in which to either file submissions or to serve the Tribunal with a notice that they had no submissions to file. The Appeal Division received submissions from both the Appellant and the Respondent. However, the Appellant's submissions were limited to additional descriptions of her health conditions. They did not address the basis on which leave to appeal was granted.

[8] The Respondent filed extensive submissions, the gist of which was, that on the grounds on which leave to appeal was granted, the General Division decision does not contain any reviewable error that would permit the intervention of the Appeal Division. The Respondent expressed the view that the Appeal Division should dismiss the appeal.

STANDARD OF REVIEW

[9] Counsel for the Respondent made a number of submissions regarding the Standard of Review, among them the argument that in order for the Appeal Division to properly determine whether the General Division committed a reviewable error, it was necessary for the Appeal Division first to decide the applicable standard of review.

[10] The current jurisprudence of the Federal Court and Federal Court of Appeal do not support the Respondent's position. Rather, it takes the position that the Appeal ought to confine its inquiry only to assessing whether or not the General Division breached any of the provisions of section 58(1) of the DESD Act. In *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242, the Federal Court of Appeal took the position that when the Appeal Division hears appeals under section 58 (1) of the DESD Act, the governing statute of the Tribunal, it needs must confine itself to the mandate provided by sections 55 to 69 of the Act:

> [19]… Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is

[2] the *Social Security Tribunal Regulations S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 2*

> conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(b) of the *Act).* There is no need to add to this wording the case law that has developed on judicial review.

[11] The Federal Court of Appeal returned to the question in *Maunder v. Canada (Attorney General),* 2015 FCA 274, affirming the position it set out in *Jean Paradis.* In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question in the context of applications for leave to appeal decisions of the General Division arriving at a similar, if not the same, conclusion.

[12] Accordingly, notwithstanding the submissions of Counsel for the Respondent, the Appeal Division must restrict itself to only determining if the General Division committed a breach of natural justice.

ANALYSIS

Did the General Division breach a principle of natural justice?

[13] The Appellant submitted that the General Division decision is flawed and resulted in a breach of natural justice, in that the General Division mischaracterised her testimony concerning how long it takes her to get out of her car and what she was advised regarding her candidacy for knee surgery. She alleged that not all of what Dr. Fleming told her about knee surgery during her consultations with him was included in his medical reports.

[14] In response, Counsel for the Respondent submits that the "offending" statement was not indicative of bias, but went more to the General Division's general credibility assessment and its weighing of the evidence.

[15] An allegation of bias is a serious charge, one that the Appeal Division found that the Appellant had implicitly levelled against the General Division. In *Committee for Justice and Liberty* v. *National Energy Board*[3], the Supreme Court of Canada addressed the question of a "reasonable apprehension of bias". The view of the dissenting minority has come to embody the

[3] *Committee for Justice and Liberty v. National Energy Board,* (1978] 1 S.C.R. 369.

thinking on the issue. Thus, per Martland, Judson and deGranprè, JJ. “the proper test to be applied is “what would an informed person, viewing the matter realistically and practically- - and having thought the matter through-- - conclude?”

[16] Counsel for the Respondent submitted that the test for bias requires that the person considering the allegation be “reasonable” in the sense of being impartial. The second part of the test requires a determination of whether the apprehension of bias is itself reasonable. The Appeal Division concurs. Further, the threshold for a finding of bias is high, given that the allegation challenges the integrity of the Tribunal and its Member decision-makers. Thus the requirement that the allegations must rise beyond a mere suspicion. *R v. S. (R.D.)* [1997) 3 S.C.R. 484

[17] The onus is on the Appellant to establish that a breach of natural justice occurred. The Appellant submitted that the General Division demonstrated bias by discounting parts of her testimony and by describing them as being “somewhat exaggerative”. (AD-1) The Appeal Division is not satisfied that these circumstances alone are sufficient to support an allegation of bias. The Appeal Division finds that the General Division’s statement must be viewed in the context of its finding that the Appellant’s testimony that Dr. Fleming had advised her to wait until she was sixty years old before undergoing knee replacement surgery and the absence of substantiating medical reports. Indeed, the General Division found there was evidence that appeared to indicate the contrary.

[18] Accordingly, the Appeal Division finds that the Appellant has not provided the Appeal Division with any information that could substantiate the charge that the General Division had demonstrated bias by its description of parts of her testimony as being “somewhat exaggerative.” Thus, she has failed to show that the allegation of bias is reasonable. The Appeal Division concludes that while the General Division's choice of words may be less than fortunate, in the circumstances, they give rise neither to a reasonable apprehension of bias or an actual bias.

CONCLUSION

[19] Leave to appeal was granted on the basis that the General Division may have breached natural justice when it described the Appellant as "somewhat exaggerative". The onus was on the Appellant to establish that she had a reasonable apprehension of bias and that the General Division had breached natural justice when it concluded that she had been "somewhat exaggerative." The Appeal Division finds that the Appellant has not met her onus in that she has not provided the Appeal Division with any information that could substantiate her position.

[20] The Appeal is dismissed.

Hazelyn Ross
Member, Appeal Division