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

Citation: *R. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 123

Tribunal File Number: AD-15-1085

BETWEEN:

R. B.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 29, 2016

Canada

REASONS AND DECISION

PARTIES:

Appellant	R. B.
Appellant's representative:	Juliana Dalley and Amita Vulimir (counsel)
Respondent's representative:	Julia Betts (counsel)

OVERVIEW

[1] This is an appeal of the decision dated July 27, 2015 of the General Division, in respect of the Appellant's claim for a Canada Pension Plan disability pension. The General Division determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan*, as it found neither that his disability was "severe" on or before his minimum qualifying period of December 31, 1999, nor that he had become disabled within a prorated period.

[2] The Appellant sought leave to appeal the decision of the General Division, on the grounds that the General Division had failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, and that it had also erred in law in making its decision. I granted leave to appeal on December 21, 2015, as I was satisfied that the appeal had a reasonable chance of success on these grounds.

[3] Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 43(a) of the *Social Security Tribunal Regulations.*

BRIEF HISTORY OF PROCEEDINGS

[4] The relevant history is set out below.

[5] The Respondent filed an Addendum with the Social Security Tribunal on June 9, 2015, days prior to the scheduled hearing before the General Division on June 12, 2015. The Respondent filed the Addendum in response to submissions filed on May 29, 2015 by the Appellant.

[6] The Social Security Tribunal had notified the parties in a Notice of Hearing that all submissions were to be filed by May 30, 2015, and that the parties would have an opportunity to respond by no later than June 10, 2015. The Social Security Tribunal also advised both parties that any new documents would be copied to the other parties and that they would be provided with an opportunity to respond.

[7] There is no issue over the timeliness by which the parties filed their respective submissions. However, given the closeness of the filing dates and the hearing date, the Appellant did not receive the Respondent's Addendum prior to or during the hearing. Indeed, the Appellant was unaware that the Respondent had prepared an Addendum, until after the hearing had completed, when his counsel received a copy by mail on June 16, 2015.

[8] After receiving a copy of the Addendum, the Appellant's counsel wrote to the Social Security Tribunal on June 26, 2015, requesting that the General Division either disregard the Addendum altogether or that it consider the Appellant's letter, in response to issues raised by the Addendum.

[9] The General Division rendered its decision on July 7, 2015, before it had received the Appellant's request of June 26, 2015.

DECISION OF THE GENERAL DIVISION

[10] The General Division set out the evidence regarding the Appellant's employment and earnings for the years 2002, 2008 and 2009 at paragraphs 21, 20, 22, 30 to 37 and 42 to 47 and 38 to 41, inclusive, of its decision.

[11] In determining whether the Appellant's disability could be found severe for the purposes of the *Canada Pension Plan,* the General Division considered whether the Appellant exhibited any residual work capacity beyond the minimum qualifying period. The General Division made a number of findings regarding the Appellant's employment and earnings for the years 2008 and 2009, but did not specifically address the year 2002 in its analysis. The General Division found that the Appellant was able to fulfil his core work activities and that he did not require any workplace accommodations to suggest that his employer was benevolent. The General Division also found that the Appellant was able to

maintain employment from October 2008 to July 2009, and that his employment ended for reasons unrelated to his medical condition. The General Division found that the Appellant "maintained a residual work capacity for employment beyond his MQP in December and prorated MQP in February 2000" and that as such he was not severely disabled for the purposes of the *Canada Pension Plan*.

LEAVE DECISION

[12] I granted leave to appeal on two grounds, that:

(1) the Appellant may have been denied a full and fair hearing and hence there may have been a breach of procedural fairness, when he did not receive the Respondent's Addendum in a timely manner and the General Division did not take any steps to address the breach; and

(2) the General Division may have erred in law when it declared that the Appellant had a prorated minimum qualifying period of January 2000.

ISSUES

[13] The issues before me are as follows:

(1) Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction, when it did not ensure that the Appellant had a copy of the Respondent's Addendum submissions?

(2) Did the General Division err in law in making its decision, when it determined that one of the issues before it was whether the Appellant had a prorated minimum qualifying period of January 2000?

(3) If the General Division either failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or if it erred in law, what is the appropriate disposition of the matter?

SUBMISSIONS

[14] Counsel submits that the General Division failed to disclose evidence and submissions which had been filed by the Respondent prior to the oral hearing and, despite being alerted to the procedural defect, failed to take any steps to remedy any prejudice caused to the Appellant by the lack of timely disclosure. Counsel submits that the General Division failed to provide the Appellant with an opportunity to seek an adjournment or to respond to the additional evidence and submissions. Counsel submits that following the hearing, the General Division failed to ensure that the Appellant's response to the Addendum was placed before the Tribunal Member. Counsel submits that, as a result, the Appellant did not receive a full and fair hearing before the General Division.

[15] Counsel for the Appellant did not provide any submissions regarding the proration issue.

[16] The Respondent's counsel notes that it is unclear from the decision of the General Division whether it relied upon the Respondent's Addendum submissions filed on June 9, 2015. The Respondent submits that if the General Division relied on the Addendum when it made its decision, then the Appellant was denied a right of reply, resulting in a breach of natural justice. The Respondent concedes that under these circumstances the appeal should be allowed and the matter remitted to the General Division for redetermination.

[17] Counsel for the Respondent submits on the other hand that in the event the General Division did not rely on the Addendum, then the Appellant was not denied a right of reply and there was no failure by the General Division to observe a principle of natural justice.

[18] Counsel for the Respondent acknowledges that the General Division erred when it stated at paragraph 7 that the Appellant could benefit from a pro-rated minimum qualifying period if he established that he was disabled in January 2000, but counsel submits that the statement simply represents "an unfortunate slip" and that as the correct

date was otherwise cited throughout the rest of the decision, there was no material effect on the outcome.

[19] Counsel for the Respondent submits that unless the General Division relied on the Respondent's Addendum, the decision is reasonable and the Appeal Division should not intervene and the appeal should be dismissed.

THE LAW

[20] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out that the only grounds of appeal are the following:

> (a) 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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> (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.

ANALYSIS

(a) Issue 1: Natural justice

[21] Counsel for the Respondent is prepared to accept that there was a breach of the principles of natural justice, provided that the General Division relied on the Addendum submissions.

[22] The Addendum submissions (GT81-GT8-6) deal with the Appellant's employment in 2002. The Respondent responded to the Appellant's submissions that the Appellant's earnings in 2002 should be disregarded and considered work activity for a benevolent employer. The Respondent pointed to the Appellant's Questionnaire for disability benefits, where the Appellant indicated that he had worked full-time as a janitor from 1987 until June

2002. The Respondent also submitted in the Addendum that while the Appellant was reassigned lighter work duties, all employers have a legal obligation to make reasonable accommodations to an individual. The Respondent also provided two Records of Employment: one for the Appellant's employment from March 2001 to September 2002 and the other for his employment from October 2008 to July 2009.

[23] Counsel for the Respondent suggests that there needs to be an element of reliance on the Addendum by the General Division, for a breach of the principles of natural justice to arise. The General Division does not appear to have directly relied on the bulk of the Addendum submissions, as there is no reference to the Appellant's 2002 employment in its analysis. It is perhaps less clear whether the General Division relied on any portion of the Addendum submissions or the 2008/2009 Record of Earnings in relation to the Appellant's 2008 to 2009 employment.

[24] Even so, the Respondent's submissions do not address the possibility alluded to in the Appellant's submissions that had the Appellant been provided with a copy of the Addendum, he might have responded "by offering further focused testimony and submissions regarding why his employment in 2008 and 2009 was not indicative of capacity to regularly pursue any substantially gainful occupation". The Addendum could have changed the Appellant's focus, strategies and preparation for the hearing. The Appellant might have sought an adjournment and ultimately might have adduced additional evidence and called other witnesses. He may have done all this to address the issue of his capacity for 2008 and 2009. And, had he done so, possibly the General Division might have made other findings regarding the nature of the Appellant's employment in 2008 and 2009.

[25] It is irrelevant whether the General Division relied on the Addendum submissions of the Respondent, as the Addendum could have impacted upon the appeal in other ways. The General Division ought to have ensured that the parties had been provided with the full hearing file, but it did not. (As a matter of good practice, counsel should exchange documents with other parties, particularly when documents are produced close to the hearing date.)

[26] The Appellant's counsel has referred me to *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, at para. 40. There, the Supreme Court of Canada held that, as a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position. Here, the Appellant did not have the benefit of the Addendum, and he was likely deprived of the opportunity to fully know and meet thecase against him. It cannot be said that under these circumstances he had been provided with a fair hearing.

[27] The Appellant's counsel submits that the General Division had an opportunity to remedy the breach following the hearing. Counsel relies on *Murray v. Canada (Attorney General)*, 2011 FC 542, where the Federal Court held that a tribunal's obligation to conduct itself in accordance with the principles of procedural fairness does not end when the hearing is concluded and it reserves its decision. However, this presupposes that the General Division Member was aware that the Appellant had not been provided with a copy of the Addendum prior to the hearing, and that the General Division Member had been provided with a copy of the Appellant's counsel's letter of June 26, 2015, before a decision had been rendered. It is unnecessary in the facts of this case to determine whether there was an ongoing breach of the principles of natural justice, as the Appellant has established that he was deprived of a fair hearing.

(b) Issue 2: Proration

[28] The Appellant did not make any submissions regarding the proration issue. The Respondent's counsel submits that notwithstanding the fact that the General Division erred when it declared that the Appellant had a prorated minimum qualifying period of January 2000, this merely represents an unfortunate slip, and the General Division otherwise correctly identified February 2000 as the prorated date throughout the rest of its decision. The Respondent's counsel submits that there was no material effect on the outcome of the proceedings.

[29] There is no evidence from or on behalf of the Appellant that he had been misled into accepting that the prorated date was January 2000 and that he had focused on this date

to establish disability. Indeed, the General Division noted the Appellant's representatives' submissions that the Appellant alleged that he has had a severe and prolonged disability since at least 1998.

[30] While the General Division clearly erred in providing two distinct dates for proration, there is no evidence that this had any impact on the parties. I consider this a moot issue.

(c) Issue 3: Relief sought

[31] The Appellant's counsel submits that when a breach of procedural fairness occurs, the appropriate relief is to remit the matter for rehearing to the General Division: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities*), [1992] 1 SCR 623. That decision was in the context of a reasonable apprehension of bias, but nonetheless the same principles apply. There, the Supreme Court of Canada wrote:

> If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of biascannot be remedied. The hearing, and any subsequent order resulting from it, is void. In *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 661, Le Dain J. speaking for the Court put his position in this way:
>
> > ... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[32] I agree that a re-hearing is the appropriate disposition when a breach of procedural fairness has occurred. It is not for me to speculate either as to what the outcome might have

been had the Appellant been provided with the Respondent's Addendum in a timely manner, or for me to attempt to remedy the breach at this juncture.

CONCLUSION

[33] The appeal is allowed and the matter remitted to a new member of the General Division for a hearing *de novo.*

Janet Lew
Member, Appeal Division