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

Citation: *S. A. B. v. Minister of Employment and Social Development,* 2016 SSTADIS 216

Tribunal File Number: AD-15-315

BETWEEN:

**S. A. B.**

Appellant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Neil Nawaz

DATE OF DECISION: June 17, 2016

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on April 13, 2015, which dismissed the Appellant's application for a disability pension on the basis that the Appellant did not prove that his disability was severe and prolonged, for the purposes of the *Canada Pension Plan* (CPP), on or before April 2009, the month before his retirement pension became payable.

[2] On May 26, 2015, the Appeal Division (AD) of the Social Security Tribunal granted the Appellant leave to appeal on the grounds that, in rendering its decision, the GD may have erred by failing to observe a principle of natural justice.

## BACKGROUND AND HISTORY OF PROCEEDINGS

### *Application for CPP Disability Benefits*

[3] The Appellant submitted an application for CPP disability benefits on April 20, 2010. The application was completed and signed by his daughter and authorized representative, "S. N. B." of 100 X X X, Unit X, X, Ontario (p. GT1-25).

[4] The Respondent denied the Appellant's application for a CPP disability pension on September 24, 2010. The Respondent noted that the Appellant had been in receipt of a CPP retirement pension since May 2009. The Respondent advised the Appellant that the CPP does not allow an individual to receive both an early retirement pension and disability benefits at the same time. The Respondent advised the Appellant that his medical condition would have had to prevent him from substantially gainful employment by April 2009, the month before he started to receive an early CPP retirement pension. The Respondent concluded from a review of the information and documents on file that there was insufficient information to show that his limitations prevented him from doing some type of work (p. GT1-12).

[5] On December 13, 2010, the Appellant sought a reconsideration of the decision of the Respondent. In a reconsideration decision dated April 1, 2011, the Respondent denied the Appellant's application for a disability pension. This time, the Respondent advised that it did not consider the Appellant to have a disability that was both severe and prolonged as defined under the CPP (p. GT1-21).

***Appeal to CPP Review Tribunal***

[6] On May 12, 2011, the Appellant's representative sought an appeal of the reconsideration decision of the Respondent. An early appeal date was sought. The letter was written on the letterhead of "N.K. B. Legal Serivces [sic] at 100 X X X, Suite 201, Mississauga, Ontario. The representative signed the letter as "N. (S.) B." (p. GT1- 5).

[7] On November 23, 2011, N. B. of the firm N.K. B. Legal Serivces [sic] wrote to the Office of the Commissioner of Review Tribunals with a change of address. The new address, effective November 30, 2011, would be 2800 X X, Suite X,X, Ontario. The representative signed the letter as "N. (S.) B." (p. GT1-149).

[8] On December 21, 2011, the Office of the Commissioner of Review Tribunals confirmed that a hearing before a Canada Pension Plan Review Tribunal (the predecessor body to the GD) had been scheduled for May 16, 2012.

[9] In early 2012, the Appellant's representative prepared a Memorandum, which set out her submissions. She signed the Memorandum as "S. N. B." (p. GT1-118).

[10] On May 16, 2012, a hearing before a CPP Review Tribunal was held. However, the Review Tribunal adjourned the hearing, as the Appellant reportedly had just retained new counsel. The Record of Adjournment indicates that the Appellant advised the Review Tribunal that his new counsel needed time to prepare for the hearing and to obtain missing documents (p. GT1-96).

[11] There is no record as to whether the Appellant provided the name and contact information for his new counsel at the hearing before the Review Tribunal on May 16, 2012.

***Transfer to Social Security GD***

[12] On April 1, 2013, the appeal was transferred to the Social Security Tribunal of Canada.

[13] On April 1, 2014, the Social Security Tribunal wrote to N. B. of N.K. B. Legal Services at 2800 X X, Suite X,X, Ontario, advising as to the next steps in the appeal process. The Social Security Tribunal did not send a copy of its letter of April 1, 2014 directly to the Appellant. The letter indicated that the parties could continue to file new documents or submissions, until otherwise notified.

[14] The appeal was assigned to a GD Member in July 2014.

[15] The GD Member decided to make its decision on the basis of documents filed. His reasons for proceeding in this manner were set out in a Notice of Hearing dated September 4, 2014 and addressed and delivered to N. B. of N.K. B. Legal Services at 2800 X X, Suite X,X, Ontario. The letter dated September 4, 2014 does not appear to have also been sent directly to the Appellant.

[16] The GD decided the matter on the basis of the documents filed and rendered a decision on April 13, 2015. On April 14, 2015, the decision was sent to the Appellant, N. B. and the Respondent.

[17] Neither of the parties filed any documents between September 4, 2014 and April 14, 2015.

***Application for Leave to Appeal to the AD***

[18] On May 25, 2015, S. B. of the law firm C. B. P.C. at 450 X X X, Unit X, X, Ontario, wrote to the Social Security Tribunal acknowledging the letter dated April 14, 2015. She confirmed that her client had not been provided with a hearing and that they would be appealing the decision on this basis. She also wrote, "I have followed [up] on numerous occasions requesting a hearing date however the only response I have received was your aforementioned letter denying my clients [sic] claim." She requested an explanation as to why her client had not been provided with a hearing date.

[19] The letter dated May 25, 2015, appears to be the first occasion that S. B. of C. B. communicated with the Social Security Tribunal. Other than the Appellant's oral submissions at the hearing before the CPP Review Tribunal on May 16, 2012, there is no record in the file of the Social Security Tribunal that N. B. of N.K. B. Legal Services at 2800 X X, Suite X,X, Ontario had ever ceased to act for the Appellant, or that S. B. of C. B. acted for the Appellant, until the letter of May 25, 2015.

[20] A review of the Social Security Tribunal's documentary record does not show any correspondence or any communications from the Appellant, N. B. of N.K. B. Legal Services at 2800 X X, Suite X,X, Ontario, or S. B. of C. B. between May 16, 2012 and May 25, 2015.

[21] The leave application was assigned to an AD Member. On June 2, 2015, the Social Security Tribunal wrote to S. B. of C. B., advising that the leave application was required to be made in the prescribed form and manner.

[22] On June 3, 2015, S. B. of C. B. again wrote to the Social Security Tribunal, requesting a response to her letter of May 25, 2015.

[23] On June 11, 2015, the Social Security Tribunal sent an email to S. B. of C. B., in response to the enquiry as to the form of hearing before the GD. The Social Security Tribunal attached a copy of the letter dated September 4, 2014, in which the GD advised that it would be making a decision on the basis of the documents filed with the Social Security Tribunal. Ms. S. A. B. was reminded that the leave application was required to be made in the prescribed form and manner.

[24] S. B. of C. B. immediately responded to the Social Security Tribunal by e-mail. She wrote:

> The letter that was sent back in 2014 that you have attached is sent to a wrong address. I have never been located at that address so I am not sure why it was sent there thus not receiving that letter.

[25] S. B. of C. B. confirmed her address as 450 X X X, Unit X, X, Ontario. Otherwise, she did not address any of the substantive content of the letter dated September 4, 2014.

[26] On June 16, 2015, S. B. of C. B. wrote to the Social Security Tribunal. She enclosed a copy of an Application Requesting Leave to Appeal, completed by her client. She advised that the original application would be sent by mail. The Social Security Tribunal subsequently received the original application on June 18, 2015.

[27] In the Application Requesting Leave to Appeal, the Appellant handwrote his representatives' first names as "N./D." and last names as "B./C.", both of "C. B. Professional Corporation," at 450 X X X, Unit X, X, Ontario.

[28] In a decision dated July 6, 2015, the AD granted leave to appeal on the sole ground that the Appellant had raised an arguable case that the GD had breached a principle of natural justice by failing to give adequate notice of the on-the-record hearing or associated filing timelines. The AD Member also invited the parties to address various questions raised in the record to provide written submissions on the form of hearing.

[29] On August 19, 2015, the Respondent made written submissions (p. AD2-1) arguing the GD had committed no reviewable error. It also submitted that the appeal should proceed without an oral hearing based on the written record only.

[30] S. B. acknowledged the Respondent's submissions in an email dated September 19, 2015. On October 13, 2015, the AD received a fax from Dave Rawana of Alexander, Rawana Paralegal Services advising that he was now representing the Appellant. He asked that the submission filing deadline be extended from October 15, 2015 to December 30, 2015 in order to give him sufficient time to review the file and prepare a submission. In response, the AD Member endorsed an extension of the deadline, but only to December 1, 2015.

[31] On December 9, 2015, the Appellant's new representative forwarded written submissions, accompanied by a Chronic Pain Assessment Report dated December 3, 2013 prepared by Dr. Stephen Brown, an anesthesiologist and pain specialist associated with the University of X. Mr. Rawana indicated that he was content to hold the hearing by videoconference, apparently under the mistaken impression that the Respondent had agreed to an oral hearing.

[32] On December 16, 2015, the Respondent submitted a letter opposing the admission of the Appellant's submissions, as they had arrived after the specified deadline and no exceptional circumstances were established.

[33] On April 7, 2016, the AD scheduled an hearing of the appeal on the basis of the documentary record for the following reasons:

(a) The complexity of the issues under appeal;

(b) The fact that the Appellant or other parties were represented;

(c) The requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

**THE LAW**

[34] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are that:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

**STANDARD OF REVIEW**

[35] Until recently, it was accepted that appeals to the AD were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[1]. In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to an administrative tribunal often analogized with a trial court. In matters where

[1] *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII)

erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[36] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*[2], has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

## ISSUES

[37] The issues before me are as follows:

(a) What standard of review applies when reviewing decisions of the GD?

(b) Did the GD fail to observe a principle of natural justice in proceeding with a hearing without giving adequate notice?

## SUBMISSIONS

[38] The Appellant's Application for Leave to Appeal was founded on the allegation that he had a right to an in-person hearing under the DESDA. The AD found this ground to have no reasonable chance of success but nevertheless permitted leave because there appeared to be an arguable case that the Appellant had not received notice of the hearing before the GD and was therefore not afforded an opportunity to fully present his case. Subsequent communications from the Appellant's former representative specifically suggested that neither she nor her client had received the GD's Notice of Hearing dated September 4, 2014.

[39] The submissions prepared by Mr. Rawana, the Appellant's new representative, did not address the ground on which leave was allowed. His letter dated December 7, 2015 instead referred to Dr. Brown's assessment report in arguing that the Appellant suffered from a severe and prolonged disability that rendered him incapable regularly of pursuing any substantially gainful occupation. As well, Mr. Rawana made no submission on the appropriate standard of review or level of deference owed by the AD to determinations made by the GD.

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[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica* 2016 FCA 93 (CanLII)

[40] In its submissions of August 19, 2015, the Respondent argued that there was no documentary evidence, or affidavit evidence to support the assertion that a Notice of Hearing was not sent by the GD to the Appellant's lawfully authorized representative, or that the Notice was not received by the Appellant's authorized representative. The Respondent further submitted that, in fact, the documentary evidence on file showed that the GD sent a Notice of Hearing to the most up-to-date address for the Appellant's representative, and no evidence was introduced to show that the Appellant's representative submitted a change of contact information form, nor was there any evidence that such a form was disregarded. Any failure to inform the Social Security Tribunal of a change in contact information does not amount to a breach of natural justice, nor does it indicate that the GD erred or that the intervention by the AD is warranted.

[41] The Respondent's submissions were made prior to *Huruglica*, which was released in March 2016. The submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard of correctness was to be applied to an alleged failure to observe a principle of natural justice.

**ANALYSIS**

***(a) Standard of Review***

[42] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir v. New Brunswick*[3], to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[43] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

[3] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII)

> … the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[44] The implication here is that the standards of reasonableness or correctness will not apply unless those words or their variants are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that subsections 58(1)(a) and (b) do not qualify errors of law or breaches of natural justice, suggesting the AD should afford no deference to the GD's interpretations.

[45] The word "unreasonable" is nowhere to be found in paragraph 58(1)(c), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the AD should intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

***(b) Notice***

[46] The Appellant denies that he ever received notice that the GD was about to conduct a hearing on the record and was thus denied an opportunity to fully present his case prior to the decision being rendered on April 15, 2015.

[47] I agree that if the Appellant and his representative were unaware of the Notice of Hearing dated September 4, 2014, they were potentially at a disadvantage, even in a hearing that did not require the personal attendance of any of the parties. This is so even though there had been ample time and opportunity to file additional documents or submissions—three years had elapsed from the abortive May 2012 CPP Review Tribunal hearing to the date on which the GD issued its decision, during which time neither the Appellant nor his then-representative made any filings. Nevertheless, without notice of the impending on-the-record hearing, they would have been deprived of an opportunity to file "last-minute" documentary evidence or written submissions.

[48] This leaves two questions before me: (i) Did the Appellant's representative receive the Notice of Hearing? (ii) If not, had she discharged her statutory obligation to inform the GD of a change in contact information?

[49] Before I attempt to answer these questions, I wish to address the element of ambiguity in the file surrounding the identity of the Appellant's first authorized repetitive, who is apparently also his daughter. During the long course of this proceeding, her name and address were listed variously as follows:

- S. N. B. of NK B. Legal Services,100 X X X, Unit X, X, Ontario (as of the May 12, 2011 letter on p. GT1-05 appealing the Respondent's reconsideration denial to the CPP Review Tribunal);
- N. (S.) B. of NK B. Legal Services, 2800 X X, Suite X,X, Ontario (as of a change of address notice filed on November 23, 2011 and found on p. GT1-149);
- S. B. (or alternatively N. B.) of C. B. Professional Corporation, 450 X X X, Unit X, X, Ontario.

The record reveals that neither the Appellant nor his representative communicated with the Tribunal in the three years that elapsed from the time of the CPP Review Tribunal hearing in May 2012 to the date that the GD rendered its decision. Although the former hearing was adjourned because the Appellant wanted to hire new counsel, there is no record of any change of the Appellant's authorized representative during the three-year period.

[50] As was noted in the Leave to Appeal Decision, the signature of S. N. B. of 100 X X X on the Application for Disability Benefits (p. GT1-28) resembles the signature of S. B. of 450 X X X on correspondence found at pp. AD1- 1 and AD1A-1. In addition, the Law Society of Upper Canada's lawyer and paralegal directory does not list a "S. B." or "S. N. B.". The directory lists "N. K. B." as a paralegal of the firm C. B. Professional Corporation with a business address of 450 X X X, Unit X, X, Ontario.

[51] In light of the above, there can be little doubt that the Appellant was represented by a single individual for the entirety of this proceeding until her replacement on October 13, 2015.

[52] As for the first question, whether the Appellant's representative received the Notice of Hearing dated September 4, 2014, the evidence strongly suggests that it was sent to her address of record. As mentioned, Ms. S. A. B. notified the CPP Review Tribunal of her change of address by way of a letter dated November 23, 2011. Although she did not communicate with either the Tribunal or the GD for the next three years, both bodies continued to send her correspondence at the 2800 X X address, including letters dated April 1, 2014 and June 11, 2014 advising the Appellant of next steps in the appeal process. There is no record of either letter having been returned to sender.

[53] According to subsection 12(1) of the *Social Security Tribunal Regulations* (SST Regulations), if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing. The September 4, 2014 Notice of Hearing was sent to the 2800 X X address by Canada Post XpressPost, and tracking information indicates that it was successfully delivered, accepted and signed for by "CARRIE RECEP." I presume the GD relied on this proof of receipt in deciding to proceed with the hearing.

[54] I was particularly interested to read Ms. S. A. B.'s email to the AD dated June 11, 2015, in which she denied ever having received the Notice of Hearing: "The letter that was sent back in 2014 that you attached is sent to a wrong address. I have never been located at that address [2800 X X] so I am not sure why it was sent there." This statement stands in complete odds with the November 23, 2011 change of address letter signed in her name, and it certainly raises questions about her credibility on this matter.

[55] It is also telling that the GD's decision somehow managed to find its way to Ms. S. A. B.—even though it was mailed to the same address at 2800 X X to which the earlier Notice of Hearing had been sent.

[56] On the whole, I find it likely that the Appellant's representative at the time, S. B., did in fact receive the Notice of Hearing dated September 4, 2014. This renders my second question—whether she informed the GD of a change in address—moot. Nevertheless, even if the Notice of Hearing had been misdirected, I would not have found any breach of natural justice. Section 6 of the SST Regulations explicitly sets out that any party must file a change in their contact

information without delay. There is no evidence that Ms. S. A. B. complied with this rule when she moved offices from 2800 X X to 450 X X X. If the Notice of Hearing indeed went to the wrong address, she must bear the responsibility.

***Additional Document***

[57] As it was prepared after its decision to dismiss, the GD was not in possession of Dr. Brown's report of December 2015 at the time of the hearing. In submitting this new evidence, the Applicant appears to be asking the AD to take it into consideration and overturn the GD's decision in his favour. This I cannot do, given the constraints of subsection 58(1) of the DESDA. The AD has no authority to make a decision based on the merits of the case. Once a hearing has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to rescind or amend a decision of the GD. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the SST Regulations. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Such an application would also need to be made with the same division that rendered the decision in question.

## CONCLUSION

[58] For the above reasons, I find that the GD was correct in finding that the Appellant had received notice of the record hearing and was justified in proceeding on that basis. The Appellant has not demonstrated to me that the GD failed to observe the principles of natural justice on the alleged grounds. The appeal is therefore dismissed.

Member, Appeal Division