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

Citation: *M. G. v. Minister of Employment and Social Development*, 2016 SSTADIS 402

Tribunal File Number: AD-16-582

BETWEEN:

M. G.

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: Neil Nawaz

DATE OF DECISION: October 17, 2016

Canada

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on January 15, 2016, which dismissed the Appellant's application for a disability pension on the basis that she did not prove that her disability was severe, for the purposes of the *Canada Pension Plan* (CPP), during her minimum qualifying period (MQP), which ended December 31, 2004. Leave to appeal was granted on September 2, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Appellant submitted an application for CPP disability benefits on April 29, 2013. She indicated that she was 49 years old, holds two bachelor's degrees and has completed many training courses in subjects such as PC software, financial planning, securities and life insurance. She has held a variety of jobs, most notably as a correctional officer for young offenders during the 1990s. She was most recently employed as a casual research assistant with the Centre for Addiction and Mental Health in 2011 and as a part-time retail sales associate from 2010 to 2014. Dr. Lunney, her psychotherapist, claimed that post-traumatic stress disorder, depression and anxiety had rendered her disabled from work as of 1997.

[3] The Respondent denied her application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged as of the MQP date. On June 19, 2014, the Appellant appealed these denials to the GD.

[4] On October 2, 2015, the GD sent the Appellant a series of written questions related to her recent work history, her medical conditions and the treatments she was receiving for them. The Appellant provided detailed responses by way of a letter dated November 6, 2015.

[5] In its decision, the GD dismissed the Appellant's appeal, finding that she had not provided sufficient evidence that she suffered from a severe disability as of the MQP date. The GD noted that the only available documents dated prior to December 31, 2004 were Dr. Lunney's clinical notes, which did not indicate any significant PTSD episodes or symptoms of depression and anxiety. The notes also showed that the Appellant was searching for jobs, networking, writing and attending training courses. Post-MQP reports suggested therapy was effective in managing her symptoms of complex PTSD. As the Appellant was 40 years old at the time of MQP, with a good education and fluency in English, the GD found that, on a balance of probabilities, she was capable of some form of work.

[6] On April 18, 2016, the Appellant filed an application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal alleging errors of fact and law on the part of the GD. On September 2, 2016, the AD granted leave on the grounds that the GD may have disregarded principles of natural justice in considering redacted documents without offering the Appellant an adequate opportunity of reply.

[7] The Appellant's submissions were set out in her application for leave to appeal. On October 6, 2016, in response to the AD's request, she made further submissions on what form of hearing would be appropriate for this appeal, among other issues.

[8] In submissions to the AD dated October 7, 2016, the Respondent asked that the decision of the GD be quashed and the matter be returned for redetermination by way of an in-person hearing. The Respondent agreed with the Appellant that the GD appeared to have failed to observe a principle of natural justice "by not providing her with a full opportunity to put forward her views and evidence, including the testimony of her psychologist, who has been following her for post-traumatic stress disorder since 1997."

[9] I have decided that an oral hearing is unnecessary and this appeal can proceed on the basis of the documentary record for the following reasons:

(a) The Respondent has conceded that a new hearing before the GD is needed;

(b) There are no gaps in the file or need for clarification;

(c) This form of hearing respects the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

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

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

The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(b) 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.

[11] According to subsection 59(1) of the DESDA, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the AD in whole or in part.

[12] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an Appellant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the MQP.

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUES

[15] The issues before me are as follows:

(a) Did the GD disregard principles of natural justice in considering redacted documents without offering the Appellant an adequate opportunity of reply?

(b) If so, what remedy is appropriate in this case?

SUBMISSIONS

[16] The Appellant submitted a lengthy letter with her application for leave that contained detailed commentary and annotation of the GD's decision. She cited dozens of instances in which she alleged the GD based its decision on erroneous findings of fact or failed to observe principles of natural justice.

[17] In response to my decision allowing leave to appeal, the Appellant submitted a letter expressing disappointment that the AD was unwilling to consider the merits of her claim. She also noted that, while leave had been allowed because she had been prevented from fully presenting her case, the GD committed many other errors that constituted valid grounds of appeal.

[18] As noted above, the Respondent agreed that a new hearing was required because the GD had not provided the Appellant with a full opportunity to put forward her case, including the testimony of her psychologist.

ANALYSIS

[19] Having reviewed the record, I agree with the parties that the GD breached a principle of natural justice in rendering its decision.

[20] The Respondent concedes that that it was unfair of the GD to hold the Appellant's hearing by way of written questions and answers, thereby depriving her of a full opportunity to present her case, including the testimony of her long-time psychologist. With this, I must agree, particularly in view of the Appellant's Hearing Information Form, which she submitted in advance of the hearing on July 13, 2015. In this document, which was designed to solicit the parties' views on the appropriate form of hearing, the Appellant expressed a clear preference for a hearing by personal appearance and indicated that she intended to bring two witnesses—a friend and her doctor.

[21] Although the GD offered a number of *pro forma* reasons for choosing to avoid an oral hearing, it remains unclear why the GD disregarded the Appellant's preference to proceed by way of written questions and answers. I do not lightly interfere with a decision of the GD on matters of form, as section 72 of the *Social Security Regulations* gives both the GD and AD wide discretion to hold a hearing as they see fit. However, in this instance, there was another factor at play that, in combination with the denial of the Appellant's ability to introduce oral evidence, resulted in a departure from procedural fairness.

[22] I allowed leave not only because the Appellant was denied an oral hearing, but also because the Respondent apparently redacted relevant details from the evidentiary record. Although the Appellant never protested any of these redactions prior to the hearing, she later alleged that the clinical notes of Dr. Lunney, her psychologist, were altered without any advance notice or explanation. She claims that the redacted portions of those notes were relevant to her psychological condition in the period surrounding her December 2004 MQP because they documented her state of mind at the time.

[23] I have reviewed the documents and question and agree that segments appear to have been "whited out," presumably by the Respondent's staff. I am aware this practice is frequently carried out in the interest of protecting the privacy of third parties, but that concern must be weighed against the right of a claimant to present her case using all relevant evidence at her disposal. In this case, it appears the Appellant was attempting to show that her fragile psychological condition affected her relationships with others, and vice versa. If this was a component of her submissions before the GD, I agree it was relevant, and Dr. Lunney's notes, and possibly portions of the Appellant's own correspondence, should not have been redacted to the extent that they were. This error, in my view, was compounded by the GD's decision to deny the Appellant an opportunity to present her case in person, which would have allowed her to bring Dr. Lunney forward as a witness to add context to his clinical notes and, where necessary, fill in the gaps in the evidentiary record.

[24] A final word on the Respondent's policy of withholding selected details: The Appellant and the GD can be forgiven for not having detected alterations to documents prior to the hearing, as the redacted segments were blanked out in a way that would likely be noticeable only to someone who was looking for them. On some types of documents, particularly forms and handwritten notes, a reader cannot easily distinguish redactions from formatting anomalies or spaces that were originally left blank. The Respondent would be better advised to explicitly specify what segments have been covered up or, at the very least, obscure protected information through use of black bars that can more easily be identified as ministerial redactions. I would also note that redaction—both the policy itself and the way in which the Respondent has chosen to implement it—does nothing to engender trust in the minds of claimants that the appeal process is fair. One need only look at the submissions of the Appellant, who was never informed that her documents were edited or why they were edited. Once she discovered the alterations, she leaped to the conclusion that the Respondent had colluded with the GD to "tamper" with her evidence and speculated that details had not only been omitted, but also rewritten.

CONCLUSION

[25] For the reasons discussed above, the appeal succeeds on the ground that the Appellant was not afforded a full and fair hearing, contrary to the principles of natural justice.

[26] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD member.

Member, Appeal Division