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

Citation: *Z. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 471

Tribunal File Number: AD-16-167

BETWEEN:

Z. P.

Applicant

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

Leave to Appeal Decision by: Hazelyn Ross

Date of Decision: December 6, 2016

REASONS AND DECISION

INTRODUCTION

[1] In a decision issued on December 7, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the Canada Pension Plan was not payable to the Applicant. On January 15, 2016 the Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal.

GROUNDS OF THE APPLICATION

[2] The Applicant submitted that in coming to its determination the General Division breached a principle of natural justice. He stated that he had evidence to back up his claim; and he asserted that he did, in fact, have a severe and prolonged disability that could be dated back to before either the end of his minimum qualifying period (MQP) of December 31, 2009 or the possible prorated MQP of August 2010.

ISSUE

[3] The Member must decide if the appeal has a reasonable chance of success.

THE LAW

[4] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development,* (DESD), Act govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[5] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must

refuse leave to appeal.[1] In *Canada (Attorney General) v. O'Keefe* 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

> [36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves,* above, at paras 71-73).

[6] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave:[2] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[7] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

ANALYSIS

[8] The Applicant submitted that the General Division breached a principle of natural justice in reaching its decision. The principles of natural justice are concerned with ensuring that parties are able to present their cases fully; to know the case they have to meet; and to have their cases heard by an impartial decision-maker. In the administrative law context "natural justice" is particularly concerned with fairness which embodies all of the above concepts and also extends to procedural fairness. The Federal Court of Appeal (FCA) has stated that natural

[1] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."
[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

justice and procedural fairness applies to all administrative bodies: *Elguindi v. Canada (Ministry of Health)* F.C.A. 1997-06-19. Thus, a breach of natural justice would vitiate the General Division decision.

[9] For the following reasons, the Appeal Division finds that the General Division did not commit a breach of natural justice and that his submissions do not give rise to a ground of appeal that would have a reasonable chance of success.

[10] First, the Applicant has not indicated in what manner the General Division committed a breach of natural justice. In the view of the Appeal Division, he has done little else but express his disagreement with the General Division decision. He linked his ground of appeal to his assertion that he, in fact, has a severe disability which has existed prior to the end of his MQP, or before his pro-rated MQP. The Appeal Division infers from this linking that it is the very determination that the Applicant finds to be a breach of natural justice.

[11] The Appeal Division has examined both the Tribunal record and the General Division decision to see whether there has been a breach of natural justice. The Appeal Division is satisfied that the Applicant both knew "the case against him" in that the Tribunal provided him with copies of all documents filed by the Respondent. Further, at the hearing the Applicant was provided an ample opportunity to present his appeal with the General Division hearing evidence from him as well as his wife and daughter. In addition, the General Division had extensive medical and other evidence before it.

[12] The Tribunal record shows that the General Division considered the totality of the evidence as well as the Applicant's submissions regarding his work capacity at paragraph 37 of its decision. The General Division was not unsympathetic to the Applicant's position but found that a finding of disability was undermined by the fact that the Applicant was gainfully employed soon after his MQP. It stated the conundrum in the following paragraphs: -

> [42] However, the difficulty in respect of the Appellant proving that he had a severe disability as of his MQP of December 31, 2009 or a possible prorated date of August 31, 2010 is that he worked as a school bus driver from September 2010 through to June 2013 following even his possible prorated MQP. The Tribunal relies on the evidence of Ms. B. of Student Transportation of Canada, the former employer of the Appellant, and finds that the Appellant successfully engaged in regular part-time work as

> a bus driver and that he did not miss work due to any reason including illness.
>
> [43] The Tribunal further relies on the Appellant's testimony that he enjoyed work and that he worked part-time hours because that was all the hours that were available. Moreover, the Tribunal relies on the Appellant's testimony that he did not miss work driving the bus because he felt it was beneficial for him to engage in the positivity of the work environment and because he had been advised to keep moving in respect of his DVT. In addition, the Tribunal relies on the testimony of the Appellant's daughter who provided that the Appellant enjoyed driving the school bus and would return home after work with humorous stories about the children he was busing. Finally, the Tribunal finds that the Appellant stopped working when an infection in his lower back occurred that required medical treatment and prevented him from sitting to drive the bus.

[13] The Appeal Division finds no error in the General Division's finding. The definition of disability excludes a finding of disability during a closed period: *Litke v. MHRSDC* 2008 FCA 366. The Appeal Division finds that the General Division did not err in its finding that the testimony and evidence disclosed that the Applicant had work capacity after the MQP or pro-rated MQP. For this reason, the Appeal Division finds that the General Division did not breach natural justice and it is not satisfied that the Applicant has raised grounds of appeal that would have a reasonable chance of success.

CONCLUSION

[14] The Application is refused.

Hazelyn Ross
Member, Appeal Division