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

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 196

Tribunal File Number: AD-16-254

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: April 28, 2017

REASONS AND DECISION

OVERVIEW

[1] On January 21, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to the Appellant.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division, and leave to appeal was granted on August 31, 2016. While other arguments were advanced, leave was granted solely with respect to a possible breach of natural justice giving rise to a reasonable apprehension of bias, in the manner in which the General Division member conducted the hearing and questioned the Appellant. Leave was refused with respect to claimed errors of law and fact, as there was no reasonable chance of success on these grounds of appeal, and leave was "granted with respect to the alleged breach of natural justice only." This decision is thus limited to the determination of a claimed breach of natural justice; submissions addressing other claimed errors have not been considered further.

[3] After giving both parties the opportunity to provide submissions on the form of hearing (in addition to their submissions on the issue under appeal), I have determined that this appeal will proceed on the record. I note that the Appellant's representative confirmed in a pre-hearing conference that, despite his previous expectation of an oral hearing with the opportunity to present testimony from the former representative, he was no longer requesting a hearing. I find that no further hearing is required, since there is to be no testimony, both parties are represented, both representatives have provided detailed written submissions, and neither party has requested a hearing. This method of proceeding is consistent with the Tribunal's obligation to proceed informally and expeditiously while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the *Social Security Tribunal Regulations*.

[4] Accordingly, I have considered the file documentation before the General Division, the above-noted decisions of the General Division and Appeal Division, the Appellant's submissions (February 9, 2016, October 31, 2016, December 7, 2016, February 22, 2017, and March 16, 2017), and the Respondent's submissions (November 25, 2016).

ISSUE

[5] Did the General Division member's conduct give rise to a reasonable apprehension of bias, such that the General Division failed to observe a principle of natural justice?

GROUND OF APPEAL

[6] The relevant ground of appeal, set out in s. 58(1)(*a*) of the *Department of Employment and Social Development Act* (DESDA), is that "the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction."

[7] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. (See also *Canada (Attorney General) v. Jean*, 2015 FCA 242.) Based on the unambiguous wording of s. 58(1)(*a*) of the DESDA, no deference is owed to the General Division on questions of natural justice.

ANALYSIS

[8] As cited by the Federal Court of Appeal in *Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA 55, the test for a reasonable apprehension of bias is found in *Committee for Justice and Liberty v. National Energy Board*, 1 S.C.R. 369:

> [...] the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [...] that test is "**what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.** [emphasis added]

[9] In his submissions, the Appellant's representative has raised two concerns that potentially relate to the member's conduct and reasonable apprehension of bias.

Questioning of the Appellant

[10] In the request for leave to appeal, the Appellant's representative claimed that the General Division member baited the Appellant by asking questions about her pain tolerance in 2008, despite being aware that she had difficulty remembering things, and then used this to challenge her credibility. The Appellant's representative further claimed that the member disregarded an objection to this line of questioning by the Appellant's representative at the hearing:

> Baiting the Applicant by asking her what her pain level was in 2008 in order to obtain an anticipated reply; a reply that would be relied upon for the purpose of challenging her credibility in this decision, is both adversarial and litigatory in nature and is inconsistent with the fair and reasonableness that is anticipated when addressing sick and injured people. My brother[1] had asked the Member to withdraw her question as it was unfair to ask however she would not. As is historically noted an Applicant will make a best guess effort when being questioned by a government person. She did just that and for so doing it evidently weighed against her credibility.

[11] The Respondent's representative submitted that no objection is found in the audio recording of the General Division hearing, and "the Appellant has not provided any evidence that she was either baited, was prejudged or was prevented from answering questions or that she was improperly questioned."

[12] The Appellant's representative's final submissions of March 14, 2017, reiterated the concern, without reference to baiting or any objection having been made at the time:

> The appellant takes issue with being questioned by the Member concerning her "pain tolerance from 7 years earlier" when the Member had already acknowledged in para 26, page AD1A-8 that she had difficulty remembering things. The Appellant felt obliged to provide an answer to questions being posed of her and at times was just guessing at the answers to which the Member was critical when the worker remembered incorrectly compared to the written record as was noted in para 42, page AD1A-11.

[1] The Appellant's representative at the General Division hearing.

[13] Given that the Appellant's minimum qualifying period (MQP) for benefits ended on December 31, 2008, her symptoms in 2008 were relevant to the General Division's determination of disability. Consequently, asking questions about such symptoms does not, in and of itself, raise an apprehension of bias. Decision-makers have the discretion to examine a witness, as well as a duty to put questions to a witness in order to clarify an obscure answer, resolve a misunderstanding or explain relevant matters (see, for example, *Brouillard Also Known As Chatel v. The Queen*,[1985] 1 SCR 39 and *R. v. Darlyn* (1946), 88 CCC 269). In my view, an informed person, having thought the matter through, would not find it likely that the member would not decide the appeal fairly, simply by virtue of having questioned the worker on her symptoms in 2008.

[14] Moreover, paragraph 42 of the decision (referenced by the Appellant's representative) reflects the member's recognition that memory is indeed fallible, and indicates that it was the Appellant who sought to rely upon her memory over the medical record:

> [42] In general, the Appellant's testimony seemed to be credible; it appeared to be straightforward, and the Appellant did not seem to be magnifying her symptoms. She was, however, very quick to discount evidence in the medical record when it differed from her own account, even when the matter in issue occurred as long ago as seven years and time might have dimmed her recollection. Moreover, she was unable to provide a clear account of her use of Tramacet. In addition, her statement that she dropped her accounting program in 1989 or 1990 because of wrist pain is cast into doubt by the medical evidence.

[15] I find nothing within this paragraph that suggests prejudgement or bias on the part of the member.

[16] I recognize (as did the decision granting leave) that the manner in which a decision-maker conducts a hearing or questions a witness can reveal a state of mind or attitude indicative of partiality. For example, sexist, unwarranted and irrelevant observations by a tribunal member, and examination by a decision-maker that is relentlessly aggressive or tantamount to witness harassment, have been found to give rise to a reasonable apprehension of bias (*Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.); *De Leon v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15607 (FC); *Guermache v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 870).

[17] The decision granting leave to appeal instructed the Appellant to reference the impugned conduct using "a transcript of the hearing." Based on my concern that this language was misleading (since the Tribunal provides recordings rather than transcripts), I directed that a copy of the recording be provided to the Appellant's representative in order that he may have a reasonable opportunity to provide fulsome submissions, with reference to the time(s) on the recording. Since the Appellant's representative advised the Tribunal that he continued to be unable to play the recording, he was provided first with instructions and second with an offer of technical assistance from the Tribunal's information technology staff. Despite the opportunity to listen to the recording, and despite being advised in the pre-hearing conference that this appeared to be central to his client's appeal, the Appellant's representative confirmed in the pre-hearing conference that he was not interested in listening to the recording and that he had nothing further to add beyond his March 2017 submissions.

[18] In those submissions, the Appellant's representative wrote, "… I can only reference the Members [sic] decisions and suggest that my reader reflect on the section of the Hearing in which the Member was making her inquiries." Although I have access to the General Division recording, I do not consider it necessary or appropriate to listen to the 1.5-hour hearing, in the circumstances of this appeal. The burden of proof is on the Appellant to establish that the General Division member's conduct at the hearing gave rise to a reasonable apprehension of bias: *Glover v. Canada (Attorney General)*, 2017 FC 363. The Appellant's representative has not pointed to any particular questions asked of the witness (other than the one discussed in paragraphs 12 and 13, above), the language or tone used by the member, a specific objection made by the former representative, untoward comments made by the member, or any other evidence that would support an allegation that the member was not impartial. Furthermore, I infer from the Appellant's representative's decision not to review the recording of the hearing that he did not expect to find supportive evidence therein. The Appellant has not discharged the onus of proof, and I do not find that the General Division member conducted herself in a manner that would give rise to a reasonable apprehension of bias.

Access to a 2006 Decision

[19] The Appellant's representative also submitted that having access to the Office of the Commissioner of Review Tribunal (OCRT) 2006 decision regarding an earlier application for disability benefits removed the General Division member's objectivity and served to prejudice the Appellant. There was, he asserted, "no merit to the Member being made aware of the outcome of earlier proceedings."

[20] The OCRT decision was a final and binding decision, no longer subject to appeal. The outcome of the OCRT proceedings was relevant to the appeal before the General Division, in particular to defining the issue to be determined in that appeal. As outlined in the General Division decision, the OCRT decision of October 26, 2006 dismissed the Appellant's appeal of the denial of a disability pension at that time, leaving a window of adjudication between October 27, 2006 and the MQP of December 31, 2008. Leave to appeal has been refused with respect to the Appellant's claim that the General Division erred in law in restricting the dates of enquiry, but in any case, the General Division needed access to the OCRT decision to make a determination, one way or the other, on the window of adjudication.

[21] In my view, an informed person, having considered the matter realistically and practically, would not find it likely that the General Division member would not decide the appeal fairly, simply because she had access to an earlier unfavourable decision respecting a period of time no longer under adjudication.

CONCLUSION

[22] I have not found that the General Division member's conduct gave rise to a reasonable apprehension of bias; thus, I do not conclude that the General Division failed to observe a principle of natural justice in this respect. As this was the only ground of appeal upon which leave was granted, the appeal is dismissed.

Shirley Netten
Member, Appeal Division