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

[TRANSLATION]

Citation: *R. V. v. Minister of Employment and Social Development,* 2017 SSTADIS 264

Tribunal File Number: AD-16-844

BETWEEN:

R. V.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: June 7, 2017

Canada

REASONS AND DECISION

[1] On March 30, 2016, 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. The Applicant requested leave to appeal to the Tribunal's Appeal Division.

[2] The only grounds of appeal to the Appeal Division are those identified in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA):

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.

[3] According to subsection 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[4] I note that the leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and appreciably lower hurdle to be met. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. At the leave to appeal stage, the Appeal Division does not have to weigh the evidence or decide on the

merits of the case. Leave to appeal should be granted unless the Appeal Division concludes [translation] "that no one could reasonably believe in the appeal's success": *Canada (Attorney General) c. Bernier*, 2017, FC 120.

[5] In this case, I must therefore determine whether there is at least one ground of appeal permissible, under subsection 58(1) of the DESDA, that could give the appeal a reasonable chance of success.

[6] The Applicant's representative submitted that:

> [...] the General Division failed to observe a principle of natural justice by refusing to allow the Appellant the right to a hearing to present his oral testimony, which would have enabled the Appellant to testify as to his pain, the resulting functional limitations, and the reason why he is unable to pursue a program of studies or employment that is less physically demanding than his job as a tracker.

[7] Before the General Division, the Applicant (Appellant) stated in one of the Tribunal's forms that he was available anytime to participate in a hearing as well as the fact that he could not participate by way of videoconference or written questions and answers because he had difficulty writing. In his submissions, his representative addressed the proposed testimony (apparently unaware that the member had already decided to determine the matter on the basis of the written record), and she indicated that the Applicant would represent himself at the hearing. As noted in the General Division decision, the member had chosen to determine the matter on the basis of the written record on the grounds that (among other things) "there are no gaps in the information in the file and there is no need for clarification."

[8] By way of background, the Applicant filed an application for disability benefits in July 2002, but his minimum qualifying period (MQP) ended on December 31, 2005. Therefore, the General Division had to determine whether the Applicant had a severe and prolonged disability on or before December 31, 2005. After a car accident in December 2003, the Applicant began suffering from chronic pain as well as from symptoms of anxiety and depression. Age 32 at the time of the accident, the Applicant was unilingual, he had a sixth grade education, and his work experience was limited to physically demanding jobs. The evidence before the General Division shows that the Applicant attempted a return to work in forestry in May 2004, and he made at

least one attempt to return to school before the end of his MQP. In its analysis, the General Division found the following:

- To determine whether a person has a severe disability, the only consideration is how the medical condition affects the capacity to work;
- The medical evidence does not show that the Applicant was unable to function at the end of his MQP, and the limitations that are described indicate no major limitation;
- The severe criterion must be assessed in a real-world context, taking personal and vocational characteristics into account, and, in this case, these factors would have made it difficult to find another job;
- When someone is capable of working, they must show that their efforts to obtain and maintain employment were unsuccessful due to their health condition;
- The assessments (post-MQP) show that the Applicant was able to work at an average physical level and, based on his skills, he would likely require retraining in order to find another job;
- The Applicant attempted unsuccessfully to return to school, and he did not attempt to find another job; and, finally,
- [Translation] "It is clear that the Appellant has limitations and that finding another job given his limited education and work experience would likely be difficult, but the evidence does not support an incapacity to obtain and maintain employment due to that medical condition."

[9] The General Division is authorized to give precedence to certain evidence. Nevertheless, in this case, the representative submits that the Applicant was not provided with the opportunity to present all the evidence, adding his testimony regarding the relevant facts. His submissions suggest that the information in the file was incomplete and required clarifications.

[10] Section 28 of the *Social Security Tribunal Regulations* (Regulations) does not confer a right to a hearing, but the General Division must hold a hearing "if it determines that a further hearing is required." Even if the choice to determine the matter on the basis of the written record is a discretionary power, the absence of a hearing may raise a question of a breach of a principle of natural justice, i.e. a breach of the right to be heard. The Federal Court, in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), wrote the following:

> At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly.
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> […]
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> However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.

[11] In addition, the Federal Court, in *Murphy v. Canada (Attorney General)*, 2016 FC 1208, expressed doubts as to the possibility, in that case, that an analysis could be sufficient without holding a hearing.

[12] Here, the General Division decided that a hearing was unnecessary, based on the determination that the information was already complete and clear. Then, the General Division, made findings on work and retraining efforts, without elaborating on the causes of failure and without hearing from the Applicant, who wanted to testify. Under these circumstances, I find that the absence of a hearing raises the possibility that the General Division failed to observe a principle of natural justice. Therefore, I find that the appeal has a reasonable chance of success, on the ground of appeal under paragraph 58(1)(*a*).

[13] Having found that there is an arguable case for the above-mentioned ground of appeal, I am not required to examine the other grounds at this stage. Subsection 58(2) does not require that individual grounds of appeal be considered and accepted or rejected: *Mette v. Canada*

(Attorney General), 2016 FCA 276. In accordance with subsection 58(3), the Appeal Division must simply grant or refuse leave to appeal. Leave to appeal is granted and the Applicant is not restricted in his ability to pursue the various grounds of appeal raised in his leave to appeal application.

CONCLUSION

[14] The application for leave to appeal is granted.

[15] This decision does not presume the result of the appeal on the merits of the case.

Shirley Netten
Member, Appeal Division