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

Citation: *S. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 303

Tribunal File Number: AD-16-1322

BETWEEN:

S. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: June 29, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated September 29, 2016. The General Division had previously conducted a hearing by teleconference (originally scheduled as a videoconference) and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because it found that his disability was not "severe" prior to his minimum qualifying period (MQP), which ended on December 31, 2011.

[2] On November 28, 2016, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division. At the Appeal Division's request, the Applicant filed further written submissions on June 21, 2017.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[4] According to subsection 58(1) of the DESDA, the only grounds of appeal are the following:

(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 made in a perverse or capricious manner or without regard for the material before it.

[5] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

ISSUE

[8] The member must decide whether the appeal has a reasonable chance of success.

SUBMISSIONS

[9] The Applicant's application requesting leave to appeal dated November 28, 2016, mirrored written submissions that were previously submitted to the General Division. As the Appeal Division does not ordinarily consider the merits of an applicant's CPP disability claim, I requested further submissions.

[10] In his letter of response dated June 21, 2017, the Applicant's representative submitted that the General Division:

(a) disregarded a principle of natural justice by holding the hearing by teleconference, rather than videoconference, as had originally been scheduled; and

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ no 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(b) failed to consider relevant medical reports demonstrating that the Applicant has experienced significant medical issues since at least 2010.

ANALYSIS

Form of Hearing

[11] The Applicant suggests that his right to be heard was circumscribed by a technology failure. As documented by the General Division in its decision:

> This hearing was originally scheduled as a videoconference; however, on the morning of the hearing, the videoconferencing technology did not work. The Appellant and his Representative consented to proceed by way of teleconference. The hearing was therefore conducted via teleconference.

[12] Unfortunately, the available audio recording of the teleconference is quite obviously incomplete and missing any discussion about the change of hearing format.[3] As a result, I have no way of confirming whether the Applicant and his representative did, in fact, consent to proceeding by teleconference. If they did, then they cannot now claim that the General Division dealt them an injustice. However, even if they did not consent and their objections were overridden by the General Division, that does not mean there was a breach of natural justice.

[13] I have reviewed the extant record and see no reason to doubt the General Division's account. On February 24, 2016, the Applicant completed a hearing information form (HIF) but did not specify any format that would be unacceptable to him. Nowhere in his submissions before the Appeal Division did he claim that he or his representative withheld their consent to proceeding by teleconference.

[14] The Applicant submits that the last-minute change in format prevented him from effectively pleading his case. In his view, fairness demanded that the trier of fact be able to see the witnesses to allow for a better assessment of credibility.

[15] It is unfortunate that videoconferencing at the Oshawa Service Canada centre suddenly became unavailable, but the shift to teleconferencing—even against the Applicant's

[3] This, in itself, is not grounds for appeal. The Tribunal records hearings as a matter of practice, but there is nothing in the legislation or regulations that obliges it to do so.

objections— was not inherently unfair. It would be one thing had the Applicant's credibility been a major factor in the General Division's reasoning, but its decision turned on other considerations, principally the substance of the underlying documentary medical evidence.

[16] There was nothing in the HIF that would have reasonably given rise to an expectation that the Applicant's preference would determine the form of hearing. Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods. Use of the word "may" in the absence of qualifiers or conditions in the text suggests that the General Division has discretion to make this decision. This is not to suggest that the General Division's discretion to make such a decision can be completely divorced from reason. However, the Federal Court of Appeal has confirmed that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error,"[4] and I see nothing like that here.

[17] As it happens, the General Division exercised its discretion to select what it believed was the most appropriate form of hearing under the circumstances. In its decision, it explained that it was proceeding by teleconference given the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[18] In *Baker v. Canada*,[5] the Supreme Court of Canada held that the concept of procedural fairness is variable and is to be assessed in the specific context of each case. *Baker* listed a number of factors that may be considered to determine what the duty of fairness requires in a particular case, including the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[19] I accept that the issues in this matter are important to the Applicant, but I also place great weight on the nature of the statutory scheme that governs the General Division. The

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[4] *Imperial Manufacturing Group Inc. v. Décor Grates Incorporated*, 2015 FCA 100; *Horseman v. Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139.
[5] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

Tribunal was designed to provide for the most expeditious and cost-effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the General Division the discretion to determine how hearings are to be conducted, whether in-person, by videoconference, by teleconference or in writing. The discretion to decide how each case will be heard should not be unduly fettered. While the General Division had wide discretion to rule on this matter, its decision to hear the appeal by teleconference in lieu of videoconference was not made on a whim, but for reasons explained, albeit cursorily, in its decision.

[20] In my view, these arguments would have no reasonable chance of success on appeal.

Consideration of Evidence

[21] The Applicant alleges that the General Division failed to consider relevant medical evidence, in particular, reports indicating that he has suffered from significant psychological conditions, including depression, anxiety and memory loss, since losing his job in 2009.

[22] I do not see an arguable case on this point. As was held in *Simpson v. Canada*,[6] an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions. That said, I have reviewed the General Division's decision and found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the evidentiary record.

[23] As examples of evidence that the General Division supposedly overlooked, the Applicant cited Dr. Kim's neurological reports dated May 18, 2010 and September 7, 2011, but I note that both documents—along with many other items of evidence—were thoroughly and fairly summarized in the decision. The General Division went on to address at length the two reports in its analysis (at paragraphs 78 and 79), ultimately concluding that, in the absence of abnormal test results, there was no evidence that the Applicant's memory problems were severe.

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[6] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[24] It is open to an administrative tribunal to sift through the relevant information, assess the quality of the evidence, decide on its weight and determine what, if anything, it chooses to accept or disregard. As the Federal Court of Appeal noted in *Simpson*:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact […]

[25] As trier of fact, the General Division was within its authority to weigh the evidence as it saw fit, so long as it arrived at a defensible conclusion. The Appeal Division is not a forum in which to reargue one's case on its merits. I am permitted to intervene only if the General Division has based its decision on a finding of fact that is "perverse," "capricious" or "without regard for the material." In this case, my review indicates that the General Division undertook a detailed and meaningful analysis of the evidence underlying the Applicant's medical conditions and the extent to which they affected his capacity to regularly pursue substantially gainful employment as of December 31, 2011.

CONCLUSION

[26] As the Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division