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

Citation: *A. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 352

Tribunal File Number: AD-16-1308

BETWEEN:

A. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 20, 2017

Canada

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) issued on October 26, 2016, which determined that the Appellant was ineligible for disability benefits under the *Canada Pension Plan* (CPP), because his disability was not "severe" during his minimum qualifying period (MQP), which ended on December 31, 2011.

[2] Leave to appeal was granted on June 16, 2017, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[3] The Appellant applied for CPP disability benefits on August 13, 2015. In his application, he disclosed that he was 52 years old and had the equivalent of a grade seven education. For more than 20 years, he worked as a customer service representative for a car rental agency, a job that ended in March 2009 following a motor vehicle accident in which he fractured his right leg.

[4] The Respondent refused the application initially and on reconsideration on the grounds that the Appellant's claimed disability was neither severe nor prolonged as of the MQP. On April 13, 2016, the Appellant appealed these refusals to the General Division.

[5] On August 5, 2016, at the Tribunal's request, the Appellant completed and returned a Hearing Information Form, in which he indicated that he required a Somali interpreter and preferred his hearing to be held in the afternoon. In a notice of hearing dated August 26, 2016, the Tribunal advised the Appellant that an in-person hearing would be held on October 17, 2016, at 1:00 p.m. The notice was sent by Canada Post Xpresspost (a variant of registered mail) to the Appellant's last known address at X X Drive, X.

[6] At the appointed time and place, the Appellant failed to appear for his hearing. The General Division chose to proceed with the appeal on the basis of the documentary record. On October 26, 2016, the General Division rendered its decision, dismissing the Appellant's appeal because he had not shown, on a balance of probabilities, that his disability met the definition of "severe" set out in subparagraph 42(2)(*a*)(i) of the CPP.

[7] In its decision, the General Division also justified its decision to proceed in the Appellant's absence, noting that Tribunal staff had telephoned the Appellant on four occasions in the month preceding the hearing, each time leaving detailed voicemail reminders of the time, date and venue. The General Division also stated:

> The Tribunal also sent the Appellant a notice of hearing by Xpresspost on August 26, 2016 to the address on file. By September 20, 2016, it was listed as an "Item out for delivery" since August 30. […] The Tribunal and the Respondent both have the same contact information for the Appellant and it is presumed to be correct.

The General Division found that "every effort" had been made to contact the Appellant regarding the hearing.

[8] On November 3, 2016, having received the General Division's decision dismissing the appeal, the Appellant telephoned the Tribunal demanding to know when his hearing had been held. On November 18, 2016, within the specified time limitation, he submitted an application requesting leave to appeal to the Appeal Division. In my decision of June 16, 2017, I granted leave to appeal because I saw an arguable case that the General Division had (i) erroneously found that the Appellant received notice of the in-person hearing and (ii) breached a principle of natural justice by proceeding with the appeal in the Appellant's absence.

[9] On July 17, 2017, the Respondent submitted a letter in which it consented to the matter being referred back to the General Division for a new hearing by a different member.

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

(a) The Respondent has agreed to a redetermination of the Appellant's disability claim on its merits;

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

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

THE LAW

Canada Pension Plan

[11] 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.

[12] 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.

[13] 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.

Department of Employment and Social Development Act

According to subsection 58(1) of the *Department of Employment and Social Development Act* (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.

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

Social Security Tribunal Regulations

[15] According to subsection 12(1) of the SST Regulations, if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.

[16] Section 21 of the SST Regulations states that the General Division may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance.

ISSUES

[17] The issues before me are as follows:

(a) Did the General Division base its decision on an erroneous finding that the Appellant received notice of the in-person hearing, which had been scheduled for October 17, 2016?

(b) Did the General Division breach a principle of natural justice by proceeding with the appeal in the Appellant's absence?

SUBMISSIONS

[18] In his application requesting leave to appeal, the Appellant wrote that he was too sick to attend the hearing at the time it was scheduled. He said that he continued to suffer from depression, emotional pain, lack of energy and nausea. He argued that judicial fairness required that his claim be heard. The Appellant also submitted a letter dated November 4, 2016, in which

Dr. Rajiv Kumar, the Appellant's family physician, stated that his patient was "unable to attend to his obligations" from September 21 to 30, 2016.

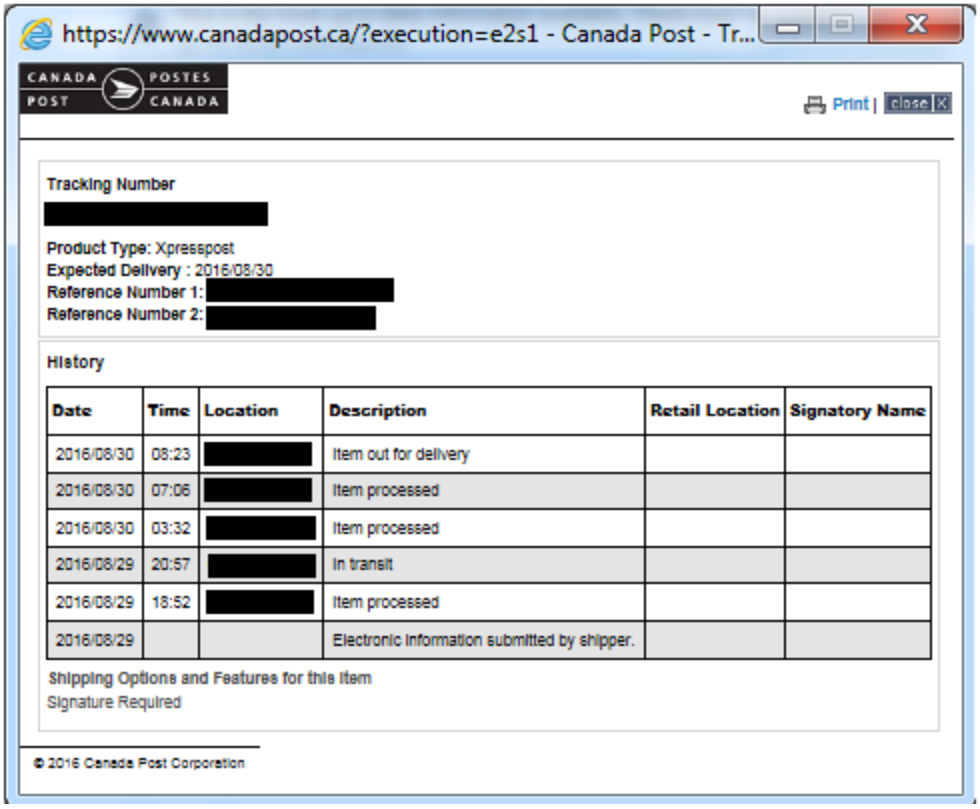
[19] As noted, the Respondent has consented to a *de novo* hearing before the General Division.

ANALYSIS

[20] The Respondent has now recommended that the Appeal Division refer the matter back to the General Division, pursuant to subsection 59(1) of the DESDA. I agree with the parties that the hearing before the General Division was flawed and is best remedied by a redetermination of the Appellant's CPP disability claim on its merits.

[21] This appeal revolves around the question of whether the Appellant was entitled to a specific form of hearing and, if so, whether he received adequate notice of it. The Appellant alleges that the General Division failed to observe a principle of natural justice by rendering a decision without giving him an opportunity to make oral submissions, but it appears his real complaint is that the Tribunal failed to notify him of the in-person hearing that it had scheduled for October 17, 2016.

[22] Subsection 12(1) of the SST Regulations permits the Tribunal to proceed in a party's absence if the Tribunal is satisfied that the party received notice of the hearing. However, it is not clear to me that the Appellant did in fact receive the notice of hearing, and I do not believe that the General Division had reasonable cause to believe that he did. It appears that the General Division relied on Canada Post tracking information, which I reproduce as follows:



https://www.canadapost.ca/?execution=e2s1 - Canada Post - Tr...

CANADA POST / POSTES CANADA

Print | close

Tracking Number

[redacted]

Product Type: Xpresspost
Expected Delivery : 2016/08/30
Reference Number 1: [redacted]
Reference Number 2: [redacted]

History

Date	Time	Location	Description	Retail Location	Signatory Name
2016/08/30	08:23	[redacted]	Item out for delivery		
2016/08/30	07:06	[redacted]	Item processed		
2016/08/30	03:32	[redacted]	Item processed		
2016/08/29	20:57	[redacted]	In transit		
2016/08/29	18:52	[redacted]	Item processed		
2016/08/29			Electronic information submitted by shipper.		

Shipping Options and Features for this Item
Signature Required

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[23] This record indicates that, as noted by the General Division, the notice of appeal was indeed sent "out for delivery" on August 30, 2016, but it does not show that the notice was actually delivered to the Appellant, and there is no evidence that he signed for any package. In these situations, Canada Post typically reproduces the recipient's signature, but there is no such confirmation of delivery apparent here.

[24] The Appellant further alleges that the General Division's decision to conduct an on-the-record hearing in effect denied him an opportunity to fully present his case. Section 21 of the SST Regulations states that the General Division may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance. Use of the word "may" in the absence of textual qualifiers or conditions suggests that the General Division has discretion to make this decision, but that discretion is not absolute.

[25] The Supreme Court of Canada dealt with the issue of procedural fairness in *Baker v. Canada*,[1] which held that a decision affecting the rights, privileges or interests of an individual

[1] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and it is to be assessed in the specific context of each case. *Baker* then lists 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.

[26] I have no doubt that this matter is of great importance to the Appellant. At stake is a pension that promises to compensate him for what he submits is a disabling medical condition, and he had a legitimate expectation that the General Division would offer him a reasonable opportunity to present relevant evidence, including oral testimony. However, it is also true that the Tribunal was designed to provide 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. That said, the General Division initially felt the issues in this case were worthy of an in-person hearing, and if the Appellant was unaware that such a hearing had been scheduled, then he was potentially at a disadvantage. I am satisfied that, in proceeding without certainty that the Appellant had received notice of the hearing, the General Division breached a principle of natural justice—specifically, the injunction that a party to a proceeding in which he has a material interest has a right to be heard.

CONCLUSION

[27] For the reasons discussed above, the appeal is allowed.

[28] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member. I also direct the Tribunal to expunge from the record the General Division's decision dated October 26, 2016.

Member, Appeal Division