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

Citation: *T. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 380

Tribunal File Number: AD-17-327

BETWEEN:

T. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Peter Hourihan

Date of Decision: July 27, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a Canada Pension Plan (CPP) disability pension on December 11, 2013. The Respondent approved the application and the Applicant received the disability pension retroactively to January 2013, the maximum allowed under paragraph 42(2)(*b*) of the CPP. The Applicant sought reconsideration, retroactive to 2005, when he indicated he had become disabled. The Respondent refused the Applicant's request for reconsideration. The Applicant appealed the decision to the Social Security Tribunal of Canada (Tribunal).

[2] On January 24, 2017, the Tribunal's General Division determined that a disability pension under the CPP was not payable earlier than January 2013, as the Applicant did not meet the test for incapacity. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 18, 2017.

ISSUE

[3] I must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] 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 and the Appeal Division must either grant or refuse leave to appeal.

[5] Subsection 58(1) of the DESDA identifies the following as the only grounds of appeal available to the Appeal Division:

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.

[6] 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.

[7] In determining whether leave to appeal should be granted, I am required to determine whether there is an arguable case. The Applicant does not have to prove the case at this stage; he has to prove only that the appeal has a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed" (paragraph 12): *Osaj v. Canada (Attorney General)*, 2016 FC 115.

[8] The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

SUBMISSIONS

[9] The Applicant submits that the General Division erred when it did not proceed by way of videoconference hearing. He submits that on the Hearing Information Form (HIF), he had requested a videoconference hearing and he believed the hearing would be proceeding in this way.

[10] The Applicant submits that the General Division made an error of fact when it overrode a doctor's report because only a doctor can override such a report.

ANALYSIS

Natural justice

[11] In respect of the Applicant's submission that the General Division erred when it did not proceed by way of videoconference hearing, thereby indicating that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its

jurisdiction as per paragraph 58(1)(*a*) of the DESDA, I find that the General Division did not err. My rationale and reasons follow.

[12] The Applicant submitted a HIF dated October 8, 2016, which was stamped as received by the Tribunal on December 5, 2016.

[13] In section two of the HIF, there is a question that applicants are expected to complete, which states: "Are there any forms of hearing in which you could not participate? If so, check the box(es) and explain why." There are four boxes titled: "Written questions and answers"; Teleconference (by telephone)"; "Videoconference (at a Service Canada Centre)"; and "Personal appearance of the parties (at a Service Canada Centre)."

[14] The Applicant checked three of four available boxes with an "X," specifically the boxes indicating written questions and answers, teleconference and videoconference. The personal appearance option was blank, indicating that this was the only option he felt was appropriate. Further, in the space titled "Reason," the Applicant indicated: "I have a ABI & I need to see people face to face because I get confused & agrivated & my aid in always with me to make sure I understand [*sic*]."

[15] It is clear that the Applicant's intention was to seek an in-person hearing for the reasons stated. I note that I am presuming that the Applicant's reference to his having a "ABI" is in reference to "An Acquired Brain Injury."

[16] The General Division indicated at paragraph 8 that the hearing was by way of questions and answers because "[t]here were gaps in the information in the file and/or a need for clarification." It further indicated that the *Social Security Tribunal Regulations* required the General division to "proceed as informally and quickly as circumstances, fairness and natural justice permit."

[17] On September 16, 2016, the Tribunal provided the Applicant with the Notice of Hearing, which clearly indicates that the form of hearing will be "Written questions and answers." The body of the form summarizes the Applicant's request that his disability benefit be considered for retroactive payments and the pertinent sections of the CPP, namely paragraph 42(2)(*b*), section 69 and subsections 60(8) to (11). It then asks one question, namely: "Please

indicate whether it is your intention to invoke an argument of incapacity in support of your appeal." The Applicant is encouraged to identify the medical evidence in support of his incapacity argument. The Notice of Hearing provides a 30-day response period.

[18] The Notice of Hearing also provides the following:

> **TYPE OF HEARING**
>
> The Tribunal Member assigned to this file has decided hold [*sic*] the hearing by way of **written questions and answers** (emphasis in original) for the following reasons:
>
> - There are gaps in the information in the file and/or a need for clarification; and
> - This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[19] On October 19, 2016, the Applicant sent an email to the Tribunal seeking an extension of time to provide a response to the question asked in the Notice of Hearing. The Applicant indicated that he intended to have his physician complete a Declaration of Incapacity. The Applicant did not indicate any concern with the form of hearing.

[20] On October 19, 2016, the Tribunal granted an extension of time to reply until November 21, 2016.

[21] On November 30, 2016, the Applicant submitted an email message and a Declaration of Incapacity. He indicated that he was under the understanding that his physician had forwarded the Declaration to the Tribunal prior to November 21, 2016; however, he learned from the Tribunal that the Declaration had not been received and so the Applicant attached a copy. The Applicant indicated in this email: "I trust you will find the above to be in order and that this matter can now proceed." The Applicant did not indicate any concern with the form of hearing.

[22] On December 5, 2016, the Applicant forwarded the Tribunal a short email indicating that he was sending a copy of the Declaration of Incapacity. The Applicant did not indicate any concern with the form of hearing.

[23] On December 19, 2016, the Tribunal sent a letter to the Applicant. This letter summarized the process up to that date, indicating that the Notice of Hearing – Written Questions and Answers had been issued on September 16, 2016, and that the Applicant had been asked one question with a response required by October 19, 2016. Further, the letter indicated that the Applicant had requested an extension on October 19, 2016, and had been given until November 21, 2016; however, no response was received and no further extension request was sought by the Applicant. The Tribunal noted that a November 30, 2016, email was received from the Applicant, wherein he indicated that he believed his physician had submitted the Declaration of Incapacity prior to November 21, 2016, and he attached a copy of the Declaration. The Tribunal accepted this and indicated that "the Tribunal will exercise its discretion to accept the [Applicant's] response into the record, as it appears the response was late because the [Applicant] had been under the impression that his physician had responded on his behalf."

[24] The General Division considered the Applicant's incapacity in significant detail at paragraphs 41 to 46. It considered all the medical and subjective evidence presented. There were no gaps in the evidence and there were no issues of credibility to indicate that an in-person hearing was necessary.

[25] Natural justice requires that an appellant has a fair and reasonable opportunity to present their case. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 30, the Supreme Court of Canada stated: "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."

[26] The Court in *Baker* also stated at paragraph 27: "[T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves the decision-maker the ability to choose its own procedure."

[27] *Robbins v. Canada (Attorney General)*, 2017 FCA 24, at paragraph 21, indicates that the Tribunal "is entitled to decide matters without a hearing (i.e., decide only on a written record and written submissions.)" and further, "[i]t is entitled to some leeway in making that sort of

procedural choice, in part because its choice is often based on its appreciation of the issues, the evidence before it and the circumstances of the case."

[28] *Parchment v. Canada (Attorney General)*, 2017 FC 354, at paragraphs 18 and 19, held that the General Division is entitled to hold hearings by teleconference, rather than in person. The Federal Court indicated that the Applicant "must point to evidence that was overlooked by the General division" or to technical difficulties.

[29] I find, according to *Baker*, above, that the Applicant was provided with a fair and reasonable opportunity to present his case. He indicated on his HIF that he wanted an in-person hearing and gave reasons why this was important. The General Division decided to hear the matter by way of questions and explained its decision at paragraph 8 of its decision. In his Application, the Applicant submitted that he had requested a videoconference.

[30] Further, according to *Robbins*, above, I find that the General Division provided the Applicant with ample opportunity to present his case, evidenced by the documented medical evidence and his full submissions.

[31] Further, as per *Parchment*, above, the Applicant did not point to any evidence that was overlooked or to any difficulties with the process.

[32] In summary, in respect of the Applicant's submission that natural justice was not served because the General Division failed to provide him with a videoconference hearing, I find that this does not have a reasonable chance of success on appeal for the reasons and rationale above (see *Osaj*, and *Hogervorst*, above).

Error of Fact

[33] In respect of the Applicant's submission that the General Division made an error of fact when it overrode a doctor's report because only a doctor can override such a report, I have considered, as per paragraph 58(1)(*c*) of DESDA, whether 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. I find that the General Division did not err in fact. My rationale and reasons are set out below.

[34] In his application for leave to appeal, the Applicant refers to the Declaration of Incapacity completed by Dr. Ross, asking:, "[h]ow do you have the capacity to override a physician's report and letter?" In this respect, he refers to a letter written by his physician on January 19, 2017. I note that this letter was prepared after the General Division decision was issued and it is therefore considered new evidence. I have addressed this below.

[35] The Declaration of Incapacity was incomplete insofar as section A(1) was not answered by the physician. The question unanswered was: "Did/does the applicant's condition make him/her incapable of forming or expressing the intention to make an application? If no, go to the "Declaration of Physician" section at the bottom of the form." The physician indicated, in Section A(2), that the date of incapacity was December 15, 2007. The remainder was completed and the General Division, at paragraph 41, inferred the physician to be of the opinion that the Applicant was incapable of forming an intention to make an application.

[36] The General Division indicated, also in paragraph 41 that:

> [T]he Tribunal is unable to give much weight to the evidence of [the physician]. First, [the physician] did not explain the reason why the Appellant became incapacitated on December 15, 2007. In other words, the Tribunal is left to wonder what changed in the Appellant's medical condition on December 17, 2007 that led [the physician] to believe the Appellant was then incapacitated. Second, [the physician] did not address or explain how the Appellant could, on the one hand, be incapable of forming or expressing the intention to make an application but yet, on the other hand, have the capacity to approach [the physician] and ask that he complete the Declaration of Incapacity in support of his appeal.

[37] The General Division looked to the law concerning incapacity, specifically subsections 60(8) to (11) of the CPP. It then considered all the evidence presented, taking particular note of the large number of physicians' reports and opinions. These included:

a) A medical report from Dr. Stein, psychiatrist, dated April 21, 2014, who articulated that the Applicant suffered from chronic pain, frequent ischaemic attacks and poor concentration, and that his prognosis was poor (paragraph 16).

b) A medical report from Dr. Shapiro, psychiatrist, dated September 29, 2008, indicating that the Applicant was in full control of his financial affairs,

was involved in litigation, maintained legal custody of his children and was involved in other related activities and noting that the Applicant "did not exhibit any psychotic phenomenon, did not have any formal thought disorder"(paragraph 17).

c) December 2008 in-person assessments coordinated by Dr. Gouws, psychologist, who noted no concerns about the Applicant's capacity to consent to the assessments (paragraph 18).

d) June 2009 evidence from Dr. Yufe, neurologist, who observed that there was no gross cognitive impairment. The doctor noted that the Applicant had generalized tonic clonic seizures and he recommended further testing (paragraphs 19 and 43(a)).

e) A February 9, 2010, report from Dr. Gouws, concerning a psycho-vocational assessment, which noted that the Applicant was "substantially unable to engage in any employment for which he is reasonably suited by education, training and experience." Further, Dr. Gouws noted that the Applicant's thought content was normal and that his attention and concentration were adequately maintained (paragraphs 20 and 43(b)).

f) An April 15, 2013, report by Dr. Stein, indicating that it was "unrealistic to expect [the Applicant] to function in the workplace because he is so unpredictable and unreliable" and that it was unlikely that there would be a full recovery or a return to work. Further, Dr. Stein indicated that the Applicant was open, lucid and cooperative (paragraphs 21 and 43(c)).

g) A September 19, 2014, report by Dr. Anello, family physician, who indicated that the Applicant suffered from chronic pain, post-traumatic stress disorder, panic attacks, depression and other disabilities, and that the Applicant was "severely disabled and unable to work." Further, Dr. Anello indicated that the Applicant was the sole caregiver for his children (paragraphs 24 and 43(d)).

[38] The General Division also considered the Applicant's evidence. For example:

a) The Applicant's letters to Service Canada dated December 9, 2013, September 10, 2014, and February 17, 2015, indicating that he thought he had been receiving CPP disability benefits when, in reality, he was not, and noting that his brain injury made it difficult for him to understand things. (paragraphs 22, 23 and 25).

b) The evidence in the Applicant's Notice of Appeal that he believed he was collecting CPP disability benefits when, in reality, he was not (paragraph 26).

[39] The General Division specifically addressed the issue of incapacity in paragraphs 37 through 46, acknowledging the test required in subsections 60(8) and (9) of the CPP and reviewing various case law, noting that it does not matter if an appellant lacks the knowledge about eligibility for a benefit (*Tatsiopoulos v. MSD* (December 17, 2004) CP 21976 (PAB)) or the capacity to make, prepare, process or complete an application (*Canada (Attorney General) v. Danielson*, 2008 FCA 78) or that he may be incapable of dealing with the consequences of an application (*Canada (Attorney General) v. Poon*, 2009 FC 654).

[40] The General Division further referenced *Danielson*, above, which held that a claimant's activities during a period of incapacity may cast light on a claimant's continuous incapacity to form or express the requisite intention and should be considered. Further, it cited *Sedrak v. Canada (Social Development)*, 2008 FCA 86, where the Court stated that the capacity to form an intention to apply for benefits is not different from the capacity to form an intention with respect to other choices an applicant faces.

[41] The General Division ultimately determined that the Applicant had the capacity to form an intention to make an application for CPP benefits in December 2013. I find that the General Division considered all the evidence presented to it and that this ground of appeal does not have a reasonable chance of success (see *Osaj* and *Hogervorst*, above).

New Evidence

[42] In paragraph 33, above, I noted that the Applicant referred to a letter written by his physician on January 19, 2017, and included a letter from Dr. Ross, dated May 24, 2017. Both letters were created after the date of the General Division decision and are considered new evidence. I have not considered either letter as I am limited to the grounds of appeal under section 58. In *Canada (Attorney General) v. O'keefe*, 2016 FC 503, at paragraph 28, the Federal Court held that "[u]nder sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former Pension AB, which was *de novo*, an appeal to the SST-AD does not allow for new evidence and is limited to the three grounds of appeal listed in section 58." See also *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at paragraph 73.

CONCLUSION

[43] The Application is refused.

Peter Hourihan
Member, Appeal Division