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

Citation: *A. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 375

Tribunal File Number: AD-17-301

BETWEEN:

A. L.

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 26, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On January 12, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant did not meet the definition of incapacity as provided under subsections 60(8) to (10) of the *Canada Pension Plan* (CPP) and was thereby not entitled to further retroactive benefits. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on December 21, 2015.

ISSUE

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

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

[4] 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.

[5] Subsection 58(1) of the DESDA identifies 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] 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": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12.

[7] 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

[8] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction when it did not conduct the process either in person or by telephone. He argues that the process is "overly-demanding and fundamentally unjust," as it is "insufficiently clear and transparent in how information is communicated and how the process progresses." He submits that there was no exchange of information, that the process was a "quasi-legal process" and that legal counsel might be required to "navigate the process."

[9] The Applicant submits that the General Division made an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before it when it did not consider the information provided by the Applicant or "how serious brain injuries affect an individual's ability to function – both in terms of how such injuries limit an individual, and in how outward behaviours may indicate an enhanced appearance of functioning."

ANALYSIS

Natural Justice

[10] The Applicant submits 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.

[11] Natural justice requires that an appellant has a fair and reasonable opportunity to present his or her 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."

[12] 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."

[13] In this case, the Applicant's representative filed the Notice of Appeal with the General Division and indicated in a covering letter, dated December 16, 2015: "I hope that we will have the opportunity to speak with you personally, so that we might provide more context to [the Applicant's] story."

[14] The Applicant completed the Hearing Information Form on February 29, 2016. On the first page of the form, the document states:

> The information you provide in this document will assist the Tribunal member to:
> a. decide the appropriate form of hearing (written questions and answers, teleconference, videoconference or personal appearance of the parties); and
> b. schedule a hearing.

[15] On the second page, the Applicant was asked to indicate if there "[a]re any forms of hearing in which you could not participate." There are corresponding boxes to be checked. In the Applicant's case, the boxes for "written questions and answers" and "videoconference" are marked; however, there is a handwritten "ignore" beside the boxes. Also handwritten beside the boxes is "we could do all/any" and further: "The representative [named] will be able to use any format. The Applicant may be able to participate, too."

[16] On October 4, 2016, the Tribunal sent a letter to the Applicant and his representative with a caption "Notice of Hearing – Written questions and answers." The form contained three

questions for the Applicant to answer, and had to be submitted by of November 7, 2016. The letter also contained a section titled "Method of Proceeding," stating:

> The Tribunal member decided to proceed by way of **written questions and answers** for the following reasons:
>
> - 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. (emphasis in the original)

[17] On October 18, 2016, the Applicant's representative sent an email to the Tribunal seeking an extension of time, until November 21, 2016, to complete the questions. There was no indication in the email that the form of hearing was a concern for the representative or the Applicant. The Tribunal granted a two-week extension as requested. The Applicant responded to the questions in correspondence dated November 5, 2016. The Applicant did not, at any time, raise concerns about the form of the hearing.

[18] In respect of the Applicant's submissions that the process is "overly-demanding and fundamentally unjust," as it is "insufficiently clear and transparent in how information is communicated and how the process progresses," that there was no exchange of information, that the process was a "quasi-legal process" and that legal counsel might be required to "navigate the process," I find they have no basis. Throughout the appeal process, the Applicant raised no issues with the process or procedure being followed. The Applicant completed all the processes and requirements. Where required, the Applicant sought extensions, which were granted, as noted above. Further, the Applicant was represented throughout the process and he was provided with the opportunity to present evidence and submissions. He was also provided with an opportunity to answer questions, through the question and answer hearing process, and he provided responses accordingly.

[19] I have taken into consideration the initial letter to the Tribunal, in which the representative indicated that he was looking forward to speaking with the General Division member personally to provide more context. I find that the Applicant and his representative had

determined that the form of hearing was not a concern when it was noted on the Hearing Information Form: "The representative [named] will be able to use any format."

[20] For these reasons, in respect of the Applicant's submission that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, I find that the Applicant was provided with the opportunity to present his case fully and fairly, as per *Baker*, above. Further, there was sufficient and clear information offered to the Applicant throughout the process in respect of the process and procedure that was followed. I find that this argument does not have a reasonable chance of success.

Erroneous Finding of Fact

[21] The Applicant submits that the General Division made an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before it, as per paragraph 58(1)(*c*) of the CPP, when it did not consider the information the Applicant had provided or consider "how serious brain injuries affect an individual's ability to function both in terms of how such injuries limit an individual, and in how outward behaviours may indicate an enhanced appearance of functioning." I find that this is not an arguable case. The General Division considered all the medical evidence submitted by the various physicians as well as the Applicant's subjective evidence.

[22] Specifically, the General Division considered the documentary medical evidence of Dr. Thornton, psychiatrist, who indicated that the Applicant had considerable physical and cognitive disabilities and, although medications helped, some processing problems, emotional impulsivity and physical limitations persisted (paragraph12 of the decision). Further, it considered the reports by Dr. Golden, psychiatrist, who has treated the Applicant since 2006, and who noted that the Applicant's cognition, focus, concentration and mood were all chronically affected (paragraph 13 of the decision). The General Division member considered the medical evidence of Dr. Ouchterlony, Trauma and Neurosurgery, who stated that the Applicant was "completely disabled and unable to work in any capacity" (paragraph 15 of the decision).

[23] The General Division considered further evidence of Dr. Golden, who indicated that the Applicant's psychiatric and cognitive limitations and his "brain injury sequelae," subsequent to

his stroke, had severely hindered the Applicant's "ability to receive, retain and act upon complex information" (paragraph 17).

[24] The General Division considered the medical evidence of Dr. Jaakkimainen, family physician, who, in September 2016, indicated that the Applicant suffered from permanent brain damage including poor concentration, motivation and problem solving. Further, that that his disability may not be obvious to people who do not know him (paragraph 19 of the decision).

[25] The General Division, at paragraphs 30 and 31, acknowledged the Applicant's physical and cognitive limitations and the fact that the Applicant required assistance; however, it determined that the Applicant had the capacity to make an application for CPP benefits, noting that he had lived independently since 2002, he was in charge of his own banking and daily activities and he attended his medical appointments independently.

[26] The General Division considered case law in respect of *Sedrak v. Canada (Social Development)*, 2008 FCA 86, which stated that "the intention to apply for benefits is not different from the capacity to form an intention with respect to other choices which present themselves to the applicant." Further, the General Division referred to *Canada (Attorney General) v. Danielson*, 2008 FCA 78, where the Court stated: "that one needs to look at the medical evidence and agreed that the activities of a claimant may be relevant to the continuous incapacity to form or express the requisite intention and ought to be considered."

[27] The General Division found that the Applicant did not meet the requirements of incapacity under the CPP and it dismissed the appeal. I find no evidence to indicate that an error of fact was made. I acknowledge that the Applicant disagrees with the General Division's finding; however, I do not find that this was an error of fact, rather, it was a decision based on the totality of the evidence presented.

CONCLUSION

[28] The Application is refused.

Peter Hourihan
Member, Appeal Division