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

Citation: *B. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 408

Tribunal File Number: AD-17-20

BETWEEN:

B. R.

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: August 11, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant has a history of mental illness and substance abuse. In August 2010, he was charged with murder and, while in custody, submitted to various psychiatric evaluations. In March 2013, the Applicant was found not criminally responsible (NCR) for murder on the basis that he was suffering from a mental disorder that rendered him incapable of appreciating the morality of his acts. He was ordered to undergo treatment at a secure psychiatric hospital.

[2] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension on April 24, 2014.[1] On January 28, 2015, the Respondent approved the application, finding that, while the Applicant was actually disabled as of December 2009, under the CPP's retroactive payment provisions, he could be deemed disabled no earlier than January 2013—15 months prior to the date of application. After the legislated four-month waiting period, the Applicant began receiving the CPP disability in May 2013. The Responded later denied the Applicant's request to reconsider the first payment date.

[3] The Applicant appealed this decision to the the General Division of the Social Security Tribunal of Canada (Tribunal), claiming that he had been incapacitated from applying earlier for the CPP disability pension. The General Division chose to conduct a hearing based on the documentary record and determined, in reasons issued on September 26, 2016, that the Applicant was not, according to the standards set out in subsections 60(8) to 60(10) of the CPP, incapable of forming or expressing an intention to make an application earlier than April 2014. Accordingly, it upheld the first payment date of May 2013.

[4] On January 3, 2017, within the specified time limitation, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. Following a request

[1] The Applicant completed and signed the application on February 2, 2014, but the Respondent did not receive it until April 24, 2014.

for further information, the Applicant's newly-retained legal counsel completed his application on February 10, 2017.

THE LAW

Canada Pension Plan

[5] Subsections 60(8) to 60(10) of the CPP set out the requirements for a finding of incapacity:

> (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
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> (9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that
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> (a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
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> (b) the person had ceased to be so incapable before that day, and
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> (c) the application was made
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> (i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or
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> (ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,
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> the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
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> (10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[6] According to paragraph 42(2)(*b*) of the CPP, a person cannot be deemed disabled, for payment purposes, more than 15 months before the Respondent received the application for a disability pension. According to section 69 of the CPP, payments start four months after the date of disability.

Department of Employment and Social Development Act

[7] 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.

[8] 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.

[9] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[10] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[2] 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.*[3]

[11] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the

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

hearing of the appeal on the merits. At the leave to appeal stage, the applicant does not have to prove the case.

ISSUE

[12] The Appeal Division must decide whether the appeal has a reasonable chance of success.

SUBMISSIONS

[13] In his application requesting leave to appeal, the Applicant made the following submissions:

(a) He suffers from a major psychiatric disorder, which the Respondent has acknowledged was disabling as of December 2009. The General Division erred in law by failing to consider evidence that the Applicant was incapable of forming or expressing an intention to make an application during the period from January 2010 to February 2014. Specifically, the General Division disregarded Dr. Beach's psychiatric assessment dated January 16, 2012 that the Applicant had residual psychotic symptoms and "was not capable of appreciating that his actions were wrong" in August 2010.

(b) On June 28, 2016, The Respondent submitted to the Tribunal an addendum to its prior written submissions. The General Division failed to observe a principle of natural justice (specifically, the right to be heard) by admitting this document without giving the Applicant an opportunity to respond to it.

ANALYSIS

Alleged Failure to Consider Evidence of Incapacity

[14] This is a case that highlights differences among various tests for capacity under the law. The Applicant has been diagnosed with a serious psychiatric condition that underlay findings that he was NCR under the *Criminal Code* and disabled under the CPP. He now wonders why this same psychiatric condition cannot be used to trigger retroactive payments under the

incapacity provisions of the CPP. It is important to understand that the standard for incapacity under subsections 60(8) and 60(9) of the CPP is different from the standard for disability under paragraph 42(2)(*a*) of the CPP. The former requires a claimant to show he is incapable of forming or expressing an intention to apply; the latter demands proof of a severe and prolonged disability that precludes substantially gainful employment. While the Applicant may have suffered from significant mental health problems, that does not necessarily mean he has met the high threshold required to extend retroactivity.

[15] The Applicant suggests that the General Division dismissed his appeal despite medical evidence indicating that he was incapable of forming or expressing an intention to make an application earlier than April 2014. In particular, the Applicant points to a report that he believes the General Division overlooked, but it is settled law that 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.[4] Furthermore, a trier of fact is also entitled to assign weight to evidence as it sees fit, provided its determinations are founded in reason. That said, I have reviewed the General Division's decision and see no indication that it ignored, or gave inadequate consideration to, any significant component of the Applicant's evidence.

[16] The General Division comprehensively summarized the significant items of documentary evidence before it, analyzing the assessments of the various medical professionals who examined the Applicant in order to determine whether his condition during the relevant period amounted to incapacity under subsection 60(8). I see no indication that the General Division misapplied the law. At no point did the General Division suggest that the Applicant had ever been incapable of forming or expressing an intention to apply but later made a recovery, which would have then triggered the "grace period" provisions under paragraph 60(9)(*c*). Contrary to the Applicant's allegations, the General Division took into account the court-ordered psychiatric report, in which Dr. Beach found that the Applicant was incapable of appreciating that his actions were wrong at the time of the alleged offence. However, as the General Division later made clear in its analysis, a finding that the Applicant was NCR would have limited bearing on whether he was capable of forming or expressing an intention to apply.

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

[17] The Applicant cited *Estate of P.H. v Minister of Human Resources and Skills Development*,[5] but it contains a fact situation that differs significantly from the case at hand, and I am not sure what relevance it has, other than as an illustration of a situation in which the General Division made a finding of incapacity under subsection 60(8). In any case, General Division decisions typically offer little precedential value to the Appeal Division.

[18] The decision closes with an analysis that suggests the General Division meaningfully assessed the evidence and had defensible reasons supporting its conclusion that there was insufficient evidence that the Applicant was incapable of forming or expressing an intention to apply before April 2014. While the General Division did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the Appeal Division is not an opportunity for an applicant to reargue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[19] I see no arguable case on this ground.

Alleged Denial of Right to Be Heard

[20] In a letter dated May 20, 2016, the General Division advised the parties that it intended to a make a decision based on the documentary record. The General Division asked the parties to submit any additional documents no later than June 20, 2016 (the filing period) and any responses to those documents no later than July 21, 2016 (the response period). Any documents submitted afterwards would be admitted at the discretion of the presiding General Division member.

[21] As the Applicant has noted, the Respondent submitted an addendum to its prior written submissions on June 28, 2016—after the end of the filing period. The record indicates that the Tribunal promptly forwarded this document to the Applicant's last known address and reminded him of his right to respond before July 21, 2016. A subsequent notice dated July 4,

[5] *The Estate of P.H. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 21.

2016 advised the Applicant that the General Division had decided to extend his response deadline to August 4, 2016. Canada Post tracking information on file indicates that the Applicant signed for this notice on July 8, 2016. A memo dated August 4, 2016 documented a telephone conversation between the Applicant and a member of the Tribunal's staff. He asked for a status report and mentioned that he had been admitted to hospital. He confirmed that he had received the July 4, 2016 notice but did not say whether he intended to respond to the Respondent's addendum.

[22] A party's right to be heard is a cardinal principle of natural justice, and it includes review and consideration of written submissions.[6] That said, I have seen nothing in the history of the proceedings before the General Division to convince me that the Applicant's rights were prejudiced. The General Division has the discretionary authority to select what it regards as the appropriate form of hearing and, in this case, the Applicant was properly advised that his appeal would be heard on the basis of the documentary record. He was given ample opportunity to respond to the Respondent's June 28, 2016 addendum and, having chosen not to do so, he cannot now claim that he was silenced.

[23] I see no reasonable chance of success on this ground of appeal.

CONCLUSION

[24] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave is refused.

Member, Appeal Division

[6] *Caceres v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 843 (CanLII).