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

Citation: *S. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 428

Tribunal File Number: AD-17-196

BETWEEN:

S. S.

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: August 23, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 30, 2016, having found that the Applicant's disability had not been severe on or before her minimum qualifying period (MQP) of December 31, 2004, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP*)* was not payable.

[2] The Applicant filed an incomplete application for leave to appeal with the Tribunal's Appeal Division on March 3, 2017. She was provided until April 10, 2017, to submit the missing information, which, if complied with, would make it possible to consider her application as having been filed on March 3, 2017. On March 27, 2017, the Applicant completed her application by providing the missing information. As such, the Tribunal received the completed application within 90 days as required in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

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 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] According to subsection 58(1) of the DESDA, the only grounds of appeal available to the Appeal Division 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 that it made in a perverse or capricious manner or without regard for the material before it.

[6] Subsection 58(2) of the DESDA provides that leave to appeal is to be refused if the Appeal Division is satisfied 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; she has to prove only that there is 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 (paragraph 12). 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.

APPLICANT'S SUBMISSIONS

[8] The Applicant submits that on December 22, 2016, she was unable to call into the scheduled teleconference hearing before the General Division. She indicated that she had made numerous attempts to connect to the teleconference, but that she merely received a telephone recording that indicated the number was incorrect. She contacted the Tribunal and was advised that a note would be made concerning her issue.

[9] The Applicant submits that the General Division indicated that there were no medical reports that she had submitted. She asserts that she did provide medical reports and a written letter in respect of her impairment, due to a pedestrian accident on September 24, 2004. She further clarified she submitted medical reports that Drs. Sokol, Veldlinger, Potashner and Hanick had completed. However, the General Division did not consider those reports.

RESPONDENT'S SUBMISSIONS

[10] The Respondent submits that the Applicant may have been denied the chance to present her case before the General Division and that leave to appeal should be granted according to section 58 of the DESDA. Specifically, the Respondent acknowledged that the Applicant was

unable to reach the teleconference, which has impacted the decision and therefore leave to appeal the General Division's decision should be granted.

ANALYSIS

[11] The Applicant has submitted that, despite several attempts to connect to the teleconference on the date of the General Division hearing, she was unable to do so. She then contacted the Tribunal to report this matter and was advised that a note would be made about it. Although the Applicant did not specify her ground of appeal, I have determined that she is submitting that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction according to paragraph 58(1)(*a*) of the DESDA.

[12] In respect of the Applicant's submission that the General Division did not consider medical reports that she submitted, I have determined that she is submitting that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, according to paragraph 58(1)(*c*) of the DESDA.

Natural Justice

[13] The General Division determined that the appropriate form of hearing was a teleconference and notified the Applicant on August 5, 2016. An adjournment was granted to the Respondent, and the teleconference hearing was ultimately set for December 22, 2016, at 10:00 a.m. (Eastern Standard Time) On November 23, 2016, the Tribunal telephoned the Applicant to confirm the teleconference for December 22, 2016, and the Applicant advised that she would participate in it. She states that she called in to the teleconference at 9:50 a.m. (Eastern Standard Time), but that she was unable to connect to the call. She attempted to connect several times, without success, and she received a voice message that the number was incorrect. She states that she then telephoned the Tribunal office to inquire and to explain what had occurred, and that she was advised that a note would be made concerning this.

[14] The General Division decision addressed the situation insofar as it acknowledged that the Applicant had not called into the teleconference and that it was satisfied that the Applicant

had been aware of the hearing. It then noted that the Tribunal is "required to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." (paragraph 6)

[15] The General Division then continued with the teleconference, citing subsection 12(1) of the *Social Security Tribunal Regulations (SST Regulations)*, which provides that "[i]f 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." (paragraph 7) It further noted that it was proceeding under the authority of subsection 3(2) of the *SST Regulations*, which enables the Tribunal to proceed by way of analogy in questions of procedure that are not dealt with in the *SST Regulations*.

[16] The General Division, in its decision, indicates at paragraph 12:

> This appeal was heard by Teleconference for the following reasons:
>
> a) There are gaps in the information in the file and/or a need for clarification.
>
> b) This method of proceeding respects the requirements under the social security tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[17] The General Division identified the issue of whether it is more likely than not that the Applicant had had a severe and prolonged disability on or before the date of her MQP of December 31, 2004. It then went on to examine the evidence available and ultimately determined that the "evidence currently on file does not support that the [Applicant] suffered from a severe disability that made her incapable regularly of pursuing any substantially gainful occupation as at her MQP date of December 31, 2004, and continuing." (paragraph 42)

[18] The General Division, in its decision at paragraph 40, states: "The Appellant having failed to appear at the hearing did not provide information on her impairments as of the date of her MQP."

[19] The Respondent, in a letter dated August 11, 2017, in response to a Tribunal request for submissions on this particular leave to appeal, submitted that the Applicant had been unable to

connect to the teleconference, acknowledged that this had impacted the General Division decision and maintained that, therefore, leave to appeal should be granted.

[20] A fundamental principle of natural justice is *audi alteram partum*, a Latin phrase meaning "listen to the other side." *Sahakyan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542, determined *audi alteram partum* is at the heart of natural justice and that an applicant has the right to be heard, to know the case to be met and have the opportunity to respond (paragraph 25). *Vlad v. Canada (Citizenship and Immigration)*, 2013 CanLII 100456 (CA IRB), held that "[d]uty of procedural fairness includes *audi alteram partum*, the right of each party to be heard (paragraph 26). *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), held:

> Although the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all of these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker." (paragraph 22).

[21] Throughout the process, the Applicant demonstrated an interest in having her appeal heard because she:

- filed her appeal to the General Division;
- followed up on the status of her case;
- acknowledged the Respondent's adjournment request;
- indicated on November 23, 2016, that she would call into the teleconference;
- attempted to call into the teleconference several times and at the proper time; and
- followed up with the Tribunal when she was not able to connect.

[22] The General Division determined that a teleconference was an appropriate form of hearing, as there were gaps in the information and it respected the *SST Regulations* "to proceed as informally and quickly as circumstances, fairness and natural justice permit." It cited subsection 12(1) of the *SST Regulations*, which states that: "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." It further acknowledged that the Applicant had not provided information on her impairments as of her MQP.

[24] Given the submissions of both parties, I find that there is a reasonable chance of success on appeal. The Applicant has raised an issue with the right to be heard, which could, if established, lead to a finding of an error in failing to observe the principles of natural justice as set out in paragraph 58(1)(*a*) of the DESDA.

Error of Fact

[25] I have not considered the Applicant's second submission that the General Division erred in fact when it failed to consider the medical records that the Applicant had submitted. In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal indicated that it is not necessary for the Appeal Division to address all the grounds of appeal an applicant raises. In that case, Dawson J.A. stated, in reference to subsection 58(2) of the DESDA that, "[t]he provision does not require that individual grounds of appeal be dismissed." Because I found that the Applicant has a reasonable chance of success on appeal in respect of the natural justice submission, I have not considered this remaining ground of appeal.

CONCLUSION

[26] The Application is granted.

[27] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Peter Hourihan
Member, Appeal Division