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

Citation: *W. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 719

Tribunal File Number: AD-17-447

BETWEEN:

**W. O.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Jude Samson

DATE OF DECISION: December 8, 2017

Canada

## REASONS AND DECISION

## OVERVIEW

[1] The Appellant says that he has been unable to work since November 2009 on account of various illnesses and related symptoms, including heart disease, major depression, diabetes, severe back pain, confusion, panic attacks, dizziness, and narcolepsy (GD2-45). He applied for a disability pension under the terms of the *Canada Pension Plan* (CPP) in July 2016, but his application was denied by the Respondent, the Minister of Employment and Social Development (Minister), as was his request for reconsideration (GD2-4 and 14).

[2] In a nutshell, the Minister did not assess the Appellant's state of health. Rather, the Minister concluded that the Appellant had been in receipt of a CPP retirement pension since September 2012 and that the CPP does not allow a person to receive both a retirement pension and a disability pension at the same time. In addition, since the Appellant's application for a disability pension was received more than 15 months after the start of his retirement pension, there was no way of converting his retirement pension into a disability pension. The Appellant says that he contributed to the CPP for many years and ought to be entitled to its benefit, now that he is unable to work.

[3] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal of Canada (Tribunal) in December 2016, but his appeal was summarily dismissed in May 2017 (GD1 and AD1A). The Appellant further appealed to the Tribunal's Appeal Division in June 2017, and I have decided that the appeal should be allowed for the reasons below.

## LEGAL FRAMEWORK

[4] The Appeal Division's focus is on particular errors that the General Division might have made. More specifically, the Appeal Division can interfere with a General Division decision only if one of the following errors set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) is established:

a) Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction?

b) Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

c) Did the General Division base 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?

[5] It is the Appellant who must show that it is more likely than not that the General Division committed at least one of these three possible errors (also known as grounds of appeal).

**Standard of Review**

[6] In a general way, the standard of review refers to the degree of scrutiny that the Appeal Division applies when reviewing General Division decisions. For example, do all General Division errors warrant the Appeal Division's intervention or are some errors more serious than others? Despite the importance of this question, recent decisions from the Federal Court of Appeal have departed from the traditional or common law standards of review that were developed by the courts over many years.[1]

[7] In the past, tribunals such as this one have applied the "reasonableness" and "correctness" standards of review that were described by the Supreme Court of Canada in numerous cases such as *Dunsmuir v. New Brunswick*.[2] However, the Federal Court of Appeal adopted a new approach in *Huruglica*, where it held that Parliament is empowered to pass legislation establishing the applicable standards of review. And when Parliament expresses its intention clearly, tribunals should apply the standards created specifically for them, rather than the common law standards that were actually developed to guide reviewing courts when exercising their supervisory powers.

[8] While the case before the Federal Court of Appeal in *Huruglica* involved a different administrative tribunal, the principles that can be taken from that decision apply to this tribunal

[1] *Canada (Attorney General) v. Jean*, 2015 FCA 242, at para. 19; *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.
[2] 2008 SCC 9.

too. Indeed, the Federal Court of Appeal took a similar approach in *Jean*, an earlier case involving this tribunal.

[9] Among these alternatives, I have decided to follow the more recent Federal Court of Appeal decisions and focus on the grounds of appeal that were specifically set out by Parliament in subsection 58(1) of the DESD Act.

[10] As a result, I am satisfied that I have the power to intervene in this case if it is established that the General Division committed any of the errors set out in paragraphs 58(1)(*a*) and (*b*) of the DESD Act. In contrast, if the General Division makes an error of fact, I can intervene only if the decision is based on that error and the error is made in a perverse or capricious manner or without regard for the material before it.

**Method of Proceeding**

[11] Pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SST Regulations), I decided that this appeal could proceed based on the documents already filed because:

a) the legal and factual issues raised by the appeal are not complex; and

b) paragraph 3(1)(*a*) of the SST Regulations says that the Tribunal's proceedings should be conducted as informally and quickly as circumstances, fairness and natural justice permit.

[12] The Minister has filed no submissions on the merits of this appeal.

**ANALYSIS**

[13] Generally speaking, the Appellant is challenging the General Division's decision on the following bases (AD1, AD1B, AD1C, and AD2):

a) Contrary to what was written at paragraph 14 of the General Division's decision, the Appellant did respond to the Tribunal's letter of May 1, 2017 (GD8);

b) The General Division focused on dates rather than on assessing his disability;

c) He is unjustly being denied benefits for which he contributed to the CPP; and

d) His delay in applying for a disability pension was caused by a Service Canada agent who, on several occasions, informed him that he was already receiving a disability pension and that that pension was included within the sums that were already being directly deposited into his account (AD1C-1 and AD2).

[14] I have reviewed the various issues raised by the Appellant and have concluded that I need only deal with the first, since it clearly engages a ground of appeal that is set out in subsection 58(1) of the DESD Act.

**The General Division Breached a Principle of Natural Justice**

[15] The General Division, as it was required to do, sent a letter dated May 1, 2017, to the Appellant advising him that his appeal could be summarily dismissed (GD0). The letter described when the Appellant started to receive his CPP retirement pension, when he applied for his CPP disability pension, and set out the various timing provisions under the CPP that prevent him from converting his retirement pension to a disability pension. The letter also mentioned a possible exception—if the Appellant was unable to form or express an intention to apply for his disability pension before the date of his actual application—though it was said that the face of the record did not reveal any allegation or evidence of this being the case.

[16] The Appellant was given until Thursday, May 25, 2017, to respond to the General Division's letter. Parenthetically, I find this deadline to be a bit short, given the Appellant's various conditions, the Tribunal's processing times, and Canada Post's delivery times.

[17] The Appellant nevertheless responded to the General Division in a handwritten letter dated May 21, 2017, which the Tribunal stamped as being received on Monday, May 29, 2017 (GD8). In that response, the Appellant said that he had read the General Division's letter of May 1, 2017, several times but was unable to understand it. He asked whether it could be written in plain language and whether he was being discriminated against. Indeed, if the General Division's letter of May 1, 2017, had been written a bit clearer, it may be that the Appellant would have raised the issue of his incapacity sooner. As it is, the Appellant raised that issue quite clearly in a subsequent letter to the Tribunal (AD1C).

[18] The General Division's decision summarily dismissing the appeal is also dated May 29, 2017 (AD1A). Based on paragraph 14 of that decision, it appears that the General Division member did not see the Appellant's response prior to completing her decision.

[19] Nevertheless, I am satisfied that a breach of natural justice occurred in the circumstances of this case. Specifically, given the Tribunal's internal processing times, I am of the view that the General Division ought to have waited more than one business day prior to dismissing the appeal. By acting so quickly, the General Division failed to consider the Appellant's response, even though it may well have been received by the Tribunal, but had simply not yet been brought to the member's attention.

[20] In addition, the cover letter that accompanied the General Division's decision indicates that it was sent to the parties only the following day, i.e. May 30, 2017. In other words, the General Division certainly had an opportunity to consider the Appellant's response prior to the time when the decision was sent from the Tribunal's offices.

**The Matter Should Be Returned to the General Division**

[21] Having found that an error occurred contrary to paragraph 58(1)(*a*) of the DESD Act, I am empowered by subsection 59(1) of that same act to "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 decision of the General Division in whole or in part."

[22] In the interests of efficiency, I considered giving the decision that the General Division should have given. However, in the course of the proceedings before the Appeal Division, as I have already noted, the Appellant more squarely raised the question of his incapacity to apply for disability benefits from an earlier date (AD1C). While it would have been preferable if the issue of incapacity had been raised earlier, I am nevertheless persuaded that it justifies sending the matter back to the General Division. In doing so, it ensures that this issue can be appropriately considered.

## CONCLUSION

[23] The Appellant was given until May 25, 2017, to respond to the General Division's letter informing him that it intended to summarily dismiss his appeal. His response to that letter was received by the Tribunal just one business day later, on May 29, 2017, but the General Division decision was also completed that day and sent to the parties the following day, without any reference to the Appellant's response. As a result, I am satisfied that the General Division failed to observe a principle of natural justice and am referring the matter back to the General Division for reconsideration by a different member, with the following directions:

a) All copies of the General Division's decision dated May 29, 2017, will be removed from the file prior to reconsideration by the new General Division member; and

b) The Appellant's letters marked AD1, AD1B, AD1C and AD2, will be made available to the new General Division member.

[24] The appeal is allowed.

Jude Samson
Member, Appeal Division