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

Citation: *R. M. v. Minister of Employment and Social Development*, 2018 SST 285

Tribunal File Number: AD-17-202

BETWEEN:

R. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: March 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] R. M. (the Claimant), has complex regional pain syndrome in her right hand following a work injury in November 2011. She also has interstitial cystitis, which causes her constant pain. She stopped working at a data entry position in June 2013 when her contract ended.

[3] The Claimant was 41 years old when she applied for the Canada Pension Plan disability pension and was denied by the Minister both initially and on reconsideration. The Claimant had to show that she had a severe disability on or before December 31, 2013, when her minimum qualifying period (MQP) ended. The General Division dismissed her appeal, finding that although the Claimant experienced pain and functional limitations, the evidence did not show a severe disability as of the MQP.

[4] The Appeal Division granted leave to appeal in October 2017.

[5] The Appeal Division concludes that the General Division did not breach the principles of natural justice in this case, and therefore the Claimant's appeal under s. 58(1)(*a*) of the *Department of Employment and Social Development Act* (DESDA) is dismissed.

ISSUES

1. Did the Claimant waive her right to raise a breach of natural justice because she did not object at the earliest practicable opportunity?

2. Did the General Division fail to observe a principle of natural justice during the Claimant's telephone hearing?

ANALYSIS

Issue 1: Did the Claimant waive her right to raise a breach of natural justice?

[6] The Claimant did not waive her right to allege the breach of natural justice at the Appeal Division. The Claimant raised the issue as best she could during the hearing at the General Division, particularly given that she was not represented. This objection during the hearing was her earliest practicable opportunity.

[7] The Minister argues that the Claimant waived her right to allege a breach of natural justice because she did not object at the earliest practicable opportunity. The Minister takes the position that it is settled law that a breach of natural justice must be raised at the earliest practicable opportunity, and that once a procedural problem is recognized, the party must not "stay in the weeds and then, once the matter is at the appellate court, pounce."[1] The Minister notes that the purpose behind the requirement to object at the earliest practicable opportunity is judicial economy, and notes that requiring a party to object when it becomes aware of a procedural problem gives the decision maker a chance to address the issue before any harm is done, or a chance to explain itself.[2]

[8] The Claimant did not waive her right to allege a breach of natural justice by the General Division because she did raise the alleged unfairness at the earliest practicable opportunity. Near the end of the hearing, the Claimant stated that she felt the General Division member was "impatient with [her]." The General Division member explained that she was asking questions in order to do her job and that it was nothing personal. The Appeal Division is satisfied that this exchange constitutes an attempt by the Claimant to raise the fact that she felt she was not being heard at the earliest practicable opportunity, namely, during the hearing. Framing the issue as one of impatience by the General Division member is reasonable. It is a somewhat more conversational and perhaps less precise way of raising the legal concept of a breach of the right to be heard, but it is sufficient given the context, since the Claimant did not have legal training of any kind and was not represented at the hearing.

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[1] *Hennessey v. Canada*, 2016 FCA 180, at para. 21
[2] *Ibid*., para. 21

[9] By definition, practicable means "reasonably done." When deciding whether a person has raised an objection at the earliest practicable moment, the question as to whether the claimant had legal representation is relevant.[3]

[10] The General Division member took the opportunity to explain herself, which is part of the purpose behind the requirement to object at the earliest practicable opportunity. The Claimant indicated "you've been amazing" and "you've done amazing" and the hearing ended with the Claimant stating, "thank you, I appreciate what you've done for me." The Claimant did not waive her right to raise the issue of whether the General Division respected her right to be heard, even if she may have left the General Division member with the impression that the issue was explained and that the explanation was accepted.

Issue 2: Did the General Division fail to observe a principle of natural justice during the Claimant's telephone hearing?

[11] The General Division did not fail to observe a principle of natural justice during the Claimant's telephone hearing. During the hearing, the Claimant was afforded the right to be heard and was given the opportunity to make submissions on every fact or factor likely to affect the decision. There was no breach of natural justice.

[12] The DESDA allows parties to appeal the General Division decision where the General Division "failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction."[4]

[13] The right to be heard is a critical component of natural justice, and the Claimant has a right during a hearing before the General Division to present submissions on relevant issues. The Supreme Court of Canada has indicated that part of the duty to act fairly is to allow the right to be heard.[5] The right to be heard is about giving a person the opportunity to answer the questions put to him or her and to make submissions on every fact or factor likely to affect the decision.[6]

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[3] *Khakh v. Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 548 (FC)
[4] DESDA, s. 58(1)(*a*)
[5] *Therrien (Re)*, 2001 SCC 35
[6] *Kouama v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC), at para. 15

[14] In her request for leave to appeal, the Claimant argued that she was treated horribly by the General Division member during her telephone hearing. The Claimant stated that the member was extremely rude, repeatedly interrupted her, and yelled at her. The Claimant stated that she was distraught and in tears for the majority of the conference call. The Claimant provided no further submissions after the Appeal Division granted leave, and the time to provide any further submissions has expired.

[15] The Minister argues that, regardless of whether the Claimant waived her right to raise the alleged breach, the General Division did not breach the Claimant's right to be heard because the General Division gave the Claimant ample opportunity to put forward her arguments. The Minister argues that the General Division member's interventions during the hearing were aimed at encouraging the Claimant to put forward her arguments, and therefore, were within the member's responsibility to efficiently manage the proceeding. The Minister provided multiple examples of points in the audio recording of the hearing at which, among other things, the General Division member explained her role as a fair and unbiased decision maker, asked whether the Claimant understood the process, gave the Claimant an opportunity to clarify her evidence, and asked the Claimant to slow down in order to facilitate the member's note taking.

[16] The General Division did not breach the Claimant's natural justice rights. The Appeal Division reviewed the recording of the Claimant's telephone hearing in its entirety. If interruptions had prevented the Claimant from making her submissions, there could be an arguable case for a natural justice error according to the DESDA. If the Claimant had cried throughout the hearing such that she could not meaningfully participate and provide her submissions but there was no adjournment, there could be an argument for a breach of natural justice. If the General Division member had been so rude and yelled so much at the Claimant that she had cause to believe that the member was no longer evidencing an open mind or a neutral position, there could be an arguable case for a breach of natural justice. However, there were no such events or such behaviours by the General Division member at the hearing.

[17] The General Division member did interrupt the Claimant from time to time during the hearing, but these interruptions were polite and explicit attempts to slow the Claimant down so that the General Division member could catch up in note taking or locate the document to which

the Claimant was referring, or were normal parts of controlling the hearing procedure (such as the General Division member ensuring she could complete her opening remarks at the start of the hearing). The Claimant expressed understanding of this need to slow down her speech during the hearing and apologized several times, and even thanked the General Division member for slowing her down.

[18] At the end of the hearing, the General Division member gave the Claimant an opportunity to add anything she may not have had the opportunity to say. At several junctures during her evidence, it seemed that the Claimant became confused about a question the General Division member had asked her, or about the content of a document or the location of a document, and she acknowledged that she felt "stressed." The General Division and the Claimant were polite throughout the hearing and extended common courtesies to each other, such as "I'm sorry" and "thank you," on a regular basis. At one juncture, the General Division member raised her voice to say, "ok, go on," but it was in response to the Claimant indicating that she could not hear the General Division member. There is no basis for the Claimant to argue that the General Division member was rude to her.

[19] To the extent that the Claimant was in tears during the hearing, she was still able to participate in the hearing and give her evidence. At one point, the Claimant did say she was experiencing some pain and required a washroom break; the General Division member gave her a break and asked whether she was ok at the end of that break. The Claimant was able to participate in the hearing and her ability to provide submissions was not jeopardized.

CONCLUSION

[20] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	R. M., Appellant Minister of Employment and Social Development, Respondent Viola Herbert, Representative for the Respondent