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

Citation: *N. G. v. Minister of Employment and Social Development*, 2018 SST 730

Tribunal File Number: AD-16-1128

BETWEEN:

N. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: July 13, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, N. G., says that he has been unable to work since 1998 due to severe chronic hepatitis C and the effects of the treatments that he has undergone in response to that disease. He applied for a disability pension under the *Canada Pension Plan* (CPP) in June 1999 and again in May 2012. In April 2013, the Respondent, the Minister of Employment and Social Development (Minister), approved his second application. At the time, however, the Minister deemed the Appellant eligible for his disability pension from February 2011, which is the maximum period of retroactivity normally available under the terms of the CPP (i.e. 15 months prior to the date of application).[1]

[3] An exception to the 15-month rule exists, however, for claimants who can show that a period of incapacity had prevented them from applying for their CPP disability pensions any sooner.[2] Indeed, the Appellant in this case went on to submit medical evidence to this effect.[3]

[4] The Tribunal's General Division decided to hear the case by way of an in-person hearing. However, the Appellant alleges that the hearing was conducted unfairly in that the General Division refused to accept post-hearing documents (i.e. ones filed after the hearing had ended but before the General Division decision had been finalized). I granted leave to appeal on this basis and have now concluded that the General Division committed an error of law and breached a principle of natural justice by refusing to accept one of the Appellant's post-hearing documents. The appeal is allowed for the reasons set out below.

---

[1] CPP, s 42(2)(*b*).
[2] CPP, ss 60(8)–(10).
[3] GD5-2; GD9-5.

PRELIMINARY MATTERS

Appellant's Adjournment Request Refused

[5] The Appellant's representative requested an adjournment at the very start of the Appeal Division hearing. In particular, he wanted an adjournment to obtain additional medical evidence regarding the Appellant's alleged incapacity.

[6] The Minister's representative opposed the adjournment request, relying on the Appeal Division's limited mandate, as set out in the *Department of Employment and Social Development Act* (DESD Act). More specifically, the Appeal Division does not conduct fresh hearings; instead, it assesses whether the General Division committed any of the errors set out in section 58(1) of the DESD Act based on the record that the General Division had before it. As a result, new evidence is almost never allowed at the Appeal Division, and an adjournment request based on the need to obtain additional evidence should be refused.

[7] I refused the adjournment request, largely for the reasons argued by the Minister, and because the adjournment request could have been made at an earlier date.[4] Indeed, I saw little point in giving the Appellant extra time to gather evidence that I would not, in turn, be able to take into account.

Oral Evidence Accepted at the Appeal Division Hearing

[8] Though I have just said that new evidence is not normally allowed at the Appeal Division, I recognize that there is an exception to this rule in cases where the evidence is necessary to establish a violation of the principles of natural justice.[5] This particular case involves allegations that the General Division member might have promised to accept post-hearing documents, though those promises were not captured by the recording of the hearing. The Appellant and his uncle were present at the General Division hearing and could give evidence on what was said regarding the admission of post-hearing documents. In these particular circumstances, therefore, I agreed to hear the evidence of these two witnesses on the

---

[4] *Mette v Canada (Attorney General)*, 2016 FCA 276 at para 12; *Marcia v Canada (Attorney General)*, 2016 FC 1367 at para 34.
[5] *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paras 20–22.

limited question of what promises the General Division member might have made to accept documents filed after the hearing.

Minister's Submission Filed after the Appeal Division Hearing

[9] Shortly after the end of the hearing before me, the Minister's representative filed a brief submission, accompanied by the Federal Court's decision in *Murray v Canada (Attorney General)* (*Murray*).[6]

[10] While the *Murray* decision could have been provided earlier, I accept that the hearing veered onto a matter that the parties had not addressed directly in their earlier submissions: what is the correct legal test that the General Division should have applied when deciding whether to accept a post-hearing document. As a result, the *Murray* decision was mentioned, at least obliquely, during the hearing, and it was helpful for the Minister's representative to provide the decision for all to consider.

[11] The Minister's submission was provided to the Appellant's representative for a response, and he did not object to its admission.[7]

[12] I have concluded, therefore, that the parties' submissions on the *Murray* decision should be taken into consideration because they pertain to a relevant issue, have been helpful in the drafting of this decision, and have not given rise to any prejudice or undue delay.

[13] In contrast, the submission from the Minister's representative also referred to the fact that the *Murray* decision had been applied by the General Division in another file. In my view, the probative value of taking that decision into account would be low, since General Division decisions are not binding on me, but the prejudicial effect would be high, since the decision in that file is not publicly available and the Minister's representative did not provide a copy of it. I refuse, therefore, to take that decision into account.

---

[6] AD15; *Murray v Canada (Attorney General)*, 2013 FC 49.
[7] AD16; AD17.

ISSUE

[14] Did the General Division commit an error of law or breach a principle of natural justice when it refused to admit the Appellant's 2014 referral to the X Centre for Rehabilitation?

[15] In light of my conclusion on this issue, I need not consider the alleged error of fact that the Appellant has raised.

ANALYSIS

The Appeal Division's Legal Framework

[16] As alluded to above, for the Appellant to succeed, he must show that the General Division committed at least one of the three recognized errors (or grounds of appeal) set out in section 58(1) of the DESD Act. Generally speaking, these reviewable errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

c) 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.

[17] When considering the degree of scrutiny with which I should review the General Division decision, I have focused on the language set out in the DESD Act.[8] As a result, any breach of a principle of natural justice or any error of law could justify my intervention. For an erroneous finding of fact to justify my intervention, however, the General Division decision must be based on that error and the General Division must have made the error in a perverse or capricious manner or without regard for the material before it.

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

Did the General Division commit an error of law or breach a principle of natural justice when it refused to admit the Appellant's 2014 referral to the X Centre for Rehabilitation?

[18] I have answered yes to this question.

[19] The General Division decided to conduct this matter by way of an in-person hearing, which was held on Friday, March 11, 2016. The Appellant contacted Tribunal staff the following Monday morning about submitting what he described as important medical information.[9] According to the Appellant, the General Division member had given him two days to submit additional documents. Tribunal staff later advised the Appellant that he could file additional documents, but they should be accompanied by a note explaining why they should be accepted.[10]

[20] The Tribunal appears to have received the Appellant's post-hearing documents by fax late on March 14, 2016, though they were not accompanied by any explanatory note.[11] At the hearing before me, it was accepted that the third and last page of that fax was the most important one: a 2014 referral from the Appellant's family physician, Dr. Anand, to the X Centre for Rehabilitation. The referral reads as follows and relates to the Appellant's condition since 1999, when he started to receive treatments for his hepatitis C:

> Patient has suffered from cognitive impairment post treatment for his Hep C. He has trouble with memory and learning new things. He would like your opinion and assessment of his medical condition.

[21] On April 6, 2016, the General Division refused to accept the Appellant's post-hearing documents because they could have been provided at the time of the hearing:[12]

> The member reviewed the information provided and concluded that it could have been provided at the time of the hearing. There is no reason to justify that this information be accepted as evidence after the hearing.

[22] The Appellant alleges that by rejecting these documents, the General Division member went back on his promise to accept new documents within two days of the hearing. According to

---

[9] AD3-1.
[10] AD3-2.
[11] AD2. The date of receipt is corroborated by the fax transmission information at the top of the document. However, the cover page indicates that the document was sent the following day. The Tribunal stamped the document as being received on March 14, 2017, but the year is clearly wrong (it should be 2016 instead of 2017).
[12] AD5.

the Appellant, the General Division member made this promise during the hearing and repeated it later, as the two left the hearing location together.

[23] From the recording of the hearing, it is clear that the Appellant did discuss his referral to the X Centre, which he referred to as the "brain centre".[13] The General Division member found this referral to be of some importance and even asked whether the hearing should be adjourned until after the Appellant had had this assessment. At the time of the hearing, this referral was a couple of years old and the Appellant did not seem to understand its importance until called upon to answer questions from the General Division member. Since the referral went from doctor to doctor, the Appellant said that he did not have a copy among his records, but he could obtain one quickly if needed.

[24] If the General Division member offered the Appellant time to file post-hearing documents, it was not captured by the recording of the hearing. While the Appellant and his uncle gave evidence in this regard, their evidence was too inconsistent to be of much value.

[25] Nevertheless, I have concluded that the General Division committed an error of law and breached a principle of natural justice by refusing to accept the Appellant's 2014 referral to the X Centre.

[26] By way of background, the Appellant in this case had previously requested and been granted extensions of time for the purpose of filing additional documents; the last such extension expired on January 12, 2016.[14] Nevertheless, the *Social Security Tribunal Regulations* (SST Regulations) do not explicitly prohibit the late-filing of documents. Indeed, section 4 of the SST Regulations provides the Tribunal with a broad discretion to grant extensions of time.

[27] In addition, the General Division must always respect the rules of procedural fairness, an obligation that continues until the General Division issues its decision.[15]

[28] As part of this analysis, therefore, I started by considering what legal test the General Division should have applied when deciding whether to admit the Appellant's post-hearing

---

[13] Audio recording of the General Division hearing, from approximately 48:20 to 52:30.
[14] GD18.
[15] *Murray v Canada (Attorney General)*, 2011 FC 542 at para 20 (*Murray* 2011).

documents. To the best of my knowledge, the courts have not provided a definitive answer to this question in the context of this Tribunal.

[29] The Tribunal's Chairperson, however, has provided some guidance to members on this question in the form of a guideline for members entitled "Deciding whether to accept documents from a party after they indicated they were ready to proceed, after regulatory timelines, and/or after the hearing."[16] According to the guideline, when members are faced with this question, they should consider all relevant factors, including but not limited to:

a) the document's relevance and probative value;

b) any new submissions or evidence it brings to the proceeding;

c) whether the submissions or evidence to be adduced will serve the interests of justice;

d) any prejudice to the other party;

e) any undue delay to the proceeding;

f) whether the document could have been provided at an earlier date; and

g) whether the member requested that a document be submitted after the hearing.

[30] This list of factors is inspired by Federal Court decisions and has been applied in other Appeal Division decisions.[17] While the Chairperson's guideline is not binding on me, I find its flexible approach to be compelling in the Tribunal's particular context.

[31] The Minister's representative submitted instead that the General Division should have applied the three-part test that was agreed to by the parties in *Murray*:[18]

> 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;

---

[16] Social Security Tribunal <https://www1.canada.ca/en/sst/rdl/chairguidis5.html>. At the time of the General Division's decision, this guideline had a different name but contained the same list of factors.
[17] *McEwing v Canada (Attorney General)*, 2013 FC 183 at para 7; *Janssen-Ortho Inc. v Apotex Inc.*, 2010 FC 81 at para 33; *C. L. v Minister of Employment and Social Development*, 2018 SST 262 at para 23.
[18] *Murray*, *supra* note 6 at para 6.

> 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
>
> 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[32] This test is conjunctive, meaning that all three parts of the test must be met in order for the post-hearing document to be admitted. The test described in *Murray* has also been applied in at least one other reported Appeal Division decision, albeit without any consideration of whether a different legal test would be more appropriate.[19]

[33] Before me, the parties focused particularly on the second part of the *Murray* test, disagreeing on whether the referral to the X Centre would probably have had an important influence on the result of the case.

[34] Generally speaking, I accept that parties should be discouraged from filing post-hearing documents. When the established deadlines are respected, matters proceed more efficiently, fairly, and expeditiously; these goals are all found in sections 2 and 3(1)(*a*) of the SST Regulations. As a result, there is some appeal in adopting a restrictive test, such as the one described in *Murray*, for the admission of post-hearing documents.

[35] For the following reasons, however, I do not consider myself bound by the test described in *Murray*:

a) the parties in *Murray* had agreed on the test to be applied, meaning that the Court never turned its mind to what the appropriate test should be; and

b) *Murray* and the line of cases on which it relies—including *Gass v Childs*[20]—were decided in a very different context.

---

[19] *The Estate of K. L. v Minister of Employment and Social Development*, 2017 SSTADIS 235.
[20] *Gass v Childs* (1958), 43 MPR 87 (NB SC (AD)).

[36] In the absence of any binding authority, I have concluded that the Tribunal remains free to adopt its own test concerning the admission of post-hearing documents, a test that best suits its context and regulatory framework.

[37] In this respect, I find the test described in *Murray* to be too restrictive. Rather, I would adopt the more flexible approach proposed in the Chairperson's guideline. In particular, the Chairperson's guideline still takes the expeditious determination of appeals into account, but allows members the room to balance that objective against others—such as fairness and informality—that are also set out in section 3(1)(*a*) of the SST Regulations.

[38] Indeed, the importance of these goals is highlighted in cases such as this one, where the Appellant was unrepresented at the hearing before the General Division and is living with a condition that affects his cognitive abilities.

[39] Turning back to the facts of this case, I have concluded that the General Division committed an error of law when it refused to accept the Appellant's post-hearing document in the way that it did. In particular, the only factor that the General Division considered when reaching its decision is whether Dr. Anand's referral could have been provided any sooner. It did not consider any of the other factors listed above (whether under the Chairperson's guideline or the test described in *Murray*), including the document's relevance.

[40] It is true that the Appellant's three-page fax did not include the explanatory note that was requested of him, but he understood that this had been discussed during the hearing. For example, he told the General Division member that he had failed to grasp the importance of Dr. Anand's referral and that it was not something that would normally be among his records. Nevertheless, he said that he could provide a copy of the referral quickly, even offering to call Dr. Anand's office from the hearing room, except that his office was closed on that day.

[41] The Appellant also explained throughout the General Division hearing that his condition makes it difficult for him to stay organized and that he found the Tribunal's proceedings to be overwhelming at times. Indeed, the Appellant's statements are corroborated by his previous

requests for an extension of time, which were needed for the purpose of gathering more evidence.[21]

[42] Beyond this error of law, I have also concluded that the General Division's rejection of the Appellant's post-hearing documents had an impact on the fairness of the proceeding, and amounted to a breach of natural justice.[22] By refusing to accept this document, the General Division rejected evidence relating to a topic in which it had expressed great interest.

[43] Among the powers given to me under section 59(1) of the DESD Act, I have the power to give the decision that the General Division should have given. More specifically, by applying the correct legal test, I am satisfied that the General Division should have admitted the Appellant's referral to the X Centre for Rehabilitation. My reasons for that decision are as follows:

a) The referral from the Appellant's family physician speaks to cognitive impairments that the Appellant has experienced since 1999. As a result, it is clearly relevant to the question of his incapacity, something the General Division member recognized during the hearing.

b) This referral supplements and corroborates a declaration of incapacity, also completed by Dr. Anand.[23]

c) The admission of the document would have promoted the interests of justice since it was, effectively, the Appellant's last opportunity to introduce new evidence.

d) New evidence was obviously going to be heard in the course of the General Division hearing, at least in the form of the Appellant's oral evidence. Nevertheless, the Minister chose not to attend the hearing, even by teleconference. It is difficult, therefore, for the Minister to complain that it would have been prejudiced by the admission of this new document. In any event, any prejudice arising from the admission of this document could have been cured by providing the Minister with a copy of the document and a brief opportunity to reply to it.

---

[21] e.g. GD12-4; GD14-4; GD16-2; GD18.
[22] *Murray* 2011, *supra* note 15.
[23] GD9-5.

e) Another new document was accepted during the hearing on March 11, 2016, but not circulated to the parties until weeks later.[24] In addition, the General Division decision was only issued in June. As a result, accepting a document received within a few days of the hearing would not have unduly delayed the proceeding.

f) The Appellant did not have the document in his possession prior to the hearing, but he was able to obtain a copy quickly after the hearing and could have done so sooner if he had realized its importance.

g) The document was discussed during the General Division hearing, though it is unclear whether the General Division member asked for it to be submitted.

[44] In my view, therefore, an overall assessment of the relevant factors weighed strongly in favour of admitting the Appellant's referral to the X Centre.

[45] Regardless of these errors, the Minister's representative urged me to dismiss the appeal. He argued that these errors should be overlooked because they are immaterial to the outcome of this case. More specifically, the threshold for meeting the CPP's so-called "incapacity provisions" is so high that the Appellant clearly would not meet it, even if Dr. Anand's 2014 referral is taken into account.[25]

[46] I have found some authority for the proposition that breaches of procedural fairness can be overlooked if there is no doubt that the breach had no material effect on the decision.[26] Indeed, the Federal Court's decision in *Grosvenor v Canada (Attorney General)* is a recent reminder of how difficult it can be to meet the CPP's incapacity provisions.[27]

[47] Nevertheless, I am not convinced that I should go so far as to say that Dr. Anand's 2014 referral would, without a doubt, have had no impact on the outcome of this case. In that vein, I cannot accept the Minister's submission to the effect that the General Division would have been

---

[24] GD19.
[25] CPP, ss 60(8)-(10).
[26] *Murray* 2011, *supra* note 15 at para 25; *Nagulesan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1382 at para 17.
[27] *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

entitled to ignore Dr. Anand's 2014 referral, even if it had been accepted into evidence. I refuse, therefore, to overlook the breach of natural justice and error of law that occurred in this case.

[48] With respect to the assessment of the Appellant's alleged incapacity, the weighing and assessing of evidence is at the heart of the General Division's jurisdiction. In addition, the parties seemed to agree at the hearing before me that, if I found that the General Division had committed a material error, then the matter should be returned to the General Division for reconsideration. Returning the matter to the General Division also allows the parties the opportunity to make more fulsome arguments regarding the importance of Dr. Anand's 2014 referral.

CONCLUSION

[49] The appeal is allowed. The matter is sent back to the General Division for reconsideration on the question of whether the Appellant's disability pension can be backdated any further on account of a period of incapacity. Among the other relevant documents, the General Division is directed to weigh the Appellant's 2014 referral to the X Centre for Rehabilitation.

Jude Samson
Member, Appeal Division

HEARD ON:	May 9, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. G., Appellant Brian F.P. Murphy, Q.C., representative for the Appellant Christopher Onderwater (student at law), representative for the Appellant Philipe A. Sarrazin, representative for the Respondent