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

Citation: *G. H. v Minister of Employment and Social Development*, 2019 SST 678

Tribunal File Number: AD-19-166

BETWEEN:

G. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 23, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for a new hearing.

OVERVIEW

[2] The Appellant, G. H., is a 60-year-old former X. In June 2016, she applied for a disability pension under the *Canada Pension Plan* (CPP), claiming that she could no longer work because of inflammatory arthritis and pulmonary blood clots. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that her disability did not become "severe and prolonged," as defined by the CPP, during her minimum qualifying period (MQP), which, under the CPP's proration provision,[1] was confined to the period between December 31, 2002 and August 31, 2003 (prorated MQP or window period).[2]

[3] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division chose to conduct a hearing based on the documentary record and, in a decision dated December 19, 2018, concluded that there was insufficient evidence that the Appellant was unable to perform substantially gainful work during the prorated MQP.

[4] On March 4, 2019, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division (i) analyzed her disability claim improperly and (ii) denied her an opportunity to explain her case when it refused her request for a teleconference hearing.

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[1] CPP at s. 19.

[2] In paragraph 3 of its decision, the General Division wrote that the prorated period extended "from August 1, 2003 to August 31, 2003." This is in error, because under section 19 of the CPP, it is not possible for a prorated period to commence on any date other than January 1. As discussed at the hearing, I am satisfied that this is no more than a typographical error and that the General Division gave full consideration to whether the Appellant's date of disability onset occurred within the eight-month window period.

[5] In a decision dated March 28, 2019, I granted leave to appeal because I saw an arguable case that the General Division had breached a principle of natural justice by choosing not to hold an oral hearing and instead deciding the appeal solely on the basis of the existing documentary record.

[6] In written submissions dated April 24, 2019, the Minister defended the General Division's decision, noting that the Appellant had been notified in writing and over the telephone that her eligibility period was only eight months. The Minister added that, even if the General Division had held an oral hearing, nothing that the Appellant could say would have proved that she became disabled within the narrow window period.

[7] Having reviewed the parties' oral and written submissions, I agree with the Appellant that the General Division denied the Appellant's right to be heard. Since the record before me is missing evidence that, in my view, is essential to make a reasoned decision, the appropriate remedy in this case is to return the matter to the General Division for a new hearing.

ISSUES

[8] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[9] The issues before me are as follows:

Issue 1: Did the General Division err when it concluded that the Appellant did not have a severe disability?

Issue 2: Did the General Division breach the Appellant's right to natural justice by holding a teleconference hearing?

ANALYSIS

Issue 1: Did the General Division err when it concluded that the Appellant did not have a severe disability?

[10] The Appellant suggests that the General Division dismissed her appeal despite medical evidence indicating that her condition was severe and prolonged according to the criteria governing CPP disability. I see no merit in this submission.

[11] Decision-makers are presumed to have considered all the evidence before them.[3] The Appellant clearly disagrees with the General Division's decision, but she does not specify what items of evidence the General Division supposedly overlooked. In the end, this submission is so broad that it amounts to a plea for the Appeal Division to reconsider the existing evidence and decide in his favour. This I cannot do. My authority allows me to determine only whether any of the Appellant's reasons for appealing fall within the three grounds listed in the DESDA and whether any of them have a reasonable chance of success.

Issue 2: Did the General Division breach the Appellant's right to natural justice by holding a teleconference hearing?

[12] The Appellant alleges that, in electing to hear her appeal exclusively by way of documentary review instead of permitting some form of testimony, the General Division breached a principle of natural justice and preventing her from presenting a full case. I am ordinarily reluctant to interfere with the discretionary authority of the General Division to decide on an appropriate form of hearing, but here I see reason to make an exception.

[13] The *Social Security Tribunal Regulations* give the Tribunal's two branches wide discretion to hold a hearing as they see fit. Section 21 permits the General Division to hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference, or personal appearance. Use of the word "may" in the text, in the absence of qualifiers or conditions, suggests that the General Division has discretion to make this decision. However, such discretion must be exercised in compliance with the rules of procedural fairness.

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

The Supreme Court of Canada has pronounced on this issue in *Baker v Canada*,[4] which held that that a decision affecting an individual's rights, privileges, or interests is sufficient to trigger the application of the duty of fairness. However, the concept of procedural fairness is variable and it must be assessed in the specific context of each case. *Baker* then set out a non-exhaustive list of factors to be considered in determining the duty of fairness required in a particular case, including the nature of the decision being made, the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives decision-makers the ability to choose their own procedures.

[14] According to the Federal Court of Appeal, the CPP is benefits-conferring legislation that has a benevolent purpose and "ought to be interpreted in a broad and generous manner with any doubt arising from the language of the legislation being resolved in favour of the claimant."[5] I do not doubt that the Appellant regarded her appeal for disability benefits as important and therefore worthy of something approaching a "full" hearing, complete with oral testimony. Indeed, she specifically ruled out a hearing by "written questions and answers" when the Tribunal sought her views on the appropriate form of hearing.[6]

[15] Nevertheless, the General Division dispensed with an oral hearing for the following reasons:

- [The member] decided that a further hearing is not required;
- The issues under appeal are not complex;
- There are no gaps in the information in the file or no need for clarification;
- Credibility is not a prevailing issue;
- This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit;

[4] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).
[5] *Villani v Canada (Attorney General)* 2001 FCA 248.
[6] Appellant's Hearing Information Form, completed December 13, 2017, GD5.

- The [Appellant] acknowledged that her disability began many years after the MQP.[7]

[16] I did not see a notice of hearing on file, and I am not sure whether the Appellant had any advance notice that her appeal would be decided on the record. What is certain is that the General Division did not have any questions for the Appellant, whether oral or written. This suggests that the General Division was satisfied that it already had all the information necessary to make an informed decision about the Appellant's disability within the window period. The General Division found "no gaps in the file," yet in its decision referred to a nine-year period, encompassing the prorated MQP, in which there was no medical information. The presiding General Division member did not offer the Appellant an opportunity to explain the nine-year gap, nor did she ask the Appellant about the specific circumstances that led her to stop working in 2003. The lack of evidence about the Appellant's condition in and around the window period may have been a factor in the General Division's decision to conduct the hearing in writing, but it could just as easily have served as a rationale to demand supplemental oral evidence to fill in the gap.

[17] There are other reasons to question the General Division's choice to proceed solely on the basis of the documentary record. Contrary to the General Division, I would suggest that the issues under appeal were, in fact, "complex." The Appellant's former family physician wrote that that she was diagnosed with morbid obesity in August 2004—only a year after the prorated MQP.[8] The Appellant has a long and complicated medical history, and her claim was founded on progressive conditions, such as osteoarthritis and chronic obstructive pulmonary disorder, that do not arise overnight.

[18] Moreover, I would dispute the General Division's view that credibility was not at issue. CPP disability claims often come down to whether the claimant's word can be trusted. The Appellant, like many in her position, argues that she is disabled, despite a lack of medical documentation during the relevant period. She submits that her testimony was the only way to fill in the aforementioned evidentiary gap. I agree. The Supreme Court of Canada noted:[9]

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[7] General Division decision, para 6.
[8] Letter by Dr. Mahdi Ibrahim dated December 20, 2012, GD2-136.
[9] *Singh v Minister of Employment and Immigration*, [1985] l SCR 177, 1985 CanLII 65 (SCC).

> [E]ven if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person […] **I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions** [emphasis added].

According to the *Canada Pension Plan Regulations,* at least some objective medical evidence is required to support a finding of disability.[10] Here, the Appellant has fulfilled that minimal obligation, even if none of it directly addressed the applicable eligibility period. That said, medical evidence does not necessarily outweigh other forms of evidence. In certain circumstances, "[t]he very nature and credibility of subjective evidence can outweigh the absence of any objective clinical medical evidence."[11]

[19] On the face of it, there were no shortage of reasons for the General Division to find that the Appellant's disability did not become severe during the eight-month period ending August 31, 2003:

- Most of the medical evidence on file was dated well after the prorated MQP;
- A memo prepared by a Service Canada agent[12] recorded the Appellant as saying that she was not disabled in 2003;
- In her application for CPP disability benefits, the Appellant indicated that she could no longer work as of 2011; and
- The Appellant's record of earnings showed that she made approximately $14,000 in each of 2008 and 2009.

[10] CPP Regulations, s 68(1)(a).
[11] *Smallwood v* Canada (*Minister of Human Resources and Development)* (July 20, 1999), CP 9274 (PAB).
[12] GD2-51.

I do not pretend that the Appellant had a strong case, but it was not non-existent either. It did not deserve to be disposed of by way of a process only one degree removed from summary dismissal. Like many claimants, the Appellant lacks a sophisticated understanding of the rules governing CPP disability, particularly those pertaining to eligibility periods. The same might be said of her representative, who has no legal training and who, at the time of the General Division hearing, was a member of the Newfoundland and Labrador House of Assembly. As such, the Appellant was poorly equipped to mount a purely paper-based case. A hearing before the General Division is ordinarily the final opportunity for the evidence in a disability claim to be assessed on its merits. While many medical conditions can be assessed by means of laboratory tests and imaging results, the subjective intensity of the Appellant's symptoms and their effect on her vocational capacity during the MQP cannot be documented so easily and, in my view, are best relayed by means of unfiltered testimony.

[20] If the General Division intended to rely on the **absence** of specific evidence, then it was only fair to offer the Appellant an opportunity to provide that evidence. In choosing to "hear" her case by relying solely on the documentary record, the General Division effectively denied the Appellant her right to be heard.

[21] I am satisfied that the General Division's refusal to hear the Appellant's testimony resulted in a breach of procedural fairness.

REMEDY

[22] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[23] Under section 3 of the *Social Security Tribunal Regulations*, the Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow

but, in this case, I feel my only option is to refer this matter back to the General Division for rehearing.

[24] I do not think that the record is complete enough to allow me to decide this matter on its merits. The General Division failure to observe a principle of natural justice led to the exclusion of an entire category of evidence that, had it been considered, might have produced a different outcome. Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is better positioned than I am to hear the Appellant's testimony and to explore whatever avenues of inquiry that may arise from it.

CONCLUSION

[25] For the above reasons, I find that the General Division failed to observe a principle of natural justice. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a new hearing.

[26] I am also directing the General Division to conduct the hearing by teleconference, videoconference, or personal appearance.

Member, Appeal Division

HEARING DATE	July 9, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. H., the Appellant Neil King, representative for the Appellant Viola Herbert, representative for the Respondent