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

Citation: *L. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 498

Tribunal File Number: AD-16-769

BETWEEN:

L. C.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: December 21, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated April 25, 2016 of the General Division, which declined to grant greater retroactive payments of a survivor's allowance to July 2008, when the Appellant turned 60 years of age, as it found that there was insufficient evidence of incapacity as set out in section 28.1 of the *Old Age Security Act* (OASA). The Appellant appealed on the basis that the General Division did not appear to have considered her family physician's declaration of incapacity and that this therefore represented a breach of the principles of natural justice.

[2] I granted leave to appeal on the basis that it appeared that the declaration of incapacity upon which the Appellant relied was missing from the hearing file before the General Division and that the member, through no fault of her own, thereby rendered a decision based on incomplete information.

[3] The Appellant indicated that she had no further submissions in support of her appeal. The Respondent filed extensive submissions. Having determined that no further hearing is required, this appeal proceeded pursuant to subsection 43(a) of the *Social Security Tribunal Regulations.*

ISSUES

[4] The issues before me are as follows:

1. Was there a breach of the principles of natural justice?
2. Is the declaration of incapacity determinative or conclusive that the Applicant was incapacitated?
3. What is the appropriate disposition of this matter?

NATURAL JUSTICE

[5] As I noted in my leave decision, there is conflicting information as to how and whether the Appellant or her family physician provided a copy of the declaration of incapacity to the Social Security Tribunal. There are questions too as to whether she might have filed the declaration with the Respondent rather than the Tribunal, although the Respondent claims that it never received a copy directly from the Appellant.

[6] On the one hand, it would be reasonable to accept that the Appellant provided a copy of the declaration of incapacity with either the Tribunal or the Respondent. After all, she has been consistent in her assertions that she provided a copy of the declaration of incapacity. The declaration of incapacity is dated December 17, 2014, and is the only piece of evidence upon which the Appellant relies to support her claim for greater retroactivity of payment of a survivor's allowance. There is no reason for her to want to withhold this declaration from being produced. The Appellant also alleges that she first became aware that the declaration was missing from the hearing file when she received the decision of the General Division.

[7] Although an appellant bears the onus of proof and is responsible for adducing evidence to prove her case, if she had filed documents, she should be entitled to expect that copies have been retained in the hearing file, unless there is anything to trigger or alert her otherwise.

[8] In this case, the Tribunal wrote to the Appellant as follows:

- on January 12, 2015, copies of the hearing file were produced to the parties;
- on November 13, 2015, the Tribunal wrote that, "<u>There is no information</u> before the Tribunal which would suggest that the incapacity exception to the 11-month maximum retroactivity rule is engaged" (GD0) (my emphasis);
- in a Notice of Hearing dated February 5, 2016, the Tribunal asked the Appellant to provide "any available medical evidence demonstrating prior

to February, 2014, you suffered from incapacity, as defined under section 28.1 of the *Old Age Security Act*".

- in a Notice of Hearing dated March 4, 2016, the Tribunal again requested that the Appellant provide any "available medical evidence" (GD0B).

[9] While it might have been reasonable to expect that this string of correspondence from the Tribunal should have alerted the Appellant that possibly the declaration of incapacity was missing from the hearing file, I cannot overlook the fact that the Appellant, perhaps in response to the Notice(s) of Hearings, contacted the Tribunal on March 8, 2016 and advised that her physician had faxed medical information last year.

Telephone Conversation Log / Journal de conversation téléphonique

Recorded by / Enregistré par:	Abodunrin , Rhoda
Date:	March 8, 2016
Time / Heure:	9:56 AM
File Number / Numéro de dossier:	GP-14-4430

Message:
I received a call from the appellant re: request for medical information
The appellant says her doctor faxed medical information last year. I explained that the member is requesting specific medical information. The appellant will consult with her doctor.

[10] It is unclear from the phone log whether the Appellant asked the Tribunal's employee to verify that the Tribunal had indeed received the declaration of incapacity, or whether the employee ascertained whether there was a declaration of incapacity and finding none, then notified the Appellant.

[11] It seems clear from the phone log that the employee advised the Appellant that the General Division was requesting "specific medical information". The Appellant might have been left with the impression that the Tribunal had a copy of the declaration of incapacity but was simply seeking additional medical information. Had the Appellant been specifically advised that the Tribunal did not have the declaration of incapacity in its hearing file, the Appellant may well have filed another copy.

[12] The Appellant purportedly advised that she would consult her physician but ultimately the Appellant did not produce any additional medical opinions nor file an additional copy of the declaration of incapacity. This tends to support her belief that the Tribunal had a copy of the declaration of incapacity. After all, there would be no reason for her to necessarily seek additional medical information if she believed that the declaration of incapacity was not only sufficient, but that it was already in the hearing file of the General Division.

[13] Natural justice is concerned with ensuring that an applicant has a fair and reasonable opportunity to present her case, that she has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias.

[14] I have no reason to disbelieve the Appellant that she or her family physician had provided a copy either to the Social Security Tribunal or the Respondent. Although the correspondence from the Tribunal suggested that it did not have any medical evidence, the Appellant has not wavered from her belief and understanding that the Tribunal had a copy of the declaration of incapacity, as evidenced by her conversation with the Tribunal on March 8, 2016.

[15] For the purposes of this appeal, despite the conflicting evidence, I am prepared to find that the Applicant filed a copy of the declaration of incapacity and that, for whatever reason, it was missing from the hearing file before the General Division. This would represent a clear breach, as the Appellant was effectively deprived of the opportunity to fairly present her case, having filed a document which was relevant to her appeal.

DECLARATION OF INCAPACITY

[16] The declaration of incapacity is found at page AD1-4. The family physician was of the opinion that the Appellant was incapacitated from April 2008 to December 2012.

[17] The family physician responded “yes” to the question as to whether the Appellant’s condition rendered her incapable of forming or expressing an intention to make an application. In the narrative section, the family physician wrote:

> Severe clinical depression and possible schizo-affective disorder. She became housebound and totally obsessed with cats, at one time [illegible] up to 100 cats in the house.

[18] This was the extent of the family physician's description regarding the Appellant's capacity. There were no accompanying medical records or other opinions to support the opinion that the Appellant might have been incapacitated from April 2008 to the end of 2012, despite the fact that the family physician noted that the Appellant was receiving treatment from a mental health clinic.

[19] The declaration of incapacity alone is inconclusive as to whether the Appellant could be found incapacitated for the material time. At most, a declaration or medical certificate is required by the Respondent, but neither document in any way displaces the legal test for incapacity set out in section 60 of the *Canada Pension Plan.* The jurisprudence is well established that medical opinions alone are not conclusive: *Canada (Attorney General) v. Danielson*, 2008 FCA 78. The declaration also falls far short in examining the Appellant's relevant actions or activities. I do not find it compelling on its own.

[20] Although I am strongly inclined to dismiss the appeal, given that the Appellant at this juncture relies solely on the declaration of incapacity, this might result in effectively depriving the Appellant of an opportunity to fairly present her case. After all, had the General Division had the declaration of incapacity before it, the member may have determined that an alternate form of hearing was appropriate and this in turn may have prompted the Appellant to adduce additional documentary evidence and/or to produce witnesses who might have been able to address the state of her capacity during the material time. The General Division might have been impressed with the Appellant's or witnesses' demeanour and any testimony she or they might have offered. While I recognize that this was improbable and that it is unlikely the Appellant would have adduced additional evidence, given her past inactions and wholesale reliance on the declaration of incapacity, I cannot dismiss it as a possibility either.

CONCLUSION

[21] The appeal is allowed and the matter remitted to the General Division for a redetermination.

Janet Lew
Member, Appeal Division