



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. O. v. Minister of Employment and Social Development*, 2016 SSTADIS 511

Tribunal File Number: AD-16-120

BETWEEN:

M. O.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 30, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of a decision dated October 19, 2015, in which the General Division (GD) of the Social Security Tribunal (SST) found that the Appellant abandoned her appeal for an Old Age Security (OAS) pension.

FACTUAL OVERVIEW

[3] The Appellant applied for a disability pension under the *Old Age Security Act* in November 2009. The Respondent denied the application at both the initial and reconsideration levels. In July 2012, the Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT).

[4] In a decision dated March 21, 2013, the OCRT allowed her appeal to proceed. In April 2013, The OCRT transferred the appeal to the SST pursuant to the *Jobs, Growth and Long-Term Prosperity Act*.

[5] On March 20, 2015 the GD requested that the Appellant provide a valid telephone number at which she could be reached for the purposes of a teleconference hearing. In a Notice of Hearing dated April 10, 2015 and addressed to the Appellant's residential address in the Philippines, the GD notified the Appellant that a teleconference hearing would be held on September 9, 2015 at 5:30 a.m., Philippines time.

[6] On September 8, 2015, the Appellant telephoned the SST to advise she was waiting to be connected to the teleconference. A member of the SST staff recorded the following call log:

The appellant is waiting for a teleconference hearing to begin. Her notice of hearing says that the TM [Tribunal Member] will contact her to connect her to the teleconference on September 9, 2015 at 5:30 am Philippine Time. I informed the appellant that I would forward this to the CMO [Case Management Officer] and that we will get back to her. There is a 12-hour time difference with her and she can be reached in the morning Eastern Time as is will be evening for her.

[7] On September 10, 2015, a member of the SST staff noted that he made two unsuccessful attempts to call the Appellant at the telephone number she had provided earlier.

[8] On October 19, 2015, the GD issued its decision, declaring the Appellant's appeal abandoned because she was "unreachable." In its reasons, the GD noted that the Appellant did not attend the hearing at the scheduled time. The GD member wrote that he attempted to telephone her several times after the hearing start time, without success. As well, SST staff had been unable to reach the Appellant at the telephone number on file, and she not made contact since her failure to appear at the hearing.

[9] On January 5, 2016, the Appellant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the SST. She denied that she had abandoned her appeal and claimed that she always intended to pursue her appeal. Following a request for further information from the AD, the Appellant perfected her application for leave on June 9, 2016, beyond the 90-day time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

[10] In a decision dated October 26, 2016, the AD permitted the Appellant an extension of time to appeal pursuant to subsection 57(2) of the DESDA. The AD also granted leave to appeal because it was satisfied the Appellant had an arguable case that the GD might have failed to observe a principle of natural justice when it determined that she abandoned her appeal. The AD invited submissions on the appropriate form of hearing.

[11] In a letter dated November 19, 2016, Appellant advised the AD that she had nothing further to add to the submissions set out in her application for leave to appeal. On December 9, 2016, the Respondent filed submissions in which it conceded that the GD breached a principle natural justice under paragraph 58(1)(a) of the DESDA. The Respondent recommended that the matter be referred back to the GD for a hearing *de novo* under subsection 59(1) of the DESDA.

[12] Having heard from the parties, I have now decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

- (a) There are no gaps in the file or need for clarification;

- (b) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[13] Subsection 58(1) of the DESDA sets out that the only grounds of appeal are the following:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The GD 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.

ISSUE

[14] Did the GD fail to observe a principle of natural justice when it found that the Appellant abandoned her appeal following supposed non-attendance at a scheduled teleconference hearing?

SUBMISSIONS

[15] As noted above, the Respondent has conceded that the GD's disposition of the Appellant's file was procedurally unfair and warrants a new hearing on the merits of her OAS claim.

[16] In a letter submitted with her notice of appeal, the Appellant wrote that she was shocked and surprised to receive the GD's decision that she had abandoned her appeal. She acknowledged receiving a notice advising her of the September 9, 2015 teleconference and claimed that she had cleared her schedule to ensure she was available to participate in the call. She went as far as to tell the caretakers in her apartment building to wake her up.

[17] The next night, she said, she bought a long distance calling card and telephoned Ottawa. She spoke to a male, who said he would have someone call her, although no one ever did. She

phoned again and this time a lady answered. She said she would have someone get in touch with her but heard nothing. She suspected that SST staff could not get through to her because it is especially difficult to get a connection to the Philippines during Canadian business hours.

[18] In a letter received by the SST on April 4, 2016, the Appellant added further detail to the circumstances surrounding the missed teleconference. The notice of hearing specified that the teleconference would begin on September 9, 2015 at 5:30 a.m., Philippines time. She waited at home with her grandson but nobody called. Despite the assertion in the GD's abandonment decision, no one to her knowledge from Ottawa ever called her. She is frustrated and feels she has been treated unfairly; she only wants another chance to be heard.

[19] The Appellant insisted that everything she has done has been in good faith. She feels emotionally drained in her quest for an OAS pension.

ANALYSIS

[20] Although it is not specifically referred to in the SST Regulations, the concept of abandonment emerges from the general authority of an administrative tribunal to regulate the proceedings before them. Where notice of a hearing has been properly given to an appellant, and neither the appellant nor anyone on his or her behalf appears at the scheduled hearing, it is within the discretion of an administrative tribunal to decide the matter on the record or declare the appeal abandoned. In my view, abandonment connotes neglect or loss of intention to pursue an appeal, but I do not find that here.

[21] I endorse the submissions of the Respondent, which I will quote here at length:

24. Natural justice involves two main principles: the right of a party to be heard and the right to be heard by an impartial decision-maker. The Appellant was granted leave to appeal on the basis that she was deemed to have abandoned her appeal because she failed to appear at her hearing.

25. The duty of procedural fairness must be looked at in the context of particular facts of each case. Several factors are to be considered, including: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself. *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 SCR 817 at paras 21-22.

26. By finding that the Appellant's appeal was abandoned when she failed to appear at her hearing, the SST-GD failed to observe a principle of natural justice and breached the Appellant's right to be heard and fully present her case.

27. From the letter submitted by the Appellant and the facts outlined in the SST-AD decision on the leave to appeal, it can be deduced that the time difference between Canada and the Philippines created confusion between the Appellant and the Tribunal as to the time of the hearing indicated in the Notice of Hearing dated April 10, 2015. There may have also been some connectivity issues when the SST-GD tried to contact the Appellant in the Philippines after the scheduled hearing.

28. The Appellant made an effort to contact the SST-GD on September 8, 2015 EST to participate in her hearing, which would have been September 9, 2015 Philippine Time Zone considering the 12-hour time difference. This was the scheduled date of hearing by teleconference. She also went as far as to notify the caretakers in her apartment to wake her up in time for the hearing at 5:30 am Philippine Time Zone. The evidence established that she was available at the time indicated on the Notice of Hearing and advised the Tribunal of this fact.

29. The Appellant continued to wait for the phone call from the SST-GD to participate in the hearing and after failing to receive a call from the SST, the Appellant contacted the SST a second time and was told that a staff member of the SST would get in touch with her.

30. The SST-GD contacted the Appellant on September 10, 2015, the day after the scheduled date for the hearing indicated on the Notice of Hearing. In doing so, the SST-GD attempted to contact the Appellant for the teleconference at a date other than that indicated on the Notice of Hearing. This led to the SST-GD erroneously contacting Appellant at the wrong time and date. According to the Notice of Hearing, it should have contacted the Appellant on September 9, 2015 at 5:30 am Philippine Time Zone, which would have been September 8, 2015 at 5:30 pm EST. Therefore, it was the SST-GD who was not available at the scheduled time of the Hearing, not the Appellant.

31. Evidence shows that the Appellant had no intention of abandoning her appeal. The Appellant has sent numerous letters and documents to the SST-GD and Service Canada to substantiate her appeal since her application for Old Age Security pension in 2009. She has also continued to express her intent to pursue her appeal both before and after the scheduled Notice of Hearing by the SST-GD, and was available at the scheduled time and date of the hearing.

32. The Appellant has also stressed that she would like to have a chance to participate in the hearing of her appeal to exercise her right to be heard.

33. There has been no decision on the substantive issue in this appeal, the application for an OAS pension, as the SST-GD dismissed the appeal as abandoned.

34. The Respondent submits there was a breach of procedural fairness or natural justice under paragraph 58(1)(a) of the DESDA when the SST-GD found in its decision that the Appellant had abandoned her appeal for failure to appear at her hearing. Accordingly, the Respondent consents to the matter being referred back to the General Division for a hearing *de novo* under subsection 59(1) of the DESDA. The matter should be sent back to the SST-GD for a re-determination. It is submitted that this is the only appropriate remedy to this appeal on the basis for which leave to appeal was granted.

[22] Having reviewed the record and the submissions of the parties, I agree that that the GD failed to observe a principle of natural justice when it declared her appeal abandoned and closed her file. While the GD member and SST staff were unable to connect to the Appellant using the telephone number she had given them, the record suggests that her intention to pursue her appeal never flagged, even though technological and/or human lapses ultimately defeated the teleconference. The fact that the Appellant called the SST on September 8 (which, because of the time difference, would have been September 9—the date of the scheduled hearing in Canada) would appear to corroborate her claim that she was waiting at home for the telephone to ring. Contrary to the GD’s findings, the Appellant was not “unreachable,” and she made contact with the SST immediately following the scheduled hearing time. I see no evidence that she intended to abandon her appeal.

CONCLUSION

[23] For the reasons discussed above, the appeal succeeds on the ground that the GD failed to observe a principle of natural justice when, in the face of evidence that she had a continuing intention to pursue her claim for an OAS pension, it declared her appeal abandoned and closed her file, thereby denying her right to be heard.

[24] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD member.



Member, Appeal Division