Federal Court  Cour fédérale

Date: 20211217

Docket: T-17-21

Citation: 2021 FC 1436

Ottawa, Ontario, December 17, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALI AL-HALBOUNI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This file is in a state of near total disarray.

[2] The fault for that falls on both parties. Mr. Al-Halbouni, except for a brief period of time, has been acting on his own behalf. Self-represented parties often pose a challenge to the Court and the party opposite as they are unfamiliar with the Court's processes. The Attorney General also shoulders blame for the state of the file, but, unlike the Applicant, has been represented throughout by counsel.

[3] Counsel at the hearing appears to have been recently engaged to make oral submissions. The state of the record as initially filed is not her responsibility; however, it has not escaped the Court's attention that no effort was made to address the deficiencies in the record until they were pointed out by the Court at the hearing.

[4] The Court was required to spend considerable time trying to understand this file and the events that occurred.

Nature of the Application before the Court

[5] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. As discussed below, this application appears to be for judicial review of a decision dated October 28, 2020, refusing the Applicant's request to file medical documents [the Filing Decision]. However, the Respondent and, to some extent, the Applicant have made submissions regarding a decision of a member the Appeal Division of the Social Security Tribunal dated January 22, 2020, refusing leave to appeal a decision of the General Division [the Appeal Decision].

Issues with the Evidence before the Court

[6] It is important to first address some issues with the evidence in the Respondent's Record As a result of these issues, most of the documents relied upon in the Respondent's submissions are not properly in evidence before this Court.

[7] The Certified Tribunal Record provided by the Social Security Tribunal [the Tribunal] does not contain the majority of the documents that were before the Appeal Division. Several documents in the Certified Tribunal Record are emails indicating that documents have been placed in an internal shared drive. The actual documents uploaded to this drive are not included, but the Index of Materials lists these documents with the prefix GD and indicates the number of pages (e.g. GD4 is 199 pages and appears to be the Submissions of the Minster before the General Division).

[8] It appears that the Tribunal considered these documents to already be in the possession of the Applicant and so did not feel that they needed to be included pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106. The first page of the Certified Tribunal Record is a letter addressed to the Courts Administration Service and dated February 12, 2021, enclosing "(1) Index of Materials; (2) Federal Court Application" and stating:

> The attached Index of Materials identifies all the documents that were in possession of the Tribunal when the decision under review was rendered. A copy of the documents that were in the possession of the Tribunal member but were not shared with the parties during the appeal are being sent with the index of Materials (attached to this letter).
>
> Please note that the audio recording of the hearing held before the General Division was sent to the Applicant on February 12, 2021.

[9] There is an email in the Certified Tribunal Record dated January 23, 2020, addressed to the Applicant that shows as attachments two documents: "Application for Leave to Appeal – Refused.pdf" and "Decision.pdf". The attachments themselves are not included in the Certified Tribunal Record.

[10] The Certified Tribunal Record also contains a file review checklist, records of telephone calls with the Applicant, and administrative documents. The documents in the Certified Tribunal Record relate to the Leave Decision and not the Filing Decision.

[11] What appears to be the missing "GD" documents have been included as part of the Respondent's Record. Volume I of the Respondent's Record lists under Tab 1, 618 pages of documents described as "Affidavit of Annie Berthiaume sworn on March 1, 2021, Exhibits A and B." However, there is no actual affidavit of Annie Berthiaume produced. Rather, the documents commence at page 1 with a letter dated February 12, 2021, which is marked as Exhibit A to the affidavit of Annie Berthiaume. This letter is addressed to Sarah Webb, a paralegal at the Department of Justice, and is not the same as the February 12, 2021 letter at page 1 of the Certified Tribunal Record. The letter encloses "(1) Index of Materials; (2) Hearing Recording, (3) Federal Court Application" together with the following statement from the Registry Operations, Social Security Tribunal of Canada:

> The parties to this judicial review are responsible for providing to the Court the materials that they feel are important to the matter before the Court. The attached Index of Materials identifies all the documents that were in possession of the Tribunal when the decision under review was rendered. A copy of the documents that were in the possession of the Tribunal member but were not shared with the parties during the appeal are being sent with the index of Materials (attached to this letter). If you have misplaced any material, please contact the undersigned as soon as possible … and identify the material(s) that you require.

[12] Exhibit B is an internal Tribunal email dated January 23, 2020, indicating that two documents have been placed in an internal shared drive. The remaining documents in the Respondent's Record are not stamped as exhibits.

[13] The documents in the Respondent's Record, other than those that are included in the Certified Tribunal Record, are not in evidence. They are not included as part of a Certified Tribunal Record, nor are they attached as exhibits to an affidavit. As a result, only the Certified Tribunal Record and the documents in the Applicant's Record attached as Exhibits to his affidavit can be relied on in this matter.

The Decision(s) under Review

[14] The Applicant was injured playing soccer on July 31, 2010, and he claims that he has been unable to work since the injury. He made an application for Canada Pension Plan Disability Benefits soon thereafter.

[15] It is unnecessary to detail the rather tortuous route that application has taken in the decade since it was filed. What is relevant is that a decision appears to have been made by the Social Security Tribunal, Appeal Division, on January 22, 2020, refusing the Applicant's application for leave to appeal the decision of the General Division.

[16] As set out above, the Certified Tribunal Record contains an email dated January 23, 2020, addressed to the email address the Applicant provided on his application for judicial review. It reads as follows:

> The attachment(s) to this email are part of your Social Security Tribunal appeal. Open and read the attachment(s) as soon as you get them. <u>You must be able to read the documents and refer to their numbers during your hearing</u>.
>
> Your Tribunal file number is AD-20-9. Give us this number when you contact us.

[emphasis added]

The email lists two attachments: “Application for Leave to Appeal – Refused.pdf” and “Decision.pdf”. The attachments themselves are not included in the Certified Tribunal Record and it cannot be confirmed that these attachments are the same documents as were subsequently provided to the Applicant.

[17] There is no evidence in the Certified Tribunal Record that the Applicant ever received this email or accessed these attachments. The Applicant’s affidavit filed in support of this application suggests he was unaware of the Appeal Decision until December 7, 2020. He attests as follows:

> I, Ali Al-Halbourni, of the City of London in the County, of Middlesex AFFIRM THAT:
>
> 1. I am the applicant to the application for judicial review of the Social Security Tribunal Appeal Decision.
>
> 2. On October 4, 2020 I sent an email to the Social Security Tribunal Appeal division which enclosed a Medical report by Dr. Burke to add to my appeal file. (See Exhibit "A").
>
> 3. l did not receive any confirmation of receipt of the email.
>
> 4. On December 2, 2020, I learned during my telephone conversation with the CPP representative that the Medical Doctor's report by Dr. Burke was not added to the file and the file was closed.
>
> 5. On December 7, 2020, l spoke to a CPP representative on the phone and was told that the Social Security Tribunal Appeal division denied my leave to appeal by decision dated January 22, 2020. (See Exhibit "B)
>
> 6. On December 7, 2020, l received an email from Social Security Tribunal attaching a letter dated October 28, 2020 entitled Acknowledgement - Correspondence Post-Decision" with respect to my file being closed. (See Exhibit "C")

> 7. I make this Affidavit for the purpose of requesting this doctor report be added to my file.

[18] The Filing Decision, as indicated above, was sent to the applicant as an attachment entitled "Acknowledgment – Correspondence Post-Decision.pdf" to an email dated December 7, 2020. That letter reads as follows:

> This is to acknowledge your correspondence of October 23, 2020.
>
> The Tribunal member of the Appeal Division who decided your appeal issued a decision on October 23, 2020. As this decision is considered final, the appeal file has been closed.
>
> The document sent to the Social Security Tribunal of Canada on October 23, 2020 will not be considered or added to your file.
>
> If you disagree with this decision, you can ask the Federal Court to review it. Other parties can do the same. This is called judicial review.
>
> If you decide to ask the Court to review this decision, you need to know that there is a short deadline to apply.
>
> [emphasis added]

[19] This decision is unintelligible. It fails to meet the test of reasonableness established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The decision is unintelligible because (i) there was no correspondence from the Applicant on October 23, 2020, and (ii) there is no record of a decision on his appeal dated October 23, 2020. Rather, the Respondent asserts that the Appeal Decision was made January 22, 2020.

[20] If this is the decision under review, the application must be allowed.

[21] On January 8, 2021, counsel for the Respondent wrote to the Applicant. In this letter, counsel writes that the letter is "further to the above application for judicial review of the Social Security Tribunal Appeal Division letter you received on December 7, 2020 with respect to your file being closed (Appeal Division denied leave to appeal by decision dated January 22, 2020)." Therefore, it appears that the Respondent's original position may have been that the October 28 Letter, as communicated to the Applicant on December 7, 2020, is the decision under review. However, the Respondent's written submissions focus on the Leave Decision and not the Filing Decision.

[22] The October 28, 2020, letter incorrectly indicates that the Applicant's leave to appeal was denied on October 23, 2020, after the Applicant submitted the medical report. It would be reasonable on those facts for the Applicant to believe that the appeal was dismissed after he filed the medical report. This is especially so if, as appears to be the case, the Applicant never received the Appeal Decision in January 2020, but only by way of email sent October 19, 2020.

[23] Only a single order or decision is to be the subject of an application for judicial review; however, Rule 302 provides the Court with a discretion to consider more than a single decision. In my view, this is such a case and I will exercise my discretion to consider both decisions.

[24] It would not be prejudicial to the parties to consider this application as being a judicial review of both the Filing Decision and the Leave Decision. Both parties have made submissions on the Leave Decision and the Respondent appears to have equivocated as to whether it is that decision that is under review. In the unique circumstances here, fairness dictates that the Court

should proceed on the basis that the Applicant is seeking judicial review of both the Leave Decision and the Filing Decision.

Timeliness

[25] The Respondent submits that this Application should be dismissed due to delay. According to the Respondent, the Leave Decision was issued on January 22, 2020, and was communicated to the Applicant on January 23, 2020.

[26] The Respondent submits that the Applicant applied for judicial review after the 30-day deadline, and he has provided no explanation for the delay nor has he sought an extension of time.

[27] The Respondent submits that, in considering whether to extend time, the Court should consider whether there is some potential merit to the application, whether the Crown has been prejudiced by the delay, and whether the moving party has a reasonable explanation (citing *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*]).

[28] The Respondent submits that, for the reasons set out in its substantive argument, there is no merit to this Application because the matter before the Tribunal is *res judicata*. The Respondent submits that the Crown is prejudiced by the delay as it assumed that the matter had been decided in its favour. Finally, the Respondent submits that while the Applicant claims to have only been made aware of the Leave Decision in December 2020, he does not offer an

explanation as to how he was made aware nor why there was a delay in it coming to his attention.

[29] The Applicant makes no submissions on the delay and has not filed reply submissions on this point. In his affidavit, the Applicant indicates that he learned that his file was closed on December 2, 2020, and implies that he did not receive the Leave Decision until December 7, 2020.

[30] There is no evidence that the written Filing Decision was received prior to December 7, 2020. The application for judicial review was filed on January 6, 2021. There is no timing issue with a review of the Filing Decision.

[31] There is no evidence that the written Appeal Decision was actually communicated to the Applicant prior to the October 19, 2020, email. The Applicant appears to have waited some 11 weeks before asking for a review of the Appeal Decision. However, he attests that he only became aware that his appeal had been denied and the file was closed on December 7, 2020. If so, the review of that decision is also timely.

[32] In *Meeches v Assiniboine*, 2017 FCA 123 at para 40, the Federal Court of Appeal stated:

> This Court has previously ruled that the time period prescribed in subsection 18.1(2) of the *Federal Courts Act* begins to run the moment an applicant has knowledge of a final decision that he or she subsequently wishes to challenge (*Robertson v. Canada (Attorney General*), 2016 FCA 30, 480 N.R. 353 at paragraph 7; *Larkman* at paragraphs 63 to 68; *Zündel v. Canada (Human Rights Commission*), [2000] 4 F.C.R. 255, 2000 CanLII 17138 (FCA) at paragraph 17).

[33] Here, we have an email dated October 19, 2020, transmitting to the Applicant the January 2020 Appeal Decision as an attachment. On the other hand, the Applicant says that he was told of this final decision on December 7, 2020. There is no evidence that the Applicant opened the attachment, or what it was. Can the final decision be communicated if he is unaware of it? Arguably a recipient has an obligation to open the attachments to an email. Indeed, the email here clearly states "Open and read the attachment(s) as soon as you get them." However, the Applicant cannot be faulted for not realizing at the time that the attachment was the final Appeal Decision as the email also states: "You must be able to read the documents and refer to their numbers during your hearing." [emphasis added]. On its face, one could reasonably believe that the appeal is not over.

[34] There was no cross-examination of the Applicant on this central point and I am prepared to accept that, notwithstanding the email in October, the final decision was not communicated to him until December 7, 2020.

[35] Even if the application were not timely, I would have exercised my discretion to extend the time in these very unusual circumstances, even absent an explanation from the Applicant.

[36] In *Larkman* it was stated that the relevant questions to be considered are: (1) Did the moving party have a continuing intention to pursue the application? (2) Is there some potential merit to the application? (3) Has the Crown been prejudiced by the delay? (4) Does the moving party have a reasonable explanation for the delay? At para 62, citing *Grewal v Canada (Minister of Employment & Immigration),* [1985] 2 FC 263 (CA) the Court of Appeal notes:

> The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour…. The overriding consideration is that the interests of justice be served."

[37] In my opinion, given that he has been pursuing this claim for a decade, the Applicant had a continuing intention to pursue this Application.

[38] With respect to the underlying merits of this application, the Respondent's submissions rely extensively on documents that are not in evidence. Given the lack of evidence before this Court, I cannot find the Leave Decision to be reasonable, and therefore there is merit to this application.

[39] I agree that the Respondent has some prejudice, having assumed that the Leave Decision was final. However, I do not believe that this is a significant prejudice as compared with other cases, such as those in which the Crown has commenced the financing of some project in reliance of the decision under review. Here, the only thing that has been done by the Crown in reliance of the Leave Decision is not hearing his appeal and potentially not paying benefits to the Applicant if this appeal were to be successful.

[40] In my view, these factors weigh heavily in favour of extending the time, even in the absence of any explanation from the Applicant other than he did not know of this final decision until much later. Given the actions of the Respondent in this application, including the state of the record before the Court, the interests of justice demand that any required extension be granted.

Reasonableness of the Decisions under Review

[41] Given the minimal evidence before this Court, I cannot find the Leave Decision to be reasonable based on the record. The record before this Court does not even include the decision of the General Division that the Appeal Division was to consider on appeal. An appeal decision in which the decision-maker does not review the decision being appealed cannot possibly be justified, and is therefore unreasonable.

[42] As set out above, the Filing Decision is unintelligible and is therefore unreasonable.

Conclusion

[43] Both the Appeal and the Leave Decisions are set aside. The Appeal Decision is to be considered afresh by a different member and is to include a consideration and analysis of the medical documents from Dr. Brad Burke that were submitted in 2020.

[44] No costs are ordered.

JUDGMENT IN T-17-21

THIS COURT'S JUDGMENT is that this application is allowed, the Appeal and Filing Decisions are set aside, the application for leave to appeal the denial of CPP Disability Benefits is to be determined by a different member with consideration and analysis of the medical reports of Dr. Brad Burke, and no costs are ordered.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-17-21
STYLE OF CAUSE:	ALI AL-HALBOUNI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 15, 2021
JUDGMENT AND REASONS:	ZINN J.
DATED:	DECEMBER 17, 2021

APPEARANCES:

Ali Al-Halbouni	APPLICANT (ON HIS OWN BEHALF)
Suzette Bernard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice Canada ESDC Legal Services Gatineau, Quebec	FOR THE RESPONDENT