Citation: *RM v Minister of Employment and Social Development and RO*, 2021 SST 478

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	R. M.
Respondent:	Minister of Employment and Social Development
Added Party:	R. O.

Decision under appeal:	General Division decision dated April 12, 2021 (GP-20-1107)

Tribunal member:	Neil Nawaz
Decision date:	September 13, 2021
File number:	AD-21-270

Decision

[1] I am refusing the Applicant's requests for an extension of time and leave to appeal. I see no basis for this appeal to go forward.

Overview

[2] The Applicant and the Added Party were in a relationship from 2010 to 2012. When the relationship began, the Added Party already had a daughter, S., from a previous relationship. In January 2012, the Added Party had a second daughter. R. is the Applicant's biological child.

[3] The Applicant developed multiple sclerosis and was approved for Canada Pension Plan (CPP) disability benefits in July 2017. At the same time, he also began receiving the disabled contributor's child's benefit (DCCB) on behalf of R.

[4] In January 2020, the Added Party applied for the DCCB on behalf of S. and R. The Minister refused the application because it was already paying the benefit for R. It also said that S. was ineligible to receive the benefit because she was not the Applicant's natural child.

[5] The Added Party appealed the Minister's refusal to the Social Security Tribunal's General Division. She explained that both children had lived with her since the end of her relationship with the Applicant. She also said that S. was entitled to the benefit because the Added Party had adopted her "in fact."

[6] The General Division held a hearing by teleconference and, in a decision dated April 12, 2021, allowed the appeal in part. It agreed with the Added Party that she, and not the Applicant, had "custody and control" of the two girls. However, it disagreed that the Applicant had ever effectively adopted S. The General Division concluded that the Added Party was entitled to receive the DCCB on R.'s behalf, but not S.'s.

[7] On August 11, 2021, after the 90-day filing deadline, the Applicant requested leave, or permission, to appeal from the Appeal Division. He alleged that the General

Division made various errors when it decided that the Added Party was entitled to receive the DCCB on R.'s behalf.

[8] I have reviewed the file and decided that the Applicant would not have a reasonable chance of success on appeal. For that reason, I don't see any reason to extend the filing deadline in this case.

Issues

[9] I had to decide the following related questions:

Issue 1: Should the Applicant receive an extension of time in which to file his application for leave to appeal?

Issue 2: Does the Applicant's appeal have a reasonable chance of success?

Analysis

Issue 1: Should the Applicant receive an extension of time?

[10] An application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant.[1] The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[11] In this case, the General Division issued its decision on April 12, 2021. The following day, the Tribunal sent the decision to the Applicant using the email address that he had provided to the Tribunal and had previously used to communicate with it. The Appeal Division did not receive the Claimant's application for leave to appeal until August 11, 2021—a month after the filing deadline. Even allowing for the 10-day delivery period deemed under the *Social Security Tribunal Regulations*, the Claimant's application for leave to appeal was submitted three weeks late.

[1] *Department of Employment and Social Development Act* (DESDA), s 57(1)(b).

[12] In a case called *Gattellaro*,[2] the Federal Court set out four factors to consider when deciding whether to allow further time to appeal:

- whether there is a reasonable explanation for the delay;
- whether the claimant demonstrates a continuing intention to pursue the appeal;
- whether allowing the extension would cause prejudice to other parties; and
- whether the matter discloses an arguable case.

[13] The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.[3]

– The Applicant had a reasonable explanation for the delay

[14] The Applicant insists that he did not know about the General Division's decision until June 14, 2021, when he received a follow-up letter from the Minister informing him that his DCCB overpayment would be deducted from his disability pension over time.[4]

[15] In view of all circumstances, I am willing to accept this explanation. It is certainly possible for emails to be occasionally misaddressed or misdirected.

– The Applicant had a continuing intention to pursue the appeal

[16] The record shows that, once he learned of the General Division's decision, the Applicant promptly contacted the Tribunal and asked it for a copy. He then fairly quickly submitted an application requesting leave to appeal. Given his haste in attending to these matters, I am willing to assume that the Applicant never stopped intending to pursue his appeal

[2] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.
[3] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[4] See Applicant's submission dated August 16, 2021, AD01B.

– The other parties would not be prejudiced by an extension

[17] I find it unlikely that permitting the Claimant to proceed with his appeal at this late date would prejudice either the Added Party's or the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. In particular, don't believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

– The Applicant does not have an arguable case

[18] Claimants seeking an extension of time must show that they have at least an arguable case on appeal. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[5]

[19] For the reasons that follow, I find that the Applicant's appeal would not have a reasonable chance of success.

Issue 2: Do the Applicant's submissions raise an arguable case on appeal?

[20] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[6]

[21] I don't see an arguable case for any of the Applicant's reasons for appealing. Here is my explanation for coming to this conclusion.

---

[5] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[6] DESDA, s 58(1).

– The Minister's findings have no bearing on the General Division's

[22] The Applicant notes that, on two separate occasions, the Minister found that the Added Party was ineligible to receive the DCCB.

[23] I don't see an arguable case on this point.

[24] To succeed at the Appeal Division, an applicant must do more than simply disagree with the General Division's decision. An applicant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal.

[25] The Minister sided with the Applicant over the Added Party twice, but those decisions became irrelevant when the matter came into the General Division's hands. The General Division is empowered to take a completely fresh look at the evidence and make its own findings without regard for whatever the Minister may have decided earlier.

– The General Division did not misinterpret the law

[26] The Applicant alleges that the General Division made an error of law by basing its decision on the fact that he does not live with R. He says that disabled contributors who live apart from their children are not precluded from establishing that they have custody and control over them. The Applicant also claims that the law recognizes custody, "no matter how minimal."

[27] Again, I fail to see an arguable case here.

[28] The Applicant is correct that the law does prevent him from collecting the DCCB on R.'s behalf simply because they don't live under the same roof. But there are many other factors that determine whether a claimant has custody and control over their

children.[7] It was the General Division's job to consider those factors and decide whether the Applicant or the Added Party met the legal standard.

[29] The *Canada Pension Plan* say that the DCCB may be paid to the child of a disabled contributor.[8] Where the DCCB is payable to a child who is under eighteen years of age, payment is to be made to the person having custody and control of the child. The law states that, except where the child is living apart from him or her, the disabled contributor shall be presumed, in the absence of any evidence to the contrary, to be the person having custody and control of the child.

[30] In other words, the law presumes the Applicant, as a disabled contributor, to have custody and control over his child. But that presumption can be rebutted if there is enough evidence to the contrary.

[31] In this case, the General Division decided that there **was** enough evidence to rebut the presumption. It wasn't only that the Applicant and his daughter live several hundred kilometres apart (he in Timmins, she in Thunder Bay). The General Division also took into account the following facts:

- A family court order gave legal custody over R. solely to the Added Party and not the Applicant;[9]
- In his application for the DCCB, Applicant responded "No" when asked about whether the child named in the application was in his custody and control;[10]
- In a follow-up questionnaire, the Applicant reported that R. was in the Added Party's custody;[11] and
- The Added Party, not the Applicant, was responsible for R.'s day-to-day care, insuring that she had essentials such as food, clothing, and a place to live.

---

[7] *P.E. v MHRSD* (November 10, 2008), CP 25371 (PAB); *Bajwa v MHRD* (April 4, 2002), CP 14184 (PAB); *MHRD v Warren* (December 12, 2001), CP 14995 (PAB).
[8] *Canada Pension Plan*, ss 74–75.
[9] See family court order dated August 28, 2013, GD1-10.
[10] Application for benefits dated October 30, 2018, GD2-36.
[11] Questionnaire dated October 2, 2018, GD2-40.

[32] The Applicant insists that the law recognizes custody, "no matter how minimal." He is mistaken. As the General Division noted, the phrase, "no matter how minimal" reflects a Ministerial policy to pay the DCCB to a disabled contributor where he or she claims to share custody and control of the child, regardless of where the child resides.[12] The General Division rightly determined that this policy has no basis in the law and that, even if it did, there was no evidence on the record to show that the Applicant did, in fact, "share" custody and control of R.

– The Applicant misconstrues the nature and purpose of the DCCB

[33] The Applicant argues that he should continue to receive the DCCB, since it is intended to "assist with costs associated with providing for the care of the child of a disabled contributor." He notes that he pays regular child support and provides for her when she visits him. He claims that he pays for activities such as gymnastics and hockey camps and gifts such as a dirt bike, which he is teaching her to ride on visits.

[34] I can't see an arguable case here either.

[35] The Claimant's own submissions point to the flaw in his argument. It is admirable that he supports his daughter financially and accommodates her in regular visits, but those acts by themselves are not enough to receive the DCCB.

[36] The DCCB is meant to be paid to persons having custody and control over children with a disabled parent. But paying child support doesn't mean you have custody and control over those children. And hosting visits—even regular visits—from those children doesn't mean you have custody and control over them either. The General Division discussed these distinctions in its decision. It also concluded that, whatever the Applicant's undertakings on behalf of his daughter, they were outweighed by other factors—first and foremost the great distance between his regular home and hers. I see no reason to revisit the General Division's findings on this question.

[12] See General Division's discussion of this question in paras 38–42 of its decision.

– Financial hardship is not a valid consideration

[37] The Claimant says that it would be punitive to force him to pay back the more than $11,000 of the DCCB that he has already received. He suggests that the General Division acted unfairly by not recognizing the financial hardship that its decision will cause him.

[38] I don't see an arguable case for this submission.

[39] I sympathize with the Applicant. I believe him when he says that he went to some effort to confirm that he was entitled to the DCCB and had no interest in receiving it in error. However, that does not change the fact that he ultimately received benefits to which he was not entitled.

[40] The General Division was bound to follow the letter of the law, and so am I. The Tribunal is not a court but a statutory decision-maker, and it cannot simply order the Minister to waive its demand for repayment based on compassionate grounds.[13]

[41] The Applicant still has one avenue of recourse. If he believes that he has been the victim of erroneous advice or administrative error, he can ask the Minister to take remedial action and forgive him his debt.[14] However, the Applicant should be aware that this would be a discretionary matter—it is entirely up the Minister to decide whether such remedial action is warranted.

Conclusion

[42] Having weighed the relevant factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I found that the Applicant had a reasonable explanation for the delay in filing his request for leave to appeal, and I accepted that he had had a continuing intention to pursue an appeal. I also thought it unlikely that either the Minister's or the Added Party's interests would be prejudiced by extending time. However, I could find no arguable case on

---

[13] *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.
[14] The Minister's discretionary power to correct its mistakes is set out in s 66(4) of the *Canada Pension Plan*.

appeal, and it was this last factor that was decisive. I see no point in advancing this application to a full appeal that is doomed to fail.

[43] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing the Applicant an extension of time to appeal.

Member, Appeal Division