Citation: *Z. A. v. Minister of Employment and Social Development*, 2014 SSTAD 201

Appeal No: AD-14-179

BETWEEN:

Z. A.

Appellant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

DATE OF DECISION: August 15, 2014

DECISION

[1] An extension of time to apply for leave to appeal is refused.

[2] Leave to appeal to the Appeal Division of the Social Security Tribunal is refused.

INTRODUCTION

[3] On October 30, 2003, a Review Tribunal determined that a Canada Pension Plan disability pension was not payable. The Applicant filed an application for leave to appeal (the "Application") with the Appeal Division of the Tribunal on March 14, 2014.

ISSUE

[4] The Tribunal must decide whether to grant an extension of time to apply for leave to appeal.

[5] If an extension of time is granted, the Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) Act*, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[7] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division 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.

[8] The decision of the Review Tribunal is considered a decision of the General Division

[9] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[10] Section 57 of the DESD Act provides that the Appeal Division may extend the time within which an application for leave to appeal may be made, but in no case may it be more than one year after the day on which the decision was communicated to the Applicant.

SUBMISSIONS

[11] The Applicant argued that he should be granted an extension of time to apply for leave to appeal because:

a) Although he was advised of a right to appeal to the Pension Appeals Board when he received the Review Tribunal decision he did not comprehend this;

b) It was not until his long-term disability benefits through his employment ended that he was motivated to pursue the Application;

c) He could not retain representation until 2013; and

d) He pursued a second application for a Canada Pension Plan disability pension and sought assistance through other venues.

[12] The Applicant submitted the following to support his Application for leave to appeal:

a) The Tribunal has discretion to extend the time to file the Application;

b) The Application discloses an arguable case, based on new material facts and errors made in the Review Tribunal decision;

c) The Applicant had a continuing intention to pursue this appeal;

[13] The Respondent made no submissions.

ANALYSIS

Extension of Time

[14] Section 57 of the DESD Act is clear. In no case can the time for filing an Application be extended more than one year from the date the decision was communicated to the Applicant. The Applicant wrote that he received the Review Tribunal decision on October 31, 2003. He filed the Application with this Tribunal on March 14, 2014. This is clearly long after the time to do so had expired.

[15] Counsel for the Applicant argued that section 57 of the DESD Act could be interpreted to permit the Application to be made within one year of the Tribunal's coming into existence. While the *Jobs, Growth and Long Term Prosperity Act* contained transitional provisions that permitted some Applications to be filed more than one year after the Review Tribunal decision was communicated, they do not apply in this case. The Applicant did not file the Application until after the Tribunal came into existence.

[16] Counsel for the Applicant also argued that the Tribunal had discretion to further extend this time. The Tribunal is a statutory Tribunal. It has no discretionary powers. So, no matter how sympathetic I am to the Applicant's plight, I cannot grant an extension of time for more than one year after the decision was communicated to the Applicant, as requested in this case. Leave to appeal is refused on this basis.

Leave to Appeal

[17] If I am wrong on this I must assess the request to extend time for leave to appeal. The Tribunal is guided by decisions of the Federal Court in this regard. In *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883 this Court concluded that the following factors must be considered and weighed when deciding this issue:

a) A continuing intention to pursue the application;

b) The matter discloses an arguable case;

c) There is a reasonable explanation for the delay; and

d) There is no prejudice to the other party in allowing the extension.

[18] The weight to be given to each of these factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served – *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[19] The Federal Court of Appeal has also concluded that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[20] The Applicant has not persuaded me that he had a continuing intention to pursue this appeal. He acknowledged that he was advised of his right to appeal to the Pension Appeals Board in 2003. His counsel argued that he did not comprehend this. He did not argue, however, that the Applicant was not legally competent, or that he could not make decisions in the time between his receipt of the Review Tribunal decision and making the Application.

[21] In the Application, the Applicant relies on the facts that he was not requested to pursue this matter by his insurer, and that his income was the same whether he received the disability pension or not. This argument does not assist his claim that he intended to pursue this.

[22] Counsel for the Applicant also argued that he did not pursue this prior to 2013 because he did not have the funds to retain counsel do so. This is not a persuasive argument. Many claimants pursue appeals without representation, or with non-legal representatives. In fact, the Applicant proceeded in this way at the Review Tribunal hearing where his brother attended with him.

[23] I am satisfied that the Applicant wished to pursue this matter after his long term disability benefits ceased. This, however, is not sufficient to establish, on a balance of probabilities, that he had a continuing intention to pursue the appeal throughout the entire period of the delay.

[24] For the reasons set out above I am also not persuaded that the Applicant has a reasonable explanation for a delay of over ten years.

[25] Counsel for the Applicant argued that there would be no prejudice to the Respondent if this matter proceeded, and relied on the *Canada (Attorney General) v. Schneider*, 2008 FC 764 decision to support his argument that evidence of actual prejudice, and not just legal argument with respect to this must be established. There is no evidence of prejudice before me. The *Schneider* decision is distinguished on its facts from this case. In *Schneider*, the delay was approximately two years. In this case, the delay is over ten years. With such a long delay it is reasonable to imagine that there would be significant difficulties for the Respondent regarding retrieval of documents, finding witnesses, etc. I find that it would be very difficult to conclude that the Respondent would not be prejudiced if the matter proceeded after such a lengthy delay.

[26] The final issue raised by the Applicant is that he has put forward an arguable case on appeal. He argued that the Review Tribunal decision made errors of fact in its assessment of the evidence before them, and did not consider all of the facts that were presented. In *Oliveira v. Canada (Minister of Human Resources Development)*, 2003 FCA 213, the Federal Court of Appeal concluded that a tribunal need not make reference to all the oral and documentary evidence presented. It is presumed to have considered all of the evidence.

[27] Further, when determining whether to grant leave to appeal, the Tribunal should not retry the factual issues, but only determine if the outcome was acceptable on the facts and the law (*Gaudet v. Attorney General of Canada*) 2003 FCA 254. I am not persuaded that the factual conclusions reached in the Review Tribunal decision are not acceptable in this case.

[28] Counsel for the Applicant further submitted that the Review Tribunal erred by not adjourning the hearing so that more medical evidence could be proffered by the Applicant. This argument fails. There was nothing in the Review Tribunal decision to indicate that either party wished to adjourn the hearing for that purpose. The Review Tribunal cannot have erred by not granting an adjournment that was not requested. Further, counsel for the Applicant argued that the Review Tribunal misapplied the law by relying on the decision in *Minister of Human Resources v.Scott* 1998 LNCPEN 4 (CPAB). This decision considers an

applicant's expectation to return to work. The statement of the law in the Review Tribunal decision is acceptable. Therefore this argument also fails.

[29] For these reasons, I am not satisfied, on a balance of probabilities, that the Applicant has put forward an arguable case on appeal.

[30] The Applicant has not persuaded me that an extension of time should be granted when the above factors are considered alone or in concert with one another. The Applicant did not point to any other factors that should be considered in determining whether an extension of time should be granted. Therefore, the request for an extension of time for leave to appeal is refused.

[31] Finally, the Applicant sought to introduce new medical evidence to support his disability claim. Section 58 of the DESD Act sets out very narrow grounds of appeal. The provision of new evidence is not a ground of appeal under this Act. Therefore, this argument also does not have a reasonable chance of success on appeal.

CONCLUSION

[32] The Application is refused for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division