

Citation: *D. M. v. Minister of Employment and Social Development*, 2014 SSTAD 248

Appeal No: AD-14-282

BETWEEN:

D. M.

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: September 22, 2014

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On February 7, 2014, the General Division of the Social Security Tribunal (the “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 June 10, 2014.

ISSUE

[3] The Tribunal must decide whether to grant an extension of time to file the Application.

[4] The Tribunal must also decide whether to grant leave to appeal at the Appeal Division if the appeal has a reasonable chance of success.

THE LAW

[5] 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”.

[6] 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.

[7] 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”.

[8] 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

[9] The Applicant submitted that the Application was filed late because he required additional time to retain counsel to represent him.

[10] The Applicant’s grounds of appeal were set out as follows:

- a) Hernia device information was not considered;
- b) “Missing health records”;
- c) “Misinformation on file”;
- d) His family doctor was not waiting for a second opinion from a rheumatologist; and
- e) The Appellant listed additional documents that he would rely on although they were not attached to the Application.

[11] The Respondent made no submissions.

ANALYSIS

[12] First, I must assess the Applicant's request to extend time for leave to appeal. I am 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.

[2] 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).

[13] Furthermore, the Federal Court of Appeal has found 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.

[14] The Application was filed with the Tribunal approximately 30 days after the time to do so had expired. The Applicant wrote that the reason he filed the Application late was that he needed additional time to secure representation. He did not, however, state whether he had retained a representative or how much additional time was required for him to do so. I am persuaded that seeking representation is a reasonable explanation for the delay in this matter. Given the short period of delay I also accept that the Applicant had a continuing intention to pursue the matter.

[15] Also, in light of the short period of delay, it is hard to imagine that the Respondent would be prejudiced in this matter. It has made no submissions on this issue.

[16] The remaining issue, then, is whether the grounds of appeal disclose what may have a reasonable chance of success on appeal. Section 58 of the DESD Act sets out very narrow grounds of appeal that can be considered. If arguments do not fall within its parameters, they cannot succeed.

[17] The Applicant submitted in support of his request for leave to appeal that he needed a lawyer to convey his thoughts. While this may have assisted him at the General Division hearing, it is not a ground of appeal that falls within section 58 of the DESD Act. It does not demonstrate that the General division made an error of fact or in law, or that it breached any of the principles of natural justice. Therefore, it does not have a reasonable chance of success on appeal.

[18] The Applicant also argued that his family physician was not waiting for a second opinion from a rheumatologist. From this statement I gather that the Applicant is pointing to an error in fact made in the General Division decision. In order for this error to have a reasonable chance of success, however, it must be one that has been made in a perverse or capricious manner, or without regard to the material before it. I find that this error would not be significant. The Applicant did not suggest that this error was made in a perverse or capricious manner, or without regard to the material before the General Division. Therefore, this argument does not have a reasonable chance of success on appeal.

[19] Finally, the Applicant stated that information regarding a hernia device was not considered and “missing health records”. This same information is listed as being included with the Application although it was not. I gather from these statements that the Applicant wished to provide new evidence to support his claim on appeal. The provision of new evidence is not a ground of appeal under section 58 of the DESD Act, and so cannot have a reasonable chance of success on appeal.

[20] If, however, If the Applicant wished to file these reports in an effort to rescind or amend the decision of the General Division, he must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and he must also file an application to rescind or amend the decision with the General Division of the Tribunal. There are additional requirements that an Applicant must meet to succeed in an application

to rescind or amend a decision. Section 66 of the DESD Act also requires an applicant to demonstrate that the information is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

[21] For these reasons, I find that the Applicant has not put forward any argument that may have a reasonable chance of success on appeal. Although this is only one factor that is considered in granting an extension of time to file an Application, I place a great deal of weight on it. Although the Applicant may have had a continuing intention to apply for leave to appeal and a reasonable explanation for his delay, unless he has a reasonable chance of success on appeal, I am not satisfied that his time to do so should be extended.

[22] Even if I were to grant the Applicant additional time to file the Application, leave to appeal would be refused for the reasons set out above.

CONCLUSION

[23] The Application is therefore refused.

Valerie Hazlett Parker
Member, Appeal Division