Citation: *J. H. v. Minister of Employment and Social Development,* 2014 SSTAD 320

Appeal No. AD-13-883

BETWEEN:

J. H.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Extension of Time and Leave to Appeal Decisions

---

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: November 7, 2014

DECISION

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

BACKGROUND & HISTORY OF PROCEEDINGS

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on February 22, 2013. The Review Tribunal found that the Applicant was disabled for the purposes of the *Canada Pension Plan* disability pension "as of the date of [the] hearing" before it, well before her minimum qualifying period of December 31, 2013 (the "MQP"). The Review Tribunal determined that payment of disability benefits would commence May 2013.

[3] The Applicant filed an initial application requesting leave to appeal (the "Application") with the Tribunal on June 14, 2013. She filed a second application requesting leave to appeal on June 28, 2013 and a third application on August 7, 2014, the latter in response to a letter dated February 28, 2014 from the Tribunal, advising that her application was incomplete, as she had yet to provide the Tribunal with a copy of the decision of the Review Tribunal. All three applications were filed outside the 90-day deadline permitted under the *Department of Employment and Social Development Act* (DESDA).

[4] On September 5, 2014, the Tribunal wrote to the Applicant as follows:

> Pursuant to s.3(1)(b) of the *Social Security Tribunal Regulations*, the Social Security Tribunal of Canada has decided to reopen file AD-13- 883. Due to special circumstances occasioned by the delay in acknowledging the receipt of the application, the complete Application requesting Leave to Appeal was deemed to have been filed on June 14, 2013.
>
> However, since the decision of the Review Tribunal was communicated to you on February 22, 2013, it would appear that your application was filed late.
>
> A Tribunal Member will review the file to determine whether or not an extension of time should be allowed.

ISSUES

[5] Should the Appeal Division extend the time for filing of the Application?

[6] If so, does the appeal have a reasonable chance of success?

THE LAW

[7] According to subsection 57(2) of the DESDA, *"*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 appellant".

[8] According to subsections 56(1) and 58(3) of the DESDA, "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".

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

APPLICANT'S SUBMISSIONS

Late Filing of Application

[10] The Applicant is seeking to appeal the decision of the Review Tribunal which she received on or sometime after February 22, 2013.

[11] The Applicant used an older form in filing her Application for Leave to Appeal and Notice of Appeal on June 14, 2013, as the form referred to the Pension Appeals Board. The Applicant did not address the lateness in her filing, but she alluded to the fact that she had expected to receive "back pay".

[12] The Applicant again appears to have used an incorrect form in the second leave application she filed with the Appeal Division on June 28, 2013, as she used a form titled, "Applicant's Notice of Appeal – General Division". She confirmed that she had received

the reconsideration decision from the Department of Human Resources and Skills Development Canada on February 22, 2013. I can only assume that she is in fact referring to the decision of the Review Tribunal issued on the same date. The Applicant explained that she was late in filing the appeal, as she had expected to receive a cheque for a lump sum payment of disability benefits for the period from June 2010 to January 2013 at some indefinite point. She had yet to receive a cheque representing this lump sum payment, despite the passage of several months, so then proceeded with the appeal.

[13] The Applicant again appears to have used an incorrect form in the third leave application she filed with the Appeal Division on August 7, 2014. She confirmed that she had received the reconsideration decision from the Department of Human Resources and Skills Development Canada sometime in June 2014. I can only assume again that she must be referring to the decision of the Review Tribunal, and that she wrongly identified the date of the decision, as there was no reconsideration decision or other decisions of the Review Tribunal during this period. The Applicant was uncertain whether she was late in her application, but advised that she was "late receiving forms mail delayed". The Applicant did not provide a copy of the letter which she purported to receive in June 2014.

Leave Application

[14] The Applicant submits that she had been advised by "everyone" that she would receive "back pay" representing disability benefits from June 2010 -- when she purportedly applied for Canada Pension Plan disability benefits -- to May 2013.

[15] She advises that she and her grandson have experienced financial hardship and have been looking forward to receiving this "back pay" as it will be used towards things such as a wheelchair, which would make life easier for them.

RESPONDENT'S SUBMISSIONS

[16] The Respondent has not filed any written submissions.

ANALYSIS

Late Filing of Application

[17] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Court set out the four criteria which the Appeal Division should consider and weigh in determining whether to extend the time period beyond 90 days within which an applicant is required to file his or her application for leave to appeal, as follows:

1. A continuing intention to pursue the application or appeal,
2. The matter discloses an arguable case,
3. There is a reasonable explanation for the delay, and
4. There is no prejudice to the other party in allowing the extension.

[18] I am prepared to accept that there is no prejudice to the Respondent in allowing an extension of time for filing of the leave application. In *Leblanc v. Minister of Human Resources Development*, 2010 FC 641, the Court found that there was no prejudice with a delay of approximately 9 months and, that to find otherwise on the facts, fell "outside the range of possible acceptable outcomes and was unreasonable". The Court said,

> "The Board found that the Minister would be prejudiced in preparing her response to the appeal due to the passage of nine months. The Board stated that witnesses' memory would be diminished and that their power of recollection would decrease. The Board was also concerned that there be finality to proceedings under the *Canada Pension Plan.* I would note that the witnesses in this case will likely be the applicant and her medical witnesses. In my opinion, a nine month delay would not effect (*sic)* the applicant's memory with respect to her medical condition as I believe a person is quite capable of remembering her medical condition. As to the medical witnesses, they would have notes and reports on which they could rely. In my view, the Board's determination that there was prejudice to the Minister falls outside the range of possible acceptable outcomes and was unreasonable.
>
> As a result of my finding, the application for judicial review is allowed and the matter is referred back to a differently constituted panel or member of the Pension Appeals Board for redetermination."

[19] Here, we are dealing with a delay of little more than three months after the time limit for doing so had expired. For the reasons expressed in *Leblanc*, I find that there is no prejudice to the Respondent if an extension of time were to be allowed. While this aspect of the test for allowing an extension of time is met, I turn to consider the other three criteria.

[20] I am prepared to accept that there is a reasonable explanation for the delay. If the Applicant believed that she could expect to receive a cheque, it would not have been unreasonable for her to have waited several weeks, if not months, for it to arrive. This however undercuts any claim that she might have had a continuing intention to pursue the application or appeal. It is unlikely that the Applicant would have formed any intention to pursue the application or appeal, until she concluded that no lump sum payment was forthcoming. So, it cannot be said then that she had a continuing intention to pursue an application or appeal, from the time when she received the decision to when she filed the leave application. However, I am prepared to accept that had the Applicant been aware that the Review Tribunal was not going to order that she receive disability benefits from June 2010 to May 2013, that she would have formed this requisite intention otherwise.

[21] Irrespective of whether there was a continuing intention to pursue the application or appeal, that would not have concluded my consideration of the leave request. *Lavin v. Attorney General of Canada*, 2001 FC 1387 allows me to grant an extension of time even if one of the four factors set out in *Gattellaro* have not been satisfied. This leaves me to consider finally whether the matter discloses an arguable case. I will address this issue in the context of the leave application.

Leave Application – Is there an Arguable Case?

[22] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits of the decision of the Review Tribunal, some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[23] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[24] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to 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.

[25] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

[26] I am required to determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success, before leave can be granted. Here, the Applicant has not specified how the reasons she has cited fall into any of the grounds of appeal. She has not cited any errors of law which the Review Tribunal might have made, nor does she allege that the Review Tribunal based its decision on an erroneous finding of fact. There are no submissions either that the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

[27] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some bases for her submissions which fall into the enumerated grounds of appeal, without having the Appeal Division speculate as to what they might be. The Applications are deficient in this regard.

However, that does not conclude the matter, as I may find that the Review Tribunal might have erred in law, whether or not the error appears on the face of the record.

[28] A review of the hearing file and the decision of the Review Tribunal indicates that the Applicant`s application for a Canada Pension Plan disability pension was date stamped received by the Respondent on June 10, 2011, rather than in June 2010, as the Applicant mistakenly believes.

[29] The Review Tribunal found the Applicant to be disabled "as of the date of [the] hearing" before it, on January 9, 2013. The Review Tribunal concluded and wrote that,

> [28] Under section 69 of the CPP legislation the disability payment begins four months after the date of disability. Four months after January 2013 is May 2013 which is the date from which [the Applicant] will start receiving payments.

[30] The Review Tribunal correctly stated the relevant provisions of the *Canada Pension Plan*, and properly calculated when disability payments ought to commence. I can see no error in law. There is no legal basis or other authority which entitles an applicant to receive disability benefits prior to being found disabled, as defined by the *Canada Pension Plan.*

[31] If the Applicant expects or wishes to have disability benefits commence in either June 2010 or June 2011, not only is she required to have filed an application for disability benefits within fifteen months of the onset of her disability (due to the deeming provisions under paragraph 42(2)(b) of the *Canada Pension Plan*), but she is also required to be found disabled by those earlier dates. Here, the Applicant had filed an application in June 2011, but the Review Tribunal found that the Applicant had a severe disability "as of the date of [the] hearing". Therefore, the Applicant could not have been entitled to disability benefits at any time prior to January 2013.

[32] The fact that the Applicant and her family have experienced financial hardship is of no relevance to a leave application, as financial hardship does not address any of the enumerated grounds of appeal and does not point to any errors or failings on the part of the Review Tribunal. I am unable to consider any financial hardship experienced by the

Applicant and her family, given the narrow constraints and requirements of subsection 58(1) of the DESDA.

[33] As the Applicant has not identified any grounds of appeal, nor am I able to find any potential errors in law, I am unable to find that the appeal has a reasonable chance of success.

CONCLUSION

[34] In summary, I find that the Applicant has not met one, if not two, of the four criteria in the test as to whether or not to extend the time for filing an application requesting leave. While I might have been prepared to overlook the fact that the Applicant may not have had a continuing intention to pursue an application or appeal, the fact that she lacks an arguable case or that there is no reasonable chance of success on appeal, leaves me to conclude that I ought not to exercise my discretion to extend the time for filing. The request to extend the time for filing is refused, as is the Application requesting leave to appeal.

Janet Lew
Member, Appeal Division