Citation: *A. W. v. Minister of Employment and Social Development*, 2014 SSTAD 324

Appeal No: AD-14-264

BETWEEN:

A. W.

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: November 10, 2014

DECISION

[1] The Tribunal grants an extension of time to file the application for leave to appeal.

[2] The Tribunal denies leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[3] On March 10, 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 incomplete application for leave to appeal (the Application) with the Appeal Division of the Tribunal on June 2, 2014. A complete Application was filed with the Tribunal on June 24, 2014 which was after the time to do so had expired. On September 22, 2014 the Appellant filed a letter requesting an extension of time to file the Application.

ISSUE

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

[5] The Tribunal must also decide 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] 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".

[9] 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

[10] The Applicant submitted in support of his request for an extension of time to file the Application that he filed an Application before the time to do so expired, and was not advised that the Application was incomplete until after the time to file it had expired. This demonstrated his continued intention to file the Application. He also submitted that he could find no evidence of any prejudice to any party as a result of his delay.

[11] The Applicant submitted in support of his Application for leave to appeal that the General Division did not consider all of the evidence that was before it, and that his disability was severe and prolonged.

[12] The Respondent made no submissions.

ANALYSIS

[13] 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.

[14] 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).

[15] 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, some arguable ground upon which the proposed appeal might succeed is needed in order for leave to be granted: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[16] 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.

[17] In the circumstances of this case I am satisfied that the Appellant should be granted an extension of time to file the Application. The fact that an incomplete Application was filed with the Tribunal within the time permitted, and a complete Application was filed within fourteen days of the time for filing having expired, I am satisfied that he had a continuing intention to pursue the appeal.

[18] Also, given the short time that the Application was late, I am satisfied that there would be no prejudice to any party as a result of this.

[19] The Applicant explained the delay by writing on September 22, 2014 that the Tribunal did not notify him that the Application was late until after the deadline to file it had expired. I do not find this to be a satisfactory explanation. This Tribunal has no responsibility to advise parties of any legal rights or remedies that they may wish to pursue. It is incumbent on a party to learn of his rights and determine whether to pursue them.

[20] Despite this, I am prepared to grant the Appellant an extension of time to file the Application.

[21] I am not satisfied, however, that the Appellant has put forward any ground of appeal that has a reasonable chance of success on appeal. In the completed Application, the Appellant set out his ground of appeal simply that the General Division did not consider all of the material before it. He did not provide any examples of this, or elaborate further on this argument.

[22] In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 the Federal Court of Appeal stated clearly that the Review Tribunal decision need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence. Hence, without some further information that identifies that the General Division did not consider some material evidence, I am unable to conclude, on a balance of probabilities, that it did not properly consider the evidence that was available at the hearing.

CONCLUSION

[23] The Application is therefore refused.

Valerie Hazlett Parker
Member, Appeal Division