Citation: *S. A. v. Minister of Employment and Social Development*, 2015 SSTAD 61

Appeal No. AD-14-592

BETWEEN:

S. A.

Applicant

and

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

Respondent

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

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: January 14, 2015

INTRODUCTION

[1] This is (1) an application to extend the time for filing of an application requesting leave to appeal and (2) an application for leave to appeal the amended decision of the General Division dated June 6, 2014.

[2] The Applicant filed the leave application (the "Leave Application") with the Social Security Tribunal on November 22, 2014, beyond the 90-day deadline (from June 17, 2014), permitted under the *Department of Employment and Social Development Act* (DESDA). The Applicant seeks leave from the decision in which the General Division determined that his retirement pension could not be cancelled in favour of a Canada Pension Plan disability pension, as it found that his disability was not "severe" prior to the month in which the retirement pension became payable.

[3] To succeed, the Applicant must persuade me that I ought to exercise my discretion and extend the time for filing of the Leave Application and secondly, must also show that the appeal has a reasonable chance of success.

ISSUES

[4] The issues before me are as follows:

1. Should the Appeal Division extend the time for filing of the Application?
2. If the Appeal Division extends the time for filing of the Application, has the Applicant identified any grounds of appeal under subsection 58(1) of the DESDA*?*
3. If the Applicant has identified any grounds of appeal, is there a reasonable chance of success on any of the grounds?

APPLICANT'S SUBMISSIONS

Late Filing of Application

[5] The Applicant explains that his Application is late as he had sent supporting documentation (i.e. his letter dated June 23, 2014) to the "wrong department" -- to the "person who signed the decision letter" -- rather than to the Appeal Division.

Leave Application

[6] The Applicant provided additional information relating primarily to his past and current medical history. The Applicant also raised a number of issues, framed as questions, which I understand could be construed as the bases for the Leave Application:

a) heart attacks can be silent killers;

b) his symptoms are severe and he may well experience another heart attack;

c) the General Division based its decision on various erroneous findings of fact, and in particular, that:

(i) his cardiologist feared a return to work due to an environment full of fumes. The Applicant states that the General Division failed to mention that his cardiologist strongly recommended that he remain on medication because of his coronary artery disease;

(ii) he is capable of walking. He states that while he is capable of walking, he does this only on his doctor's recommendations;

(iii) if his blood pressure changes, he should see some other doctor. He states that the only recommendation he has received is that he attend at St. Paul's Hospital;

(iv) he fears returning to his previous employment due to environmental factors. The Applicant states that he does not fear nor is in stress over his previous employment; and

(v) he has allergic rhinitis. The Applicant questions this finding.

d) he did not realize any income between September 22, 2011 and October 1, 2013, and as a consequence, had to rely on his RRSPs to survive.

[7] The Applicant enclosed a medical report dated February 21, 2013 from his neurologist, as well as documentation showing that, but for his health, he wanted to return to work. The Applicant also enclosed a letter dated March 20, 2014 from his previous employer, confirming that he had been employed from July 1992 up to March 2014. The employer confirmed that it had terminated the Applicant's employment at that time, as it had closed its plant.

RESPONDENT'S SUBMISSIONS

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

ANALYSIS

Late Filing of Application

[9] Subsection 57(2) of the DESDA stipulates that "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".

[10] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Court set out 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 application for leave to appeal. There should be the following:

1. A continuing intention to pursue the application or appeal,
2. A reasonable explanation for the delay,
3. No prejudice to the other party in allowing the extension and
4. Disclosure of an arguable case.

a. Was there a Continuing Intention to Pursue an Appeal?

[11] On the face of it, the Applicant appears to have had a continuing intention to pursue an appeal, as he suggests that he filed a leave application and simply sent it to the "wrong department". His letter of June 23, 2014 is addressed to the General Division of the Social Security Tribunal, rather than to the Appeal Division.

[12] However, the Leave Application is not on the application form provided by the Social Security Tribunal. While that factor alone is not fatal, I note that the Applicant subsequently used the application form in filing of the Leave Application on November 22, 2014. The Applicant's letter of June 23, 2014 therefore bears greater scrutiny, to shed some light on what his intentions may have been at that time. The Applicant's letter of June 23, 2014 makes no reference to nor evidences any specific intention by him to appeal the amended decision of the General Division. Nowhere does the Applicant explicitly identify in his letter any errors or failings which the General Division might have made. Although I have earlier indicated that the Applicant's questions could be construed as the bases for his Leave Application, his list of questions is prefaced by the words, "My questions to you", as opposed to words which might otherwise have suggested an appeal was being pursued. The Applicant also wrote in his letter,

> "I received the amended decision letter regarding my application for CPP disability pension. I respect the law but would like to ask a few questions and correct the situation in which I am in now.
>
> . . .
>
> . . . Please do not find this letter criticizing the amended decision. My wish is to get some employment to my ability.

[13] The Applicant concluded by thanking the Social Security for "looking into [his] case once again". Neither the letter of June 23, 2014 nor any of the accompanying enclosures to the letter indicate that the Applicant was seeking an appeal of the amended decision of the General Division. The letter and enclosures suggest that, at the time and at most, the Applicant was seeking a reassessment of his claim, which is an entirely distinct matter from an appeal of a decision. However, that perhaps may be taking too narrow a

view. Although the Applicant describes his letter as "supporting documents", clearly they form the basis of his appeal, as he does not set out any reasons for leave in the application filed on November 22, 2014 and relies exclusively on his letter of June 23, 2014, with enclosures. Had the Applicant properly delivered his letter of June 23, 2014 to the Appeal Division of the Social Security Tribunal, it likely would have been accepted as a leave application. I find some support for this in the fact that the letter ultimately was delivered to and date-stamped by the Social Security Tribunal on September 3, 2014. The Applicant therefore has persuaded me that he had a continuing intention to pursue an appeal.

b. Was there a Reasonable Explanation for the Delay?

[14] Given that I have accepted that the letter dated June 23, 2014 was intended to have served as the leave application, and the Applicant had delivered the letter to the Burnaby, BC Service Canada Centre on June 27, 2014 (albeit to the wrong entity), I accept that the Applicant's explanation for the delay is reasonable.

c. Is there any Prejudice to the Other Party in Allowing an Extension?

[15] The delay involved is approximately two months, calculated from the 90-day expiry date in June 2014 to when the Applicant filed his Leave Application in November 2014. In *Leblanc v. Minister of Human Resources Development*, 2010 FC 641, the Court found that there was no prejudice with a delay of approximately nine months and, that to find otherwise on the facts, fell "outside the range of possible acceptable outcomes and was unreasonable". The Court said,

> "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.

[16] 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.

d. Does the Matter Disclose an Arguable Case?

[17] I will address the issue of whether the matter discloses an arguable case in the context of the Leave Application.

[18] Irrespective of whether the matter discloses an arguable case, *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. Given that the Applicant has satisfied me that he has met three of the factors, I am prepared to grant an extension of time for the Leave Application filed in November 2014. Even had I not been prepared to grant an extension, I might have been prepared also to treat the June 2014 letter filed with the Burnaby, BC Service Canada office as a leave application.

Leave Application

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

[20] 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".

[21] 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 required for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). 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.

[22] 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.

[23] The Applicant is required to satisfy me that the reasons he seeks an appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted. The Applicant submits that the General Division based its decision on erroneous findings of fact, without regards for the material before it.

[24] The Applicant submits that heart attacks can be silent killers, his symptoms are severe, and he could experience another heart attack. He further submits that he has suffered financial consequences and had to rely on RRSPs for survival. These considerations do not fall within nor address any of the enumerated grounds of appeal and do not point to any errors or failings on the part of the General Division. I am unable to consider these three particular issues, given the narrow constraints and requirements of subsection 58(1) of the DESDA.

Alleged Erroneous Findings of Fact

[25] For the purposes of this Leave Application, I do not require that there be an actual demonstrated error on the part of the General Division, but in assessing this ground of appeal raised by the Applicant, I need to satisfy myself that the General Division made the findings which the Applicant submits the General Division made. The fact that an alleged erroneous finding of fact may appear in the Evidence section of the amended decision does not qualify as a finding of fact, as it is simply evidence.

[26] The Applicant submits that the General Division found that his cardiologist feared his return to work due to the work environment, while failing to mention that the cardiologist recommended that he remain on medication due to coronary artery disease. I could find no reference to this in the Analysis of the amended decision of the General

Division and it does not appear to have been the basis upon which the General Division made its decision. Hence, it cannot be said that the General Division made an erroneous finding of fact on this point.

[27] There is no requirement that the General Division refer in its reasons to each and every piece of evidence before it, as it is presumed to have considered all of the evidence: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. In any event, the fact that the General Division may not have mentioned that the Applicant will remain on medication is not determinative of one of the final issues as to whether the Applicant's disability is severe.

[28] The Applicant submits that the General Division found that he is capable of walking. The Applicant readily concedes that he walks. He does so based on his doctor's recommendations. Hence, it cannot be said that the General Division made an erroneous finding of fact in stating that he is capable of walking.

[29] The Applicant submits that the General Division found that if his blood pressure readings change, he should see some other doctor, when the only recommendation is that he attend at St. Paul's Hospital. The General Division wrote at paragraph 17 in its Evidence section that, "he might have to see someone again". This alleged erroneous finding of fact does not form part of the Analysis section of the amended decision and does not appear to have been the basis upon which the General Division made its decision. Hence, it cannot be said that the General Division made an erroneous finding of fact in stating that he should see some other doctor if his blood pressure readings change.

[30] The Applicant submits that the General Division found that he fears returning to his previous employment due to environmental factors. In fact, at paragraph 28 of its amended decision, the General Division wrote,

> "The [Applicant] testified today that he has not looked for other work because he is still fearful of having another heart attack. The Appellant testified that his biggest fear is another plugged coronary artery and another heart attack however he is hoping that his medication keeps his arteries clear."

[31] Hence, it cannot be said that the General Division made an erroneous finding of fact that the Applicant fears returning to work due to environmental factors.

[32] The Applicant submits that the General Division found that he has allergic rhinitis. This alleged erroneous finding of fact does not form part of the Analysis section of the amended decision and does not appear to have been the basis upon which the General Division made its decision. Hence, it cannot be said that the General Division made an erroneous finding of fact in stating that he has rhinitis. In any event, I note from a review of the file before the General Division that his cardiologist wrote in a consultation report dated January 9, 2012 (at page GT1-78) that the Applicant "is known to have allergic rhinitis". A similar reference is made by the cardiologist in a separate report dated March 13, 2012 (at page GT1-80). His otolaryngologist wrote that the Applicant has "likely allergic rhinitis" (at page GT1-46).

[33] The alleged erroneous findings of fact do not form part of the Analysis section of the amended and do not appear to have been the basis upon which the General Division made its decision. The Applicant has not identified any erroneous findings of fact made by the General Division and hence, has not satisfied me that he has raised an arguable ground or that there is a reasonable chance of success.

New Facts

[34] The Applicant has provided additional records, including a report from his neurologist and documentation relating to his past employment, which he states support his claim for disability benefits. The General Division did not have these records before it. The Applicant has not indicated how the proposed additional records might fall into or relate to one of the enumerated grounds of appeal.

[35] For the purposes of a leave application, I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. The subsection does not permit me to undertake a reassessment of the evidence. As the Applicant has not identified any grounds in relation to these additional records, he has not satisfied me that there is a reasonable chance of success in relation to these additional records.

[36] If the Applicant has filed the additional records in an effort to rescind or amend the decision of the General Division, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements that must be met to succeed in an application for rescinding or amending a decision. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party.

[37] There are other requirements too, if the Applicant proposes to introduce and rely upon these additional records. Paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new fact 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.

[38] In any event, it strikes me that the records which the Applicant proposes to introduce and rely upon likely would not constitute new material facts under section 66 of the DESDA.

[39] In short, there are no grounds upon which I can consider any additional medical records for the purposes of a leave application or appeal, notwithstanding how supportive the Applicant may consider them to be.

CONCLUSION

[40] While I am prepared to extend the time for filing of the leave Application, the Applicant has not satisfied me that he has raised an arguable ground or that there is a reasonable chance of success on what I understand to be his grounds of appeal, and as such, the leave Application is refused.

Janet Lew
Member, Appeal Division