Citation: *L. D. v. Minister of Employment and Social Development,* 2015 SSTAD 318

Appeal No. AD-13-683

BETWEEN:

L. D.

Applicant

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: Hazelyn Ross

DATE OF DECISION: March 9, 2015

DECISION

[1] The Social Security Tribunal, (the Tribunal), grants Leave to extend the time for filing an Application for Leave to Appeal, however, the Tribunal refuses Leave to Appeal.

BACKGROUND

[2] On April 08, 2013, a Review Tribunal issued its decision to deny the Applicant a disability pension under the Canada Pension Plan, (CPP). While it is not clear on which date the Applicant actually received the decision, the Tribunal received her Application requesting Leave to Appeal (the Application) on September 09, 2013. Thus, the Application is more than 30 days late.

[3] The Applicant is seeking leave to file a late Application. She also seeks Leave to Appeal the Review Tribunal decision. Her Minimum Qualifying Period, (MQP), date is December 31, 2015.

ISSUE

[4] Two issues are before the Tribunal.

1. Should the Tribunal extend the time for making the Application?

2. Provided that the Tribunal does extend the time for making the Application, does the Appeal have a reasonable chance of success?

The Application to Extend Time

Should the Tribunal Extend the Time for Making the Application?

[5] The Review Tribunal heard the appeal on February 13, 2013, and issued the decision on April 08, 2013. The Applicant had until on or about July 18, 2013 to submit her request for Leave to Appeal the decision. It would be almost 60 days after the deadline that the Tribunal would receive the Application. In a letter, dated August 14, 2013, the Applicant states that she would like to appeal the Review Tribunal decision. She also set out the reasons for the late

Application and indicated that she would be sending additional information that she would like added to her claim.

[6] In her letter the Applicant explains that she missed the deadline for filing the Application because of her personal situation at the time she received the decision. She states that not only was she suffering from psychological stressors, she was also in a precarious housing situation.

[7] The Applicant's psychiatrist, Dr. Cornelia Wieman, Staff Psychiatrist, of the Aboriginal Services Unit of the Centre for Addiction and Mental Health, Toronto has written in support of her claims. Dr. Wieman writes that between April 2013 and August 2013, the Applicant was "experiencing a great deal of anxiety and depression related to severe psychosocial stressors in her life at the time. She was in a very precarious housing situation and was only able to procure stable housing in July 2013."[1]

[8] The Respondent was asked to make submissions concerning the Application to extend the time for filing the Application. In his submission, Counsel for the Respondent argued that the Tribunal did not have jurisdiction to hear the Application because as the Applicant did not use the required form to make the application, there is not a valid and subsisting Application before the Tribunal. Counsel also submitted that the Application was statute barred for being filed more than one year after the date on which the decision was communicated to the Applicant.

[9] The *Department of Employment and Social Development* (DESD) *Act* ss. 57(1) prescribes that "an application for leave must be made to the Appeal Division in the prescribed form and manner." S. 40 of the *Social Security Tribunal Regulations*, (the Regulations)[2] mandate that the application must be in the form set out by the Tribunal on its website. The Applicant did not use the prescribed form. Her application is made by way of a letter to the Tribunal, supported by Dr. Wieman's aforementioned letter and medical materials. The Tribunal received these materials on October 12, 2013.

[10] Thus, in addition to the issues set out earlier, the Tribunal must decide two preliminary issues. First, the Tribunal must decide whether there is a proper application for leave to appeal

[1] Letter of Cornelia Wieman, M.D., FRCPC, Staff Psychiatrist, Aboriginal Services Unit, Centre for Addiction and Mental Health dated September 12, 2013.
[2] SOR/2013-60, effective April 1, 2013, as amended by S.C. 2013, c. 40, s. 236.

before it. In the event that the Tribunal decides that the Application for leave is properly before it, the Tribunal must go on to decide whether the Application is statute-barred for being filed out of time.

Is the Application for Leave properly before the Tribunal?

[11] There is no question that the Application fails to conform to the prescribed form, thus the Application is clearly not properly before the Tribunal. However, the Tribunal is not persuaded that this should automatically end the matter. Paragraph 3(1)(b) of the Regulations provides that the Tribunal may, "in special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision."

[12] In the Tribunal's view, special circumstances are present in the instant case. First, the Applicant has documented mental health difficulties that impact her functioning. In addition, the Applicant is self-represented. As well, the materials include many of the items required to be included on the Tribunal's form such as the Tribunal decision number and the Applicant's contact information. The Applicant also attached a copy of the Review Tribunal decision she was appealing. Accordingly, the Tribunal would vary the provision of s. 40 of the Regulations to permit the Applicant to file her Application without using the form set out by the Tribunal on its website.

[13] Counsel for the Respondent has submitted that in the event the Tribunal determines that it has jurisdiction, it should require the Applicant to file a new Application that accords with the requirements as to form of and manner of Application set out in the DESD and the Regulations.

[14] The Tribunal has considered this submission. However, given that the time limit for making the Application has already expired and also given that the time permitted for extending the time for making the Application has also expired, the Tribunal is not prepared to make such a ruling as it would likely render the Application statute barred. Noting that the letter, and other information provided by the Applicant, contain sufficient information to allow the Tribunal and the Respondent to discern the basis of the Application the Tribunal is prepared to apply the special circumstances provision and to accept Dr. Wieman's letter, together with the

Applicant's letter in which she indicates her continuing desire to appeal, as the Application. The Tribunal is of the view that this course best serves the interest of fairness.

Is the Application statute barred?

[15] The Respondent submits that the Application is statute barred because it was filed more than one year after the date the decision was communicated to the Applicant. The Applicant's letter is dated August 14, 2013; Dr. Wieman's letter is dated September 12, 2013 and the Tribunal date stamped these documents as being received on September 12, 2013. Accordingly, the documents were filed within one year of the date the Review Tribunal decision was issued and there is no question of their being caught by the operation of DESD ss. 57(2).

Is it appropriate to extend the time for filing the Application?

[16] The Applicant acknowledged that the Application is late. She made a request for the Tribunal to extend the time for making the Application. The Tribunal must decide whether it is appropriate to extend the time for making the Application. In *Gattelaro,*[3] the Federal Court stated that in exercising the authority to extend the time limit for leave to appeal, a Tribunal Member must consider the following criteria:

- Whether there was a continuing intention to pursue the application or appeal;
- Whether the matter discloses an arguable case;
- There is a reasonable explanation for the delay; and
- Whether there is prejudice to the other party in allowing the extension.

[17] The Tribunal has considered the reasons advanced for the delay in the context of the *Gattelaro* factors. Leaving aside for the moment whether or not the matter discloses an arguable case, based on her submissions, the Tribunal is of the view that the Applicant has demonstrated a continuing intention to pursue the Appeal. The Tribunal is also satisfied that in the circumstances of her case, the Applicant has provided a reasonable explanation for the delay. As well, the Tribunal finds that the Respondent would not be unduly prejudiced if it were to extend the time for filing the Application as the Respondent, necessarily, would not have

[3] *Canada (Minister of Human Resources Development) v. Gattelaro,* 2005 FC 833.

taken any steps in this matter, pending a decision on whether leave is granted or refused. For these reasons the Tribunal would extend the time for filing the Application.

Is there an arguable case?

[18] On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower, hurdle than that which must be met on the hearing of the appeal on the merits. However, to be successful, the Applicant must make out some arguable case[4] or show some arguable ground upon which the proposed appeal might succeed. While it is not for the Tribunal to assess the merits of an Application when considering whether or not to grant Leave to Appeal, the Tribunal must look to the issues raised by the Applicant in his or her Leave Application to decide whether or not he or she has raised an arguable case.

THE LAW

[19] Ss. 56(1), 58(1), 58(2) and 58(3) of the DESD Act, are the applicable statutory provisions that govern the grant of Leave. Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that the Appeal Division must either "grant or refuse leave to appeal." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[20] 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.

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[4] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[21] 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".

ANALYSIS

[22] In order to grant leave to appeal, the Tribunal is required to be satisfied that the appeal has a reasonable chance of success. This means that the Tribunal must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal. Only then can the Tribunal assess the chance of success of the appeal.

[23] The Tribunal is not satisfied that the appeal has a reasonable chance of success. While the Applicant disagrees with the Review Tribunal decision she has not pointed to any error of law; fact; or mixed law or fact committed by the Review Tribunal. Neither has the Applicant pointed to any failure to observe a principle of natural justice on the part of the Review Tribunal, nor has the Applicant alleged that the Review Tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

[24] Additionally, the Tribunal has examined the Review Tribunal decision for errors that do not appear on the face of the record and is unable to pinpoint any. In making its decision the Review Tribunal considered the Applicant's personal circumstances, including her educational level, employment history and employability. While acknowledging that the Applicant suffers pain, the Review Tribunal found she had retained work capacity, transferable skills and that she had failed to establish that her pain prevented her from pursuing regularly any substantially gainful occupation. The Applicant's mental health difficulties and the possibility of a return to work if she were to address these issues[5] also formed part of the Review Tribunal analysis.

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[5] Review Tribunal decision, paras. 49-50
[49l The Review Tribunal determined that it is reasonable to expect that once Ms. L.D. undergoes the recommended psychological and physiotherapy treatment, she will see an improvement in her symptoms allowing for a return to some type of work.
[50] The Review Tribunal has carefully reviewed the medical reports and listened attentively to the evidence of the Appellant and her witness. There is insufficient evidence to find on a balance of probabilities that the Appellant has a severe and prolonged disability at the date of this hearing, within the meaning of the CPP.

[25] In her present Application, the Applicant relies heavily on evidence of her mental health disability. However, this evidence is new evidence, in that Dr. Wieman's letter was created after the Review Tribunal hearing and for that reason was not discoverable with reasonable, or any diligence, prior to the Review Tribunal hearing. It shows that the Applicant consulted Dr. Wieman for the first time in June 2013. This is both after the hearing and the issuance of the Review Tribunal decision. This type of information would be more pertinent to an application to rescind or amend the Review Tribunal decision on the basis of "new facts", which this is not. In any event a "new facts" application is likely statute barred.

[26] In light of these factors, the Tribunal is not satisfied that on the facts that were before the Review Tribunal, the appeal would have a reasonable chance of success.

CONCLUSION

[27] The Application to extend the time for making an Application for Leave to Appeal is granted.

[28] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division