Citation: *F. D. v. Minister of Employment and Social Development*, 2015 SSTAD 347

Appeal No. AD-15-65

BETWEEN:

F. D.

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: March 12, 2015

DECISION

[1] Time to file the Application Requesting Leave to Appeal is not extended.

[2] Leave to appeal to the Appeal Division of the Social Security Tribunal is refused.

INTRODUCTION

[3] The Appellant applied for a *Canada Pension Plan* disability pension and claimed that he was disabled as a result of a workplace injury and diabetic neuropathy. The Respondent denied his claim initially and after reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals. Pursuant to the *Jobs, Growth and Long-term Prosperity Act* the matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013. The General Division conducted a teleconference hearing and on October 29, 2015 dismissed the Appellant's appeal.

[4] The Appellant sought leave to appeal from the Appeal Division of this Tribunal. The Application Requesting Leave to Appeal was filed with the Tribunal after the time permitted to do so had expired. The Appellant contended that leave to appeal should be be granted because he was severely disabled, insufficient weight was given to the medical evidence that was before the General Division when it made its decision, and his lack of attendance at the General Division hearing was explained. The Appellant also presented his handwritten notes and the decision of the Workplace Safety and Insurance Appeals Tribunal to support his claim.

[5] The Respondent filed no submissions.

ANALYSIS

[6] The *Department of Employment and Social Development Act* (the Act) governs the operation of the Social Security Tribunal. Section 57 of the Act provides that an Application for Leave to Appeal to the Appeal Division of the Tribunal must be filed within 90 days of when the decision was communicated to the Appellant. The Appellant in this case filed the Application approximately ten days after the time to do so had expired. He made no submissions specifically on this issue, but referred to a letter his Representative

sent to the Tribunal in November which stated that the Representative had been ill for approximately four months so neither he nor the Appellant were aware of the General Division hearing date and so did not attend the hearing.

[7] In *Canada (Minister of Human Resources Development) v. Gattelaro*, 2005 FC 883 the Federal Court set out what factors should be considered when determining whether to extend the time for filing an application for leave to appeal. They are whether the Appellant had a continuing intention to appeal, a reasonable explanation for the delay, an arguable case, and whether there would be any prejudice to the Respondent. The weight given to each of these factors may vary in each case. In this case, given the very short period of time that the application for leave to appeal was late I am satisfied that the Appellant had a continuing intention to appeal and a reasonable explanation for delay. No information was provided regarding any prejudice to the parties.

[8] I must now examine whether the Appellant had an arguable case on appeal, which is also the legal test to be met to be granted leave to appeal. The Federal Court of Appeal has decided 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. v. Canada (Attorney General)*, 2010 FCA 63.

[9] Section 58 of the Act sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division (see the Appendix to this decision).

[10] The Appellant's Representative wrote to the Tribunal on November 12, 2014 and advised that he had been ill for approximately four months, so neither he nor the Appellant attended the General Division hearing. He did not request any further opportunity to make representations on behalf of his client, or contend that the Appellant was not afforded a proper opportunity to present his case. Hence, there is no basis to find that any of the principles of natural justice were breached when the General Division conducted the hearing in the Appellant's absence. This explanation for not attending the hearing is not a ground of appeal that has a reasonable chance of success on appeal.

[11] The Appellant argued that he believed that he was disabled and incapable of working, that this was supported by the medical evidence that was before the General Division and that the General Division did not place sufficient weight on this evidence. With these arguments, he essentially asks this Tribunal to reevaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact which in this case was the General Division. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the General Division who made the findings of fact – *Simpson v. Canada (Attorney General),* 2012 FCA 82. Therefore, these arguments are not grounds of appeal that have a reasonable chance of success on appeal.

[12] Finally, the Appellant provided his handwritten notes regarding a workers' compensation matter and a decision of the Workplace Safety and Insurance Appeals Tribunal regarding his workplace injury. The provision of new evidence is not a ground of appeal that can be considered under section 58 of the Act. It does not have a reasonable chance of success on appeal.

[13] If the Appellant has filed these documents 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. There are additional requirements that an Applicant must meet to succeed in an application to rescind or amend a decision. Section 66 of the Act also 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.

CONCLUSION

[14] For these reasons, I am satisfied that the Appellant has not presented an arguable case on appeal. I place greater weight on this factor in determining whether to grant an extension of time to file the Application for Leave to Appeal. While the Appellant had a

continuing intention to pursue the matter, and filed the application shortly after the time to do so had expired, no purpose is served by extending the time to file an application for leave to appeal that does not have a reasonable chance of success on the merits. Therefore, time to file the application for leave to appeal is not extended.

[15] Similarly, the Application is refused as the Appellant has not presented a ground of appeal that has a reasonable chance of success on appeal.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.