Citation: *L. T. v. Minister of Human Resources and Skills Development,* 2015 SSTAD 396

Appeal No: AD-13-1054

BETWEEN:

L. T.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Shu-Tai Cheng

DATE OF DECISION: March 24, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on April 11, 2013. The Review Tribunal dismissed her application for disability benefits under the *Canada Pension Plan*, as it found that her disability was not "severe" at the time of her minimum qualifying period (MQP) of December 31, 2008.

[2] The Applicant filed additional medical records in support of her Application requesting leave to appeal to the Appeal Division of the Social Security Tribunal of Canada (Application). To succeed on this Application, the Applicant must show that the appeal has a reasonable chance of success.

[3] The Application was filed with the Social Security Tribunal of Canada (Tribunal) on July 12, 2013, 92 days after it was received by the Applicant (on April 11, 2013). The letter sent to the Applicant enclosing the Review Tribunal decision stated that parties have 90 days to appeal.

SUBMISSIONS

[4] The Applicant seeks leave on the following grounds: "medical reasons (see attached)" and "recent doctors [sic] medical report including all health issues". Medical documents, dated between December 10, 2012 and March 19, 2013, were attached. Further documents were submitted to the Tribunal on March 18, 2014 and March 4, 2015, including medical reports to March 18, 2014.

[5] The Applicant's reasons for late appeal were "medical reasons".

[6] The Respondent has not filed any submissions.

LAW AND ANALYSIS

Late Filing of Application

[7] Subsection 57(2) of the *Department of Employment and Social Development Act* (DESD Act) states 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".

[8] 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/her 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.

[9] Given that the delay involved is two days, calculated from the 90-day expiry date, and that the Applicant gave medical reasons for the short delay, I find that there is a continuing intention to pursue the Application, a reasonable explanation for the delay and no prejudice to the other party in allowing the extension. I will address the issue of whether the matter discloses an arguable case in the context of the Leave Application. Since I am satisfied on the three other *Gattellaro* factors and consider that it is interests of justice to do so, I grant an extension of time for the filing of the Application.

Leave Application

[10] 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, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *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.

[11] 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.

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

[13] The Applicant needs to satisfy me that the reasons for 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.

[14] The grounds relied upon by the Applicant are new facts in the form of new medical documents dated between December 10, 2012 and March 18, 2014. She also filed an authorization and consent to disclose information to her member of parliament on March 4, 2015.

[15] There is no suggestion by the Applicant that the Review Tribunal failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law nor identified any erroneous findings of fact which the Review Tribunal may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision. The Applicant has not cited any of the enumerated grounds of appeal.

[16] 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 reasons which fall into the enumerated grounds of appeal. The Application is deficient in this regard and the Applicant has not satisfied me that the appeal has a reasonable chance of success.

New Facts

[17] The Applicant produced various new medical records to support her disability claim. The proposed additional records should relate to the grounds of appeal. The Applicant has not indicated how the proposed additional records might fall into or relate to one of the enumerated grounds of appeal. If the Applicant is requesting that we consider these additional medical records, re-weigh the evidence and re-assess the claim in her favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESD Act. Neither the leave application nor the appeal provides any opportunity to re-hear the merits of the matter.

[18] If the Applicant intends to file the additional medical records in an effort to rescind or amend the decision of the Review Tribunal, she 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 DESD Act 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. In this particular instance, the Applicant was required to have made an application to rescind or amend within one year of having received the decision of the Review Tribunal issued April 11, 2013. She is now well out of time.

[19] Paragraph 66(1)(b) of the DESD Act 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.

[20] 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 DESD Act. The MQP was in 2008, the Review Tribunal decision found that there was no medical report upon which to reach the conclusion that the Applicant had a severe medical condition at the MQP, and the additional medical records that the Applicant proposes to rely upon relate to medical assessments performed between December 2012 and March 2014.

[21] This is not a re-hearing of the merits of the claim. 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 regards them to be in her claim for disability benefits.

CONCLUSION

[22] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division