Citation: ***P. C. v. Minister of Employment and Social Development,*** **2015 SSTAD 535**

Date: April 29, 2015

File number: AD-15-192

APPEAL DIVISION

Between:

P. C.

Applicant

and

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

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* disability pension in 2003. The Respondent denied her claim initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. After a hearing in March 2004 a Review Tribunal dismissed the Applicant's appeal.

[2] The Applicant again applied for a *Canada Pension Plan* disability pension in 2008. The Respondent denied this claim. The Applicant did not appeal from this decision.

[3] In 2010 the Applicant applied to have the 2004 Review Tribunal decision rescinded or amended pursuant to section 84(2) of the *Canada Pension Plan*. The Respondent denied this claim, and the Applicant again appealed to the Office of the Commissioner of Review Tribunals. On October 29, 2010 a Review Tribunal dismissed this appeal, finding that the Applicant had not submitted any new facts under the legislation.

[4] In February 2013 the Applicant applied to have the 2010 Review Tribunal decision rescinded or amended pursuant to s. 84(2) of the *Canada Pension Plan*. This was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. On June 2, 2014 the General Division decided this matter on the written record. It dismissed the Applicant's claim as it was statute-barred and did not meet the legislative test for "new material facts".

[5] The Applicant sought leave to appeal from the General Division decision. The Application Requesting Leave to Appeal to the Appeal Division was filed with the Appeal Division of the Tribunal on February 11, 2015 which appeared to be after the time to do so had expired. The Applicant's husband, who is also her Representative, wrote that the Application was filed late because the Applicant's health continued to deteriorate and he had to spend much of his time caring for her and taking her to appointments. In addition, due to her disability, the Applicant had difficulty with decision making, was forgetful and unstable.

[6] Regarding the appeal, the Applicant submitted that many doctors and government officials had concluded that she is disabled, that her diagnoses of lupus and fibromyalgia were not discoverable at the time of the 2004 hearing because they had not been made, that she was not able to properly present her case at the 2004 hearing as her Husband was not able to present the case, and in 2010 because the hearing was "shut down" as she did not "meet the test", that the Review Tribunal decisions did not refer to her ongoing pain which was a main disabling condition and she disagreed with submissions made by the Respondent at a Review Tribunal hearing.

[7] The Respondent filed no submissions.

ANALYSIS

Late Application

[8] The *Department of Employment and Social Development Act* governs the operation of the Social Security Tribunal. Section 57 of this *Act* provides that an appeal to the Appeal Division of the Tribunal from a decision of the General Division must be brought within 90 days of when that decision was communicated to an applicant, however, that time may be extended (see the Appendix to this decision). The General Division decision in this case was dated June 2, 2014 and was mailed to the Applicant that day. The Applicant filed the Application Requesting Leave to Appeal with the Tribunal in February 2015, approximately eight months later. This was clearly after the time to do so had expired. I must therefore decide if the time to file the Application Requesting Leave to Appeal should be extended.

[9] In assessing the request to extend time for leave to appeal, the Tribunal is guided by decisions of the Federal Court. 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) There is a reasonable explanation for the delay;

c) There is no prejudice to the other party in allowing the extension; and

d) The matter discloses an arguable case.

[10] 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).

[11] In this case, the Applicant's husband contended that the Application was filed late because of the time and effort required to care for the Applicant, and her difficulties with decision making, forgetfulness, etc. I am satisfied that this is a reasonable explanation for the delay in filing the application.

[12] The Applicant did not, however, provide any submissions regarding whether she had a continuing intention to pursue the application. Similarly, there is no information before me regarding whether there would be any prejudice to either party if the matter were to proceed. I am unable to make any decision regarding these factors.

[13] I must also consider whether the Applicant has presented an arguable case. The Federal Court of Appeal decided that an arguable case at law is akin to whether legally an Applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 41, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63. This is the same legal test to be met in order to be granted leave to appeal, so it will be examined in that context below.

Leave to Appeal

[14] Section 58 of the *Department of Employment and Social Development 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). Consequently I must decide if the Applicant has presented a ground of appeal set out in section 58 of the *Act* that has a reasonable chance of success on appeal.

[15] To support her request for leave to appeal the Applicant referred to a number of letters and medical reports that demonstrated that various government bodies, medical professionals, and others had concluded that she was disabled. I do not disagree with their conclusions.

However, the legal test to be found disabled under the *Canada Pension Plan* (CPP) is different than the test to be found disabled for parking permits, home renovations and other matters. The fact that other government bodies have concluded that the Applicant is disabled for their purposes does not necessarily mean that she is disabled under the CPP. In addition, the presentation of this material does not point to any error of fact or law, or any breach of the principles of natural justice made by the General Division. Therefore, this is not a ground of appeal that has a reasonable chance of success on appeal.

[16] The Applicant also asserted that her diagnoses of lupus and fibromyalgia were not discoverable at the time of the 2004 Review Tribunal hearing as they had not been made. While this may be so, this submission does not point to any error or to any breach of the principles of natural justice by the General Division. Therefore it is not a ground of appeal that has a reasonable chance of success on appeal.

[17] The Applicant further contended that she was not able to properly present her case at the Review Tribunal hearings in 2004 or 2010 due to the way the hearings were conducted. She did not indicate that she complained of any such deficiency at the time of each of these hearings, nor did she pursue any legal remedy for this at the time of each hearing. The Federal Court, in *Mohammadian v. Canada* [2000] 3 FC 371, decided that Appellants should be required to complain about such issues at the first opportunity when it is reasonable to expect them to do so. In this case, at the very least, it would have been reasonable to expect the Applicant to complain about not being able to present her case in 2004 in her application for a disability pension in 2008 or at the hearing in 2010. She did not do so.

[18] I am not persuaded that there was any breach of natural justice at the 2010 Review Tribunal hearing. The Applicant asserted that she was not able to fully present her case because she "did not meet the test" but provided no further details regarding this. The practice of the Review Tribunals in applications under section 84(2) of the CPP was to first hear evidence and submissions regarding the issue of whether there were new facts. If this was not found to have been presented, the hearing ended. Only if the Review Tribunal concluded that there were new facts did it hear evidence and submissions on the issue of disability. Since the Review Tribunal in 2010 found that no new facts were presented, it would have concluded the hearing at this

stage. This would not have breached of any of the principles of natural justice. As such, I am not persuaded that principles of natural justice were breached at that hearing.

[19] In addition, this argument did not allege that the General Division breached the principles of natural justice in any way. Accordingly, this is not a ground of appeal that has a reasonable chance of success on appeal.

[20] Further, the Applicant argued that the Review Tribunal decisions did not refer to her pain, which was a disabling condition. This argument does not point to any error made by the General Division or to any breach of the principles of natural justice. It is not a ground of appeal that has a reasonable chance of success on appeal.

[21] Finally, the Applicant did not agree with some of the arguments advanced by the Respondent at the Review Tribunal hearings. Mere disagreement with an opposing party to litigation does not point to any error made by the decision maker, or to any breach of natural justice. On the contrary, it could be that if the arguments of both parties were not considered by the decision maker that natural justice would have been breached. Therefore, this argument also is not a ground of appeal that has a reasonable chance of success on appeal.

CONCLUSION

[22] In summary, although the Applicant presented a number of arguments as grounds of appeal, I am not satisfied that any of them have a reasonable chance of success. Therefore leave to appeal must be refused.

[23] I also place greater weight on this factor in determining whether to extend time for the Application Requesting Leave to Appeal to the Appeal Division to be filed. No purpose is served in extending the time to file the Application if it does not have a reasonable chance of success on its merits.

[24] Although the Applicant adequately explained her delay in making the Application, I am not satisfied that she had a continuous intention to pursue the matter. I am also unable to assess whether there may be prejudice to a party if this matter were to proceed.

[25] After considering all of the circumstances of this case and the law, I am not satisfied that it is in the interest of justice that the time for filing the Application Requesting Leave to Appeal to the Appeal Division should be extended.

[26] The Application is refused for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

57. (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

(a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and

(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

(2) 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.

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.

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