

Citation: *H. W. v. Minister of Employment and Social Development*, 2015 SSTAD 882

Appeal No. AD-15-323

BETWEEN:

H. W.

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: Janet LEW

DATE OF DECISION: July 15, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 6, 2015. The General Division refused to exercise its discretion in favour of extending the time for the Applicant to file a notice of appeal. The Applicant filed an application requesting leave to appeal to the Appeal Division on June 2, 2015. To succeed on this leave application, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

BACKGROUND and HISTORY OF PROCEEDINGS

[3] The Applicant applied for a Canada Pension Plan disability pension on March 14, 2013 (Document GD3, pages 22 to 25). On July 11, 2013, the Respondent denied the Applicant's application for a Canada Pension Plan disability pension, as it did not consider her to have a disability that is both severe and prolonged as defined under the *Canada Pension Plan* (Document GD3, pages 17 to 19).

[4] The Applicant applied for a reconsideration of the decision on October 21, 2013 (Document GD3, page 11). Upon reconsideration, the Respondent denied the Applicant's application for a disability pension on January 22, 2014, noting again that it did not consider her to have a disability that is both severe and prolonged (Document GD3, pages 7 to 9).

[5] The Applicant filed a Notice of Appeal with the General Division on June 17, 2014. She indicated in the Notice of Appeal that she had received the reconsideration decision on April 17, 2014 (Document GD1).

[6] The Social Security Tribunal wrote to the Applicant on July 4, 2014, advising her that the Social Security Tribunal would not consider an appeal to be properly filed until it had received all of the required information. The Social Security Tribunal advised the

Applicant that for the appeal to be filed, it would have to receive “without delay” a signed declaration that the information provided by her was true.

[7] The Social Security Tribunal also advised the Applicant in its letter of July 4, 2014 that a complete Notice of Appeal had to be received within 90 days of the date that the reconsideration decision from the Respondent was communicated to her, and that if she wished to proceed and did not provide the requested information “within the timeframe specified above”, she would need to request an extension of time to file the complete Notice of Appeal. There was no specified date in the letter however as to when she was required to provide the requested information.

[8] The Applicant filed a signed declaration on July 15, 2014 with the Social Security Tribunal (Document GD1A). This was filed within the 90 days after April 17, 2014, the date the Applicant declared on her Notice of Appeal that she had received the reconsideration decision.

[9] By letter dated August 8, 2014, the Social Security Tribunal wrote to the Applicant advising that her Notice of Appeal appeared to have been filed more than 90 days after the date that the reconsideration decision had been communicated to her, although it is unclear on what basis this determination was made.

[10] The Tribunal wrote that as the appeal appeared late, the Applicant had to request an extension of time to file the Notice of Appeal by September 7, 2014 and address all of the following factors:

- (a) Whether there was a continued intention to pursue the appeal;
- (b) Whether the matter discloses an arguable case;
- (c) Whether there was a reasonable explanation for the delay; and
- (d) Whether there would be prejudice to the other parties in extending the deadline.

[11] On September 2, 2014, the Applicant filed a second Notice of Appeal of the reconsideration decision. This second Notice of Appeal contained a change of address. This time, the Applicant indicated that she received the reconsideration decision of the

Respondent on August 28, 2014. She explained that she was late with the appeal as there had been a delay with the paperwork and a delay with the post office (Document GD2).

[12] The General Division rendered its decision on May 6, 2015, denying her request for an extension of time to file her first Notice of Appeal filed on June 17, 2014. The General Division made three significant findings of fact:

- (1) that the Applicant gave conflicting information as to when she received her reconsideration decision, as she provided two different dates of receipt. Initially she stated that she had received the reconsideration decision on April 17, 2014, and then in the second Notice of Appeal filed on September 2, 2014, advised that she had received it on August 28, 2014;
- (2) that, “assuming a 10 day delivery period for the Respondent’s [reconsideration decision] to be delivered, the Respondent’s [reconsideration decision] was received by the Applicant on February 1, 2014”, not on April 17, 2014 or on August 28, 2014; and
- (3) the Applicant, who initially filed her Notice of Appeal on June 17, 2014, did not perfect it until July 15, 2014, when she filed a signed declaration; and therefore, this effectively made the Notice to Appeal late, as it was “filed” (i.e. perfected) more than 90 days after February 1, 2014.

[13] While the General Division found that the Applicant had an arguable case and that an extension would not cause undue prejudice to the Respondent, the General Division found that although she demonstrated a continued intention to pursue her appeal, she had not provided a reasonable explanation for the delay in “filing” (i.e. perfecting) the Notice of Appeal on July 15, 2014.

[14] On June 2, 2015, the Applicant filed an application requesting leave to appeal the decision of the General Division.

[15] On June 15, 2015, the Social Security Tribunal wrote to the Applicant, with the following questions:

1. You filed an initial Notice of Appeal on June 17, 2014. You indicated that you had received the reconsideration decision of the Minister on April 17, 2014. You filed a second Notice of Appeal on September 2, 2014. In this second Notice of Appeal, you indicated that you had received the reconsideration decision on August 28, 2014.
 - (a) Please confirm if that was the reconsideration decision of the Minister which you received on August 28, 2014.
 - (b) If not, what document(s) were you referring to which you say that you received on August 28, 2014?
 - (c) What evidence, if any, do you have that you in fact received the reconsideration decision on April 17, 2014.
2. You indicate in the second Notice of Appeal filed on September 2, 2014, that you had moved from X X to X, Ontario. You also explained that you were late with the appeal as there had been a delay with the paperwork and a delay with the post office.
 - (a) When did this move from X X to X, Ontario take place?
 - (b) What paperwork do you say was delayed in being delivered to you?
 - (c) If your move took place sometime between January 22, 2014 and June 17, 2014, please provide some evidence when this move took place.
3. In the Application Requesting Leave to Appeal to the Appeal Division filed on June 2, 2015, you say that you “missed a signature” and when you got the paperwork to sign, the time had already expired.
 - (a) What paperwork do you say that you had to sign?
 - (b) When did you receive this paperwork?

[16] By letter dated June 21, 2015 and received by the Social Security Tribunal on June 26, 2015, the Applicant responded as follows, that:

- She submitted her first appeal on June 17, 2014;
- She had moved from X to X, Ontario on July 10, 2014; and
- She had gone to the post office to have mail forwarded to her. She received notice from the Social Security Tribunal that she forgot to sign somewhere on

the document dated August 28, 2014. She replied back on September 2, 2014.

[17] The Applicant did not respond to any of the other questions posed by the Social Security Tribunal in its letter of June 15, 2015, nor did she provide any supporting documentation.

SUBMISSIONS

[18] The Applicant advises that she is seeking an appeal of the decision of the General Division because of delay occasioned by her physicians and mail delivery. She advises that after she filed her notice of appeal, she moved and “when [she] got the paperwork to sign, the time had already expired. The post office had to forward it from X, Ont. to X, Ont. which took 3 wks.” She submits that she was late in filing the Notice of Appeal with the General Division due to circumstances beyond her control.

ANALYSIS

[19] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[20] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[21] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

[22] The Applicant's leave materials raise questions as to when the Applicant might have received the reconsideration decision, given that she had moved from X to X. If she could show that the move had taken place sometime between the issuance of the reconsideration decision and the filing of her Notice of Appeal with the General Division, this might have added some credibility to the possibility that she had received the reconsideration decision on April 17, 2014, in which case the Notice of Appeal would have been filed on time when it was perfected on July 15, 2014.

[23] However, it is evident from the Applicant's responses filed with the Social Security Tribunal on June 26, 2015, that the move from X to X did not take place until July 10, 2014. In other words, the Applicant's move from X was an entirely irrelevant consideration as to whether she might have received the reconsideration decision later than might ordinarily be expected and why she did not file her Notice of Appeal earlier than April 17, 2014. The postal delays which the Applicant refers to in her explanation relate to those after her move on July 10, 2014. The postal delays referred to by the Applicant obviously would not be relevant towards explaining any late receipt of the reconsideration decision after January 22, 2014, as she had already received the reconsideration decision sometime before June 17, 2014, when she filed her Notice of Appeal.

[24] The Applicant has not raised any grounds which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. She does not allege that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, nor does she allege that the General Division erred in law or 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. There should be at least one reviewable error made by the General Division that gives the appeal a reasonable chance of success.

[25] 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 particulars of the error or failing committed by the General Division which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. The application is deficient in this regard and I am not satisfied that the appeal has a reasonable chance of success.

[26] While the Applicant has not raised appropriate grounds of appeal, subsection 58(1) of the DESDA nonetheless enables the Appeal Division to determine if there is an error of law, whether or not the error appears on the face of the record.

[27] In this case, the General Division determined that the Applicant had been late in filing a notice of appeal. The General Division assessed whether there was a basis upon which it could exercise its discretion and extend the time for filing the notice of appeal. The General Division did not come to its decision arbitrarily or capriciously. It considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, though stated that the overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

[28] The General Division found that the Applicant had an arguable case, that she demonstrated a continued intention to pursue her appeal, and that an extension would not cause undue prejudice to the Respondent. The General Division found however that the Applicant had failed to provide a reasonable explanation for the delay in filing the notice of appeal.

[29] The Applicant advised in the first Notice of Appeal filed on June 17, 2014 that she had received the reconsideration decision on April 17, 2014 and had perfected the Notice of Appeal by July 15, 2014. If she had indeed received the reconsideration decision on April 17, 2014, the Notice of Appeal would have been filed on time, as it was filed within 90 days after the reconsideration decision had been communicated to her. It is speculative as to whether the General Division would have accepted this date of April 17, 2014, had the Applicant not filed a second Notice of Appeal and provided a second date as to when she received the reconsideration decision. Had the General Division used the April 17, 2014 as

the date when she received the reconsideration decision, it may well have determined that the Applicant's first Notice of Appeal had been filed on time.

[30] The fact that the Applicant filed a second Notice of Appeal and provided a second date of August 28, 2014 when she received the reconsideration decision complicated matters for her. After the second Notice of Appeal was filed, the General Division found the Applicant to be unreliable. The Tribunal wrote that it found "inconsistency" between the Applicant's explanation of the delay and the hearing file record. It was on this basis that the General Division found it appropriate to recalculate what it considered would have been a reasonable timeframe for the Applicant to have received the reconsideration decision. The General Division essentially applied the "deeming" provisions of the *Social Security Tribunal Regulations* under paragraph 19(1)(a) that if a decision is sent by ordinary mail, it is deemed to have been communicated to a party 10 days after the day on which it is mailed to the party, despite the fact that the provisions are not applicable to reconsideration decisions of the Respondent.

[31] While it may have appeared unreasonable to the General Division that the Applicant received the reconsideration decision in April 2014, weeks after it had been made, it should have also been obvious that the Applicant was grossly mistaken when she stated in her Second Notice of Appeal filed on September 2, 2014 that she received the reconsideration decision on August 28, 2014. She had to have received the reconsideration well before this date, as she had filed her first Notice of Appeal in June 2014 and perfected it in July 2014. It should have also been obvious that the Applicant was not trying to secure any advantage for herself when she stated in her Second Notice of Appeal that she received the reconsideration decision on August 28, 2014.

[32] These considerations raise an arguable case as to whether the General Division may have erred in law. While I am not altogether convinced that the Applicant was necessarily late in filing her Notice of Appeal, was it appropriate for the General Division to have placed considerable, if not an inordinate amount of weight on the absence of a reasonable explanation for the delay in filing her Notice of Appeal, when it was not outrightly evident when she might have received the reconsideration decision?

[33] Although the General Division cited *Larkman*, it is not altogether apparent whether the General Division followed it. Not only did the Federal Court of Appeal hold that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. At paragraphs 61 and 62, the Federal Court of Appeal wrote,

[61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:

- (1) Did the moving party have a continuing intention to pursue the application?
- (2) Is there some potential merit to the application?
- (3) Has the Crown been prejudiced from the delay?
- (4) Does the moving party have a reasonable explanation for the delay?

See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249 (CanLII) at paragraph 8.

[62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal, supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (CanLII) at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195 (CanLII), 89 Admin LR (4th) 1.

[34] I am overall satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[35] The Application is granted.

[36] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew

Member, Appeal Division