Citation: *R. B. v. Minister of Employment and Social Development*, 2015 SSTAD 959

Appeal No. AD-15-351

BETWEEN:

R. B.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Extension of Time and Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: August 5, 2015

INTRODUCTION

[1] This is an application to extend the time for filing of an application requesting leave to appeal and for leave to appeal the decision of the General Division dated August 19, 2014.

[2] The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" at her minimum qualifying period of December 31, 2011. The decision of the General Division was mailed to the Applicant in or about August 2014 and then again on February 25, 2015.

[3] The Applicant seeks leave to appeal the decision of the General Division. She filed the form "Application Requesting Leave to Appeal to the Appeal Division" on June 15, 2015. She did not disclose when she might have received the decision of the General Division, nor did she explain why her appeal might have been filed late or why she was appealing the decision, and on what grounds.

[4] If the Applicant's leave application was not made within 90 days after the day on which the decision of the General Division was communicated to her, the Applicant must seek an extension of time for filing her leave application. To succeed on this application, the Applicant must persuade me that her leave application was filed within 90 days after having the decision of the General Division communicated to her. Or, if the leave application was filed late, she must persuade me that I either exercise my discretion and extend the time for filing of the leave application, or that I relieve her from complying with the formal filing requirements of the *Social Security Tribunal Regulations*. Secondly, the Applicant must also persuade me that the appeal has a reasonable chance of success.

ISSUES

[5] The issues before me are as follows:

(a) When did the Applicant receive the decision of the General Division?

(b) Did the Applicant file her application requesting leave on time, i.e. within 90 days after the day on which the decision of the General Division had been communicated to her?

(c) If the Applicant was late in filing the application requesting leave, should the Appeal Division exercise its discretion and extend the time for filing of the leave application?

(d) If the Applicant was late in filing the application requesting leave and an extension of time for filing of the application requesting leave is not available to the Applicant, do special circumstances exist here such that I may vary the formal filing provisions or relieve the Applicant from complying with them?

(e) If the Applicant was on time in making her leave application, or if she was late and I grant an extension of time for filing of the application requesting leave, or I vary or waive the formal filing requirements for a leave application, does the appeal have a reasonable chance of success? i.e. are there any grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) that would have a reasonable chance of success?

BACKGROUND

[6] Some background to the history of the proceedings is necessary.

[7] The General Division rendered its decision on August 19, 2014. The Social Security Tribunal mailed a copy of the decision of the General Division to the parties on August 21, 2014. The Social Security Tribunal advised the parties that if one wished to appeal the decision, one would have to seek leave within 90 days of the decision having been communicated and that to be granted leave, one would have to demonstrate to the Appeal Division that one or more grounds of appeal existed.

[8] On February 18, 2015, the Applicant contacted the Social Security Tribunal to enquire into the status of her appeal before the General Division. The Social Security

Tribunal informed her that the decision had been mailed to her on August 21, 2014. At this point, the Applicant advised that as she had new contact information, she did not receive the decision of the General Division. The Applicant apparently had moved at some time in the past, but had neglected to notify the Social Security Tribunal of her change of address. Indeed, the hearing file indicates that correspondence which had been sent to the Applicant in December 2013 was returned to the Social Security Tribunal, marked "moved".

[9] During this telephone conference on February 18, 2015, the Social Security Tribunal informed the Applicant that the General Division had denied her appeal. The Applicant advised that she would be looking to appeal the decision and, as she would be away between March 18 and May 29, 2015, might be faxing an application to the Appeal Division in the interim.

[10] On February 25, 2015, the Social Security Tribunal mailed a copy of the decision to the Applicant's new address. The accompanying letter advised the Applicant that if she wished to appeal the decision, she would have to seek leave within 90 days of the decision having been communicated and that to be granted leave, would have to demonstrate one or more grounds of appeal.

[11] On March 13, 2015, the Applicant submitted a letter to the General Division. It is unclear whether the letter was intended to be her application requesting leave to appeal to the Appeal Division, as she did not specifically state that she was appealing the decision of the General Division. She advised that she had not worked since surgery to her left hand on January 5, 2010, and that to this day, she was unable to carry anything.

[12] The Social Security Tribunal wrote to the Applicant on March 23, 2015, and advised that, as the decision of the General Division was considered final, the General Division did not have the authority to revisit her appeal. The Social Security Tribunal also advised the Applicant that if she wished to appeal the decision, she would have to seek leave within 90 days of the decision having been communicated to her and that to be granted leave, she would have to demonstrate one or more grounds of appeal. As the Applicant was reportedly away between March 18 and May 29, 2015, she would not have received the Social Security Tribunal's letter of March 23, 2015, until after her return in late May 2015.

[13] On June 15, 2015, the Applicant filed the Leave Application.

[14] On June 17, 2015, the Social Security Tribunal wrote to the Applicant advising that her application was incomplete as it was missing mandatory information. The Social Security Tribunal advised that as such, it did not consider her application to have been filed yet, and it could not proceed until all of the mandatory information was received. The Social Security Tribunal advised that it required the grounds for leave and any statements of fact upon which the Applicant relied for her leave application, and which had been presented to the General Division. The Social Security Tribunal advised the Applicant that if it received all the missing information needed to complete the leave application by July 17, 2015, the Social Security Tribunal would accept the completed application as having been received on June 15, 2015.

[15] On June 25, 2015, the Applicant contacted the Social Security Tribunal, as she was unclear what was required of her, in terms of any statements of facts. On June 26, 2015, the Applicant again contacted the Social Security Tribunal. This time, she queried why the Social Security Tribunal asked her to provide missing information. The Social Security Tribunal advised her to complete the form in her own words to the best of her ability.

[16] On July 3, 2015, the Social Security Tribunal received the Applicant's letter dated June 29, 2015. The Applicant confirmed that she was appealing. On July 9, 2015, the Social Security Tribunal confirmed that it now considered the leave application to be complete.

SUBMISSIONS

[17] In her letter dated June 29, 2015, the Applicant wrote,

> This is the letter you need for the Appealing at the Tribunal. I'm very to tell you about this appealing to Tribunal. I don't know nothing about this. Only Sunlife Insurance here in Edmonton told me about this because I'm receiving monthly pension at Sunlife Insurance for my disability since January 2010. I work at Royal Alexandra Hospital here in Edmonton AB at the X Services. Next year I'm already 65 on X X. I hope Old Ages Pension will support me. (*sic)*

[18] The Respondent has not filed any written submissions.

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 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.

(a) When was the decision of the General Division communicated to the Applicant?

[21] The Social Security Tribunal mailed a copy of the decision of the General Division to the parties initially on August 21, 2014. The Applicant did not receive the decision at that time, as she had moved. The Social Security Tribunal re-sent the decision on February 25, 2015.

[22] Under paragraph 19(1)(a) of the Regulations, I deem that the decision of the General Division was communicated to the Applicant 10 days after the day on which it was mailed to her on February 25, 2015. Accordingly, taking into account that the 10th day would have fallen on a weekend and realistically, postal delivery would not have been effected on a weekend, I find that the decision was communicated to the Applicant on March 9, 2015.

(b) Did the Applicant file her application requesting leave on time?

[23] Under paragraph 57(1)(b) of the DESDA, the Applicant had 90 days after the day on which the decision was communicated to her to file an application for leave. I calculate that she therefore had until June 7, 2015 to make an application for leave to appeal to the Appeal Division.

[24] I am prepared to find that, after the decision had been communicated to the Applicant, that she filed an application requesting leave on March 13, 2015, when she filed her letter dated March 6, 2015. I am prepared to do so, given that in her telephone conference with the Social Security Tribunal on February 18, 2015, she advised that she would be looking to do so. After the telephone conference, the Social Security Tribunal should have anticipated that it would be receiving a leave application from the Applicant, prior to her departure. Given the telephone conference, it should have been evident from the letter dated March 6, 2015 that the Applicant was appealing the decision and not seeking to have the General Division re-open and review its decision. There was no suggestion by the Applicant that she was requesting that the General Division re-open and review its decision. As well, I do not find any requirement that a letter must necessarily use the word "appeal" to indicate that leave or an appeal is being sought, taking all of the circumstances into account. In short, I find that the Applicant was on time in filing her application requesting leave to appeal to the Appeal Division.

[25] The Social Security Tribunal determined that the Applicant's letter dated March 6, 2015 did not qualify as an application requesting leave. Yet, the letter in substance is no different from the Application Requesting Leave to Appeal to the Appeal Division filed on June 15, 2015 (although the Application does contain a signed declaration), or from the letter dated June 29, 2015. In fact, the Applicant's letter of March 6, 2015 contains more information than either the Application Requesting Leave to Appeal or the letter dated June 29, 2015. While the grounds set out in the Applicant's letter of March 6, 2015 may have been weak at best, they were clearly set out in her letter and, as such, the Social Security Tribunal ought to have considered her leave application to have been more or less perfected by then (other than her failure to provide a signed declaration).

[26] Until its letter of June 17, 2015, the Social Security Tribunal had not suggested that the Applicant was late or that she had to file a leave application within a certain date for it to be considered "on time". I find that had Social Security Tribunal alerted the Applicant and had she been aware that she had to provide any missing information by a certain date, that she would have done so, as she has did in response to the letter of June 17, 2015.

[27] Although the leave application was filed on time, it was not in the prescribed form and manner required under subsection 57(1) of the DESDA and subsection 40(1) of the Regulations. Paragraph 40(1)(g) of the Regulations requires that the appeal be in the form set out by the Social Security Tribunal on its website and contain inter alia a declaration that the information provided is true to the best of the appellant's knowledge. The Applicant did not provide a signed declaration until June 15, 2015.

[28] There are two options before me to cure this procedural defect: one, by exercising my discretion and extending the time for filing of the leave application; or two, if I should find that special circumstances exist, vary the formal filing provisions or relieve the Applicant from complying with them.

[29] In *L.N. v. M.E.S.D.*, (April 30, 2015) SSTAD-13-782, I reviewed the provisions of paragraph 3(1)(b) of the *Regulations.* The paragraph enables me to relieve an applicant from compliance with subsection 57(1) of the DESDA, if I vary the provisions of the *Regulations*. In this case, I could vary subsection 40(1) of the *Regulations* by removing the requirement that the leave Application contain a declaration that the information provided is true to the best of the Applicant's knowledge (assuming that I accept that "special circumstances" exist). If I should vary subsection 40(1) of the *Regulations* in this manner, the Applicant would have met the requirements under subsection 57(1) of the DESDA on March 13, 2015, when she filed her leave application, and there would then be no issue as to whether her leave Application is late. While I found that there were "special circumstances" in *L.N.*, ultimately I concluded that "special circumstances" should only be available in limited circumstances and that it ought not to be widely available otherwise. The preferred course ought to be considering whether it is appropriate to extend the time for filing of a leave application under subsection 57(2) of the DESDA.

(c) If the Applicant was late in filing the leave application, should the Appeal Division exercise its discretion and extend the time for filing of the leave application?

[30] Subsection 57(2) of the DESDA permits the Appeal Division to allow further time of no more than one year after the day on which the decision was communicated to an applicant, within which a leave application can be made.

[31] In Canada (Minister *of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out the 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 or her application for leave to appeal, as follows:

(a) A continuing intention to pursue the application or appeal

(b) The matter discloses an arguable case

(c) There is a reasonable explanation for the delay and

(d) There is no prejudice to the other party in allowing the extension.

[32] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (CanLII), the Federal Court of Appeal held 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.

[33] The Applicant did not perfect the leave application until approximately one week after 90 days had elapsed from when the decision of the General Division was communicated to her. Within that time, she verbally communicated that she would be appealing and had also filed a letter with the General Division on March 13, 2015. This demonstrates that she had a continuing intention to pursue an appeal. There is a reasonable explanation why she did not perfect her leave application, as she was away on holidays and did not receive the letter from the Social Security Tribunal indicating that there was missing information, until after her return from holidays. There is no prejudice to the other party in allowing an extension. Given these considerations, the interests of justice require that I

exercise my discretion and allow an extension of time. I will review the issue of whether the matter discloses an arguable case in the context of the application for leave.

(d) Does the appeal have a reasonable chance of success?

[34] As noted above, subsection 58(1) of the DESDA sets out the grounds of appeal. 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.

[35] There is no suggestion by the Applicant that the General Division 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 General Division 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.

[36] 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 on this basis, I am not satisfied that the appeal has a reasonable chance of success.

[37] 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. However, I do not readily see any errors of law which may have been made by the General Division.

[38] I do make one final observation however. The General Division wrote in its decision (at paragraph 17) that the Applicant had been invited to provide additional information regarding her medical evidence and contributions to the Canada Pension Plan in 2012, but noted that the Applicant did not reply to its enquiries.

[39] It would be misleading to suggest that the Applicant ignored the request for information from the Social Security Tribunal, given that one could safely infer that she did

not receive the request as she had moved by the time the Social Security Tribunal mailed the request to her. The Social Security Tribunal did not have contact information for the Applicant. Indeed, the Notice of Hearing – Written Questions and Answers which was directed to the Applicant, did not have an address for service. Had the perceived lack of response to the questions been a basis upon which the General Division made its decision, I might have regarded that as an error of law upon which an arguable case could have been made. However, I am satisfied that this was not the basis upon which the General Division made its decision.

CONCLUSION

[40] As the Applicant's reasons for appeal effectively disclose no grounds of appeal for me to consider under subsection 58(1) of the DESDA, I am unable to find that the appeal has a reasonable chance of success and I therefore refuse the Application for leave.

Janet Lew
Member, Appeal Division