Citation: ***M. F. v. Minister of Employment and Social Development,*** **2015 SSTAD 1014**

Date: August 26, 2015

File number: AD-15-920

APPEAL DIVISION

Between:

M. F.

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. He claimed that he was disabled by chronic pain and mobility issues resulting from a work injury. The Respondent denied his claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada. The General Division held a hearing and on January 29, 2015 dismissed the appeal.

[2] The Applicant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal on August 19, 2015, which was after the time to do so had expired. He explained that he filed the request for leave to appeal late because he suffered a severe stroke and was hospitalized from March 5, 2015 until June 18, 2015. He also wrote that he suffers from avascular necrosis.

[3] The Respondent filed no submissions.

ANALYSIS

[4] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. Section 57 of the Act provides that an appeal to the Appeal Division must be made within 90 days of when the General Division decision was communicated to the Applicant. This time may be extended, but in no case may an application for leave to appeal be made more than one year after the decision was communicated to the Applicant (see Appendix to this decision for relevant sections of the Act).

[5] To decide whether the time for filing an appeal is to be extended, I must consider and weigh the criteria as set out in court decisions. In *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883, the Federal Court stated that the criteria are as follows:

a) The Appellant must demonstrate a continuing intention to pursue the 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.

[6] The Applicant in this case explained that he was late in filing the application requesting leave to appeal because he was hospitalized after a stroke from March 5, 2015 until June 18, 2015. This was almost the entire time permitted for the application for leave to appeal to be filed with the Appeal Division of the Tribunal. The Applicant filed his application for leave to appeal within 90 days of his release from hospital. From this, I am satisfied that he had a reasonable explanation for the delay in filing the application requesting leave to appeal.

[7] The Applicant made no submissions specifically regarding his continuing intention to request leave to appeal. Given the facts set out above, however, I am satisfied that the Applicant had such an intention.

[8] There were no submissions from either party regarding any prejudice if this matter were to proceed. I make no finding in this regard.

[9] The Applicant contended that he should be granted leave to appeal because he suffers from avascular necrosis ant that he had a severe stroke in March 2015. I am not satisfied that this establishes that the Applicant has an arguable case on appeal (which is akin to having a reasonable chance of success on appeal, see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63I). In this case, to receive a *Canada Pension Plan* disability pension, the Applicant must establish that he was disabled on or before December 31, 2009 and thereafter. Although it is tragic that the Applicant suffered a severe stroke in 2015, this does not assist the Applicant in establishing that he was disabled in 2009.

[10] Also, in *Klabouch v. Canada (Social Development)*, 2008 FCA 33 the Federal Court of Appeal concluded that it is not the diagnosis of a condition which establishes that a claimant is disabled, but the impact of the condition on a claimant's ability to work. The Applicant contended that he was disabled because he suffers from avascular necrosis. He did not provide any information, however, about what the impact of this medical condition was on his ability to

work. I am therefore not persuaded that this diagnosis, in conjunction with the stroke or alone, demonstrates that the Applicant has an arguable case on appeal.

[11] The Courts have also clearly stated that the weight to be given to each of the *Gatellaro* 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 (see for example *Canada (Attorney General) v. Larkman*, 2012 FCA 204). I place greater weight on the fact that the Applicant has not presented an arguable case on appeal than on the other factors considered. There is little point in extending the time to file the application for leave to appeal when the Applicant has not presented an arguable case on appeal. Even if the time to file the application for leave to appeal were extended, leave to appeal cannot be granted unless the Applicant has presented a ground of appeal that has a reasonable chance of success. This is set out clearly in subsection 58(2) of the *Department of Employment and Social Development Act*.

[12] I am sympathetic to the Applicant's plight. In spite of this, however, I am not satisfied that it is in the interests of justice for time to be extended for him to file the application for leave to appeal.

[13] If the Applicant has presented the diagnosis of avascular necrosis in an effort to rescind or amend the General Division decision 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 of the Tribunal. There are additional requirements that an Applicant must meet to succeed in an application to rescind or amend a decision. Section 66 of the *Department of Employment and Social Development 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.

[14] For these reasons the request for an extension of time to file the application requesting leave to appeal is refused.

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.

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