Citation: ***C. M. v. Minister of Employment and Social Development,*** **2015 SSTAD 1005**

Date: August 20, 2015

File number: AD-15-432

APPEAL DIVISION

Between:

C. M.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on August 20, 2015

DECISION

[1] The Tribunal allows an extension of the time to file the application for leave to appeal.

[2] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[3] The Applicant seeks leave to appeal, (the Application), a decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), that was issued on March 12, 2015. In the decision, the General Division found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension.

[4] The Application is clearly late. It is dated June 29, 2015 and date stamped as received on July 6, 2015. This is more than the 90 days in which to file the Application provided for by subsection 57(1)(b) of the *Department of Employment and Social Development* (DESD) *Act.* However, the Applicant did not acknowledge that the Application is filed late. Thus, the Tribunal must decide the preliminary question of whether to extend the time for filing the Application. For the following reasons, the Tribunal has decided to exercise the discretion provided by the DESD Act subsection 57(2) to allow further time within which an application for leave to appeal is to be made.

[5] In deciding to allow further time the Tribunal considered and applied the factors set out in *Gattellaro*[1] and expanded on by the Federal Court of Appeal in *Hogervorst.*[2] In *Hogervorst*, the Federal Court of Appeal added a fifth criterion to the *Gattellaro* test stating, "The test is flexible and must be geared to ensure that justice is done between the parties, which is the underlying consideration in an application to extend time. This flexibility includes assigning an appropriate weight to each factor depending on the circumstances, the granting of leave even though one of the four standard criteria are not present and the requirement of a fifth factor, i.e.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883
[2] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41

the facts of the particular case." Thus, I have considered the facts of the instant case, in addition to the following:

- Whether the Applicant had a continuing intention to pursue the appeal;
- Whether the matter discloses an arguable case;
- Whether the Applicant has put forward a reasonable explanation for the delay; and
- Whether the Respondent would be prejudiced if the Tribunal were to extend the time for filing the appeal.

[6] Of the four *Gattellaro* factors, I find that the Applicant has clearly met only one. The fact that he has filed the Application could be taken as demonstrating a continuing intention to pursue the appeal. However, he has not put forward a reasonable explanation for the delay in filing. In fact, the Applicant did not acknowledge that the Application is late. However, this is likely due to the fact that the unrepresented Applicant may have misinterpreted the instructions on the form he used to file his Application. The Applicant used a form that asked him whether he was filing after 90 days of receiving the reconsideration decision. He appears to have used the wrong form. The Applicant indicated that he received the decision on March 28, 2015; the Application appeared to have been sent by ordinary mail. Therefore, I find that the Applicant likely has a reasonable explanation for the delay.

[7] In addition, given the early stage of the appeal proceeding, I find that allowing the extension would result in very little prejudice to the Respondent. It is in the area of whether or not the matter discloses an arguable case that I have some reservation. The Applicant has submitted that in his present medical state he is unable to use his arms for work related purposes and that he cannot be retrained. He argues that the General Division did not take his mobility restrictions into consideration. In my view, the only way I can decide if the Applicant has an arguable case is to grant the Application to extend time, which in the circumstances of this Application, namely an unrepresented applicant who has used the wrong form to make his application, seems appropriate.

[8] The Tribunal grants an extension of time to file the Application.

GROUNDS OF THE APPLICATION

[9] The Applicant relied on his perception that the General Division did not give adequate consideration to his medical conditions or misapplied the law in respect of his ability to retrain as the basis for his Application/appeal. His position is contained in his statement set out below. I find that the statement raises questions of whether the General Division decision breached subsections 58(1)(b) and (c) of the DESD Act. The Applicant submitted,

> I am still waiting for a surgeon consult about my shoulder. I have been waiting several years. I have also had phisio (sic) for my shoulder to no avail. I cannot sit or lay or stand for long periods of time and cannot raise my arms for work or other related purposes. So exactly do you think I can retrain for? My mobility and range of motion deteriorated on a daily basis. You have not taken that into consideration. Its (sic) been 6yrs since my last series of x-rays and I continue to find myself less and less able to perform daily tasks.

ISSUE

[10] Having decided to grant an extension of time to file the Application, the Tribunal must decide whether to grant the Application, thus the issue is: does the appeal have a reasonable chance of success?

THE LAW

[11] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[3] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success[4]. In *Hogervorst* as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

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[3] Sections 56 to 59 of the DESD Act. Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[4] The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ANALYSIS

[12] In order to grant leave to appeal I must be satisfied that the appeal would have a reasonable chance of success. This means that I must first find that at least one of the grounds of the Application relate to a ground of appeal that would have a reasonable chance of success if the matter were to proceed to a hearing. For the reasons set out below I am not satisfied that the appeal would have a reasonable chance of success.

[13] First, while the Applicant takes the position that the General Division erred by failing to take his present medical state into consideration when it made its decision, I find that the General Division did not err.

[14] The question that the General Division had to decide was quite clear, namely was the Applicant suffering from a severe and prolonged mental or physical disability as described by paragraph 42(2)(a) of the CPP on or before his minimum qualifying period, (MQP), date of December 31, 2008. I find that the General Division did not err in its application of the law to the facts.

[15] The Applicant's last day of work was December 23, 2008. He stated that he stopped working due to back pain caused by "disc displacement". Seven months later, the prognosis, contained in the medical report dated July 14, 2009, was that the Applicant's "low back pain will be chronic. It will be worse and better on a daily basis, depending on activity level. The overall picture will be of gradual deterioration over time." GT1-38

[16] The decision indicates that in assessing whether the Applicant's mental or physical conditions were severe and prolonged, the General Division Member considered all of the findings of the medical reports that were before her. She noted that there were only two medical reports prior to the MQP. One was an x-ray taken in 2006 and the other followed a consultation with a Dr. Oxner. The General Division Member also noted that neither these reports nor the CPP medical report referred to earlier stated that the Applicant was incapable regularly of pursuing any substantially gainful occupation. In light of this I am unable to find that the General Division ignored pertinent medical evidence.

[17] Similarly, I find that the General Division did not err in its application of the law to the facts in respect of the requirement that applicants seek alternative work. *Klabouch v. Canada (Social Development),* 2008 FCA 33, is clear that the question of whether an applicant for CPP disability pension attempted to find alternative work is a relevant consideration in determining whether an applicant's disability is severe. Hand in hand with the requirement to seek alternative employment, is the caveat, that there must be a reasonable explanation for failing to do so. In other words, applicants are ordinarily expected to exhaust all possibility of alternative work. See *M.C. v. M.S.D. (July 8, 2011) CP 26647 PAB,* where the applicant was found to have treatable pain conditions, but had made no attempt to find alternative work.

[18] The Applicant does not dispute that he did not seek alternative employment. His explanation for failing to do so was and remains that his back pain prevents him from engaging in work of any kind. The General Division Member rejected his explanation on the basis that the medical evidence did not support that on or before the MQP he had a severe mental or physical condition. I find that the General Division decision is reasonable as it is transparent and intelligible given the facts and the law.

CONCLUSION

[19] The Applicant submitted that the General Division erred by failing to give due consideration to his physical limitations, which he states persist and have worsened some six years after he stopped working. The Tribunal does not dispute that the Applicant's symptoms have worsened. Indeed, this was the prognosis of his family physician in July 2009. However, the General Division had to decide whether, at the time of the MQP, namely December 31, 2008, the Applicant's mental or physical conditions were such as to bring him within the CPP definition of severe and prolonged. The General Division Member found they were not and the Tribunal has been unable to find any error on her part. Therefore, the Tribunal is not satisfied that the appeal would have a reasonable chance of success.

[20] The criteria for granting leave not having been met, the Application is refused.

Hazelyn Ross
Member, Appeal Division