Citation: *J. W. v. Minister of Employment and Social Development*, 2015 SSTAD 1179

Appeal No. AD-15-240

BETWEEN:

J. W.

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 Decisions

---

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 1, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated September 12, 2014. The General Division conducted a videoconference hearing on May 26, 2014 and 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, 2003 or at a pro-rated date of January 31, 2005. The Applicant received the decision of the General Division on September 26, 2014. She filed an incomplete application requesting leave to appeal on May 4, 2015, several months past the deadline for filing a leave application. The Applicant retained a representative who filed further submissions on May 11, 2015. To succeed on this application, I must be satisfied that there is a basis for me to extend the time for filing and that the appeal has a reasonable chance of success.

ISSUES

[2] The following issues are before me:

i. Should I exercise my discretion and extend the time for filing of the leave application?

ii. Does the matter disclose an arguable case, i.e. does the appeal have a reasonable chance of success?

HISTORY OF PROCEEDINGS

[3] The Applicant applied for a Canada Pension Plan disability pension on August 2, 2012 (GT1-10 to GT-13). The Respondent denied the application initially and upon reconsideration. The Applicant appealed the Respondent's reconsideration decision to the Office of the Commissioner of Review Tribunals on November 27, 2012.

[4] Under section 257 of the Jobs, Growth and Long-term Prosperity Act (JGLPA), any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it

read immediately before the coming into force of section 229 of the JGLPA, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred the Applicant's appeal of the reconsideration decision to the Social Security Tribunal.

[5] In or about November 2013, the Applicant filed a Notice of Readiness. On February 28, 2014, the Social Security Tribunal advised the parties that the General Division Member intended to proceed by way of videoconference on March 19, 2014. On March 5, 2014, the Applicant wrote to the Social Security Tribunal requesting an adjournment of the hearing, as she would be away until late April 2014. On March 14, 2014, the General Division granted an adjournment of the hearing. On May 2, 2014, the Social Security Tribunal rescheduled the hearing to May 26, 2014.

[6] The General Division conducted a hearing by videoconference on May 26, 2014 and rendered its September 12, 2014. While the General Division noted the significant health concerns facing the Applicant, it also noted that the medical evidence on file left some doubt as to the severity of the Applicant's symptoms as of her minimum qualifying period. The General Division referred to a number of diagnostic investigations which showed normal or mild results. The General Division also noted that the Applicant had only three appointments with a nurse practitioner between January 2008 and December 2011, that there were no "concerning findings at her back physical", she had normal range of motion of the lumbar spine and was expected to remain stable for pain if properly managed. The General Division also noted that the Applicant worked full-time from doing physical work from May 9, 2011 to June 2, 2011 and from June 7, 2011 until August 14, 2011, albeit the latter was with some difficulty. The General Division also noted that after August 2011, the Applicant then began doing a sedentary type of job on a part-time basis in 2013 and continued with this work up to the hearing before it. The General Division concluded that the Applicant had not demonstrated that she was incapable regularly of pursuing any substantially gainful occupation as of December 31, 2003 or January 31, 2005.

SUBMISSIONS

[7] The Applicant explained that she was late in filing the leave application as she is a layperson, did not understand the appeal process and did not seek any legal advice until May 1, 2015.

[8] The Applicant submits that leave ought to be granted as she has been suffering from a disability her entire life and as it has caused a lower standard of enjoyment of life. The Applicant's representative submits that the General Division erred as it failed to observe a principle of natural justice or otherwise acted beyond or effused to exercise its jurisdiction.

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

ANALYSIS

i. Late Filing of Application

[10] The Applicant was approximately four months late in filing the leave application.

[11] Subsection 57(2) of the DESDA stipulates that "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".

[12] 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.

[13] 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.

[14] In reviewing each of the four factors, there is no prejudice to the Respondent in allowing an extension. The Applicant explains that she did not understand the leave process, but this does not reasonably explain why she was delayed in filing the application, nor does it necessarily evidence a continuing intention to pursue an appeal. This leaves the fourth factor – whether the matter discloses an arguable case – for consideration. This fourth factor merits a greater assignment of weight in the overall determination as to whether it would be in the interests of justice to exercise my discretion and allow an extension of time for filing. If it seems obvious, for instance, that there is no reasonable chance or even a remote chance of success on the appeal, then it would seem contrary to the interests of justice to exercise my discretion and allow an extension of time. If, on the other hand, there is a solid arguable case, or some extenuating circumstances, then it would be in the best interests of justice to exercise my discretion in favour of extending the time for filing.

[15] While ordinarily one should not determine whether leave to appeal ought to be granted or dismissed before an extension of time on the leave application has been allowed, it would seem that the most expeditious manner of dealing with late leave applications is to assess at the outset whether the matter discloses an arguable case, i.e. if the appeal has a reasonable chance of success. The answer to whether there is an arguable case can, in most cases, respond to two questions simultaneously: whether an extension of time should be allowed, and whether leave to appeal should be granted.

[16] If ultimately the Appeal Division is not satisfied that the appeal has a reasonable chance of success and is therefore likely to refuse leave to appeal, then it would seem that it could relieve one the effort in determining whether to exercise one's discretion to extend the time for filing of the leave application. If, on the other hand, the Appeal Division is satisfied that the appeal has a reasonable chance of success, then the Appeal Division must return to the balance of the *Gattellaro* and *Larkman* considerations in determining whether to exercise

its discretion and extend the time for filing, before it can proceed to answer the question as to whether leave to appeal should be granted.

ii. Does the matter disclose an arguable case?

[17] 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.

[18] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out that the only grounds of appeal are 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.

[19] I need to be satisfied that any 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.

[20] The Applicant submits that leave ought to be granted as she has been suffering from a disability her entire life and as it has caused a lower standard of enjoyment of life. I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. The impact of the Applicant's disability is an irrelevant consideration under subsection 58(1) of the DESDA, and the subsection does not permit me to undertake a reassessment of the evidence either.

[21] The Applicant's representative submits that the General Division erred as it failed to observe a principle of natural justice or otherwise acted beyond or effused to exercise its jurisdiction.

[22] It is insufficient to make a general statement 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, without specifying how the General Division might have failed to observe a principle of natural justice or how it otherwise acted beyond or refused to exercise its jurisdiction and how that error or failing might have impacted upon the outcome, as otherwise the application for leave to appeal provides no guidance or direction as to how I am to assess whether the appeal has a reasonable chance of success.

[23] 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 on this basis.

[24] 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.

[25] In addressing the medical evidence before it, the General Division wrote that the medical evidence on file "leaves some doubt as to the severity of her symptoms as of the MQP". This suggests that the General Division might have erred and applied a stricter standard of proof when it indicated that it was left with "some doubt" as to the severity of the Applicant's symptoms. Yet, at the same time, the General Division also wrote at paragraph 34 that the Applicant must prove "on a balance of probabilities" that she had a severe and prolonged disability and at paragraph 39:

> [39] Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal **is not satisfied on the balance of probabilities** that the Appellant suffered from a severe disability in accordance with the CPP criteria as of December 31, 2003 or January 31, 2005. (My emphasis)

[26] Had the General Division not set out the legal standard of proof which the Applicant was required to meet and also referred to this standard when it summarized its findings, I might have been prepared to find an arguable case. It seems that the General Division was alive to the standard of proof which the Applicant was required to meet, and that its expression "some doubt" was an unfortunate slip.

[27] As the Applicant's reasons for appeal effectively disclose no grounds of appeal for me to consider, and as the Applicant has not identified with sufficient specificity any errors which the General Division may have made in its decision, I am not satisfied that the appeal has a reasonable chance of success. As such, I refuse both the application for an extension of time for filing and the application for leave to appeal.

CONCLUSION

[28] The applications for an extension of time for filing and for leave to appeal are both dismissed.

Janet Lew
Member, Appeal Division