

Citation: *P. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1290

Date: November 5, 2015

File number: AD-14-599

APPEAL DIVISION

Between:

P. S.

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 claimed that she was disabled by fibromyalgia and mental illness when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a teleconference hearing and on November 27, 2014 dismissed the appeal.

[2] The Applicant filed some documents to request leave to appeal to the Appeal Division of the Tribunal on December 3, 2014. Her representative was advised by letter from the Tribunal that further documents were required to complete the application for leave to appeal. These documents were filed with the Tribunal on September 25, 2015, which appeared to be after the time to file an application requesting leave to appeal had expired.

[3] The Applicant argued that leave to appeal should be granted because she was disabled prior to the Minimum Qualifying Period (the date by which a disability pension claimant must be found to be disabled in order to receive a *Canada Pension Plan* disability pension), and that the General Division did not take into account the fibromyalgia and anxiety conditions which prevented her from working.

[4] The parties were given an opportunity to file submissions regarding whether the time for filing the application requesting leave to appeal should be extended and whether leave to appeal should be granted. The Appellant wrote that the application was filed within the time permitted. The Respondent argued that time for filing the application requesting leave to appeal should not be extended because the Appellant did not request this and she did not meet the legal test to be granted this relief. It also argued that leave to appeal should not be granted because the Applicant has not presented a ground of appeal that may have a reasonable chance of success on appeal.

[5] I must decide if the time for filing the application requesting leave to appeal should be extended, and if so, whether leave to appeal should be granted in this case.

ANALYSIS

[6] *The Department of Employment and Social Development Act* governs the operation of this Tribunal. Subsection 57(1) of the Act provides that an application must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the Appellant. Subsection 57(2) provides that this time may be extended but in no case for more than one year after the date that the decision was communicated to the appellant.

[7] The Applicant did not file a complete application requesting leave to appeal to the Appeal Division within the time permitted to do so. She filed some of the required documents to request leave to appeal to the Appeal Division within the time permitted to do so. However, subsection 40(1) of the *Social Security Tribunal Regulations* sets out eight requirements for an application for leave to appeal. The application did not comply with these requirements when it was initially filed with the Tribunal. The application was therefore not properly filed with the Tribunal. The Tribunal wrote to the Applicant's representative and requested the missing documents in December 2014. The Applicant did not file the remaining documents until September 2015, long after the time for filing an application requesting leave to appeal had expired.

[8] The Respondent suggested that as the Applicant had not requested an extension of time to file that application, no extension should be granted and the matter dismissed. Although that argument is persuasive, it is instructive to fully analyse the issues before me.

[9] In deciding whether to extend the time to file the application requesting leave to appeal I must consider and weigh the criteria as set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, which are:

- 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.

[10] The weight to be given to each of the *Gattellaro* 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 – *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[11] There is no basis upon which I can conclude that the Applicant had a reasonable explanation for her delay in completing the application, or that she had a continuing intention to appeal the General Division decision. She provided no explanation for the late filing of the documents.

[12] The Respondent did not suggest that it would be prejudiced in any way if the matter were to proceed. The Applicant made no submissions on this. I am satisfied that there would be no prejudice if the matter were to proceed.

[13] The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success on appeal- *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. I placed greater weight this factor as it is to be considered in deciding if the time for filing the application should be extended, and it is the legal test to be met for leave to appeal to be granted.

[14] Section 58 of *the Department of Employment and Social Development Act* sets out the only grounds of appeal that can be considered (this is reproduced in the Appendix to this decision). In this regard, the Applicant argued that she had a disability that was severe and prolonged prior to the Minimum Qualifying Period. This was the very issue that was before the General Division. The repetition of the Applicant's legal position is not a ground of appeal under the Act and so does not disclose an arguable case on appeal.

[15] The Applicant also submitted that the General Division did not take into account her fibromyalgia and anxiety when making its decision. Evidence regarding these conditions was presented to the General Division, and was considered by it. The basis of the decision was not that the Applicant did not suffer from these and other medical conditions, but that there was insufficient evidence to establish that the Applicant's conditions resulted in a disability that was

severe and prolonged at the Minimum Qualifying Period. This ground of appeal also does not present an arguable case on appeal.

[16] The interests of justice are not served by granting an extension of time to file an application requesting leave to appeal when there are no valid grounds of appeal that can be pursued. For all of these reasons, I find that it is not in the interests of justice for this matter to proceed, or for an extension of time to file the application to be granted in this case.

CONCLUSION

[17] An extension of time to apply for leave to appeal is refused for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

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.