Citation: *B. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1338

Appeal No: AD-15-1013

BETWEEN:

B. S.

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

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: November 19, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 21, 2015, following an in-person hearing on the same date. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2011. The Applicant received the decision of the General Division on April 22, 2015. His counsel filed an application requesting leave to appeal on October 7, 2015, close to three months past the deadline for filing a leave application. 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?

SUBMISSIONS

i Late Filing of Application

[3] Counsel submits that the Applicant was justifiably late in filing a leave application. He explains that his client, having been unrepresented for several months, was unfamiliar with the procedures and unaware of any deadlines. Counsel explains that his client has a disability affecting his memory and organizational skills, which interfered with his ability to file the application in a timely manner. Counsel explains that once he was retained, the

Applicant notified the Social Security Tribunal of his intention to seek leave, by letter dated September 16, 2015, and in the interim, counsel gathered information for the appeal.

ii. Leave Application

[4] Counsel submits that the General Division demonstrated bias when it determined that Dr. Julien "played the advocated for the [Applicant] in his application for CPP benefits", without providing adequate reasons or an explanation for this finding. Counsel submits that this finding creates a "reasonable apprehension of bias" and constitutes a breach of natural justice. Counsel relies on *H.W. v. Minister of Employment and Social Development,* 2015 SSTAD 104, where one of my colleagues held that the General Division in that case:

> stated that reports of Dr. Pop and Dr. Harth were not given weight, at least in part, because the Applicant consulted with them to try to build her case.
>
> [t]hese statements in the General Division decision, when read in the context of the entire decision, suggest that the General Division may have been biased. If so, this would be a breach of the principles of natural justice. This is a ground of appeal that has a reasonable chance of success on appeal.

[5] Counsel submits that the General Division erred in law when it found that Dr. Julien's "neutrality was lost", without providing any indication how it came to this conclusion. Counsel further submits that there are deficiencies in the reasons that prevent meaningful review of the correctness of the decision. Counsel submits that the error is similar to the one in *M.N. v. Minister of Employment and Social Development,* 2014 SSTAD 250, where my colleague referred to the decision of the Federal Court of Appeal in *Doucette v. Canada (Minister of Human Resources Development)* 2004 FCA 292 and wrote:

> The Federal Court of Appeal, in *Doucette v. Canada (Minister of Human Resources Development)* 2004 FCA 292 (CanLII) concluded that if, in the opinion of the appeal court, the deficiencies in the reasons [of the trier of fact] prevent meaningful appellant review of the correctness of the decision, then an error of law has been committed. In this case, the Appellant has pointed to deficiencies that may meet this legal test. The decision did not address why

> certain assessment reports were relied on and another was not. Therefore, this argument may have a reasonable chance of success on appeal.

[6] Counsel further submits that the General Division erred in law when it failed to explain why it preferred the opinions of Drs. McIntyre, Sheoran and Agdobo over Dr. Julien's opinion. Counsel relies on *K.O. v. Minister of Employment and Social Development*, 2014 SSTAD 384, where my colleague wrote:

> In this case, there was contradictory medical evidence. The General Division relied on some of this evidence in making the decision. It did not, however, explain why it preferred this evidence in the face of contradictory evidence. This is an error. Therefore, this ground of appeal has a reasonable chance of success on appeal.

[7] The Respondent has not filed any written submissions, addressing either the late appeal or the leave application.

ANALYSIS

i. Late Filing of Application

[8] The Applicant was approximately three months late in filing the leave application.

[9] Subsection 57(2) of the *Department of Employment and Social Development Act* (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".

[10] 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:

1. A continuing intention to pursue the application or appeal;

2. The matter discloses an arguable case;

3. There is a reasonable explanation for the delay; and

4. There is no prejudice to the other party in allowing the extension.

[11] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (CanLII), the parties there agreed that the criteria were similar, although rather than determining whether there was an arguable case, addressed whether there was any potential merit to the application. 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.

[12] In reviewing each of the four factors, there is no prejudice to the Respondent in allowing an extension. Counsel explains that the Applicant did not understand the leave process and was unaware of any deadlines, but this does not reasonably explain why he 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 might be in the best interests of justice to exercise my discretion in favour of extending the time for filing.

[13] 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.

[14] 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.

[15] I turn now to a determination as to whether the matter discloses an arguable case.

ii. Does the matter disclose an arguable case?

[16] 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.

[17] Subsection 58(1) of the DESDA 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.

[18] 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.

[19] On the face of it, counsel's submissions that the General Division failed to provide sufficient reasons for its findings regarding Dr. Julien appear compelling, but a review of the decision of the General Division suggests otherwise. At paragraphs 33 and 34, the General Division wrote:

> [33] Dr. Julien's conclusions as a generalist are not preferred to, and in fact are contrary to, the specialist opinions of Drs. McIntyre, Sheoran, and Agdobo who do not find evidence of a significant brain injury, or clinical depression. At the time of writing his reports Dr. Julien had only treated the Appellant for 2 to 3 years long after the MVA in 2000. Dr. Julian does not refer to any other reports in his reports, or offer a justification for departing from the other medical opinions. In his chart note of October 2009 he says the Appellant is able to work, and by September 2011 says that the Appellant is permanently disabled without explaining what had happened in the interim to cause a change in his opinion.
>
> [34] The Tribunal finds that Dr. Julien has played the advocate for the Appellant in his application for CPP benefits. There are indications that his neutrality was lost, and the Tribunal must be vigilant in assessing his evidence, particularly when the doctor does not testify *(Canada (MHRD) v. Angheloni*, 2003 FCA 140).

[20] It cannot be said that the General Division did not provide adequate reasons or an explanation for finding that Dr. Julien advocated on behalf of his patient or that his neutrality was lost, or that it did not explain why it preferred the opinions of Drs. McIntyre, Sheoran and Agdobo over the opinion of Dr. Julien, upon which meaningful appellate review can take place. The matter before me is factually distinguishable from those authorities cited by counsel.

[21] I am not satisfied that the appeal has a reasonable chance of success on the grounds set out by counsel.

[22] As I have determined that the appeal does not have an arguable case or a reasonable chance of success on appeal, I am unprepared to exercise my discretion and extend the time for filing the leave application.

CONCLUSION

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

Janet Lew
Member, Appeal Division