Citation: *M. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1419

Appeal No. AD-15-1077

BETWEEN:

M. A.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 11, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 17, 2015. The General Division conducted an in-person hearing on April 15, 2015 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, 2011. The Applicant did not indicate when she might have received the decision of the General Division, but it appears that she filed the application requesting leave to appeal beyond the time limit to do so, when she filed it on October 2, 2015. The Applicant alleges that the General Division made a number of errors. 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. if the Applicant filed the application requesting leave to appeal beyond the time limit, should I exercise my discretion and extend the time for filing of the leave application? and

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

SUBMISSIONS

[3] The Applicant appears to have filed her application requesting leave to appeal after 90 days after the day on which it was communicated to her. This is outside the time in which an application for leave to appeal is required to be made, pursuant to paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA). The Applicant did not address the issue as to whether I should exercise my discretion and grant an extension of time for filing her application requesting leave to appeal, in the event that she filed the application requesting leave to appeal beyond the time limit to do so.

[4] The Applicant submits that the appeal has a reasonable chance of success for the following reasons:

(a) the General Division did not consider the fact that she was unable to "work adequately". She explains that she had been terminated from her previous employment and did not look for any other employment because she was unable to "work adequately";

(b) the Applicant does not dispute the findings of fact regarding the advice she received from her physician about a return to work, but explains that she had been driven by financial need, and therefore had advised her physician that she wished to attempt working graduated hours. Despite being on pain relief medication, the Applicant found she was unable to perform her duties;

(c) any disability pension she might receive from the Canada Pension Plan will pale in comparison to the earnings she formerly enjoyed. She was quite happy and proud to be employed by her previous employer, but she was terminated as she was unable to meet performance standards due to her disabilities;

(d) at paragraph 41 of its decision, the General Division erred in finding that she "should be able to pursue other gainful occupations" within her "limitations or retrain", when she has both physical and mental limitations and is suffering from so many different kinds of pain. She states that any job would require her to "basically work continuously for almost 8 hours and [she is] not able to continuously stand or sit for very long periods of time". She states that she gets major headaches and dizziness;

(e) any medical opinions which downplayed the severity of her claim ought not to have been given any, if much, weight by the General Division, as the experts who provided these medical opinions were biased as they had been retained by insurance companies; and

(f) the General Division erred in stating that she had been employed at Dicom System for six to seven months. The Applicant states that in fact she had been employed there for approximately five years.

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

ANALYSIS

i. Late Filing of Application

[6] Paragraph 57(1)(b) of the DESDA requires an application for leave to appeal to be made to the Appeal Division 90 days after the day on which the decision is communicated to the appellant.

[7] The General Division issued its decision on June 17, 2015. Although the Applicant does not specify when she might have received the decision, paragraph 19(1)(a) of the *Social Security Tribunal Regulations* deems a decision to have been communicated to a party if sent by ordinary mail "10 days after the day on which it is mailed to the party". The letter from the Social Security Tribunal which accompanies the decision is dated June 19, 2015. Presumably the letter and decision were sent on June 19, 2015.

[8] Applying paragraph 19(1)(a) of the *Social Security Tribunal Regulations,* the decision of the General Division is therefore deemed to have been communicated to the Applicant on June 28, 2015. Ninety days after this date falls on September 28, 2015, a Sunday.

[9] Under sections 26 and 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday; Sunday falls within the definition of a "holiday". Therefore, I calculate that the Applicant was required to have filed the application requesting leave to appeal by no later than September 29, 2015. The Applicant was three days late in filing the leave application.

[10] 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".

[11] 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.

[12] 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.

[13] The Applicant did not address any of these four factors. Nonetheless, it is apparent that the Respondent will not suffer any prejudice if an extension of time were granted, given that the delay is a mere three days. It is not altogether apparent that the Applicant had a continued intention to pursue an appeal or any reasonable explanation for the delay, or whether there are any particular circumstances in the consideration that the interests of justice be served, to allow for an extension.

[14] The fourth factor identified above -- whether the matter discloses an arguable case –- 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 neither a reasonable chance nor even a slight or 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 is more likely than

not that it would be in the best interests of justice to exercise my discretion in favour of extending the time for filing.

ii. Does the matter disclose an arguable case?

[15] 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.

[16] 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.

[17] I need to be satisfied that the 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.

(a) Evidence

[18] The Applicant alleges that the General Division did not consider the evidence regarding her desire to work, but for her inability to work. The Applicant also explains why her physician advised her about a return to work. She submits that the General Division ought not to have assigned much weight to the medical opinions of the experts retained by the insurance companies. She submits that overall, the General Division did not properly assess her claim.

[19] The Federal Court of Appeal has previously addressed this submission in other cases that the trier of fact had failed to consider all of the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel identified a number of medical reports which she said that the Pension Appeals Board had ignored, attached too much weight to, misunderstood, or misinterpreted. The Federal Court of Appeal dismissed the application for judicial review before it, stating that "a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence". The Federal Court of Appeal also refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". I agree with that approach, though if there is a material issue or fact, the decision-maker ought to address it.

[20] The Applicant complains of headaches and dizziness. The General Division specifically discussed both complaints in its analysis. The General Division also discussed the Applicant's other injuries as well has her capacities and functional limitations and restrictions. Thus, it cannot be said that the General Division ignored these considerations.

[21] The Applicant's submissions essentially call for a reassessment and re-weighing of the evidence, which is beyond the scope of a leave application. The role of the Appeal Division is to determine if the General Division committed a reviewable error under subsection 58(1) of the DESDA, and if so, to provide a remedy for that error. The Appeal Division has no jurisdiction to intervene otherwise or to hear the appeal on a *de novo* basis.

(b) Erroneous finding of fact

[22] The Applicant alleges that the General Division made an erroneous finding of fact when it stated that she had been employed by Dicom System for approximately six to seven months. She states that she had been employed there for approximately five years.

[23] The General Division may have mis-stated the evidence before it, but it does not appear that the General Division based its decision on the length of her employment with Dicom System. Indeed, the fact of her past employment was not referred to in its analysis. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Standard of proof

[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 35 that the Applicant must prove "on a balance of probabilities" that she had a severe and prolonged disability and at paragraph 40:

> [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 she suffered from a severe disability as of the MQP. (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 or that there is an arguable case. As such, notwithstanding the fact that the delay involved is a mere three days, I do not find that it is in the interests of justice that I exercise my discretion and extend the time for filing of the leave application either.

CONCLUSION

[28] Given the considerations above, the applications for an extension of time for filing and for leave to appeal are both dismissed.

Janet Lew
Member, Appeal Division