Citation: *L. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1484

Appeal No: AD-15-1268

BETWEEN:

L. M.

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 Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 31, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 25, 2015. The General Division conducted an in-person hearing and found that the Applicant had a severe and prolonged disability in July 2001, when she became ill. The General Division also determined that as the application for a Canada Pension Plan disability pension was received on May 3, 2010, the Applicant was deemed disabled in February 2009 and that payment of a disability pension therefore should commence in June 2009. The Applicant's current representative, her spouse, filed an Application Requesting Leave to Appeal to the Appeal Division on November 23, 2015, months past the deadline for filing a leave application. The representative alleges that the General Division erred, as it ought to have determined the Applicant incapacitated since July 2001. To succeed on this application, I must be satisfied that there is a reasonable basis 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 appeal have a reasonable chance of success?

SUBMISSIONS

[3] The Applicant's representative submits that there are sound reasons to account for the delay in filing the leave application.

[4] The General Division concluded that the Applicant has had a severe medical condition since 2001, two years prior to her minimum qualifying period of December 31, 2003, and that she suffers from a prolonged medical condition. The Applicant does not dispute these findings. Rather, the representative submits that the Applicant is entitled to

greater retroactivity of the commencement of the payment of a disability pension to July 2001, as the Applicant "had no capability of forming the intention to apply for disability benefits under the *Canada Pension Plan* until at *least* August 27, 2009". The representative submits that there are a variety of factors why the Applicant lacked the capacity to form the intention to make an application for a Canada Pension Plan disability pension. He explains that the Applicant was unable to comprehend the magnitude of her illness or that it would be prolonged, resulting in a continuous and ingrained belief that her symptoms were transient and would soon resolve. The representative enclosed a number of medical records and reports, as well as a chronology for the Applicant and educational material regarding cognitive dissonance and denial. I understand that effectively the Applicant submits that the General Division erred in failing to consider whether the Applicant was incapacitated, given the documentary record and verbal testimony.

[5] The representative submits that the General Division also erred in failing to grant greater retroactivity, given the "considerable and undue hardship" which the Applicant will face.

[6] The Respondent has not filed any written submissions in respect of this leave application.

ANALYSIS

i. Late Filing of Application

[7] The Applicant is more than four months late in filing the leave application.

[8] 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".

[9] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out the four main 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.

[10] 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.

[11] In reviewing each of the four factors, there is no prejudice to the Respondent in allowing an extension. The representative explains that he took steps to appeal the decision but as he received inaccurate advice as to how the Applicant should proceed, misdirected the leave application to Service Canada, rather than filing it with the Social Security Tribunal. He also explains that he consulted numerous lawyers and paralegals but received conflicting advice. He also explains that he had personal family matters which required his attention. Given that the Applicant relied on her spouse to pursue the appeal on her behalf, I am satisfied that she had a continuing intention to pursue her appeal and that there is a reasonable explanation to account for her delay in filing the leave application. I have not considered whether the matter discloses an arguable case in the context of whether I ought to extend the time for filing, but it is well established that an applicant need not satisfy all four factors set out in *Gattellaro*, or that all four factors be assigned equal weight, given that the overriding consideration remains the interests of justice. In the interests of justice and the factual circumstances of this case, I am prepared to extend the time for filing the leave application.

ii. Does the appeal have a reasonable chance of success?

[12] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[13] 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. The Federal Court recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Incapacity

[14] The representative submits that the General Division failed to consider whether the Applicant was incapacitated. He submits that had it done so, it would have deemed the application for a Canada Pension Plan disability pension to have been made as early as mid-2001.

[15] It is unclear whether the Applicant's representative at the time (who is not the same as her current representative) advanced submissions along these lines at the hearing on March 24, 2015. However, I do not find that the Applicant was required to specifically argue that she was incapacitated, as the General Division was required to determine when payment of the disability pension was to effectively commence, once it had determined that the Applicant was disabled for the purposes of the *Canada Pension Plan* by her minimum qualifying period. Hence, there had to have been some evidence before the

General Division to suggest that the incapacity provisions under the *Canada Pension Plan* were at all applicable. Had there been evidence of incapacity, this should have triggered a determination as to whether the Applicant was indeed incapacitated and if so, whether granting greater retroactivity of payments of a disability pension was warranted.

[16] The representative summarized some of the evidence that was before the General Division. He submits that "it is possible that these factors were not fully highlighted … during the tribunal hearing" and that as a result, the General Division "did not fully consider the grounds giving rise to the exceptional circumstances that would allow backdating of the payment of benefits beyond 2009". The representative submits that the Applicant was incapable of forming an intention to make an application for a Canada Pension Plan disability pension due to what he describes as the following:

- misinterpretation and rationalization by the Applicant, which led her to believe that her diminished functional capacity would be restored;
- improper diagnosis by the Applicant's family physician and non-diagnosis by specialists, which further reaffirmed the Applicant's expectations that her symptoms would resolve;
- isolated extreme endurance activities. The Applicant participated in the New York City Marathon in 2005 and an Ironman Triathlon in 2007, which reinforced her belief that she was not ill and that her symptoms would not persist;
- the confusing nature and lack of general awareness of Lyme disease, chronic fatigue syndrome and fibromyalgia, which fostered the Applicant's misconceptions and misinterpretations; and
- cognitive dysfunction, impairment and incapacity – their sudden onset triggered denial on the part of the Applicant.

[17] The representative submits that these factors rendered the Applicant unable to accept the magnitude of her illness, or that it would continue to be prolonged, and that as

a result, she could not have formed the requisite intention to apply for a Canada Pension Plan disability pension until May 2010.

[18] These submissions, as presented by the representative, largely call for a reassessment of the evidence or re-weighing of the factors considered by the General Division. As the Federal Court recently held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. My role for the purposes of assessing an application requesting leave to appeal is to determine whether there are any grounds of appeal under subsection 58(1) of the DESDA and to determine whether the appeal has a reasonable chance of success. In the proceedings before me, this involves reviewing the evidence to the limited extent of considering whether there was any evidentiary basis for the General Division to regard the Applicant incapacitated for the purposes of the *Canada Pension Plan.*

[19] The incapacity provisions under the *Canada Pension Plan* can be found at subsections 60(8) to 60(11):

> [8] *Incapacity* – Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of the evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
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> [9] Where an application for benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that
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> a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
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> b) the person had ceased to be so incapable before that day, and
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> c) the application was made

(i)within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii)where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[10] *Period* of incapacity – For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[11] Application – Subsections (8) to (10) apply only to individuals who were incapacitated after January 1, 1991.

[20] To be considered incapacitated for the purposes of the *Canada Pension Plan*, a person must be incapable of forming or expressing an intention to make an application on the person's own behalf.

[21] In *E.M.H. v. Minister of Employment and Social Development*, (November 30, 2015), AD-15-495 (currently unreported), my colleague H. Ross reviewed the jurisprudence relating to the incapacity provisions of the *Canada Pension Plan.* She wrote:

> [18] . . . In *Canada (Attorney General) v. Danielson*, 2008 FCA 78, the Federal Court of Appeal (FCA), described section 60 as "precise and focused in that it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity of forming or expressing an intention to make an application. " The [Federal Court of Appeal] went on to state that the activities of a claimant during the period between the claimed date of commencement of disability and the date of application may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered.
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> [19] The Federal Court of Appeal returned to the question in *Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86. This time the [Federal Court of Appeal] addressed the question of the nature of the "capacity to form the intention to apply for benefits." In the opinion of the [Federal Court of Appeal],

> "the capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his worldview does not indicate a lack of capacity.
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> [20] In *Slater v. Canada (Attorney General),* 2008 FCA 375, the [Federal Court of Appeal] elaborated on the type of evidence necessary to establish whether an applicant lacked the capacity to form or express the intention to apply for a benefit. The [Federal Court of Appeal] stated that it was necessary to look at both medical evidence and the relevant activities of the applicant.
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> [21] The Pension Appeals Board (PAB) dealt with this question in *Nenshi v. Canada (Minister of Social Development), (January 9, 2006), CP 22251 (PAB).* The PAB stated that "it is not whether a person is capable to deal with the consequences of an application, but rather whether the person was capable of forming an intention to apply or not. The capacity lacking which an applicant must establish is of forming or expressing an intention to make an application, not the preparation process and completion of the application." In relation to the appellant, *Nenshi*, the PAB noted that she "always knew she was ill and received treatment for such illness. She may not have been able to deal with the physical act of completing the forms, but she could form and express an intent to apply."

[22] The jurisprudence is clear that it is either irrelevant or insufficient whether the Applicant had not been properly diagnosed, that she was in a state of denial about her overall medical condition or that she had a number of debilitating symptoms and faced restrictions and limitations and might have been largely bedridden since 2001. The issue is not whether the Applicant is disabled or not. Rather, the issue is whether the Applicant meets the narrow definition of incapacity under the *Canada Pension Plan*. It is a much higher and more rigorous standard than the test for disability. As the Federal Court of Appeal held in *Slater*, it is necessary to look at not only the medical evidence, but also the relevant activities of the applicant.

[23] In *Danielson*, the Federal Court of Appeal allowed the application for judicial review. There, the applicant Attorney General of Canada submitted that there were a number of activities which were relevant and which the Pension Appeals Board should have considered. The Federal Court of Appeal held that the Pension Appeals Board should have looked at whether these events at the time they occurred evidenced a

capacity to form or express an intention to make an application for benefits. There, the Pension Appeals Board had omitted to do that or to consider other relevant activities.

[24] The issue of incapacity was not directly placed before the General Division, but the General Division nonetheless examined the Applicant's activities. It noted that the Applicant had pursued various treatment options, including physiotherapy, acupuncture, chiropractic therapy, antibiotics, reflexology, and orthotics. The General Division also noted that the Applicant was disappointed that she had not accomplished anything in the four years after she began experiencing profound fatigue, and that she thereby set out to train for and complete a marathon, and then, despite her ongoing fatigue, two years later, trained for and completed an Ironman. The General Division also noted that after reading a newspaper article about Lyme disease, the Applicant secured a referral to a specialist in hematological pathology. The General Division also noted that the Applicant had come up some with marketing ideas in the course of her volunteer work for Animal Assistance. These events occurred during the period of alleged incapacity.

[25] Given the scope of activities in which the Applicant was involved, and her apparent capacity where her ability to form intentions was concerned, there does not appear to have been any basis upon which the General Division ought to have been alerted that possibly the Applicant had been continuously incapacitated at any time between 2001 and 2010, when she applied for a Canada Pension Plan disability pension.

[26] There is support for this too in the Applicant's own leave application, to suggest that the Applicant was not incapacitated as defined by the *Canada Pension Plan*. At page AD1-27, the representative wrote:

> We are not suggesting that [the Applicant] did not have the mental capacity to realize that she was experiencing disabling symptoms - clearly she sought medical and paramedical treatments to address the severe pain, fatigue and cognitive symptoms that were profoundly reducing her functional ability.
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> The reason she was incapable of forming intent to make a CPP disability application is because since the onset of disability in 2001, she always believed there was nothing medically wrong and that her debilitating symptoms were only temporary and would imminently resolve. Denial allowed her to continue to hold

> this belief even as her symptoms persisted long-term and continuous over the course of many years.

[27] Denial of her own circumstances does not meet the stringent test for incapacity, where the Applicant, by her own admission, had the mental capacity to pursue treatment. The mental capacity described by the Applicant does not speak to being incapable of forming or expressing an intention to make an application. As the Federal Court of Appeal in *Sedrak* held, the capacity is not different in kind from the capacity to form an intention with respect to other choices. Clearly, the Applicant was in a position in which she could and did make choices on her own behalf.

[28] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division erred in law in failing to consider whether the Applicant could be found incapacitated. Given the evidence before it, there was nothing to signal to the General Division that the incapacity provisions were relevant to the Applicant's circumstances.

(b) New facts

[29] The Applicant's representative has filed medical records, a chronology and educational material regarding cognitive dissonance and denial. Some of these records were before the General Division.

[30] In a leave application, any new facts should relate to the grounds of appeal. The representative has not indicated how any additional records and in particular, the educational material regarding cognitive dissonance and denial might fall into or address any of the enumerated grounds of appeal. If he is requesting that we consider these additional facts, re-weigh the evidence and re-assess the claim in the Applicant's favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is incapacitated as defined by the Canada Pension Plan.

[31] In *Tracey*, the Federal Court determined that there is no obligation to consider any new evidence. Indeed, Roussel J. wrote:

> Under the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves v. Canada (Attorney General),* 2014 FC 1100, at para 108).

[32] If the representative has provided these additional records in an effort to rescind or amend the decision of the General Division, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so, which in this case is the General Division.

[33] The new facts as presented by the Applicant do not raise nor relate to any grounds of appeal and I am therefore unable to consider them for the purposes of a leave application.

(c) Hardship

[34] The representative submits that the Applicant ought to be entitled to greater retroactivity, as she has been put through considerable and undue hardship. The representative submits that the hardship will be perpetuated if greater retroactivity is not granted.

[35] The fact that the Applicant has and will continue to suffer hardship is of no consequence, for the purposes of determining entitlement to greater retroactivity. The *Canada Pension Plan* does not permit either the General Division or the Appeal Division to consider the impact their decisions may have on any of the parties, nor does it confer any discretion upon the General Division or the Appeal Division to consider other factors outside of the *Canada Pension Plan* in deciding whether an applicant is entitled to greater retroactivity or is incapacitated as defined by the *Canada Pension Plan.* I am not satisfied that the appeal has a reasonable chance of success on the ground that the Applicant will endure ongoing hardship.

CONCLUSION

[36] Given these considerations, the application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division