Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *A. E. v. Minister of Employment and Social Development*, 2016 SSTADIS 49

Date: January 22, 2016

File number: AD-15-270

APPEAL DIVISION

Between:

A. E.

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 he was disabled by osteoarthritis and resulting physical limitations when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his 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 that the Applicant did not attend. On January 9, 2015 it dismissed the appeal.

[2] The Applicant requested an extension of time to file an application for leave to appeal and for leave to appeal. He argued that he had a reasonable explanation for his delay in filing this appeal, a continuing intention to appeal, an arguable case on appeal and that no prejudice would result if the matter were to proceed. In addition, it was in the interests of justice for the matter to proceed.

[3] The Respondent filed no submissions with respect to this application.

ANALYSIS

[4] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 57 of the Act provides that an application for leave to appeal to the Appeal Division must be filed within 90 days of the day on which the General Division decision is communicated to the applicant. The time for filing an application may be extended, but in no case can it be extended for more than one year after the date that the decision was communicated to the applicant. Section 58 of the Act sets out the only grounds of appeal that can be considered to grant leave to appeal a decision of the General Division (see the Appendix to this decision). Hence, I must decide if the Applicant should be granted an extension of time to file the application for leave to appeal, and if so whether leave to appeal should be granted.

Extension of Time

[5] In assessing the request to extend time for leave to appeal, the Tribunal is guided by decisions of the Federal Court. In *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883 this Court concluded that the following factors must be considered and weighed when deciding this issue:

a) A continuing intention to pursue the application;

b) There is a reasonable explanation for the delay;

c) There is no prejudice to the other party in allowing the extension; and

d) The matter discloses an arguable case.

[6] The weight to be given to each of these 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).

[7] The Applicant presented detailed submissions regarding each of the *Gattellaro* factors and the interests of justice. He explained that he returned to Egypt in the fall of 2014 because it was cheaper to live there. Although he had tried to make arrangements with a friend in Canada to forward communication from the Tribunal to him, this did not work effectively. As a result, he did not receive the Notice of Hearing dated September 2014 in a timely way. He was also not able to afford a reliable telephone connection from Egypt to Canada to attend the hearing, and did not understand that an interpreter could be provided for him at the hearing. Thus, he did not attend the hearing. The Applicant argued, in addition, that he had asked a friend to forward relevant documents to a Legal Aid office in Toronto on his behalf so that it could represent him at the hearing. This did not occur.

[8] The Applicant further submitted that because he was in Egypt he did not receive the January 2015 General Division decision until April 2015. When he returned to Canada he immediately took steps to retain counsel to represent him. The Tribunal received a letter from the Applicant on May 13, 2015 that set out his intention to appeal the General Division decision and promised that further documents would be filed. In October 2015 he again contacted the Tribunal to advise of a change of address. Counsel filed the completed

application requesting an extension of time and leave to appeal with the Tribunal on January 8, 2016.

[9] On the basis of the facts set out above I am satisfied that the Applicant had a continuing intention to appeal the General Division decision, and a reasonable explanation for his delay in doing so.

[10] The Applicant contended that there would be no prejudice to the Respondent if this matter were to proceed, but severe prejudice to the Applicant if an extension of time were not granted to him. I agree.

[11] The Federal Court of Appeal has decided that an arguable case at law is akin to whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63**.** Since this is the same legal test to be met for leave to appeal to be granted under the Act, it is considered in that context below.

Leave to Appeal

[12] To be granted leave to appeal the Applicant must present at least one ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal. The Applicant presented a number of arguments which he submitted met this test for leave to appeal to be granted.

[13] First, the Applicant argued that the General Division failed to observe the principles of natural justice when it proceeded with the teleconference hearing in his absence. His counsel referred to the Notice of Hearing which stated that one reason for holding an oral hearing was that there was gaps/need for clarification of the information provided in the written record. Counsel argued that as the matter was decided without the Applicant present, the Applicant was not able to fully present his case and respond to the Respondent's case, nor could he provide clarification that the General Division identified as being necessary. The Applicant's counsel also argued that the nature of the alleged disability was subjective, and would require an assessment of the Applicant's credibility

regarding his pain and level of functioning. Without the Applicant present, this could not be done in a way that complied with the principles of natural justice.

[14] I have reviewed the General Division decision. The Applicant did not advise the Tribunal that he would not be in Canada, or that he might require special arrangements to attend the hearing. On the material before her, General Division Member was satisfied that the Applicant had received notice of the hearing and so proceeded in his absence. No error was made in so doing. Although the General Division made its decision without all the possible relevant evidence being presented, I am not satisfied that it, by action or omission, prevented the Applicant from presenting his case, knowing or meeting the case against him. The decision was unbiased and made on the facts and the law. This ground of appeal does not have a reasonable chance of success on appeal.

[15] The Applicant also argued that the General Division erred as it did not consider this disability claim in light of the principles set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248. He contended that although the decision cited *Villani* and its principles, it did not apply them to his circumstances. In particular, he argued that the General Division did not take into consideration that his short-term memory had deteriorated, that his English skills were limited, that his university education was obtained in a foreign country and approximately 30 years prior to the hearing, and that the only work experience he had in Canada was in a physically demanding job operating a heating and air conditioning repair and servicing business. The General Division decision stated that the Applicant was 60 years of age, had an excellent education and good work experience. I am satisfied that the General Division decision may have contained an error in this regard as it did not consider all of the Applicant's personal circumstances. This ground of appeal may have a reasonable chance of success on appeal.

[16] The Applicant further argued that the General Division further erred in law by referring to vague categories of labour and concluding that because there was some suggestion that he could perform some unspecified sedentary job this qualified as "any" occupation under the *Canada Pension Plan*. She relied on *Villani* to support her argument

that this was an error. I am satisfied that this ground of appeal points to an error of law in the decision and may have a reasonable chance of success on appeal.

[17] Finally, the Applicant submitted that the General Division erred when it concluded that because no severe degenerative changes in his knees were shown in diagnostic tests until 2010, which was significantly after the Minimum Qualifying Period; his condition was not severe at the Minimum Qualifying Period. The Applicant contended that the General Division decision failed to consider that osteoarthritis is a chronic degenerative condition, which worsens over time. I am not satisfied that this ground of appeal may have a reasonable chance of success on appeal. The General Division decision contained this finding of fact based on the evidence that was before it. It was not made in a perverse or capricious manner. Leave to appeal is not granted on this basis.

CONCLUSION

[18] After considering the General Division decision, the law and the written submissions before me and for the reasons set out above, I am persuaded that it would be in the interests of justice to extend the time to file the application for leave to appeal.

[19] Leave to appeal is also granted as the Applicant has presented at least one ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

57 (1) an application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

(a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and

(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

57. (2) 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.

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.