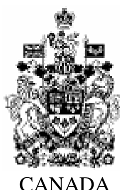
Social Security Tribunal



Tribunal de la sécurité sociale

Citation: ***K. M. v. Minister of Employment and Social Development*****, 2016 SSTADIS 148**

Date: April 26, 2016

File number: AD-16-207

Appeal Division

BETWEEN:

K. M.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

Canada

DECISION

[1] The Appeal Division extends the time for filing the Application for leave.

[2] The Application for Leave to Appeal is refused.

BACKGROUND

[3] The Applicant applied for a *Canada Pension Plan,* (CPP), disability pension in March 2011. The Respondent denied the application both initially and upon reconsideration of its decision. The Applicant appealed the reconsideration decision to the General Division of the *Social Security Tribunal,* (the Tribunal).

[4] On September 10, 2015 the General Division issued a decision in which it found that the notice of appeal had been filed out of time. The General Division Member found that while the Applicant may well be disabled as of the hearing date, there was insufficient evidence to establish that on or before the end of his minimum qualifying period, namely, December 31, 2003, the Applicant was suffering from a severe and prolonged disability within the meaning of the CPP. The General Division dismissed the appeal. The Applicant seeks leave to appeal from the decision of the General Division, (the Application).

[5] The Tribunal received the Application on January 25, 2016.

GROUNDS OF THE APPLICATION

[6] In his application for leave, the Applicant submitted that he was disabled and, therefore, he was entitled to a disability pension. He stated that his doctor also knew that he is disabled and that he has been sick for a long time. (AD1). He did not relate the basis of his appeal to any of the grounds of appeal set out in the under paragraph 58(1)(a) of the *Department of Employment and Social Development,* (DESD) *Act*.

THE ISSUE

[7] The Appeal Division must decide whether the appeal would have a reasonable chance of success.

PRELIMINARY ISSUES

[8] The Application was filed outside of the 90 day time limit allowed by ss. 57(b) of the DESD Act. This means that the Appeal Division must decide whether to extend the time limit for filing the Application.

The Late Appeal

[9] The DESD Act provides in ss. 57 (b) that an Applicant has 90 days from the date on which a decision of the General Division was communicated to him to file an application for leave. The DESD Act also allows the Appeal Division to extend the time for filing an application; however, it limits any extension of time to one year from the date the decision was communicated to an applicant. In this appeal, the relevant date is September 15, 2015. This is the date that the Applicant stated he received the General Division decision. The Tribunal received an incomplete Application 132 days after the date the decision was communicated to the Appellant.

[10] When it received the incomplete Application, the Tribunal advised the Applicant that it would consider his application complete as of January 25, 2016 if he sent it the missing information, namely, the grounds of appeal, before February 29, 2016. In its letter dated January 29, 2016, the Tribunal also advised the Applicant that if his appeal was late, a Member would have to make a decision as to whether or not the time for filing the appeal would be extended. As noted above, the appeal was already late when it was filed on January 25, 2016, a fact the Applicant acknowledged. He explained that he did not apply within the 90 day time limit because he became discouraged when he was told by telephone that a hearing of his appeal would not take place for another two or three years. (AD1-2) He offered no other explanation for the delay in filing.

[11] In considering whether to extend the time to file the Application, the Appeal Division considered the common law test set out by the Federal Court in *Canada (Minister of Human Resource Development) v. Gattelaro*, 2005 FC 833. The Federal Court set out the following criteria that must be considered:-

- Whether there was a continuing intention to pursue the application or appeal;
- Whether the matter discloses an arguable case;
- There is a reasonable explanation for the delay; and
- Whether there is prejudice to the other party in allowing the extension.

[12] These considerations were enlarged in *(Canada) Attorney General v. Larkman* 2012 FCA 204, when the Federal Court of Appeal stated that in considering whether to extend time, the "overriding concern is that the interests of justice be served. In *Larkman's* case the interests of justice considerations involved looking at the effect the order-in-council in question would have on her and her descendants. [para 91]

[13] Of the four *Gattelaro* factors, the only one that is clearly in the Applicant's favour is that the delay of forty-two or so days does not unduly prejudice the other party. The Appeal Division is satisfied that the Respondent would still be able to prepare its case, should leave to appeal be granted. As well, the fact that, despite his stated misgiving, the Applicant did file the Application six weeks after the end of the 90-day time limit could, liberally interpreted, be seen as indicative of a continuing intention to pursue the appeal. Where the matter falls down is that the Applicant has not, in the view, of the Appeal Division, provided a reasonable explanation for the delay nor is it certain that his matter discloses an arguable case, as the Applicant has not related his submissions to a ground of appeal.

[14] As in *Larkman*, the Appeal Division asked the question, "although the Applicant cannot satisfactorily explain several weeks of delay should he be permitted to pursue an appeal?" for the following reasons, the Appeal Division finds that the interests of justice requires it to extend the time for filing. First, the Applicant has a limited education, there being some indication in the Tribunal record that he is somewhat illiterate in the English language. As well, he is self- represented, which two circumstances taken together may go a long way to explain the late filing Accordingly, the Appeal Division grants the extension of tine to file the Application

[15] Having granted the extension of the time limit to file the Application, the Appeal Division now turns to deciding whether or not it will grant leave to appeal the GD decision which is a separate issue.

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[16] On an application for leave an applicant is required to satisfy the Appeal Division that his appeal would have a reasonable chance of success. According to ss. 58(2) of the DESD Act, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success". An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success an applicant by raising an arguable case in his application for leave.[1] An arguable case has been equated to a reasonable chance of success[2].

[17] The DESD Act sets out the grounds of appeal at ss. 58(1). These are the only grounds of appeal. The provision reads as follows:-

> (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] In order to grant the Application, the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above.

ANALYSIS

Did the General Division breach ss. 58(1) of the DESD Act?

[19] The Appellant's reasons for seeking leave to appeal include the fact that he has worked and contributed to the CPP since around 1975. He argues that he is entitled to a CPP disability benefit because both he and his doctor know that he is disabled and despite being

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63

given several opportunities to relate his submissions to the grounds of appeal set out in the DESD Act, the Applicant has not done so. (AD1A/AD1B/AD1C/AD1D)

[20] The Appeal Division finds that the Applicant's arguments do not give rise to grounds of appeal that would have a reasonable chance of success. The Appeal Division is unable to find in either his statements or the Tribunal record or the decision any breach of natural justice or error of law or erroneous finding of fact that the General Division may have made. The Applicant's submissions amount to no more than expressions of his disagreement with the decision of the General Division. The Appeal Division cannot reweigh the evidence in order to arrive at a decision that favours the Applicant. Thus, it cannot grant leave to appeal.

CONCLUSION

[21] On the basis of the foregoing, the Appeal Division finds that the Applicant has not raised grounds of appeal that satisfies it that the appeal would have a reasonable chance of success on appeal. The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division