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

Citation: *M. E. v. Minister of Employment and Social Development*, 2016 SSTADIS 179

Tribunal File Number: AD-16-640

BETWEEN:

M. E.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 19, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 8, 2016. The General Division determined that the appeal was not brought within the time permitted and that it therefore would not proceed.

[2] The Applicant applied for leave to appeal on May 4, 2016. She explained why her appeal with the General Division was late. She argued that the General Division failed to consider all of the evidence before it. The Applicant can only succeed on this application if I am satisfied that the appeal has a reasonable chance of success.

ISSUE

[3] Does the appeal have a reasonable chance of success?

GENERAL DIVISION DECISION

[4] The General Division determined that the Applicant had received the Respondent's reconsideration decision by February 18, 2014 and that her deadline to file an appeal was therefore February 18, 2015. The Applicant filed an appeal on September 25, 2015, more than one year after she received the reconsideration decision. The General Division relied on subsection 52(2) of the *Department of Employment and Social Development Act* (DESDA), which states that "in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant". It thereby dismissed the appeal as it was brought out of time.

SUBMISSIONS

[5] The Applicant explains that she did not see any purpose in seeking a Canada Pension Plan disability pension before September 2015, as she was already receiving long-term disability benefits until August 2015, and understood that any Canada Pension Plan disability benefits would simply be paid to the disability insurer. It was only after she was

compelled to retire and stopped receiving long-term disability benefits from her disability insurer that she sought to appeal the Respondent's reconsideration decision.

[6] The Applicant argues that, as both her employer and disability insurer have found her "totally and permanently disabled", she should be entitled to some compensation. She argues that the General Division erred as it should have considered all of the medical evidence. The Applicant notes that she continues to undergo treatment. She also provided additional medical information in support of her claim for a Canada Pension Plan disability pension.

[7] The Social Security Tribunal provided a copy of the leave materials to the Respondent. However, the Respondent did not file any written submissions.

ANALYSIS

[8] Subsection 58(1) of the 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;
>
> (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.

[9] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[10] The Applicant did not dispute any of the facts set out by the General Division. She also did not address the basis upon which the General Division dismissed the appeal. The

General Division found that the Applicant had not brought her appeal on time and that, pursuant to subsection 52(2) of the DESDA, the appeal could proceed.

[11] In *Fazal v. Canada (Attorney General)*, 2016 FC 487, the Federal Court squarely addressed this issue. In the application before it, the Court held:

> It is clear that the application for leave was filed more than one year after the date that the decision was communicated to the appellant. The [DESDA] does not permit any discretion to be applied. On the standard of correctness the decision was correct.

[12] Although *Fazal* was decided in the context of an application for leave to the Appeal Division, the same principle applies here. The appeal to the General Division was filed more than one year after the date that the decision was communicated to the Applicant. The DESDA does not permit any discretion to be exercised. The Applicant's explanations for the late appeal are irrelevant. The decision of the General Division is correct.

[13] The Applicant argues that the General Division erred as it should have considered all of the medical evidence. As the appeal had been filed more than one year after the date that the reconsideration decision was communicated to the Applicant, the General Division did not have any authority to consider the medical records or to proceed with hearing the appeal.

[14] The Applicant has filed additional medical information in support of her claim. As the Federal Court recently pronounced in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in subsection 58(1) of the DESDA. There is no suggestion by the Applicant that these additional medical records address any of the grounds of appeal listed in subsection 58(1) of the DESDA.

CONCLUSION

[15] I am not satisfied that the appeal has a reasonable chance of success and the application for leave to appeal is therefore dismissed.

Janet Lew
Member, Appeal Division