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

Citation: *G. J. v. Minister of Employment and Social Development,* 2016 SSTADIS 180

Tribunal File Number: AD-16-146

BETWEEN:

G. J.

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: Hazelyn Ross

DATE OF DECISION: May 20, 2016

Canada

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), grants leave to appeal.

INTRODUCTION

[2] The Applicant applies for leave to appeal, (the Application), from the decision of the General Division of the Tribunal issued November 5, 2015 that refused to extend the time for filing his appeal of a reconsideration decision. The reconsideration decision found the Applicant ineligible for a disability pension under the *Canada Pension Plan,* (CPP). The Applicant filed a notice of appeal with the General Division of the Tribunal several weeks after the expiry of the statutory time limit within which notices of appeal should be filed.

[3] In a letter dated October 6, 2015, the Tribunal asked the Applicant to explain the reason for the delay. In essence then, to demonstrate why the General Division should extend the time limit for filing the appeal. Having received and considered the Applicant's response, a Member of the General Division found that the Notice of Appeal was filed outside the statutory time limit. The Member did find that the Applicant had both an arguable case and that the Respondent would suffer no prejudice if the time limit for filing the notice of appeal were to be extended, however, the Member declined to extend the time. The General Division found that the factors favourable to the Applicant were offset by its finding that he had not provided a reasonable explanation for the delay in filing the Notice of Appeal, nor had the Applicant established a continuing intention to pursue the appeal.

[4] Paragraphs 8 and 14 of the decision contain the analysis underlying the General Division's conclusions.

GROUNDS OF THE APPEAL

[5] Counsel for the Applicant points to a number of errors by the General Division that he states give rise to grounds of appeal that would have a reasonable chance of success. In the

main, the submissions of Counsel for the Applicant raise errors of law, thereby engaging paragraph 58(1)(c) of the *Department of Employment and Social Development,* (DESD), *Act.*

[6] Counsel for the Applicant repeated the statements that were made before the General Division, i.e. he submitted that the time limit for filing should be extended because.

> “the Applicant required more time to seek legal advice and gather additional medical evidence as in addition to his chronic pain he has limited education and work experience and the fact that his lack of literacy greatly limits job opportunities.
>
> He retained our services after April, 2014 and by September 17, 2014 we had filed the appeal documentation and authorization.
>
> Upon our advice he instructed us to attempt to get more fulsome medical evidence by writing to his general practitioner, Dr. Mark Enright, and Orthopaedic Surgeon, Dr. John McCall. Our request to Dr. Mark Enright was partially answered by his letter of September 12, 2014 but unfortunately he felt he couldn't answer all our questions and referred us to Dr. McCall as well.
>
> Dr. McCall's report was only received in December 2014 and forwarded to the SST on January 12, 2015. (AD1-4)

ISSUE

[7] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE GOVERNING STATUTORY PROVISIONS

[8] The DESD Act provides for time limits within which an appeal may be brought to the General Division of the Tribunal. These are set out in section 52 of the DESD Act, namely:-

> **52.** ***Appeal - time limit* – (1**) An appeal of a decision (of the Minister) must be brought to the General Division in the prescribed form and manner and within,
> (a) in the case of a decision made under the *Employment Insurance Act,* 30days after the day on which it is communicated to the appellant; and
> (b) in any other the case, 90 days after the day on which it is communicated to the appellant.

It is paragraph (b) that applies to the instant matter.

[9] The DESD Act also allows the General Division to extend the time limit for making an appeal, providing in subsection 52(2) that-

(2) *Extension* - the General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[10] Subsections 56(1) and 58(3) of the DESD Act are of utmost importance to the appeal process before the Appeal Division. Under subsection 56(1) an applicant must first obtain leave to appeal. It is only after this preliminary hurdle has been overcome that an appeal to the Appeal Division may be brought. Per subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[11] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Per 58(2) "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[12] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case was equated to a reasonable chance of success.

[13] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

[14] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

SUBMISSIONS

[15] As stated earlier Counsel for the Applicant relies on the submissions he made in his letter of November 2, 2015. (GD6). However, he has included some additional detail in the Application, such as when he was retained to act for the Applicant (AD1C) and the Applicant's attempt to obtain medical evidence from his family physician and orthopaedic surgeon. (AD1B) In addition, Counsel for the Applicant cited recent case law from the Appeal Division dealing with extending time limits, which he states supports the granting of the extension.

ANALYSIS

[16] This Application involves a determination of whether the General Division erred in any respect regarding its decision to refuse to extend the time for bringing the appeal. While the legislation provides for such extensions it is silent as to the circumstances that would permit the grant of the extension. Thus, it is the common law test that applies. The test has been set out in *Canada (Minister of Human Resources Development) v. Gattelaro,* 2005 FC 833, and is widely referred to as the *Gattelaro* factors. Thus, in exercising the authority to extend the time limit for leave to appeal, the General Division must consider the following:-

- 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.

[17] In addition to these factors, the Federal Court of Appeal has also stipulated that the underlying consideration in all applications to extend time is to ensure that justice is done between the parties. *Canada (Minister of Human Resources Development) v. Hogervorst* 2007 FCA 41; *Canada (Attorney General) v. Larkman,* 2012 FCA 204.

[18] Counsel for the Applicant has submitted that the General Division misapplied the *Gattelaro* factors. Inherent to Counsel's submission is the position that the Applicant provided a sufficient explanation for the delay as well as demonstrated a continuing intention to pursue the appeal by virtue of the relatively short delay in filing the notice of appeal. Counsel for the Applicant sought to rely on the recent Appeal Division cases of *A.P. v. Minister of Employment and Social Development* 2015 SSTAD 1404 CanLII; *B.B. v. Minister of Employment and Social*

Development 2015 SSTAD 886CanLII; and *G.D. v. Minister of Employment and Social Development* 2015 SSTAD 1345. He argued that the Applicant's case is on all fours with the *A.P.* and *G.D* decisions. Counsel hung his submission on the assertion that in these cases the Applicant's had provided somewhat similar explanation for their delays. Having read these decisions, the Appeal Division distinguishes them from the instance case, finding that they raised particular circumstances that are not present in the instant case. Also, the rationale for the decision in B.B. was counsel's conduct as opposed to the Applicant's conduct.

[19] Turning to the manner in which the General Division decided the question of whether to extend time, the Appeal Division is not persuaded that on the facts that were before it at the time it decided the matter that the General Division erred in any way. What was before the General Division by way of explanation for the delay was the rather cryptic statement that the Applicant "had required more time to seek legal services and gather additional medical evidence" together with the statement that the Applicant retained counsel's services after April 2014 and had filed the notice of appeal by September 17, 2014. (GD6) There was no elaboration as to the exact date counsel was retained, or why the Applicant did require additional time to retain counsel. Counsel for the Applicant would seek to provide these explanations after the General Division had rendered its decision. (AD1C).

[20] Thus, the Appeal Division finds that given these circumstances it was open to the General Division to find, as it did, that the Applicant had not provided a satisfactory explanation for the delay and, concomitantly, that he had not demonstrated a continuing intention to pursue his appeal. Further, it was also open to the General Division to find that these "negatives" outweighed the factors that were in the Applicant's favour.

[21] However, in the view of the Appeal Division the enquiry ought not to have ended at this point. In the view of the Appeal Division the General Division was also required to address the question of justice between the parties. The only reference in the General Division decision to the "interests of justice" comes at paragraph 18, the final paragraph of the decision, when the General Division states that "inconsideration of the *Gatellaro* factors and in the interests of justice, the Tribunal finds, that an extension of time to appeal pursuant to subsection 52(2) of the DESD Act is refused. It is not clear to the Appeal Division how the General Division

addressed the interests of justice as this is the only mention of the concept. Thus, the Appeal Division is not satisfied that the General Division turned its mind to the question during its determination of whether or not to extend the time for bringing the appeal. This is an error of law.

[22] While acknowledging that it was open to the General Division to find that the Applicant had provided an unsatisfactory explanation for the delay, the Appeal Division is guided by the *dicta* of the Federal Court of Appeal in *Larkman* when it described the role of the *Gattellaro* factors:-

> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal,* at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (CanLII) at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195 (CanLII), 89 Admin LR (4th) 1.

CONCLUSION

[23] Counsel for the Applicant argued that the General Division committed errors of law when it refused to extend the time for bringing the Applicant's appeal. The Appeal Division has found that the General Division likely committed an error of law by failing to consider the interest of justice when it made its determination. Therefore, the Applicant has raised an arguable case.Accordingly, the Appeal Division grants the application for leave to appeal.

[24] The Application is granted.

[25] The decision granting leave to appeal does not presume the outcome of the appeal on the merits of the case.

Hazelyn Ross
Member, Appeal Division