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

Citation: *J. D. v. Minister of Employment and Social Development,* 2016 SSTADIS 175

Tribunal File Number: AD-16-108

BETWEEN:

J. D.

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 13, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 7, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the Canada Pension Plan, as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2010.

[2] The Applicant applied for leave to appeal on December 29, 2015, several months after the deadline for filing an appeal had passed. She enclosed her medical file, including records from the Manitoba Healthcare Employee Benefits Plan. She can only succeed on this application if I am satisfied that the appeal has a reasonable chance of success.

ISSUE

[3] The two issues before me are as follows:

(1) should I exercise my discretion and extend the time for filing the leave application, and

(2) does the appeal have a reasonable chance of success?

SUBMISSIONS

[4] The Applicant explains that she was late in filing her leave application as she was waiting for a claim specialist to review her case and give her advice. The Applicant applied for a Canada Pension Plan disability pension once the specialist contacted her and recommended that she appeal.

[5] The Applicant is of the position that the General Division may not have had all of the medical documentation before it, so she enclosed her medical file, including records from the Manitoba Healthcare Employee Benefits Plan.

[6] The Social Security Tribunal (SST) requested additional information from the Applicant. On January 14, 2016, the SST invited the Applicant to explain why she delayed filing the leave application, to confirm that she had a continuing intention to appeal, to explain if any of the parties might suffer any prejudice and to address whether the appeal had a reasonable chance of success. The SST also invited the Applicant to identify any grounds of appeal. The SST attempted to contact the Applicant by telephone on February 18, 2016. The SST also sent another letter, dated February 18, 2016, confirming its requests of January 14, 2016. The Applicant confirmed that she did not have any additional submissions or response to the SST's letters of January 14, 2016 and February 18, 2016.

[7] The Respondent filed submissions on February 16, 2016. The Respondent is of the position that the Applicant missed the 90-day deadline for filing an application requesting leave to appeal and that the Appeal Division should not extend the time for filing the leave application. The Respondent argues that the Applicant has not provided a reasonable explanation for the delay, that there was no continuing intention to appeal, that the Applicant does not have an arguable case, and that it may suffer prejudice if an extension is granted. The Respondent argues that the Applicant is attempting to re- litigate her case, in part by introducing new evidence which ought not to be admissible.
The Respondent argues that it is not the Appeal Division's function to re-hear cases.

ANALYSIS

(a) Late application

[8] The Applicant was approximately six months late in filing an application requesting leave to appeal. In Canada (Minister *of Human Resources Development) v. Gattellaro,* 2005 FC 833, the Federal Court set out the four criteria which should be considered 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. They include whether: an applicant held a continuing intention to pursue the application or appeal; the matter discloses an arguable case; there is a reasonable explanation for the delay; and there is no prejudice to the other party in allowing the extension. 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.

[9] The Respondent indicates that it may suffer prejudice where the Applicant attempts to provide new evidence and as it has a right to the finality of a proceeding. Generally, new evidence is not admissible on appeal, unless it addresses any of the grounds of appeal under subsection 58(1) of the DESDA. Viewed from that perspective, any prejudice to the Respondent is minimal. While finality is desired, that must be weighed against any prejudice which an applicant might suffer if an extension of time for filing were not granted.

[10] The remaining factors do not fall in the Applicant's favour. There is no evidence before me as to whether the Applicant held a continuing intention to appeal. She had yet to form an intention to appeal, until she received advice from the claim specialist that she should pursue an appeal. The Applicant explains that she was late as she was waiting for legal advice. I do not find that to be a sufficient explanation, as she could have filed an application, out of an abundance of caution, while continuing to await legal advice. The Applicant has not set out any grounds of appeal to satisfy me that the appeal has an arguable case. Finally, the Applicant has not persuaded me that there are other considerations which would render it in the interests of justice to allow an extension. I am not prepared to exercise my discretion and grant an extension of time for filing leave.

(b) Application requesting leave to appeal

[11] Although I have not granted leave, I will briefly address the issues raised by the application requesting leave to appeal.

[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;

(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.

[13] 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 endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[14] There is no suggestion by the Applicant that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law nor identified any erroneous findings of fact which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision. The Applicant has not cited any of the enumerated grounds of appeal.

[15] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, it ought to, at the very least, set out some particulars of the error or failing committed by the General Division which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. The application is deficient in this regard and I am not satisfied that the appeal has a reasonable chance of success.

[16] The General Division may not have had the complete medical file of the Applicant, but this does not speak to any of the grounds of appeal under subsection 58(1) of the DESDA, nor does it suggest that there was any error on the part of the General Division. It was incumbent upon the Applicant to ensure that she had filed her complete medical file with the Social Security Tribunal or, failing that, to seek an adjournment of the proceedings until she obtained it.

[17] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Medical records

[18] The Applicant filed her medical file in support of her leave application. She did not identify the grounds upon which she filed these medical records, other than to suggest that perhaps the General Division did not have her complete medical file.

[19] In essence, the Applicant is requesting that I consider any additional facts, re-weigh the evidence and re-assess the claim in her favour. The grounds of appeal under subsection 58(1) of the DESDA are very narrow. They do not permit me to acquiesce to the Applicant's request. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503 at para. 28, the Federal Court held that "an appeal to the [Social Security Tribunal-Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58".

[20] Essentially, the Applicant is seeking a reassessment. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave should be granted or denied, to reassess the evidence or reweigh the factors considered by the General Division. Neither the leave, nor the appeal, provides opportunities to re- litigate or re-prosecute the claim. I am therefore not satisfied that the appeal has a reasonable chance of success. It is not appropriate that I conduct a reassessment of the evidence.

CONCLUSION

[21] The applications to extend the time for filing the leave application and for leave to appeal are both dismissed.

Janet Lew
Member, Appeal Division