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

Citation: *C. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 267

Tribunal File Number: AD-16-491

BETWEEN:

C. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

On Leave to Appeal
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 13, 2016

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension on December 22, 2014. The Respondent denied the application initially and on reconsideration in a letter dated June 9, 2015. The Applicant appealed that decision to the General Division (GD) of the Social Security Tribunal (SST) on November 9, 2015, beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

[2] In a decision dated March 15, 2016, the GD refused an extension of time for the Applicant to appeal to the SST.

[3] The Applicant filed an Application for Leave to Appeal with the Appeal Division (AD) of the SST on March 31, 2016, within the time limit set out in paragraph 57(1)(b) of the DESDA.

ISSUE

[4] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Gattellaro

[5] In deciding whether to allow further time to appeal, an administrative tribunal must weigh the four factors set out in *Canada (MHRD) v. Gattellaro*[1]:

(a) The Applicant must demonstrate a continuing intention to pursue the appeal;

---

[1] *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FC 883

(b) There is a reasonable explanation for the delay;

(c) The matter discloses an arguable case; and

(d) There is no prejudice to the other party in allowing the extension.

[6] The weight to be given to each of the *Gattellaro* 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 (AG) v. Larkman*.[2]

DESDA

[7] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted. The AD must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[8] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204

[10] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success – *Canada (MHRD) v. Hogervorst*; *Fancy v. Canada (AG).*[3]

CPP Disability Pension

[11] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[12] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP. Paragraph 44(2)(a) of the CPP states that in order to qualify for a disability benefit an individual must have made sufficient contributions in either four of the last six years or three of the last six years, where the claimant has at least 25 years of valid contributions.

[14] Subsection 44(2.1) of the CPP (the Proration Provision) provides for the possibility of an MQP based on prorated contributions:

---

[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63

> (2.1) For the purposes of determining the minimum qualifying period of a contributor referred to in subparagraph (1)(b)(ii), the basic exemption for the year in which they would have been considered to have become disabled, and in which the unadjusted pensionable earnings are less than the relevant Year's Basic Exemption for that year, is an amount equal to that proportion of the amount of that Year's Basic Exemption that the number of months that would not have been excluded from the contributory period by reason of disability is of 12.

APPLICANT'S SUBMISSIONS

[15] The Applicant submits that the GD 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. She alleges the GD did not review all of the medical information that she provided with her Notice of Appeal, which shows she is unable to continue at her current job due to her worsening condition. Her appeal to the GD was past the 90-day deadline because she lost track of time while working with her doctor to obtain information.

ANALYSIS

[16] I have reviewed the entirety of the file that was before the GD and see no reasonable chance of success on any of the grounds submitted by the Applicant in her Application for Leave to Appeal. The GD was correct in noting that the Notice of Appeal was submitted to the SST well after the 90-day limit, and I see no arguable case that the GD incorrectly applied the four *Gattellaro* factors to the circumstances at hand. The GD found that the Applicant did not demonstrate a continuing intention to pursue the appeal, nor did she offer a reasonable explanation for the delay, and I see no error in fact or law that would warrant overturning these determinations. In making these determinations, the GD was acting within its jurisdiction as finder of fact to weigh the evidence and make a decision based on its interpretation of the law and analysis of the material before it.

[17] Although the Applicant did not make specific submissions on this point, I would like to address in detail the third *Gattellaro* factor—and the GD's finding that the matter did not disclose an arguable case. In denying the Applicant's claim for CPP disability benefits, the Respondent determined that she did not have sufficient earnings and contributions to establish an MQP without the application of the Proration Provision. In practical terms, this meant that the Applicant was required to show that she became disabled for CPP purposes between January 1, 2008 and October 31, 2008. The GD did not dispute these dates and, having

reviewed the Application's Record of Earnings, I see no indication that this calculation of the MQP was based on an error in law or fact.

[18] In determining that the Applicant lacked an arguable case, the GD noted that she continued to work part-time as a cashier in a grocery store and recorded unadjusted pensionable earnings of $12,123 in 2013 and $13,415 in 2014—well after her MQP. I would also note that all of the submitted medical reports are dated 2014 or after—years after the end of her eligibility period. Given these circumstances, I would not interfere with the GD's finding that the Applicant presented no arguable case on appeal.

[19] The thrust of the Applicant's submissions amounted to a request that the AD consider and assess the evidence supporting her disability claim on its merits. This is beyond the parameters of the DESDA, which in subsection 58(1) sets out very limited grounds of appeal. The AD is only permitted to determine only whether any of an applicant's reasons for appealing a decision of the GD fall within the specified grounds and whether any of them have a reasonable chance of success. I see no reasonable chance of success on the grounds of appeal put forward by the Applicant.

CONCLUSION

[20] The application for leave to appeal is refused.

Member, Appeal Division