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

Citation: *G. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 275

Tribunal File Number: AD-16-405

BETWEEN:

G. S.

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: Neil Nawaz

DATE OF DECISION: July 20, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] In a decision dated August 21, 2015, the General Division (GD) of the Social Security Tribunal of Canada determined that a pension under the *Canada Pension Plan* (CPP) was payable to the Applicant, as she had a severe and prolonged disability as of her minimum qualifying period (MQP) of December 31, 2006.

[2] Citing paragraph 42(2)(b) of the CPP, the GD noted that a person cannot be deemed disabled more than fifteen months before the Respondent received his or her application for a disability pension. As the application in this case was received in April 2012, the GD deemed the Applicant disabled as of January 2011. Section 69 of the CPP requires payments to start four months after the deemed date of disability, so the GD ordered the Applicant's disability pension to start as of May 2011.

[3] The Applicant then filed an Application for Leave to Appeal with the Appeal Division (AD) of the Social Security Tribunal on March 8, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[4] I must decide if an extension of time to make the Application for Leave should be granted.

THE LAW

DESDA

[5] Pursuant to paragraph 57(1)(b) of the DESDA, an Application for Leave to Appeal must be made to the AD within 90 days after the day on which the decision was communicated to the Applicant.

[6] The AD must consider and weigh the criteria as set out in case law. In *Canada (MHRD) v Gattellaro*[1], the Federal Court stated that the criteria are as follows:

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

(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.

[7] 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].

[8] 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.

[9] 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.

[10] 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.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204

[11] 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*[3]; *Fancy v. Canada (AG)*[4].

CPP

[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 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.

[14] 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.

[15] For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b)). According to section 69, payments start four months after the deemed date of disability.

APPLICANT'S SUBMISSIONS

[16] The Applicant's husband and authorized representative submitted the Application Requesting Leave to Appeal on March 8, 2016, 197 days after the decision was mailed to his residential address on August 24, 2015 and well after the requisite 90-day filing deadline. The application form requires claimants to disclose the date on which they received the GD's

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

decision and provide reasons, if applicable, for why the request for leave to appeal was late. In response, the Applicant's representative wrote:

> …we had to wait the full 90 days before we heard from anyone about the fact that CPP Disability did indeed agree with the Tribunal Decision. We would then hear the amount rewarded to my wife because they would figure an amount that went back retroactively minus what she had received from CPP since April, 26, 2014 when she had to apply early at a loss as we needed some money as she had been ill and unable to work for so many years. We were told a payment of $710 monthly would begin December, 26, 2015. It did in fact arrive November, 26, 2015. So I thought I had 90 days from that point to respond.

[17] The Applicant's representative also explained why he believed his wife's appeal had a reasonable chance of success. He submitted that the GD had proof from medical professionals, friends and neighbours who had seen the steady decline in his wife since 2003-04. He asked for retroactive CPP disability payments going back to at least 2005 because the Applicant was unable to work as a result of progressive multiple sclerosis (MS). The Applicant's representative said that he was his wife's sole caregiver, and he was burdened by health problems himself.

[18] In a submission dated April 6, 2016, the Applicant's representative added that he believed paragraph 42(2)(b) of the CPP to be unjust. The GD agreed that his wife was severely disabled in 2005, but they could not apply for benefits without a medical diagnosis that would meet the statutory requirements. MS and severe depression are conditions that are very hard to diagnose. If they had known in 2005 what they know now, they would have applied earlier and met the criteria. If their first application not been turned down, she would have been compensated from 2005. If she had been able to work at that time (although she unsuccessfully tried to do so), she would have contributed to the CPP all those years and her payments would have been higher today. Instead, she had to take her CPP retirement pension early because of financial difficulties that arose after it took so long to decide in her case.

ANALYSIS

[19] I find that the Application for Leave to Appeal was filed after the 90-day limit. The Applicant's representative stated that his wife and he received the GD's decision at their home on August 25, 2015. They did not submit their application to the AD until March 8, 2016, almost 2½ months after the submission deadline elapsed.

[20] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[21] The Applicant's representative wrote that he was late in filing the Application for Leave to Appeal because he wanted to see the amount of his wife's first CPP disability pension payment before deciding whether to appeal.

[22] Although it appears the Applicant and her representative were under a misapprehension about the 90-day deadline and when it began running, I am willing to accept that they had a continuing intention to appeal the GD's decision, despite their delay in submitting the application for leave. I am satisfied that they have a continuing belief they have been subject to an injustice and would not have simply dropped this matter.

Reasonable Explanation for the Delay

[23] The Applicant's representative pleads that he was under the impression that the "clock" for the 90-day deadline to appeal to the AD began running from either November 26, 2015 or December 26, 2015—the dates, respectively, when the first CPP disability payment *actually* arrived and when he *expected* it to arrive.

[24] I find this explanation unreasonable. The Applicant and her representative apparently wanted to wait until they received their first disability payment before deciding whether or not to appeal, and they claim that were under the mistaken impression that the deadline was 90 days after that date. However, the letter accompanying the GD's decision contained explicit instructions on the appeal process that contained this sentence: "…you may request permission to appeal by submitting an application for leave to appeal to the Appeal Division within 90 days of the decision being communicated to you." Furthermore, the GD decision itself clearly indicated in paragraph 72 that payments would be starting as of May 2011—a date whose limited retroactivity was the reason the Applicant ultimately chose to appeal. On August 25, 2015, the Applicant and her representative were aware, or should have been aware, that their entitlement to back-payments was limited, and it was open to them to take steps to file an appeal much earlier than they eventually did.

Arguable Case

[25] I see no error in law or fact in the GD's determination that the Applicant—who was ultimately successful in showing that her disability was severe and prolonged—is entitled to disability pension payments retroactive to no earlier than 11 months prior to the date the Applicant originally filed her Application for the CPP disability pension. Paragraph 42(2)(b) and section 69 of the CPP are unambiguous and together they prevent the Applicant, who applied for benefits in April 2012, from receiving them any earlier than as of May 2011.

[26] The thrust of the remainder of the Applicant's submissions amount 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 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 they have a reasonable chance of success. As discussed, I see no reasonable chance of success on the grounds of appeal put forward by the Applicant.

[27] The Applicant has also suggested that the provisions of the CPP limiting retroactive disability payments are unjust and unfair. Even if this is true, both the GD and the AD must follow the letter of the law. If the Applicant is asking me to grant her disability benefits back to 2006 or earlier, I lack the discretionary authority to do so and can only exercise such jurisdiction as granted by the AD's enabling statute. Support for this position may be found in *Canada (MHRD) v. Tucker*,[5] among many other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

Prejudice to the Other Party

[28] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

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[5] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278

CONCLUSION

[29] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. The Applicant failed to offer a plausible explanation for submitting her Application for Leave to Appeal 2½ months late, although it could be reasonably presumed that she had a continuing intention to pursue her appeal, despite the delay. It is also true that the Respondent's interests would not likely be prejudiced by extending time. Although two of the four *Gattellaro* factors were in her favour, they were ultimately overwhelmed, in my estimation, by the Applicant's lack of an arguable case: I saw no grounds—whether a breach of natural justice or an error in law or fact—on which the Appellant would have a reasonable chance of success on appeal.

[30] In consideration of the *Gattellaro* factors and in the interests of justice, I would refuse an extension of time to appeal pursuant to subsection 57(2) of the DESDA.

Member, Appeal Division