



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 278

Tribunal File Number: AD-16-122

BETWEEN:

N. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: July 23, 2016

REASONS AND DECISION

DECISION

The request to extend time to appeal is refused.

INTRODUCTION

[1] In a decision dated July 31, 2015, the General Division (GD) of the Social Security Tribunal of Canada determined that a pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant, as she did not have a severe and prolonged disability as of her minimum qualifying period (MQP) of December 31, 2013.

[2] On January 6, 2016, the Applicant filed an incomplete Application for Leave to Appeal with the Appeal Division (AD) of the Social Security Tribunal, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA). On April 13, 2016, in response to a request for further information, the Applicant submitted a letter elaborating on her reasons for seeking an appeal.

ISSUE

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

THE LAW

DESDA

[4] 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.

[5] 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.

[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.

[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.

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

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*³; *Fancy v. Canada (AG)*⁴.

CPP

[11] 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.

[12] 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.

[13] 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.

APPLICANT'S SUBMISSIONS

[14] The Applicant submitted her Application Requesting Leave to Appeal on January 6, 2016, 149 days after receiving the decision at her residential address on August 10, 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 decision and provide reasons, if applicable, why the request for leave to appeal was late. In response, the Applicant wrote that she had misplaced the forms due to her condition and had needed to request a new set. In her follow-up letter of April 13, 2016, she wrote:

³ *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41

⁴ *Fancy v. Canada (Attorney General)*, 2010 FCA 63

I apologize for the delayed response. I was dealing with sporadic bouts of sickness, which confined me to my bed throughout January, February and March 2016. I was extremely weak and could not find the energy to respond with the missing information related to my appeal.

[15] The Applicant also explained why she believed her appeal had a reasonable chance of success. She cited the subsection 58(1) grounds and stated that her condition remained the same, as outlined by her health providers in the paperwork already submitted. Asked to expand on her grounds of appeal, she added:

- Exercising does not help her fibromyalgic pain. She suffers throughout the day and finds relief only if she continually adjusts her position, whether sitting, standing, bending or lying down.
- Her narcolepsy has not resolved. She continues to nod off to sleep when seated and has to adjust her position frequently to avoid aggravating her fibromyalgia.
- Although a sleep study reflected excellent control, her sleep apnea fluctuates daily.
- Her health issues have resulted in anxiety attacks and bouts of depression.
- She has been recently advised by her family physician to make further adjustments to her lifestyle to address the onset of diabetes, high cholesterol and excessive amounts of uric acid.

ANALYSIS

[16] I find that the Application for Leave to Appeal was filed after the 90-day limit. The Applicant stated that she received the GD's decision on August 10, 2015. She did not submit her application to the AD until January 6, 2016, almost two months after the submission deadline elapsed.

[17] 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

[18] The Applicant wrote that she was late in filing the Application for Leave to Appeal because she misplaced the forms due to her condition and was then confined to bed during January, February and March 2016.

[19] The Applicant's 90-day deadline expired on November 8, 2015 and she claims to have been physically incapacitated from January 2016 onward. I see no record on file to confirm that the Applicant requested replacement forms, but if she did so, it must have been late in the appeal period or some time after it expired. I recognize that the Applicant claims that her mental health has been negatively affected by her physical ailments, but the timelines suggest it is most likely that she simply forgot about her right of appeal after receiving the GD's decision.

[20] I find it unlikely that the Applicant had a continuing intention to appeal the GD's decision.

Reasonable Explanation for the Delay

[21] The Applicant cites her medical conditions for first leading her to mislay her application form and later confining her to bed. However, she has not submitted any independent medical information to confirm that her health has been any worse in recent months than it was in the period when she was pursuing her appeal before the GD.

[22] While the Appellant claimed she was weak and has previously said that she suffers from occasional forgetfulness, she has not produced evidence of significant physical or cognitive difficulties that would explain the delay. In all, I find her explanation unreasonable.

Arguable Case

[23] I have reviewed the decision and see no obvious indication that the GD breached a principle of natural justice or committed an error in law or fact.

[24] Most significantly, the Applicant's alleged grounds of appeal are so broad that they amount to a recapitulation of the evidence that was before the GD. Subsection 58(1) of the DESDA sets out very limited grounds of appeal, and the AD cannot consider a request to

reassess the evidence supporting an applicant's disability claim on its merits. 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. After submitting generic reasons for appeal with her Application for Leave, the Applicant was asked to provide specific instances where she believed the GD erred; she replied with a variation of the same submissions that she made to the GD.

[25] As such, I see no reasonable chance of success on the grounds of appeal based on the submissions that Applicant has put forward.

Prejudice to the Other Party

[26] 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.

CONCLUSION

[27] 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. I was not convinced the Applicant had a continuing intention to pursue her appeal and found her explanation for the delay unreasonable. Although the Respondent's interests would not likely be prejudiced by extending time, all other *Gattellaro* factors were dwarfed, 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.

[28] 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