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

Citation: *J. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 291

Tribunal File Number: AD-16-436

BETWEEN:

J. M.

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 August 2, 2016

REASONS AND DECISION

DECISION

The request to extend time to appeal is refused.

INTRODUCTION

[1] In a decision dated November 13, 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 had a severe and prolonged disability as of the minimum qualifying period (MQP), which it found to be December 31, 2013.

[2] On March 10, 2016, the Applicant filed a written request with the Appeal Division (AD) of the Social Security Tribunal to extend the appeal deadline. On April 18, 2016, she submitted a letter requesting permission to file an appeal, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

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:

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

(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.

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[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] In her letter dated March 10, 2016, the Applicant acknowledged that the deadline to file an application for leave to appeal had passed but requested an extension because she was "seeking legal support" and "unforeseen health circumstances (injury)" prevented her from submitting it on time.

[15] The Applicant submitted an effectively complete Application Requesting Leave to Appeal on April 18, 2016, 152 days after the GD's decision was mailed to her residential

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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

address and well after the requisite 90-day filing deadline. In her letter, the Applicant alleged that the GD, in denying her CPP disability benefits, failed to observe a principle of natural justice by failing to consider the "most relevant, specialized information." In particular, the Applicant alleged:

- The GD based its decision in part on her family physician's comments that she was stable, but Dr. Jones' report dated July 25, 2012 noted that her condition was "unstable" and she remained "at great risk for relapse."
- The GD did not fully observe medical evidence of her physical, degenerative condition. Although she has retrained, and may continue to retrain, her disability affects her vocational capacity in terms of her ability to work long hours, manage pain and maintain activities of daily living.
- One of her Records of Employment stated that her medical condition was the cause of her termination.

[16] The Applicant felt her appeal had reasonable chance of success given the amount of medical documentation that she had submitted to prove a severe and prolonged condition.

ANALYSIS

[17] I find that the Application for Leave to Appeal was filed after the 90-day limit. The Applicant has acknowledged that she was late in filing her application for leave to appeal, which was not received by the AD until April 18, 2016, two months after the submission deadline.

[18] 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

[19] On March 10, 2016, the Applicant wrote that she was late in filing the Application for Leave to Appeal because she was seeking legal support and an unforeseen injury had prevented her from submitting it one time.

[20] Although the Applicant submitted a request to extend the deadline approximately two weeks after it expired, I am nevertheless willing to accept that she had a continuing intention to appeal the GD's decision. As not a great deal of time passed before the Applicant contacted the AD, I am satisfied that she did not mean to drop the matter.

Reasonable Explanation for the Delay

[21] The Applicant claims that health problems caused her to delay submitting a request for leave. However, she has not submitted any independent medical information to confirm that she sustained an injury that would have prevented her from completing and forwarding the necessary paperwork.

[22] The Applicant also cited difficulty in obtaining legal support but I note that, despite the additional time taken, she apparently never hired a representative, and it is not obvious that her request for leave was prepared with assistance.

[23] In all, I find her explanation unreasonable.

Arguable Case

[24] The Applicant alleges that the GD failed to observe a principle of natural justice by failing to consider the "most relevant, specialized information" relating to her condition. Specifically, the Applicant alleges that the GD ignored, or gave insufficient consideration to, Dr. Jones' July 2012 report and a Record of Employment that cited her medical condition as the cause of her termination.

[25] First, I note that the GD incorrectly found that the Applicant's Minimum Qualifying Period (MQP) was December 31, 2013, when in fact it should have been revised to December 31, 2015, in light of the Appellant's updated Record of Earnings, which the Respondent included with its submissions of October 27, 2015. Despite this error, I find that it was likely not material to the outcome of the GD's decision, as the Applicant's two additional years of earnings (2013 and 2014) were themselves the largest factor behind the GD's decision to deny the appeal. Moreover, a cursory perusal of the hearing file indicates that it contained no medical documentation prepared after 2012.

[26] The July 25, 2012 report of Dr. Barry Jones was available at the time of hearing, but the GD evidently believed that other factors outweighed the psychiatrist's assessment. I did not see the Record of Employment mentioned by the Applicant in the hearing file, and an appeal to the AD is not an occasion to submit or refer to evidence that could have been made available to the GD prior to the hearing. In any case, an administrative tribunal is presumed to have considered all the evidence before it, and the GD was acting within its jurisdiction to weigh the evidence, determining what facts, if any, it chose to accept or disregard, before ultimately coming to a decision based on its interpretation and analysis of the material before it. In *Simpson v. Canada*,[5] the Federal Court of Appeal held that

> assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[27] In essence, the Applicant is asking me to conduct a *de novo* hearing and substitute a decision in her favour. I am unable to do this, as my authority under subsection 58(1) permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. Hence, I do not see how the Applicant has an arguable case, arising out of the fact that the GD chose to place more or less weight on some of the evidence than the Applicant submits was appropriate.

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.

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 two months

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[5]. *Simpson v. Canada (Attorney General)*, 2012 FCA 82

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