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

Citation: *M. J. v. Minister of Employment and Social Development,* 2016 SSTADIS 285

Tribunal File Number: AD-16-552

BETWEEN:

M. J.

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: Hazelyn Ross

DATE OF DECISION: July 28, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies for leave to appeal the decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), dated January 19, 2016, (the Application). In its decision the General Division refused to extend the time for filing a notice of appeal.

REASONS FOR THE APPLICATION

[2] The Applicant's representative has submitted that the General Division breached the three grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act,* (DESD Act).

ISSUE

[3] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[4] Leave to appeal is governed by subsections 56(1) and 58(3) of the DESD Act. It is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." Section 52 of the DESD Act governs appeal time limits.

> **52.** ***Appeal - time limit*** **– (1**) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,
> (a) in the case of a decision made under the *Employment Insurance Act,* 30days after the day on which it is communicated to the appellant; and
> (b)in any other the case, 90 days after the day on which it is communicated to the appellant.

[5] Subsection 52(2) allows the General Division to extend the time for filing a notice of appeal. However, the subsection also imposes an upper limit of one year to such extensions.

> ***(2) Extension –*** the General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[6] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

Chronology

[7] This Application is concerned with how the General Division interpreted and applied subsection 52 (2) to the Applicant's case. The Appeal Division finds it helpful to set out the history of this matter as a first step as the history of this matter informs the decision.

May 17, 2012: Service Canada receives the initial application. November 20, 2012: Service Canada denies the application. (GD8-13)
February 28, 2013: Service Canada issues its reconsideration decision and upholds earlier denial of November 20, 2012. (GD8-7)
May 1, 2013: Service Canada receives letter from Dr. Cruz dated April 18, 2013 in which he sets out the Applicant's medical and mental health history and family circumstance. (GD2-2)
February 26, 2014: The Tribunal receives an incomplete Notice of Appeal. (GD1).
March 6, 2014: The Tribunal writes to the Applicant to advise her that her notice of appeal is both incomplete and late. It asks her to provide the missing information and to make an application to extend time for filing notice of appeal.
May 8, 2014: The Tribunal receives the following reply,

> "My name is M. J. (SIN: X X X) and I am writing as a Notice of Appeal regarding Tribunal Number GP-14-973. The information in this letter is true to the best of my knowledge. Since first applying to the Social Security Tribunal, my health condition has not improved. On April 7, 2014, I have had my fourth surgery since January 2012 to remove a tumour related to squamous cell carcinoma in the perianal area. During this time I am experiencing a lot of pain, both prior to and post-surgery. I am unable to complete activities of daily living without major assistance from my husband and children. My surgeon, Dr. Theodore Ross, will be submitting documentation regarding my condition. It is my hope that I have addressed what is necessary to complete this process."

June 9, 2014: The Tribunal sends a 2nd letter to the Applicant again advising her that the notice of appeal is both incomplete and late. The Tribunal asks the Applicant to provide the missing information and to request an extension of the time for filing the notice of appeal.
June 26, 2014: The Tribunal receives a letter from Applicant's representative, which does not give an explanation for the late filing. The letter states, "M. J.'s sickness has been the focal point of her attention within the last 2 years and as such, her ability to get paper work done and completed has been, at best, a challenge." (GD3-1)

July 18, 2014: The Tribunal writes to the Applicant advising her that she is required to file an executed "Authorisation to Disclose" before it can communicate with her representative.
July 31, 2104; The Applicant sends an executed "Authorisation to Disclose" to the Tribunal via facsimile transmission together with copies of a medical report from Dr. Ross, dated April 7, 2014 and three prescriptions. (GD 6-1)
October 17, 2014: The Tribunal acknowledges that it has received a complete Notice of Appeal. The Tribunal indicates that future correspondence would be sent to the Applicant's representative.
January 12, 2015: The Applicant's representative writes to the Tribunal and encloses a medical note dated December 2, 2014. (GD5-1)
June 11, 2015: The Tribunal sends a letter to the Applicant's representative that it copies to her. The letter advises that the notice of appeal was filed late and she should make a request to extend the time limit for filing. This is the Tribunal's third request.
July 2, 2015: The Tribunal receives a reply from Applicant's representative dated July 1, 2015. The Applicant's representative states that he thought proof had been provided that the Applicant was not late in filing her Notice of Appeal. (GD7-1)
January 19, 2016: The General Division issues its decision refusing to extend the time for filing the notice of appeal.
April 12, 2016: The Applicant files an application for leave to appeal the General Division decision.

ANALYSIS

[8] In order to obtain leave to appeal an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[9] An applicant satisfies the Appeal Division that their appeal has a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case was equated to a reasonable chance of success.

[10] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

The General Division breached natural justice

[11] The Applicant's representative submitted that the General Division breached a principle of natural justice when it refused to extend the time for filing the notice of appeal. He submitted that the Applicant had been deprived of a fair hearing in that the decision prevented her from presenting her case. The Applicant's representative cited the decision of the Federal Court of Appeal, (FCA), in *Canada (Attorney General) v. Larkman*, 2012 FCA. He argued that the length of the delay in the Applicant's case was nowhere near as significant as it was in *Larkman* case and on this basis the General Division ought to have extended the time limit.

[12] The Applicant's representative has raised a novel argument with his submissions. He equated a refusal to extend a time limit with a breach of natural justice, which argument begs the question of whether the mere refusal to extend time can constitute a breach of natural justice. Natural justice is concerned with fairness. The Appeal Division agrees that the result of a refusal to extend the time limit for filing a notice of appeal is that the proceedings come to a halt. Thus, a refusal effectively closes off all further appeal rights. However, the Appeal Division also finds that it does not follow that any such refusal automatically results in a breach of natural justice.

[13] In the Applicant's case the General Division found that the notice of appeal was filed late. The Appeal Division agrees. The reconsideration letter is dated February 28, 2013. Although the reconsideration decision was made under the previous statutory regime, the time limit for filing the notice of appeal was still 90 days. The Applicant's file was transferred to the Tribunal as of April 1, 2013, by which point time had already began to run. As calculated by the General Division, the Applicant would have been expected to file her notice of appeal by June 8, 2013. The Transfer of her file to the Tribunal on April 1, 2013, did not mean that time was reset; it continued to run notwithstanding the transfer of the Applicant's file to a new governing body.

[14] As previously discussed, the Tribunal record shows that it received an incomplete notice of appeal on February 26, 2014. A notice of appeal is complete only if it complies with the requirements of section 24 of the *Social Security Tribunal Regulations, SOR/2013-60*. After

receipt of the incomplete notice of appeal the Tribunal engaged in a series of communication with the Applicant, the sequence of which has been set out above. Eventually, the Tribunal received a complete notice of appeal when, on July 31, 2104, the Applicant filed an executed "Authorisation to Disclose" and other documents. However, despite its several entreaties, at no time did the Tribunal receive a request for an extension of time. The closest it got was the statement in the June 26, 2014 letter that the Applicant's health had been her main preoccupation for the previous two years and as a result completing paperwork had been a challenge.

[15] While this could be seen as some explanation for the delay, it fell far short of what was required of a request to extend the time limit, the details of which were included in the Tribunal's letters asking the Applicant to make the request to extend time. In the result, the Appeal Division finds that the General Division acted fairly to the Applicant in that despite there being no proper request to extend the time limit before it, it did consider the question. Thus, no breach of natural justice arises on the part of the General Division.

The General Division erred in law

[16] The Applicant's representative submitted that the General Division misinterpreted and misapplied the four factors in *Canada (Minister of Human Resources Development) v. Gattellaro 2005 FC 883*, 2005 FC 883. He also submitted that the General Division misapplied *Larkman*.

The Appeal Division is not persuaded of this argument. *Gattellaro* requires that when considering whether or not to extend a time limit a decision-maker must have regard to whether the:-

(a) Applicant had demonstrated that a continuing intention to pursue the appeal;
(b) The matter disclosed an arguable case;
(c) The applicant had provided a reasonable explanation for the delay; and
(d) The extent to which the other party would be prejudiced by an extension.

[17] *Larkman* added the gloss that decision-makers must also consider whether the interest of justice was served by the grant of the extension.

[18] The General Division assessed the material before it in the context of the four *Gattellaro* factors. The Applicant's representative took issue with the General Division's finding that the Applicant did not have a continuing intention to pursue her appeal. He submits that this is evidenced by the fact that she continued to see her physicians during the relevant period, all of whom thought she should be granted a CPP disability pension. He submitted that although the Applicant completed high school in her native country, she was unsophisticated and was unaware that the 90-day time limit would be strictly enforced.

[19] These arguments do not satisfy the Appeal Division that the General Division erred in law when it found that the Applicant did not take any steps to pursue her appeal within the 90-day period. The Appeal Division interprets taking steps to pursue an appeal as meaning preparing and filing the notice of appeal with the Tribunal. Attending at one's physicians is not taking steps to pursue an appeal. Furthermore, given that all of the correspondence relating to this decision and appeal has stressed the 90-day time limit and the need to request an extension, the Appeal Division is not satisfied that the Applicant was unaware of the importance of the 90-day time limit. (GD8-9) Consequently, the Appeal Division finds that the General Division did not err in this regard as submitted.

The General Division erred in finding there was no arguable case

[20] The Applicant's representative submitted that the Applicant has an arguable case. He stated that her medical conditions have given rise to depression and that she has suffered from a severe and prolonged disability since 2001. In addition, the Applicant has been receiving psychiatric treatment from Dr. Ganeshwaran since 2001and from Dr. Cruz since 2011.

[21] The General Division found that the only medical evidence in the Tribunal's file that related to the Applicant's medical condition at the time of her MQP is contained in the medical report of Dr. Cruz of April 18, 2013. In this report Dr. Cruz repeated much of what he said in his earlier report of January 23, 2013. It was his opinion that the Applicant was not employable.

[22] The Appeal Division was unable to locate any medical report from Dr. Ganeshwaran in the Tribunal record. It did locate a reference to him in Dr. Cruz' letter, where he refers to him as treating the Applicant. (GD8-42)

[23] The General Division noted that Dr. Cruz did not start treating the Applicant until 2011 and that she did not list depression as a disabling condition in her application for disability benefits. More importantly, the General Division found that the date on which the Applicant stated she could no longer work post-dated the end of her minimum qualifying period, (MQP), of December 31, 2008. All of which, in the opinion of the Appeal Division, does not support a finding that the Applicant had an arguable case.

[24] In her application for disability benefits, the Applicant stated that she stopped working as a result of a layoff in May 2006. (GD8-92) Dr. Cruz stated that she was unable to find alternate employment. The Applicant described the conditions that prevented her from working as bloating and pain; being unable to evacuate her bowels without bleeding and straining; and a constant need to urinate. (GD8-94) She underwent surgery in November 2011 and again in January 2012 to alleviate these conditions. The Applicant also underwent a surgical procedure in April 2014. (GD4-5) These conditions and procedures appear to have post-dated the MQP. Thus, they are not relevant to the determination of whether, as of the MQP, the Applicant had an arguable case.

[25] In his correspondence with the Tribunal the Applicant's representative continues to stress her current circumstances. However, in determining her eligibility for a CPP disability pension, the important date is December 31, 2009. The Applicant had to be found to be suffering from a disability that was severe and prolonged on or before this date. The Applicant's present circumstances could be relevant only if they demonstrated a condition that was continues and that pre-dated the MQP. Further, the condition should prevent her from performing any substantially gainful occupation. On the basis of the foregoing the Appeal Division finds that the General Division did not err when it found that the Applicant did not have an arguable case.

There is a reasonable explanation for the delay

[26] The Applicant's representative submitted that the delay was caused by the Applicant's fragile mental health and her physical pain. This explanation implicitly verges on "incapacity" However; there is nothing in the Applicant's file that demonstrates that at the relevant time she met the criteria for such a finding. She appears to have completed the application for disability benefits herself as well as to have requested reconsideration on her own. Additionally, as her representative stated, she had been consulting with medical personnel. All of which undermines this explanation. The Appeal Division finds that the Applicant has not provided a reasonable explanation for the delay.

[27] Furthermore, the Appeal Division is not persuaded by the argument that *Larkman* [2] provides a sufficient basis to permit the extension because compared to *Larkman* the delay in the Applicant's case was minor. The Appeal Division distinguishes *Larkman* from the Applicant's case. The distinguishing factor being that the DESD imposes a ceiling on the time period for which an extension of the time limit can be granted, while the *Federal Courts Act* appears to impose no such, ceiling:-

Time limitation

> **18.1 (2)** An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[2] In 2010, Larkman sought an extension of the 30 day limitation period in s. 18.1(2) of the Federal Courts Act to apply for judicial review to set aside an Order in Council which caused her grandmother's "enfranchisement" in 1952. The statutory regime (now repealed) under which the Order in Council was made was aimed at assimilating Aboriginal peoples, eradicating their culture and folding them into what was regarded as mainstream culture. The Order in Council stripped the grandmother of her status of "Indian" under the Indian Act (1951) and denied Indian status to all of the grandmother's descendants, including Larkman. In her intended application for judicial review, Larkman alleged that the Order in Council was obtained by a fraud committed upon her grandmother. The Federal Court, without offering reasons, allowed Larkman's motion and granted her an extension of time until 15 days shortly after its order. The Attorney General appealed. The Federal Court of Appeal, considering the motion de novo, granted Larkman's motion for the extension, but varied the deadline to 15 days after the appeal court's judgment.

[28] Furthermore, as the Appeal Division has already noted, the Applicant provided no real explanation for the delay. Thus, the Appeal Division finds that the General Division did not err in finding that the Applicant had not provided a reasonable explanation for the delay.

Prejudice to the Other Party

[29] The General Division found that there was little prejudice to the Respondent in granting the extension of time. The submissions of the Applicant's representative on this point are not helpful.

The General Division decision is based on an erroneous finding of fact

[30] The Applicant's representative submitted that the General Division made an erroneous finding of fact when it found that the delay was not sufficiently explained by the Applicant's health condition. He argued that her health condition has been deteriorating since 2008 and that her psychiatric condition was the main reason why her appeal was not perfected in time. The Appeal Division has already addressed the substance of these submissions and is satisfied that the General Division did not base its decision on an erroneous finding of fact as alleged.

[31] Furthermore, the Appeal Division's position in regard to the applicability of *Larkman* as *carte blanche* for the grant of leave to the Applicant remains unchanged. Even accepting that compared to *Larkman* the delay in the present case is considerably less, given its findings the Appeal Division is not persuaded that the General Division failed to act in the best interest of justice by denying the extension.

[32] For all of the above reasons the Application is refused.

CONCLUSION

[33] The Application is refused.

Hazelyn Ross
Member, Appeal Division