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

Citation: *A. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 300

Tribunal File Number: AD-16-171

BETWEEN:

A. S.

Applicant

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: August 5, 2016

Canada

DECISION AND REASONS

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), grants leave to appeal.

INTRODUCTION

[2] The Applicant applied for disability benefits under paragraph 42(2)(a) of the Canada *Pension Plan*, (CPP). The Respondent denied her application. It maintained the denial on reconsideration. The Applicant appealed from the reconsideration decision to the Tribunal's General Division. On September 29, 2015, the General Division issued a decision in which it determined that the Applicant was ineligible for a CPP disability pension. The Applicant seeks leave to appeal the decision, (the Application).

REASONS FOR THE APPLICATION

[3] Initially, the Applicant submitted that 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. (AD1) In a second submission, she asserted that the General Division had failed to observe a principle of natural justice. (AD1A)

ISSUE

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

THE LAW

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal 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."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to 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."

[7] An applicant satisfies the Appeal Division that his appeal would have 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 has been equated to a reasonable chance of success.

[8] 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.

[9] *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.

PRELIMINARY ISSUE

Is the Application Late?

[10] This issue arises because while the General Division issued the decision on September 29, 2015, the Tribunal received the Application on January 18, 2016. Applying the deemed date

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

of communication provisions,[2] the Applicant received the General Division decision on or before January 8, 2016. Therefore, the Application was made ten days late.[3]

[11] In the Application, the Applicant explained that her appeal was late because she became very depressed when she received the General Division decision denying her appeal.[4] (AD1-2). In response to the Tribunal's letter dated January 21, 2016, the Applicant responded by asking that an appeal be filed because she has a genetic condition that causes her chronic pain and chronic fatigue. She also set out, over several pages, the reasons she believed she had a reasonable chance of success. The Applicant attached a number of medical reports to her response. However, she did not make a request for an extension of the time limit for filing.

[12] Having regard to the Tribunal record; the circumstances of the case; and applying the four-part test set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, and the injunction to consider the best interest of justice contained in *Canada (Attorney General) v. Larkman,* 2012 FCA 204, the Appeal Division finds that this is an appropriate case in which to extend the time for filing the Application.

Intention to pursue the appeal

[13] The Appeal Division finds that the Applicant has demonstrated that she had a continuing intention pursue her appeal. She submitted the original Application quite close to the time limit for filing. While less than fulsome, the Applicant's intent can be derived from it. The Appeal Division is satisfied that, despite her stated reasons for filing late, the Applicant has met this first factor of the *Gattellaro* test.

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[2] Per section 19 of the *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236 General Division decisions made pursuant to subsection 54 (1) of the DESD Act are deemed to have been communicated to the recipient ten days after the day they were sent, if they were sent by ordinary mail.*

[3] Pursuant to subsection 57(1) of the DESD Act, the Applicant had 90 days from the day on which the decision was communicated to her in which to file the Application for Leave to Appeal. The January 8, 2016 date adjusts for the deemed date of communication in accordance with section 19 of the Social Security Tribunal Regulations.

[4] "My appeal is late because when I got denied it sent me into a bad bout of depression. I wasn't sure if there was any point continuing this fight. But I know I have severe pain and fatigue so I am going to fight this." (AD1-1)

Has the Applicant provided a Reasonable Explanation for the Delay?

[14] The Applicant's explanation for the delay in filing was that she was unable to act because she became depressed when she received the General Division decision dismissing her appeal. Falling into a depressed state is explanation of the delay. The Applicant has not provided any medical document to support her claim that she was depressed. Nor has she provided any medical documentation that could support her claim that she was prevented her from filing the Application on time because she was depressed. In the result, the Appeal Division finds that the Applicant has not provided a reasonable explanation for the delay.

Does the Applicant have an Arguable Case?

[15] The Applicant submitted that she has an arguable case. She states that she suffers from a genetic disorder. She also claims that the General Division made several erroneous findings of fact concerning her condition. She points to instances in the decision where, in her view, the General Division either misinterpreted or disregarded evidence. (AD1A-2&3) In the view of the Appeal Division the Applicant has raised an arguable case in the *Hogervorst* and *Fancy* sense.

What is the Prejudice to the Other Party?

[16] The Appeal Division is satisfied that the Respondent will suffer no prejudice if the extension is granted. The delay is short and no question arises of the Respondent being unable to process and file a response or to mount a defence in the event that Leave to Appeal is granted.

Is Granting an Extension to the Time Limit in the Interest of Justice?

[17] The Appeal Division finds that granting an extension of the time serves the best interest of justice. The Tribunal communicated with the Applicant concerning deficiencies in her application for leave to appeal. While the initial Application was filed late, the Tribunal did not point this out to the Applicant, nor did it indicate to the Applicant that she was required to make a request to extend the time limit for filing. What the Tribunal did say in its letters of January 21, 2016 and February 16, 2016 was that if the application was filed beyond the 90-day time limit a Member of the Tribunal must decide whether to extend the time limit for filing the appeal. The Applicant was not advised that she was required to take any positive steps in this regard. She cannot be expected to comply with a request that was not made.

[18] Furthermore, the delay is minimal. It occasions no real prejudice to the Respondent. Thus, the Appeal Division is satisfied that this is an appropriate case in which to extend the time limit for filing the Application.

[19] The time for filing the Appeal is extended.

ANALYSIS

Did the General Division breach a principle of natural justice?

[20] The principles of natural justice are concerned with ensuring that parties are able to present their cases fully; to know the case they have to meet; and to have their cases heard by an impartial decision-maker. In the administrative law context "natural justice" is particularly concerned with fairness which embodies all of the above concepts and also extends to procedural fairness.

[21] The Applicant submitted that the General Division breached natural justice. However, her submissions do not, in the view of the Appeal Division, advance a ground of appeal under this head. The Applicant has not shown how the General Division prevented her from putting forward her case, or denied her the opportunity to respond to the Minister's position; or otherwise treated her unfairly. She has put forward submissions that speak to a disregard of evidence or of a decision based on erroneous findings of fact; however, these submissions do not establish that the General Division breached a principle of natural justice. Leave to appeal cannot be granted under this head.

Did the General Division base its decision on an erroneous finding of fact?

[22] At paragraph 25 of the decision, the General Division stated:-

> "… The Tribunal also notes that the Appellant received advice from a geneticist that the Appellant did indeed have HMS however the Appellant testified that Dr. Gilchrist did not do a genetic test in order to determine that she had the syndrome she just speculated that is what her issue was according to her symptoms. While the Tribunal believes the testimony from the Appellant that she had been diagnosed with the syndrome the Tribunal finds no such evidence anywhere in the medical files.

[23] The Applicant submitted that the General Division statement contains several factual errors. She countered that on August 8, 2013, the geneticist, Dr. Dawna Gilchrist, diagnosed her

with “familial hypermobility syndrome.” The Applicant stated that Dr. Gilchrist reached her conclusion on the basis of “the Beighton score”; a test she administered to her. The Applicant also submitted that a Dr. Naidu repeated the diagnosis in a letter dated August 20, 2013 and that his letter had been before the General Division, which had ignored it.

[24] The Applicant’s position is borne out in so far that the Tribunal record contains a letter from Dr. Gilchrist in which she makes the diagnosis. However, it is not clear from the letter whether or not Dr. Gilchrist had actually administered the test, or had merely ruled out a form of hypermobility syndrome based on the absence of certain symptoms. The Tribunal record does not contain any medical reports from Dr. Naidu.

[25] Given that the General Division accepted the Applicant’s testimony that she had been diagnosed with familial hypermobility syndrome, and also given the fact that there was medical evidence in the form of Dr. Gilchrist’s letter, the Appeal Division finds that the Applicant has raised an arguable case on this point.

[26] The Applicant also submitted that the General Division erred when it concluded that there was no medical evidence that could establish whether she had followed recommended treatment. Again, she focused on physiotherapy. She submitted that at the hearing she presented a number of receipts from a physiotherapist, including Dr. Dhiren Naidu and Dr. and Dr. Tahisha Naidu. These receipts do not form part of the Tribunal record. Even if they did, physiotherapy was not the only treatment that had been recommended to the Applicant. Dr. Gilchrist suggested the following:-

> “The mainstay of treatment is avoidance of injury. To this end, Amanda has already limited her lifestyle. Soft splints may be helpful for painful joints during routine activities. Corseting may help with back pain. Vitamin C at 1 g. per day may help strengthen collagen, and glucosamine may help fend off premature arthritis. The second mainstay of treatment was muscle strengthening. Amanda is already swimming. I have recommended that she consider light weight training in a controlled environment such as using machines at the gym. Free weights, except very small weights, should be avoided. All activities should be low impact and non- contact.” (GD5-51/52)

[27] In this context the Appeal Division finds that it cannot be said that the General Division erred. In addition to physiotherapy, Dr. Gilchrist made several treatment recommendations to

the Applicant. An examination of the Tribunal record shows that it does not contain any evidence of her following them, therefore, the General Division did not err in this regard.

[28] Thirdly, the Applicant submitted that the General Division erred when it concluded that the medical evidence indicates that the medical community was unsure as to what she suffers from. The Applicant focused on her diagnosis of familial hypermobility syndrome, however, the medical evidence contained in the Tribunal record indicates that she was being investigated for other ailments. Thus, for example the rheumatologist Dr. Katz, while acknowledging that the Applicant had issues relating to hypermobility, carried out investigations for "seronegative spondyloarthropathy". He suggested a spine/SI joint MRI (GT5-62). Commenting on the result of the MRI of the Applicant's back, Dr. Katz noted that it had been less convincing for inflammatory changes although there may have been some sacroiliac joint involvement. (GD5-64)

[29] Based on this analysis, the Appeal Division is not persuaded that the General Division erred when it concluded that the medical evidence indicated some uncertainty about the Applicant's medical conditions.

CONCLUSION

[30] In requesting leave to appeal, the Applicant submitted that the General Division breached a principle of natural justice and based its decision on several erroneous findings of fact. Based on the above, the Appeal Division is satisfied that the applicant has raised an arguable case with regard to the General Division's treatment of the way in which the diagnosis of familial hypermobility syndrome was reached.

[31] It is sufficient that an applicant show that one ground of appeal has a reasonable chance of success. *M.C.M v. Minister of Human Resources and Skills Developmen*t, 2013 SST-AD 2. Accordingly, the Application is granted.

[32] This decision granting leave to appeal does not presume the result of the appeal.

Hazelyn Ross
Member, Appeal Division