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

Citation: *J. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 353

Tribunal File Number: AD-16-232

BETWEEN:

J. R.

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 on Request for Extension of Time by: Neil Nawaz

Date of Decision: September 9, 2016

REASONS AND DECISION

DECISION

Extension of time to appeal is refused.

INTRODUCTION

[1] In a decision dated October 30, 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 February 1, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal. Following three requests for further information from the AD, the Applicant perfected her application for leave on May 19, 2016, 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:

(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.

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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

[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.

[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 's application requesting leave to appeal was effectively complete on May 19, 2016, 199 days after the GD's decision was mailed to her and well after the requisite 90-day filing deadline. In letters dated February 1, 2016 and March 4, 2016, the Applicant

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

alleged that the GD, in denying her CPP disability benefits, made errors in law and fact and failed to observe a principle of natural justice. In particular, the Applicant alleged:

- The GD misrepresented facts and failed to fully inform itself of the medical reports on file, disregarding statements from her physicians deeming her disabled.
- The GD failed to give appropriate weight to expert evidence that she is unable to work due to physical limitations arising from various medical conditions, including lupus.
- The GD failed to give adequate consideration to the decisions of *Villani v. Canada (A.G.)*[5] and *MNH v. Densmore.*[6]
- The GD failed to give adequate consideration to the reports of Dr. Gomori (June 16, 2014), Dr. Warthington (March 23, 2015), Dr. Hitchon (August 27, 2015) and Dr. Durcan (October 13, 2015).

[15] The Applicant also resubmitted the reports of Dr. Durcan and Dr. Hitchon, listed above, as well as a letter dated February 28, 2016 from Dr. Kenny Maslow.

ANALYSIS

[16] I find that the application for leave to appeal was filed after the 90-day limit. 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

[17] After the Applicant submitted an incomplete application on February 1, 2016, she was contacted three times—on February 4, 2016, March 7, 2016 and April 25, 2016—to provide missing items that would have perfected her request for leave. The application was finally deemed complete on May 19, 2016.

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[5] *Villani v. Canada (A.G.),* 2001 FCA 248
[6] *MNH v. Densmore* (June 2, 1993), CP2389

[18] Although it ultimately took the Applicant more than three months to complete her application, the fact that she repeatedly responded to the requests for additional information (however imperfectly) persuades me that she had a continuing intention to appeal the GD's decision throughout that time.

Reasonable Explanation for the Delay

[19] The Applicant offered no reason as to why she failed to submit a complete application on time, although it appears she never used the authorized form recommended for leave to appeal requests. This form requires applicants who have missed the 90-day submission deadline to explain why they are late.

[20] However, I also note that the AD's telephone call logs suggest the Applicant found the appeal process to be complicated and stressful. Many unrepresented claimants find the required steps to request leave overwhelming, and it would appear that this was a factor in the Applicant's delay in submitting her completed application.

Arguable Case

[21] The Applicant alleges that the GD misrepresented facts and failed to give appropriate weight to expert evidence that deemed her disabled from work. I find this ground of appeal has no reasonable chance of success. My review of the decision indicates that the GD analyzed in detail the many medical conditions and associated symptoms claimed by Applicant and whether they affected her capacity to regularly pursue substantially gainful employment during the MQP. In the end, it found that, while she did suffer from impairments, they were not of sufficient severity to interfere with her ability to retrain or perform alternate work.

[22] Outside of unsupported allegations of misrepresentation and maliciousness, the Applicant has not specified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. The AD ought not to have to speculate as to the true basis of the application. It is not sufficient for an applicant to state their disagreement with the decision of the GD, nor is it sufficient for an

applicant to express her continued conviction that her health conditions render her disabled within the meaning of the CPP.

[23] The Applicant alleged that the GD disregarded *Villani,* a decision of the Supreme Court of Canada that requires analyses of the severe criterion to take into account the particular circumstances of a claimant, including age, education level, language proficiency and past work and life experience. However, the decision shows that the GD took note of the Applicant's background in paragraph 8 and summarized the correct legal standard in paragraph 26. I see no arguable case to overturn the assessment undertaken by the GD, where it has noted the correct legal test and taken the Applicant's personal circumstances into account.

[24] The Applicant also alleges that the GD failed to adequately consider *Densmore*, a case from the now-defunct Pension Appeals Board that is often cited as legal validation of chronic pain. However, the Applicant did not specify how the GD misinterpreted or misapplied any of the principles from *Densmore*, which was referenced in the decision to emphasize that chronic pain must be accompanied by functional limitations.

[25] The Applicant submits that the GD ignored, or gave insufficient consideration to four medical reports that supported her claim of disability. I note that three of the listed documents were before the GD at the time of the hearing and two of those were explicitly referred to in its decision. As for the fourth, I could find no record in the hearing file of a March 23, 2015 report from "Dr. Warthington," although there were two reports from a Dr. Warrington, one of which was mentioned in the decision. 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*,[7] 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.

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

[26] In the absence of a specific allegation of error, I must find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, I am unable to do this. My authority as a member of the AD permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[27] I see no arguable case on any of the claimed grounds.

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.

Additional Information

[29] Finally, I note that the Applicant submitted additional medical information that was prepared after the GD rendered its decision. An appeal to the AD is not ordinarily an occasion on which new evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the AD any authority hold a hearing *de novo* or to make a decision based on the merits of the case.

CONCLUSION

[30] 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. There was evidence that the Applicant had a continuing intention to pursue her appeal, and I found a reasonable explanation for the delay in submitting her application. It is also true that the Respondent's interests would not likely be prejudiced by extending time. Although three 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 Applicant would have a reasonable chance of success on appeal.

[31] 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