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

Citation: *C. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 362

Tribunal File Number: AD-16-659

BETWEEN:

C. H.

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: September 15, 2016

REASONS AND DECISION

DECISION

Extension of time to appeal is refused.

INTRODUCTION

[1] In a decision dated October 22, 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 prior to the minimum qualifying period (MQP), which it found to be December 31, 2016.

[2] On February 23, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal. Following a request 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:

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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.

[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]

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[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204

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, 209 days after the GD's decision was mailed to her and well after the requisite 90-day filing deadline. In her application for leave to appeal, the Applicant indicated that she received the GD's decision on December 29, 2016. I will presume this is a typographical error and the Applicant intended the year to be 2015. Even so, if we assume that the Applicant or her legal representative did not receive the GD's decision until December 29, 2015, submission of the perfected application was still 52 days late. The Applicant offered no acknowledgement of, or reasons for, the delay in submitting her application.

[15] In her application requesting for leave to appeal and in an accompanying letter dated May 19, 2016 prepared by her legal representative, the Applicant made the following submissions:

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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

(a) The Applicant disputes the decision as she was totally disabled in 2014 and her conditions are severe and prolonged. She has numerous medical issues that prevent her from performing even the simplest of tasks.

(b) She has provided medical evidence that supports her disability, including:

- Dr. Oleg Tugalev's medical reports dated March 7, 2013 and October 3, 2013, which indicated diagnoses of mild s-shape scoliosis, mechanical spine pain, fibromyalgia, depression and possible bipolar disorder and inadequate personality disorder;

- Dr. Jennifer Bonnet's letters dated February 25, 2014 and August 7, 2014, which stated that the Applicant was totally and unable to work.

(c) The medical reports show she suffers from fibromyalgia (characterized by chronic fatigue and chronic pain) chronic neck pain (causing headaches and restricting her from many physical activities), major depressive episodes (anxiety, rapid thinking, poor memory and concentration).

(a) In making its decision, the GD erred in law by failing to consider all of the medical evidence, which strongly suggested that her disability is severe and prolonged.

[16] The Applicant also submitted a letter dated December 9, 2015 from Dr. Bonnet, the Applicant's family physician, and noted that she was now attending counselling with the Thames Valley Family Health Team.

ANALYSIS

[17] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that on October 23, 2015 the GD's decision was mailed to both the Applicant at her last known residential address and the to the Applicant's authorized legal representative at the law firm of Mandryk, Stewart & Morgan. According to subsection 19(a) of the *Social Security Tribunal Regulations*, a decision is deemed to have been communicated to a party 10 days after the date on which it was mailed. In the application requesting leave—both the

incomplete and the complete versions—the Applicant's legal representative indicated that the GD's decision was not received until December 29, 2015. Neither the Applicant nor her legal representative offered an explanation as to why they overlooked the issued decision for two months, but by the time they submitted the application requesting leave, on February 23, 2016, they had already missed the 90-day deadline. The problem was compounded by the fact that the application was incomplete.

[18] It appears the AD then committed a lapse of its own, by taking more than two months following receipt of the incomplete application to notify the Applicant of its deficiencies. The record indicates that the AD did not send out a letter requesting further information until May 12, 2016, to which the Applicant's representative promptly responded one week later. Still, this delay on the part of the AD did not obviate the fact that the Applicant filed its application for leave on February 23, 2016—123 days after the GD's decision was mailed.

[19] 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

[20] The record indicates that the Applicant's legal representative continued to submit medical evidence to the GD as late as December 2015, under the apparent misapprehension that her client's file remained active. Whatever the source of the confusion, I am willing to give the Applicant the benefit of the doubt on this issue and find that she had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[21] Neither the Applicant nor her representative offered any reason as to why they failed to submit a complete application on time. However, it appears that the initial part of the delay—from October 23, 2015 to December 29, 2015 arose out of a belief that the GD had not already disposed of the Applicant's file. Whether this belief was genuine or not, I find this an unreasonable basis for the delay, as two copies of the GD's decision were sent out, respectively, to the Applicant and her legal representative at addresses they had supplied. Once the Applicant and her legal representative became aware that the GD had issued its decision and the 90-day

deadline was operative, they still had more than a month to submit an application requesting leave. Despite that, they still missed the deadline, filing an incomplete application on February 23, 2016.

Arguable Case

[22] The Applicant alleges that the GD failed to consider all of the medical evidence, which she maintains established disability under the CPP criteria. However, beyond this broad allegation, the Applicant has not identified 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.

[23] Nearly all of the Applicant's submissions to the AD amount to a recapitulation of evidence and argument that was already presented to the GD. 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.

[24] It is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.[5] That said, I have reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the Applicant's disability claim. The GD analyzed in detail her various medical conditions and associated symptoms 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.

[25] The Applicant suggests that the GD ignored, or gave insufficient consideration to selected medical reports that supported her claim of disability. I note that nearly all of the listed

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

documents were before the GD at the time of the hearing. The one exception was Dr. Bonnet's August 7, 2014 letter, for which I could find no record in the hearing file. 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*,[6] 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.

[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] Finally, I note that the Applicant has submitted to the AD an additional document. Dr. Bonnet's letter of December 9, 2015 was obviously prepared well after the GD's decision was issued. 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 to make a decision based on the merits of the case. Once a hearing before the GD has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the GD to rescind or amend its decision, but he or she would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

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

[28] I see no reasonable chance of success on any claimed ground.

Prejudice to the Other Party

[29] 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

[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. While I was persuaded the Applicant had a continuing intention to pursue her appeal, there was no explanation for the delay, and any explanation I could impute for it struck me as 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 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