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

Citation: *J. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 388

Tribunal File Number: AD-16-198

BETWEEN:

J. L.

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

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 4, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 20, 2015, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" by the end of his minimum qualifying period on December 31, 2011. The General Division found that although the Applicant suffers from chronic pain, he retained the capacity to pursue alternative work at light to moderate levels. The Applicant filed an application requesting leave to appeal with the Social Security Tribunal (Tribunal) on January 22, 2016, after having received an extension of time for filing the application to August 31, 2015. The Applicant initially sought a second extension, but did not pursue it.

ISSUES

[2] The two issues before me are as follows:

(a) should I exercise my discretion and extend the time for filing the leave application, and

(b) if so, does the appeal have a reasonable chance of success?

BRIEF HISTORY OF PROCEEDINGS

[3] For the purposes of this application, the key dates are as follows:

- March 20, 2015 – the General Division rendered its decision;
- June 22, 2015 – the Applicant sought a minimum 15-month extension of time to file an application requesting leave to appeal, from the usual 90-day window to file an application. He explained that he was in the process of moving and would require time to arrange appointments and obtain supporting medical reports. An extension was granted to August 31, 2015;

- August 31, 2015 –The Applicant did not file a leave application by this date, but his representative sought a further extension, to enable the Applicant to "access legal and medical input";

- September 18, 2015 - the Tribunal wrote to the Applicant, advising that he would need to provide certain information, before a Tribunal member could decide whether to grant or refuse a further extension of time to file an application requesting leave to appeal.

- January 22, 2016 – the Applicant filed an application requesting leave to appeal. He did not provide the information sought in the Tribunal's letter of September 18, 2015.

- April 8, 2016 – the Tribunal wrote to the Applicant, inviting him to clarify the grounds of appeal.

- May 2, 2016 – the Applicant responded to the letter dated April 8, 2016 from the Tribunal.

ANALYSIS

(a) Late Filing of Application

[4] Paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA) requires that an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to an appellant. Subsection 57(2) of the DESDA stipulates that "the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant".

[5] There is no entitlement as of right to an extension. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court listed four factors which should be considered in determining whether to extend the time period beyond 90

days within which an applicant is required to file his or her application for leave to appeal. They include whether: an applicant held a continuing intention to pursue the application or appeal; the matter discloses an arguable case; there is a reasonable explanation for the delay; and there is no prejudice to the other party in allowing the extension. In *Canada (Attorney General) v. Larkman*, 2012 FCA 204, the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. It is clear from *Larkman* that the enquiry into the interests of justice is not confined to the four *Gattellaro* factors and that other considerations can be taken into account.

[6] The Applicant's representative, his mother, maintains that the Applicant should be entitled to more time to file a leave application, as he had waited a "number of years" before the appeal proceeded before the General Division. She argues that more time is required, to enable the Applicant to obtain legal and medical input. She also notes that she has been preoccupied with other matters, including attending to her siblings, who have each had their own medical issues. She explains that the Applicant requires assistance, as he "does not know how to proceed".

[7] The Applicant notified the Tribunal that he would be filing an application requesting leave to appeal within 90 days, and he corresponded with the Tribunal again on August 31, 2015. He explained that he required additional time as he was in the process of moving and wished to secure medical reports. Furthermore, there was some reliance on his mother, who was preoccupied with other matters and could not render timely assistance to her son. While not all of these factors merit an extension, overall, I am satisfied that the Applicant has a reasonable explanation for the late application and that he has demonstrated a continuing intention to pursue an application or appeal. I find also that there is no prejudice to the Respondent in allowing an extension, given that the delay involved was not significant.

[8] I have not considered whether the matter discloses an arguable case in the context of whether I ought to extend the time for filing, but it is well established that an applicant

need not satisfy all four factors set out in *Gattellaro*, or that all four factors be assigned equal weight, given that the overriding consideration remains the interests of justice. In the interests of justice and the factual circumstances of this case, I am prepared to extend the time for filing the leave application and consider the issue of whether there is an arguable case in the context of the leave application.

(b) Application requesting leave to appeal

[9] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

> (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.

[10] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[11] Notwithstanding the Tribunal's letter of April 8, 2016, the Applicant did not identify any grounds of appeal under subsection 58(1) of the DESDA. Nevertheless, that does not end my assessment of this leave application, as the Federal Court has cautioned the Tribunal against mechanistically applying the language of section 58 of the DESDA when it performs its gatekeeping function: *Karadeolian v. Canada (Attorney General),* 2016 FC 615 at para. 10. The Federal Court suggests that the Tribunal should examine the medical evidence and compare it to the decision under consideration. It wrote, "[i]f important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should

ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave".

[12] I have reviewed the evidence which was before the General Division. The General Division summarized the Applicant's medical and treatment history, as well as the medical evidence. The Applicant has chronic pain, particularly in his shoulders and arms. The Applicant also reports having back and right leg sciatic pain, as well as sleep disruption. The General Division addressed each of the Applicant's medical conditions and the medical evidence in its analysis. My review of the hearing file does not indicate that the General Division either overlooked or possibly misconstrued important evidence. As such, I am not satisfied that the appeal has a reasonable chance of success.

[13] The Applicant suggests that his health caregivers did not undertake comprehensive testing or ensure appropriate referrals for investigation and treatment, particularly to test the Applicant's functional capacity. This however does not constitute a ground of appeal under subsection 58(1) of the DESDA.

[14] The Applicant has indicated that additional medical records would be forthcoming. However, that would call for a reassessment. The Federal Court recently pronounced in *Canada (Attorney General) v. O'Keefe,* 2016 FC 503 that an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in subsection 58(1) of the DESDA. From this, it is apparent that an appeal does not provide an opportunity for a reassessment. There is no suggestion either by the Appellant that any forthcoming medical records would address any of the grounds of appeal listed in subsection 58(1) of the DESDA.

CONCLUSION

[15] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division