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

Citation: *A. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 429

Tribunal File Number: AD-16-154

BETWEEN:

A. B.

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: November 2, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 20, 2015, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2014. The Applicant filed an application requesting leave to appeal with the Social Security Tribunal (Tribunal) on January 12, 2016, and again on February 12, 2016, without citing any grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). In response to an invitation from the Tribunal that she should provide grounds of appeal, the Applicant filed additional submissions on March 24, 2016.

ISSUES

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

(1) was the Applicant late in filing the application requesting leave to appeal and if so, should I exercise my discretion and extend the time for filing the leave application, and

(2) does the appeal have a reasonable chance of success?

ANALYSIS

(a) Late Filing of Application

[3] Paragraph 57(1)(b) of the 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.

[4] Arguably, the Applicant did not fully comply with the requirements under subsection 57(1) of the DESDA and the *Social Security Tribunal Regulations* (Regulations) that she make an application "in the prescribed form and manner", as she did not fully

perfect her application until March 24, 2016, when she cited the grounds upon which she based her appeal. It does not serve the purposes of the underlying legislation of the legislation, i.e. that it be "benefits conferring", to so dogmatically require an appeal to fully contain the information set out under subsection 24(1) of the *Regulations* and to perfunctorily dismiss an appeal on the basis of that technicality. On that basis, I would accept that the Applicant filed her application requesting leave to appeal within the time required, on January 12, 2016, notwithstanding the fact she did not identify any grounds until after 90 days had elapsed from when the decision of the General Division had been communicated to her. If there had been neglect or undue delay in moving her appeal forward, that might have been another consideration altogether, but that does not appear to be the case here.

[5] However, if Parliament in fact intended that appeals be dismissed on the basis of technical irregularities, I may nonetheless extend the time for filing the application requesting leave to appeal, under subsection 57(2) of the DESDA. 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".

[6] 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 set out the 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 (CanLII), 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.

[7] The Applicant strove to preserve her cause of action by filing an application on January 12, 2016. The Tribunal wrote to the Applicant on January 18, 2016, notifying her that the application was incomplete. The Applicant responded on February 12, 2016. The Tribunal wrote to the Applicant again, on February 19, 2016. The Applicant filed submissions on March 24, 2016.

[8] Consequently, I am satisfied that the Applicant has a reasonable explanation for the late application – evidenced by the string of correspondence with the Tribunal - and that she demonstrated a continuing intention to pursue an application or appeal. I find also that there is no prejudice to the Applicant in allowing an extension, given that the delay involved is not significant.

[9] 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.

(a) Application requesting leave to appeal

[10] 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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[11] 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.

[12] The Applicant alleges that the General Division failed to observe a principle of natural justice, or that it otherwise acted beyond or refused to exercise its jurisdiction, as the denial of her claim has effectively left her in "oppressive conditions". She noted her medical issues, particularly involving the pain in her eye and resulting headaches and neck pain, depression, panic attacks and anxiety. Although she consults a psychiatrist and takes anti-depressant medication, there has been no improvement in either her physical or emotional health (AD1 and AD1B). Indeed, she indicates that her health has declined (AD1A).

[13] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, that he or she has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. The Applicant's submissions fall far short of suggesting that the General Division deprived the Applicant of a reasonable and fair opportunity to present her case.

[14] I am mindful of the Applicant's financial circumstances. However, disability benefits are not available to everyone who suffers from a disability. It is clear that an applicant must meet certain requirements in order to qualify for a disability pension under the *Canada Pension Plan*. The impact of the decision of the General Division on the Applicant is of no relevance, as there are highly technical requirements she must meet to qualify for a disability pension. The General Division found that the Applicant had not met those requirements. The *Canada Pension Plan* does not permit a General Division (or the Appeal Division for that matter) to consider the impact its decisions may have on any of the parties, nor does it confer any discretion upon the General Division to consider other factors outside of the *Canada Pension Plan* in deciding whether an applicant is disabled as defined by that Act.

[15] Although the Applicant alleges that the General Division failed to observe a principle of natural justice, or that it otherwise acted beyond or refused to exercise its

jurisdiction, she has not identified a failure in this regard. I will therefore turn to examining the medical evidence and comparing it to the decision of the General Division. After all, 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 wrote, "if 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".

[16] I have reviewed the evidence which was before the General Division. The Applicant has loss of vision in her left eye. She also alleges that she is depressed and has a thyroid disorder. Yet, there was no documentary evidence of depression or of a thyroid disorder. The General Division considered the evidence and made findings relating to the Applicant's eye injury, based on that evidence. 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.

CONCLUSION

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

Janet Lew
Member, Appeal Division