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

Citation: *M. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 460

Tribunal File Number: AD-16-867

BETWEEN:

M. M.

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: Neil Nawaz

Date of Decision: November 25, 2016

REASONS AND DECISION

DECISION

[1] Leave to appeal is refused.

INTRODUCTION

[2] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension on May 2, 2013. The Respondent denied the application initially and on reconsideration in a letter dated January 10, 2014 (Reconsideration Letter).

[3] On May 27, 2015, the Applicant filed an incomplete Notice of Appeal with the General Division (GD) of the Social Security Tribunal (SST). Following requests for the Applicant's social insurance number (SIN) and a copy of the Reconsideration Letter, both of which were required under the *Social Security Tribunal Regulations* (SST Regulations), the Applicant perfected his appeal on August 6, 2015, well beyond the time limits set out in the *Department of Employment and Social Development Act* (DESDA).

[4] In a decision dated April 8, 2016, the GD refused an extension of time for the Applicant to appeal to the SST.

[5] The Applicant's authorized representative filed an application for leave to appeal with the Appeal Division (AD) of the SST on June 27, 2016, within the time limit set out in paragraph 57(1)(b) of the DESDA.

FACTUAL BACKGROUND

[6] On January 10, 2014, the Respondent issued a Reconsideration Letter denying the Applicant CPP disability benefits. It was addressed and mailed to the Applicant at his residential address of record at X Boulevard in X and to the office of his then-representative. On May 27, 2015, the Applicant filed an incomplete Notice of Appeal with the GD, along with a letter that read in part:

> Feb 23 2015 I sent a letter in to Chatham and said that I had not received any correspondence in a while.

> I sent in reconsideration in October 2014[1] and have not received any reply.
>
> In my letter to Chatham I said that my address had changed and perhaps they had not recovered the new address which is X, X, ON XXX XXX.
>
> I am enclosing the only correspondence that I have from you. Please note that you sent correspondence to the old address. I had sent you a letter about the change of address and I suspect it got lost,
>
> I am also enclosing a notice of appeal just in case.
>
> I am asking for an extension if I need it. There is no harm to anyone if I get the extensions, and I should not be faulted if I did not get any correspondence from you about my reconsideration. I have pointed out the change in address

[7] Also enclosed was a Canada Post document that appeared to indicate a package had been delivered to an address in Chatham on February 24, 2015.

[8] On June 8, 2015, the SST sent the Applicant a letter requesting information required to complete the appeal, specifically, a copy of the Reconsideration Letter. The Applicant's new representative forwarded the Reconsideration Letter on June 29, 2016. The SST then requested the Applicant's SIN, which the representative duly provided on August 6, 2015, at which point the appeal was declared complete.

[9] In a letter dated September 1, 2015, the Applicant's representable explained that the delay in submitting his appeal was due to the fact that he had not received any correspondence "since submitting his reconsideration in October 2014." The Applicant's representative also reiterated his client's view that there would be no prejudice to any party if an extension were permitted.

[10] In March 2016, the GD member assigned to hear the file asked the Respondent to provide dates confirming any correspondence by mail received directly from the Applicant regarding his CPP disability application between September 2014 and February 2015. The Respondent replied that it had received no correspondence from either the Applicant or his former representative between October 2, 2013 and February 24, 2015.

[11] In its decision of March 8, 2016, the GD found that the Applicant's appeal was completed more than one year after he received the Reconsideration Letter. As a result, pursuant to subsection 52(2) of the DESDA, no extension of time was permissible.

[1] It appears this is in error: The Applicant actually requested reconsideration from the Respondent in October 2013.

ISSUE

[12] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

SST Regulations

[13] According to subsection 24(1) of the SST Regulations, an appeal to the GD must be in the form set out by the SST on its website, and contain the following:

(a) a copy of the decision that was made under subsection 81(2) or (3) of the *Canada Pension Plan*, subsection 27.1(2) of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(b) the date the decision was communicated to the appellant;

(c) if a person is authorized to represent the appellant, the person's name, address, telephone number and, if any, facsimile number and email address;

(d) the grounds for the appeal;

(e) any documents or submissions that the appellant relies on in their appeal;

(f) an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal;

(g) the appellant's full name, address, telephone number and, if any, facsimile number and email address; and

(h) a declaration that the information provided is true to the best of the appellant's knowledge.

DESDA

[14] Pursuant to paragraph 52(1)(b) of the DESDA, an appeal must be brought to the GD within 90 days after the day on which the decision was communicated to the appellant. Under subsection 52(2), the GD may allow further time within which an appeal may be brought, but in

no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[15] According to subsections 56(1) and 58(3), 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.

[16] According to subsection 58(1), the only grounds of appeal are 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.

[17] 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.

[18] 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*[2] and *Fancy v. Canada (A.G.).*[3]

APPLICANT'S SUBMISSIONS

[19] The Applicant's current representative submits that, in refusing the request for an extension of time to appeal, the GD failed to observe a principle of natural justice by disregarding the following factors:

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

(a) The GD found that the Reconsideration Letter dated January 10, 2014, was effectively communicated to the Applicant as of January 20, 2014, but this is inaccurate given that the Applicant did not actually receive the reconsideration letter until April 2, 2015, due to a change of address. He sent the Respondent a letter in February 2015, advising them of same, a fact acknowledged by the GD. Upon receipt of this letter, the Applicant immediately notified his legal representative, who acted promptly in delivering an appeal one month later, well within the 90-day deadline. Although the appeal was not complete at that time, the missing information was provided by August 2015.

(b) The GD also acknowledges that that the Reconsideration Letter was mailed to the Applicant's former representative. If so, the Applicant should not bear responsibility for his former representative's negligence in failing to initiate the appeal within the specified timelines. As held in *Breathe E-Z Homes Ltd. v. Canada (MNR),*[4] justice and equity should prevail in determining whether to grant an extension of time to file an appeal. In its decision, the Tax Court of Canada declined to penalize the applicant for delegating the task of filing the appeal to a professional advisor.

(c) In deciding whether to allow an extension in time, the GD should have considered the criteria laid out in *Canada (MHRD) v. Gattellaro*.[5] In this case, the Applicant had a continuing intention to pursue the appeal, he had an arguable case, he had a reasonable explanation for the delay, and no prejudice would accrue to the Respondent in allowing the extension.

ANALYSIS

[20] I have reviewed the entirety of the file that was before the GD and see no reasonable chance of success on the grounds submitted by the Applicant. The GD found that the Notice of Appeal was submitted to the SST more than one year after receipt of the Respondent's Reconsideration Letter, and I see no arguable case that the GD relied on an erroneous finding of fact, misapplied the law or treated the Applicant unfairly.

[4] *Breathe E-Z Homes Ltd. v. Canada (Minister of National Revenue)*, 2014 TCC 122.
[5] *Canada (Minister of Human Resources and Development) v. Gattellaro* 2005 FC 883.

[21] In his submissions, the Applicant's representative acknowledges that the Notice of Appeal was not submitted, even in its incomplete form, until May 27, 2015—more than 16 months after the Reconsideration Letter was issued. The Applicant's representative submits that, as per the wording of subsection 52(2) of the DESDA, the Reconsideration Letter was not actually communicated to his client until April 2015, as he had changed his residential address in the interim and his former representative failed to advise him of his appeal rights.

[22] I see nothing unreasonable in the GD's presumption that the Applicant received the Reconsideration Letter within 10 days of mailing, particularly since (i) he had an authorized legal representative on the record and (ii) he was under a moral, if not legal, obligation to inform the Respondent of a change of address—which he evidently did not do until February 2015. In my view, the SST appeal deadlines would be rendered meaningless if a prospective appellant were permitted to plead ignorance of notices many months after a move.

[23] For appeals submitted more than one year after reconsideration, the law is strict and unambiguous. Subsection 52(2) of the DESDA states that in no case may an appeal be brought more than one year after the reconsideration decision was communicated to the appellant. While factors such as those set out in *Gattellaro* may be considered for extension requests that come after 90 days, the wording of subsection 52(2) all but eliminates scope for a decision-maker to exercise discretion once a year has elapsed. The Applicant's intention to pursue an appeal then becomes irrelevant, as does his explanation for being late, the quality of his case or the unlikelihood of prejudice to the other party.

[24] It is indeed unfortunate that filing lapses may have denied the Applicant an appeal, but the GD was bound to follow the letter of the law, and so am I. Given the purported negligence of the Applicant's former representative, I am implored to exercise fairness and reverse the GD's decision, but I lack the authority to do so and can only exercise such jurisdiction as granted by the AD's enabling statute. Support for this position may be found in *Pincombe v. Canada*,[6] among other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

[6] *Pincombe v. Canada* (A.G.) [1995] FCJ No. 1320 (FCA).

Without delving into the details of *Breathe E-Z Homes*, my hands are bound in a way that the court in that case was not.

CONCLUSION

[25] In my view, the GD did not base its decision to deny an extension to appeal on an erroneous finding of fact, nor did it err in law or breach a principle of natural justice. As I see no reasonable chance of success on the grounds of appeal put forward, the application for leave to appeal is refused.

Member, Appeal Division