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

Citation: *R. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 494

Tribunal File Number: AD-16-259

BETWEEN:

R. 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: December 21, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 28, 2015, which determined that the Applicant ceased to be disabled for the purposes of the *Canada Pension Plan*, in March 2012. The Applicant filed an application requesting leave to appeal on February 9, 2016, invoking several grounds of appeal.

ISSUES

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

(1) is the application requesting leave to appeal late? 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 application

[3] The Applicant advises that the decision of the General Division had been communicated to her on September 6, 2015. She submits that she had filed an application requesting leave to appeal in December 2015, via a Service Canada location and that she had been assured then that the application would be filed. Indeed, the application requesting leave to appeal bears a date stamp of December 4, 2015 by Service Canada. However, the application was returned to the Applicant in February 2016, prompting her to forward the application directly to the Social Security Tribunal.

[4] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out the four criteria 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.

[5] I am satisfied by the date-stamped application that the Applicant held a continuing intention throughout to pursue an appeal, that there is a reasonable explanation for the delay in filing the application, and given the relatively short delay, that there is no prejudice to the other party if an extension were granted. The Applicant has also set out several grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development*. I will assess whether any of these grounds establish an arguable case below, but I am satisfied that it is in the overall interests of justice to allow an extension of time.

(a) Application requesting leave to appeal

[6] 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.

[7] Before granting leave, 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.

[8] Recently, the Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 indicated that it is unnecessary for the Appeal Division to address all of the grounds of appeal raised by an applicant. In response to the Respondent's arguments that the Appeal Division was required to deny leave on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESDA "does not require that individual grounds of appeal be dismissed … individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave". This is one of those occasions before me.

[9] The Applicant raises several grounds of appeal. She submits, for instance, that the General Division failed to consider *Villani v. Canada (Attorney General)*, 2001 FCA 248, and consider her personal circumstances, such as her age, in a "real world" context, in assessing whether she remained disabled. The Applicant further argues that the General Division erred in its application of the severity test, when it determined whether she had "some capacity to work" (at paragraphs 29 and 30), rather than whether she was incapable regularly of pursuing any substantially gainful occupation.

[10] Although the General Division referred to one of the Applicant's personal characteristics – her age – at paragraph 29, it is not apparent that the General Division considered her age, along with any other personal characteristics in its analysis. Indeed, there was no reference to *Villani* in the decision. And, although the General Division cited the severity test under the *Canada Pension Plan*, the member seemingly may have applied a different test, as suggested in paragraphs 29 and 30, when she wrote that she had to determine whether the Applicant "had some capacity to work".

[11] I note that in *Plaquet v. Canada (Attorney General)*, 2016 FC 1209 at para 38, the Federal Court held that the General Division had acted unreasonably and erred in applying established law in determining that the test for severe disability required the applicant there to establish that her new diagnosis and forward-looking prognoses prevented her from "all work". The Federal Court concluded that that finding placed the bar too high and was contrary to *Villani*. On this ground alone, I am satisfied that the appeal has a reasonable chance of success.

[12] The Applicant has cited other grounds, which may be inter-related to the ground on which I am prepared to grant leave to appeal. For the reasons which I have set out above, it is unnecessary for me to address each of them.

CONCLUSION

[13] The application for leave to appeal is allowed.

[14] This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division