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

Citation: *S. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 6

Tribunal File Number: AD-16-1382

BETWEEN:

S. K.

Appellant

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

Decision on Request for Extension of Time by: Janet Lew

Date of Decision: January 6, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 6, 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, 1997[1]. The Applicant filed an application requesting leave to appeal on December 15, 2016, alleging that the General Division failed to observe a principle of natural justice. She also advised that additional medical opinions would be forthcoming.

ISSUES

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

(1) was the application for leave to appeal filed late and if so, is there any basis whereby I can extend the time for filing the leave application, and

(2) if an extension is permitted, does the appeal have a reasonable chance of success?

ANALYSIS

(a) Late application

[3] Paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA) requires that an application for leave to appeal 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

[1] There is a typographical error at paragraph 37, where the end of the minimum qualifying period is incorrectly identified as December 31, 2015, rather than as December 31, 1997. The earnings history set out at GT1-82 confirms that the Applicant last met the minimum qualifying period in December 1997, based on valid contributions to the Canada Pension Plan in five years from 1978 to 1992. However, this error does not change the outcome before the General Division.

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

[4] The Applicant did not disclose when the decision of the General Division had been communicated to her. In the case of ordinary mail, section 19 of the *Social Security Tribunal Regulations* deems that the decision of the General Division had been communicated to the Applicant 10 days after it had been mailed to her. Correspondence from the Social Security Tribunal indicates that the decision had been sent to her under cover of a letter dated November 9, 2015. Therefore, the Applicant is deemed to have received the decision on November 19, 2015. This is more than one year after the day on which the decision had been communicated to the Applicant and, under subsection 57(2), there is no basis whereby I can extend the time for filing the application for leave to appeal.

[5] In *Mahmood v. Canada (Attorney General)*, 2016 FC 487, Mr. Mahmood had filed an application for leave more than one year after the date that the decision had been communicated to him. The Federal Court held that the DESDA "does not permit any discretion to be applied" and even if the DESDA had permitted discretion, it was reasonable on the facts not to grant an extension, as the evidence was insufficient to establish a severe disability. Similarly, in the Applicant's case, not only did she indicate that she did not become disabled until 2011, but there was also a lack of medical evidence addressing the timeframe in or around the end of the minimum qualifying period. For instance, none of the medical reports or records, including from the Applicant's family physician and physiatrist, addressed the 1997 timeframe. Indeed, the family physician and physiatrist did not begin to treat the Applicant until years after her minimum qualifying period had passed.

(b) Application requesting leave to appeal

[6] Even if there had been no issue of the timeliness of the application requesting leave to appeal, I would have nonetheless dismissed the application.

[7] 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.

[8] 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 of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[9] The Applicant claims that the Social Security Tribunal "representative being the moderator" was not present at the initial teleconference hearing, which resulted in rescheduling the hearing. She submits that there was an inordinate amount of delay in rescheduling the hearing, thereby creating a "default". She also added that additional expert opinion would be filed.

[10] The hearing had been scheduled for a videoconference hearing for July 31, 2015 (GT0-Notice of Hearing). In early July 2015, the Applicant's representative sought an adjournment of the hearing, as he expected to receive several medical reports and records (GT4 - Adjournment request). The Applicant also indicated that she was not well enough to attend a videoconference hearing. The General Division granted the adjournment request and the hearing was rescheduled to a teleconference for October 2, 2015 (GT0A).

[11] On October 2, 2015, the Applicant's representative sought an adjournment due to a family medical emergency. As a result, this hearing was also adjourned. Upon

consultation with the Applicant's representative, the Social Security Tribunal rescheduled the teleconference hearing to November 6, 2015 (GT0B).

[12] There is no evidence in the application materials to suggest that the General Division member failed to attend the initial teleconference hearing on October 2, 2015, and that this thereby resulted in rescheduling the hearing. Indeed, it appears that the member, the Applicant and her representative were present or available by telephone, and that due to unforeseen circumstances involving the Applicant's representative, the hearing was adjourned.

[13] The Applicant further submits that there was an inordinate amount of delay involved in rescheduling the matter and that this resulted in some prejudice to her. The initial teleconference hearing was rescheduled from October 2, 2015, to November 6, 2015. I do not consider this an inordinate amount of delay, nor do I see that any actual prejudice arose as a result of this adjournment. The Applicant does not allege, for instance, that she had arranged for expert testimony and that her expert(s) thereby became unavailable after the first scheduled teleconference hearing, or that she was somehow deprived of the opportunity to call evidence.

[14] I am not satisfied that the appeal has a reasonable chance of success, even setting aside the issue of the timeliness of the application requesting leave to appeal.

[15] Finally, the Applicant advises that she expects to file supporting medical evidence to prove that her disability is severe, but the Federal Court pronounced in *Canada (Attorney General) v. O'Keefe,* 2016 FC 503 and more recently in *Marcia v. Canada (Attorney General),* 2016 FC 1367 that new evidence does not constitute a ground of appeal. As the Federal Court stated in *Marcia,*

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[16] I am not satisfied that the appeal has a reasonable chance of success on the basis of any new medical records which the Applicant proposes to file.

CONCLUSION

[17] Both the application for an extension of time to file the appeal and the application requesting leave to appeal are dismissed.

Janet Lew
Member, Appeal Division