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

Citation: *M. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 19

Tribunal File Number: AD-16-891

BETWEEN:

M. H.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of decision: January 27, 2017

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] In a decision dated April 25, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant, as she did not have a severe and prolonged disability prior to the minimum qualifying period (MQP), which it found to be December 31, 2014.

[2] On July 2, 2016, the Applicant's authorized representative filed an incomplete application for leave to appeal with the Appeal Division of the Tribunal. Following a request for further information from the Appeal Division, the Applicant perfected her application for leave on August 11, 2016, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[3] I must decide if an extension of time to make the application for leave should be granted.

THE LAW

DESDA

[4] Pursuant to paragraph 57(1)(*b*) of the DESDA, 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 the applicant. Under subsection 57(2), 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 applicant.

[5] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada (MHRD) v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

(a) The applicant must demonstrate a continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) There is no prejudice to the other party in allowing the extension; and

(d) The matter discloses an arguable case.

[6] The weight to be given to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada (A.G.) v. Larkman.*[2]

[7] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[8] According to subsection 58(1) of the DESDA 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 made in a perverse or capricious manner or without regard for the material before it.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an 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, an applicant does not have to prove the case.

[10] 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*;[3] *Fancy v. Canada (A.G.).*[4]

CPP

[11] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the MQP.

[12] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[13] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

APPLICANT'S SUBMISSIONS

[14] On July 2, 2016, the Applicant's representative submitted an application requesting leave to appeal alleging that the General Division had based its decision on an erroneous finding of fact. The application offered no details but indicated additional submissions would

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

be forthcoming. In response to a request for further information from Tribunal staff, the Applicant's representative submitted detailed reasons for requesting leave on August 11, 2016, 108 days after the General Division's decision was mailed to her office, and after the requisite 90-day filing deadline.

[15] In her submissions of August 11, 2016, the Applicant's representative alleged that the General Division erred in rendering its decision as follows:

(a) While acknowledging in paragraph 118 that the Applicant has been consistently treated by Dr. Zajc and Dr. Ng, the General Division concluded that they were "not convinced" that her pain and limitations were severe at the time of the MQP. Yet the General Division did not provide any reasons for this conclusion, despite the many reports supporting the Applicant's disability claim.

(b) Among those reports was Dr. Ng's letter dated November 15, 2015, which was prepared for the Tribunal at the request of the Applicant's representative. It is an error to state that it did not provide evidence at the MQP. A rheumatologist who has treated the Applicant since 2008, Dr. Ng wrote that she has suffered from diffuse chronic generalized pain of several years' duration that has prevented her from pursuing any regular gainful employment, either full-time or part-time. In addition, Dr. Zajc, the family physician, noted that the Applicant has suffered from generalized anxiety disorder since 1994.

(c) In a pattern repeated throughout the decision, the General Division simply stated in paragraph 119 that it was "not convinced" that the Applicant's restrictions precluded all work at the time of the MQP, without applying the severity definition to her condition. There was no analysis of her capacity to perform substantially gainful work, specifically whether she would be able to attend a place of employment on a regular basis.

(d) In paragraph 120, the General Division noted that the Applicant was not referred to a psychiatrist until early 2014 but that was her doctor's call, and, in any case, the referral was made before the MQP. In his May 2014 report, Dr. Mehta noted

that the Applicant had "moderate anxiety and extreme depression." While he later noted that a medication increase had improved the Applicant's mood, this cannot be equated to a capacity to engage regularly in substantially gainful employment. The Applicant submits the General Division made a significant error in failing to place the medical reports in context.

(e) In Paragraph 121, the General Division placed substantial weight on Dr. Zajc's clinical notes of August 14, 2014 and October 9, 2014, in which it was noted that the Applicant had seen improvements in her sleep, fibromyalgia and mood and was discussing part-time work within her capabilities. However, Dr. Zajc also noted that "prolonged sitting at a desk was not possible due to neck and arm pain," and the Applicant had "challenges coping with focus/concentration and inability to cope with conflict or resolving disputes." The General Division also erred in ignoring the following passage in Dr. Zajc's notes: "[L]engthy discussion around trying to find work that could be PT and physically/emotionally manageable – limited options… will fill out CPP forms." One would logically assume from this that the doctor is agreeing that the Applicant is indeed disabled. In addition, any improvement in the Applicant's condition was not sustained, as she had to reduce the medication due to headaches.

(f) In paragraph 122, the General Division noted that the Applicant attended a wellness program, in addition to a fibromyalgia course, in the autumn of 2015 but received no additional treatment from a psychiatrist. In fact, the Applicant continually sees her physicians and follows their recommendations.

(g) In paragraph 124, the General Division found that the Applicant retained the capacity to do some work within her limitations. However, this flies in the face of the evidence on file, as well as the testimony of the Applicant. The General Division completely disregarded the opinion of many of the Applicant's medical practitioners.

(h) In paragraph 125, the General Division stated that resolving whether chronic pain constitutes a severe disability under the CPP is difficult because it involves an assessment of the genuineness of what are often subjective symptoms. Yet the General Division made no determination on this issue and ignored medical reports validating the Applicant's pain complaints.

ANALYSIS

[16] I find that the application requesting leave to appeal was filed after the 90-day limit. In her request for leave, the Applicant's authorized legal representative indicated that she received the General Division's decision on April 30, 2016. The Applicant's representative did not submit a complete application requesting leave to appeal until August 11, 2016, after the 90-day deadline set out in subsection 57(1) of the DESDA.

[17] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[18] On July 2, 2016, the Applicant's representative submitted an application requesting leave, although it did not list any substantive reasons for mounting an appeal, beyond a perfunctory allegation of factual error. Still, I am willing to give the Applicant the benefit of the doubt on this question and find that she had a continuing intention to pursue the appeal, since her representative made contact with the Tribunal prior to the expiry of the 90-day deadline.

Reasonable Explanation for the Delay

[19] Although the form to request leave to appeal specifically asks for an explanation if the request for appeal is late, the Applicant's representative offered no reasons for why it was submitted past the 90-day filing deadline.

Prejudice to the Other Party

[20] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the

expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

Arguable Case

[21] Many of the Applicant's claimed grounds of appeal are so broad that they amount to a request to retry the entire claim. However, I will address the Applicant's specific allegations of error where they fall within the categories set out in subsection 58(1) and make an assessment on whether any of them have a reasonable chance of success.

(a) Conclusions of Dr. Zajc and Dr. Ng

[22] The Applicant alleges that the General Division erroneously stated that Dr. Zajc and

Dr. Ng were "not convinced" that her pain and limitations were severe at the time of the MQP. I see no arguable case on this point, as the General Division's apparent intention in paragraph 118 was not to relay the conclusions of the two treatment providers, but to declare *itself* "not convinced" that the Applicant's disability was less than severe.

(b) Weighting of Dr. Ng's Letter

[23] The Applicant alleges the General Division erred in stating that Dr. Ng's letter of November 15, 2015 did not provide evidence of a severe disability at the MQP. However, in my view, this ground stands no reasonable chance of success on appeal, as I do not see any indication that the General Division misrepresented Dr. Ng's opinion. Paragraphs 103-06 of the decision contain a lengthy and fair summary of the Ng letter (pages 2-4 in a document labelled "GP-14-3472 Mar 2" in the evidentiary record), including the Rheumatologist's conclusion that the Applicant was disabled and unable to pursue regular gainful employment, either full-time or part-time.

[24] It is open to an administrative tribunal charged with finding fact to sift through the relevant facts, assess the quality of the evidence and determine what, if any, it chooses to accept or disregard, before deciding on its weight and ultimately coming to a decision based on its interpretation and analysis. If the General Division chose to give lesser weight to Dr. Ng's letter, it is not my place as a member of the Appeal Division to challenge that assessment unless

there is an error or omission that is “perverse” or “capricious” or “without regard” for the record.” I do not see that here. The Applicant’s submissions seem to imply that a medical opinion, such as Dr. Ng’s, decides the matter if it employs the language of paragraph 42(2)(*a*) of the CPP. This approach, it seems to me, misconstrues the function of the General Division, whose role is to consider the available evidence through the lens of a legal—as opposed to medical—definition of disability.

(c) Quality of Reasons and Analysis

[25] The Applicant alleges that the General Division did not analyze the evidence or actually apply the severity definition to her condition. Instead, it merely stated repeatedly that it was “not convinced” that the Applicant’s restrictions precluded all work at the time of the MQP.

[26] While the General Division frequently used the same construction to express its view that there was insufficient evidence of disability, I do not see an arguable case that it failed in its duty to provide sufficient reasons. The General Division’s decision concludes with an analysis that cites several reasons for its view that the Applicant’s disability fell short of the severity threshold, among them her improvement following treatment at the RAPT program, discussions with her family physician in October 2014 about the possibility of taking on part-time work and the particularly fast-paced environment of her last job.

[27] At the Appeal Division, the issue is not whether I agree or disagree with the decision of the General Division but whether it has committed an error that falls within one of the categories set out in subsection 58(1) of the DESDA. In this case, I see no reason to interfere with a decision of the General Division where it has justified the outcome with defensible reasons.

(d) Psychiatric Treatment

[28] The Applicant submits that the General Division failed to place the Applicant’s mental health reports in their appropriate context, but I see no reasonable chance of success on this ground. The Applicant has not identified where, in paragraphs 120-22, the General Division committed a factual error, and her submissions amount to a complaint that the General Division emphasized certain aspects of the evidence at the expense of others. While I agree that General

Division appeared to draw an adverse inference from the fact that the Applicant did not receive a psychiatric referral until early 2014 (which the Applicant rightfully notes was during the MQP), it appeared to be making the valid point—albeit awkwardly—that she had managed to function with depression and anxiety for a long time without receiving treatment. Otherwise, I saw nothing to indicate that the General Division misrepresented or distorted Dr. Mehta's views.

(e) Selective Use of Clinical Notes

[29] The Applicant objects to what it submits was undue weight on selected passages in Dr. Zajc's clinical notes, which noted improvements in her condition and discussions about part-time work. Again, I refer to an administrative tribunal's right to weigh evidence as it sees fit. In *Simpson v. Canada (A.G.)*,[5] the Federal Court of Appeal considered the scope of the authority of the Pension Appeals Board to assess evidence:

> [A] tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[30] The same principle can be applied to the Applicant's complaint that the General Division ignored Dr. Zajc's noted intention to complete CPP forms on the Applicant's behalf. I would also add that the General Division summarized significant portions of Dr. Zajc's clinical notes in paragraphs 82-94 of its decision, suggesting that it gave them, in their totality, due consideration. If the General Division chose not to emphasize the clinical note about the CPP application, it may be because it documented elsewhere (in paragraph 12 of the decision) that Dr. Zajc did ultimately complete and submit a CPP medical report. Contrary to the suggestion of the Applicant, the fact that a physician has filled out a CPP form on behalf of his or her patient does not necessarily mean that the patient is disabled according to the definition set out in paragraph 42(2)(*a*). There may be a range of reasons why a treatment provider prepares a

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

report for a patient, but it is ultimately the Tribunal's job to assess disability according to the applicable legal standard.

[31] I see no arguable case on this ground.

(f) Psychiatric Treatment after August 2014

[32] The Applicant alleges the General Division erred in paragraph 122, where it noted that the Applicant received no additional psychiatric treatment after August 2014.

[33] I see no arguable case on this ground. The Applicant has not pointed to a specific mental health intervention after August 2014 that the General Division ignored or disregarded. The Applicant's response—that she continually follows her physician's recommendations—does not identify any erroneous finding of fact that falls under subsection 58(1).

(g) Finding of Residual Capacity

[34] The Applicant alleges that the General Division's finding that the she retained capacity to do work within limitations flies in the face of the evidence and disregards the opinions of her medical practitioners.

[35] I see no arguable case on this ground. While the General Division's analysis may not have arrived at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence, but to determine whether the decision is defensible on the facts and the law. An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

(h) Subjective Pain Symptoms

[36] The Applicant criticizes the General Division for failing to assess the genuineness of her subjective chronic pain symptoms and ignoring medical reports validating her complaints.

[37] I see no reasonable chance of success on this ground. As mentioned, it is established law that an administrative tribunal is presumed that to have considered all the evidence before it. I have already indicated that I found the General Division's reasons sufficient. Furthermore, my reading of the decision indicates that the General Division did not deny that the Applicant suffers from pain; the bulk of its analysis was concerned with determining whether her symptoms constituted a barrier to substantially gainful employment.

CONCLUSION

[38] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I was able to infer that the Applicant had a continuing intention to pursue her appeal, and I also thought it unlikely that the Respondent's interests would be prejudiced by extending time. However, the Applicant offered no reasonable explanation for the delay, and I could find no arguable case on appeal among any of her lengthy submissions. It was this last factor that was decisive; I see no point in advancing this application to a full appeal that is doomed to fail.

[39] In consideration of the *Gattellaro* factors and in the interests of justice, I would refuse an extension of time to appeal pursuant to subsection 57(2) of the DESDA.

Member, Appeal Division