



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 30

Tribunal File Number: AD-16-963

BETWEEN:

T. D.

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: February 9, 2017

REASONS AND DECISION

Extension of time to appeal and leave to appeal are refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated March 3, 2016, in which it found that she abandoned her appeal for a *Canada Pension Plan* (CPP) disability pension.

[2] On July 22, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division of the Tribunal. She denied that she had abandoned her appeal and alleged that she always intended to pursue her appeal. Following two requests for further information from the Appeal Division, the Applicant perfected her application for leave on August 25, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

BACKGROUND

[3] The Applicant applied for a disability pension under the CPP in December 2013. The Respondent denied the application at both the initial and reconsideration levels. In October 2014, the Applicant appealed the reconsideration decision to the General Division.

[4] A telephone conversation log indicates that the Applicant registered a change of address with the Tribunal on January 5, 2015.

[5] On October 16, 2015 and November 16, 2015, the Tribunal sent letters to the Applicant at X X Drive, X, BC, XXX XXX. Neither letter was returned to the Tribunal, and both were presumed delivered.

[6] On December 15, 2015, the Tribunal sent a notice of hearing to the Applicant by Priority Post to the address at X X Drive. On January 25, 2016, the notice of hearing was returned to the Tribunal and was marked unclaimed.

[7] On January 28, 2016, the notice of hearing was sent to the same address by regular mail. It was not returned to the Tribunal.

[8] The Tribunal attempted to contact the Applicant by telephone on February 26, 2016 at the last number she provided to confirm her attendance at the hearing as scheduled. The Tribunal was unable to reach the Applicant, as the phone number on file was no longer her number.

[9] On March 3, 2016, the General Division issued its decision, finding that the Applicant had abandoned her appeal. In its reasons, the General Division noted that the Applicant had not attended the hearing at the scheduled time, despite multiple attempts to notify her of the hearing by post and telephone.

THE LAW

SST Regulations

[10] Paragraph 3(1)(a) of the *Social Security Tribunal Regulations* (SST Regulations) states that “[t]he Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.”

[11] Subsection 3(2) of the SST Regulations provides that “[i]f a question of procedure that is not dealt with by these Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations.”

[12] Section 6 of the SST Regulations says that “[a] party must file with the Tribunal a notice of any change in their contact information without delay.”

[13] Section 12 of the SST Regulations specifies that “[i]f a party fails to appear at a hearing, the Tribunal may proceed in the party’s absence if the Tribunal is satisfied that the party received notice of the hearing.”

[14] Section 28 of the SST Regulations states that “[a]fter every party has filed a notice that they have no documents or submissions to file—or at the end of the applicable period set out in section 27, whichever comes first—the Income Security Section must without delay:

- (a) make a decision on the basis of the documents and submissions filed; or
- (b) if it determines that further hearing is required, send a notice of hearing to the parties.”

DESDA

[15] 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.

[16] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada (Minister of Human Resources Development) 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) The matter discloses an arguable case; and
- (d) There is no prejudice to the other party in allowing the extension.

[17] 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 (Attorney General) v. Larkman*.²

[18] 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, and the Appeal Division must either grant or refuse leave to appeal.

[19] Subsection 58(1) of the DESDA sets out that the only grounds of appeal are the following:

¹ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

² *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

- (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.

[20] 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.”

[21] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*.³ The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*.⁴

[22] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success.

ISSUES

[23] I must decide two questions: Should an extension of time to make the application for leave to appeal be granted? If so, does the appeal have a reasonable chance of success? Both questions turn on whether the Applicant has an arguable case.

SUBMISSIONS

[24] In her request for leave to appeal to the Appeal Division, received on July 22, 2016, the Applicant wrote that she received the decision of the General Division on July 11, 2016. She said she was homeless from June 30, 2015 to July 1, 2016, and had missed the mail sent to her old address during that period.

³ *Kerth v. Canada (Minister of Human Resources Development)*, [1999] F.C.J. 1252.

⁴ *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[25] The Applicant also said that her medical condition is disabling and continued to hinder her ability to work. She said it took her a year to get off the streets due to lack of financial aid, and she was only able to get a home thanks to assistance from a friend.

[26] On August 23, 2016, in response to a request for further information, the Applicant alleged that the General Division made an error regarding the facts contained in the appeal file.

[27] She said she was homeless on January 28, 2016, when the notice of hearing was mailed to her last address. On February 26, 2016, when the Tribunal attempted to contact her, she had no access to a telephone, her number having been disconnected because she was unable to pay her bill. She has since updated the Tribunal with a new phone number and mailing address.

[28] The Tribunal took a year to set up her hearing, and it is in no way her fault that her disability rendered her homeless. She lives with a very severe physical limitation. Her file needs to be re-opened and a new hearing date set up now that she has a phone number and mailing address.

ANALYSIS

[29] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that on March 4, 2016 the General Division's decision was mailed to the Applicant at her last known residential address. According to paragraph 19(a) of the SST Regulations, a decision is deemed to have been communicated to a party 10 days after the date on which it was sent by ordinary mail. In her application requesting leave, the Applicant indicated that she did not receive the General Division's decision until July 11, 2016, because she lost her mailing address when she became homeless. The Applicant submitted an incomplete request for leave on July 22, 2016—140 days after the General Division's decision was mailed— and perfected it on August 23, 2016.

[30] 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

[31] The record indicates that the Applicant first responded to the General Division's abandonment decision after the 90-day deadline, even allowing for a 10-day delivery period. While I appreciate that the Applicant was without a fixed address and undoubtedly had many other matters to attend to during this period, I think it is more likely than not that her intention to pursue the appeal fell by the wayside.

Reasonable Explanation for the Delay

[32] The Applicant claims that she was homeless between June 2015 and July 2016, a submission I am willing to accept, given the fact the Tribunal was unable to reach her by telephone or registered mail. I also note that she has been managing her appeals by herself and without the benefit of professional assistance.

Prejudice to the Other Party

[33] 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

[34] In essence, the Applicant argues that the General Division failed to observe a principle of natural justice when it declared her appeal abandoned and closed her file. She submits that she was treated unfairly because she wanted a hearing on her CPP disability application and never intended to abandon her appeal.

[35] Having reviewed the General Division's decision against the record, I do not see a reasonable chance of success on appeal. Although it is not specifically referred to in the SST Regulations, the concept of abandonment emerges from the general authority of an administrative tribunal to regulate the proceedings before them. Where notice of a hearing has been properly given to an appellant, and neither the appellant nor anyone on his or her behalf

appears at the scheduled hearing, it is within the discretion of an administrative tribunal to declare the appeal abandoned.

[36] While I sympathize with the Applicant and do not doubt that she was homeless in 2015-16, the mandate of the Appeal Division is relatively narrow: 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.

[37] In this case, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision.

[38] I have reviewed the General Division's decision and the supporting record and see no indication that it inappropriately or unreasonably exercised its discretionary power to find the Applicant's appeal abandoned. Section 6 of the SST Regulations imposes a positive duty on claimants to notify the Tribunal, without delay, of any change in their contact information. The Tribunal, having not been informed of the Applicant's changed circumstances, made several unsuccessful attempts to give her notice of her scheduled hearing. According to section 28 of the SST Regulations, the General Division would have been within its jurisdiction, once the notice of hearing was sent to the Applicant's last registered address, to make a decision on the basis of the documents and submissions filed. Instead, it declared the Applicant's appeal abandoned, a disposition that permits the Applicant, should she wish, to submit a fresh application for benefits—one in which the Respondent will be permitted to give her medical evidence full reconsideration.

[39] While the General Division's analysis did not arrive 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.

CONCLUSION

[40] 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. The Applicant offered a reasonable explanation for the delay, and I also thought it unlikely that the Respondent's interests would be prejudiced by extending time. While I doubted that the Applicant had continuing intention to pursue her appeal, all other factors were outweighed, in my estimation, by the Applicant's lack of an arguable case; I see no grounds—whether a breach of natural justice or an error in law or fact—on which the Applicant would have a reasonable chance of success on appeal.

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



Member, Appeal Division