



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 93

Tribunal File Number: AD-17-184

BETWEEN:

J. K.

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: March 9, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 14, 2016, 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” on or before the end of her minimum qualifying period (MQP) of December 31, 2014. The Applicant filed an application requesting leave to appeal on February 28, 2017, alleging that the General Division failed to observe a principle of natural justice.

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?
- (2) 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 “[t]he 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 appellant.”

[4] There is conflicting information in the hearing file as to when the decision of the General Division was communicated to the Applicant. On the one hand, a telephone log prepared on November 24, 2016 indicates that the Applicant reported that she had yet to

receive a copy of the decision. On the other hand, she disclosed in the leave application that she had received the decision of the General Division on March 14, 2016. Given that the General Division member rendered her decision on March 14, 2016, I find it improbable that the decision would have been communicated to the Applicant on the same day on which it was rendered.

[5] Yet, the Applicant also claims in the leave application that she had been provided a three-month extension, following the appeal before the General Division, to file a specialist's medical report. She claims that she received the General Division's decision on March 14, 2016, before the expiry of this three-month timeframe on April 28, 2016. As I have indicated above, while it is improbable that she received the decision on the same date on which it was rendered, I find it more likely than not that the Applicant received the decision sometime between March 14 and April 28, 2016. In short, the Applicant is close to one year late in filing an application requesting leave to appeal.

[6] The Applicant has not provided any explanation as to why she filed her leave application late, nor has she demonstrated any continuing intention to pursue an appeal. There is, however, little to no prejudice to the Respondent in granting an extension of time for filing the leave application. Of greater significance is whether the appeal has a reasonable chance of success, i.e. an arguable ground, and whether it is in the interests of justice to grant an extension. The Applicant has not suggested that there are any extenuating circumstances in the consideration of the interests of justice, so I am left with determining whether the appeal has a reasonable chance of success. For the reasons that follow, I am satisfied that the appeal has a reasonable chance of success and am therefore prepared to grant an extension of time to file the leave application as it would be in the interests of justice to do so.

(a) Does the appeal have a reasonable chance of success?

[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;
- (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.

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

[9] The Applicant claims that during the course of the proceedings before the General Division, the member informed her that she had three months until April 28, 2016, by which she could submit a report from her specialist. The Applicant maintains that she received the decision of the General Division before the three-month timeframe had passed and before she had an opportunity to file her specialist's report. Indeed, she claims that she did not receive a copy of her specialist's report until May 2, 2016. The Applicant relies on her specialist's report, along with other medical documentation and the evidence of her witnesses, to establish that she had a severe and prolonged disability by the end of her MQP. She suggests that the General Division breached a principle of natural justice, in denying her the opportunity to fairly present her case, after the member indicated that she could file additional medical opinions.

[10] I have listened to portions of the recording of the hearing before the General Division. The member enquired of the Applicant whether she had any additional medical

records and indicated that, if so, she was prepared to provide an extension of time to file these. For instance, at approximately 27:45 and again at 53:55 minutes into the recording, the member indicated that she would provide the Applicant with one week to submit medical records from her family physician regarding her low back pain. The Applicant subsequently provided a copy of her cholesterol results from mid-2014 to January 2016, which she had received from her family physician.

[11] I have not readily located any instances in the recording of the hearing where the General Division offered an extension to April 28, 2016, by which time the Applicant could file additional medical reports. It may be, however, that the Applicant can produce evidence of this. The best evidence of this would likely be the timestamp of the recording where the General Division is alleged to have provided an extension of time by which to file medical records.

[12] I am satisfied that the appeal has a reasonable chance of success on the ground raised by the Applicant.

CONCLUSION

[13] The application for leave to appeal is granted. This decision granting leave to appeal does not, in any way, prejudice the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division