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

Citation: *H. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 136

Tribunal File Number: AD-16-855

BETWEEN:

H. A.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: April 3, 2017

Tribunal File Number: AD-16-855

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] In a decision dated May 27, 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, because she did not have a severe and prolonged disability prior to the minimum qualifying period (MQP) ending December 31, 1997.

[2] On June 23, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division of the Tribunal. Following multiple requests for further information, the Applicant perfected her application for leave on October 20, 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 whether an extension of time to make the application for leave to appeal should be granted.

THE LAW

Department of Employment and Social Development Act

[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 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 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 v. Hogervorst*[3]; *Fancy v. Canada.*[4]

Canada Pension Plan

[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] In her request for leave to appeal submitted on June 23, 2016, the Applicant stated that she was in financial need and could not work because she had injured her head and leg. In a

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

letter dated June 28, 2016, the Tribunal informed the Applicant that her application was incomplete and contained insufficient grounds for appeal. It reminded the Applicant of the grounds of appeal set out in subsection 58(1) of the DESDA and asked her to provide detailed reasons why she believed her alleged grounds would have a reasonable chance of success. Tribunal staff elaborated on this message in a July 7, 2016 telephone conversation with the Applicant's son and authorized representative. On July 12, 2016, the Applicant replied in a short, handwritten note that she had broken her back and required assistance from family members with personal and domestic tasks.

[15] The Tribunal made four more written requests—by way of letters dated July 21, 2016; August 8, 2016; August 22, 2016; and September 15, 2016—for the Applicant to provide reasons that would fall into one or more of the permitted grounds enumerated in subsection 58(1). A pattern developed whereby each letter prompted one, sometimes two, telephone calls from the Applicant's representative, in which he attempted to understand what was required of him, followed by a letter that was little different in substance from its predecessors. The Applicant's replies were dated July 26, 2016; August 12, 2016; September 8, 2016; and October 17, 2016, the last one alleging that "the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction." The Applicant added that natural justice was identified with the constituents of a fair hearing, namely the right to be present at one's case in an unbiased forum.

ANALYSIS

[16] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the Respondent received the Applicant's incomplete request for leave on June 23, 2016, but it was not perfected until October 20, 2016—143 days after the General Division's decision was mailed, and after the 90-day filing 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] Although the Applicant did not file a complete application for leave to appeal until after the filing deadline, I am willing to find that she had a continuing intention to pursue the appeal, since her first initial incomplete request for leave came well before the expiry of the filing deadline and was pursued assiduously thereafter.

Reasonable Explanation for the Delay

[19] The Applicant offered no explanation for the delay in completing her appeal, although I must note that in its many letters to her, Tribunal staff never explicitly asked for a reason. Still, it is obvious from the record that the delay arose because of the Tribunal's repeated attempts to draw what it deemed were adequately detailed reasons for requesting leave to appeal. As such, I am willing to give the Applicant the benefit of the doubt on this question.

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] The Applicant alleges that the General Division dismissed her appeal despite medical evidence indicating that her condition was "severe and prolonged," according to the criteria governing CPP disability. However, outside of this broad allegation, the Applicant has not specified 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.

[22] For the most part, the Applicant's submissions were, in effect, simple restatements of her claim for disability, which the General Division had already adjudicated. Unfortunately, the Appeal Division has no mandate to re-hear disability claims on their merits. 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 grounds of appeal enumerated in subsection

58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[23] After considerable prompting, the Applicant offered a natural justice argument, suggesting, in the most general terms, that the General Division denied her right to be heard and subjected her to bias. However, in the absence of any details that showed, specifically, how the General Division conducted its proceedings unfairly, I could not find an arguable case on these grounds.

[24] My review of the decision and the underlying evidence indicates that the General Division analyzed the Applicant's medical conditions—primarily headaches and chronic back pain—and how they affected her capacity to regularly pursue substantially gainful employment. In doing so, the General Division took into account the Applicant's education and employment history before concluding there was insufficient evidence of incapacity during the MQP, which ended nearly 20 years ago. The General Division's decision closed with an analysis that suggests it meaningfully assessed the evidence and had defensible reasons supporting its conclusion. I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it.

[25] The Applicant has not convinced me that she has a reasonable chance of success on appeal.

CONCLUSION

[26] 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 accepted that the Applicant had a continuing intention to pursue her appeal and saw fit to assume that she had a reasonable explanation for the delay in filing her request for leave. I also thought it unlikely that the Respondent's interests would be prejudiced by extending time. However, I could find no arguable case on appeal, and 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.

[27] 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