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

Citation: *B. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 122

Tribunal File Number: AD-16-1097

BETWEEN:

B. B.

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: March 30, 2017

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] In a decision dated May 31, 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 he did not have a severe and prolonged disability prior to the minimum qualifying period (MQP) ending December 31, 2009.

[2] On August 31, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division of the Tribunal. Following a request for further information, the Applicant perfected his application for leave on October 21, 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 a letter dated August 31, 2016, the Applicant asked that his appeal be allowed on the grounds set out in subsection 58(1) of the DESDA. In response to a request for further

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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.

information from Tribunal staff, the Applicant submitted a second letter, dated August 11, 2016, in which he alleged that the General Division failed to observe a principle of natural justice when it ignored the fact that his illness started in early 2007, prior to his MQP of December 31, 2009. At that time, his illness was still fairly new, and it was too early to determine its cause, but his doctors made it clear that he was disabled from performing work in any capacity. Since then, his condition has declined and he remains disabled from performing work in a competitive workforce. The General Division failed to take this into consideration.

ANALYSIS

[15] 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 August 31, 2016, and it was not perfected until October 11, 2016—131 days after General Division's decision was mailed, and after the 90-day filing deadline set out in subsection 57(1) of the DESDA.

[16] 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

[17] Although the Applicant did not file a complete application for leave to appeal until after the filing deadline, I am willing to find that he had a continuing intention to pursue the appeal, since his first submission came just prior to the expiry of the filing deadline.

Reasonable Explanation for the Delay

[18] The Applicant offered no explanation for the delay in completing his appeal. I note that he did not make his request for leave by way of the officially-sanctioned form, which specifically asks for an explanation if the request for leave to appeal is late. I also note that neither of the letters from the Tribunal requesting further information asked him for an explanation. As such, I am willing to give him the benefit of the doubt on this question and assume that he had a reasonable explanation for the filing delay.

Prejudice to the Other Party

[19] 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

[20] The Applicant alleges that the General Division dismissed his appeal despite medical evidence indicating that his 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. My review of the decision and the underlying evidence indicates that the General Division analyzed in detail the Applicant's medical conditions—primarily chronic back pain and depression—and how they affected his 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 as of the MQP. 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.

[21] The Applicant's submissions recapitulate evidence and arguments that, from what I can gather, were already presented to the General Division. 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 decision of the General Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[22] I see no arguable case for the grounds claimed by the Applicant.

CONCLUSION

[23] 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 his appeal and saw fit to assume that he had a reasonable explanation for the delay in filing his 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.

[24] 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