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

Citation: *I. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 129

Tribunal File Number: AD-16-486

BETWEEN:

I. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: March 30, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is an appeal from the decision of the General Division of the Social Security Tribunal (Tribunal) dated September 1, 2015, which determined that the Applicant's disability was no longer severe as of May 31, 2008. As a result of the decision, the Applicant is required to repay the Respondent the overpayment of a Canada Pension Plan disability pension.

ISSUES

[2] The two issues before me are as follows:

(1) Is the application requesting leave to appeal late? If so, should I exercise my discretion and 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.

[4] The Applicant has not disclosed when the General Division's decision was communicated to her. However, section 19 of the *Social Security Tribunal Regulations* provides that such decisions are deemed to have been communicated to a party if sent by ordinary mail (such as in this case), 10 days after the day on which it was mailed to the party. A review of the hearing file indicates that the Tribunal sent the Respondent a letter dated September 3, 2015, along with a copy of the General Division's decision. I am prepared to find that the Tribunal sent the letter and decision on September 3, 2015, and accordingly, I deem that the General Division's decision was communicated to the

Applicant on September 14, 2015. The application requesting leave to appeal should have been made within 90 days after the decision was communicated to her, which in this case was no later than December 13, 2015. The Applicant did not file or make an application until March 10, 2016.

[5] There is no entitlement as of right to an extension. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out the four factors that should be considered in determining whether to extend the time period beyond 90 days within which an applicant is required to file his or her application for leave to appeal. They include: (1) whether an applicant held a continuing intention to pursue the application or appeal; (2) whether the matter discloses an arguable case; (3) whether there is a reasonable explanation for the delay; and (4) whether there is no prejudice to the other party in allowing the extension. In *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (CanLII), the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. It is clear from *Larkman* that the enquiry into the interests of justice is not confined to the four *Gattellaro* factors and that other considerations can be taken into account.

[6] There is no prejudice to the Respondent in allowing an extension, given the relatively short delay involved. The Applicant has not provided any explanation for the delay in bringing an application, nor evidenced any continuing intention to pursue an appeal in this matter. She also has not suggested that there are any extenuating circumstances that I may consider in the interests of justice.

[7] I have not considered whether the matter discloses an arguable case in the context of whether I ought to extend the time for filing, but it is well established that an applicant need not satisfy all four factors set out in *Gattellaro*, or that all four factors be assigned equal weight, given that the overriding consideration remains the interests of justice. Although there are no compelling reasons to exercise my discretion and allow an extension, other than for the fact that there is no prejudice to the Respondent in allowing an extension

and the fact that the Applicant alleges that the General Division was biased, I am nonetheless prepared to extend the time for filing the leave application.

(b) Application requesting leave to appeal

[8] 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.

[9] Before leave can be granted, 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.

[10] The Applicant alleges that the General Division member acted in bad faith and was deliberately malicious, given the outcome of the proceedings. The Applicant asserts that the member operated in contact with other parties in conspiring against her to deny her a disability pension. Despite her advice over a year ago that she would be investigating the conspiracy by filing a freedom of information request, she has not provided any evidence to support her allegations of a conspiracy or that the member acted in bad faith. These are very serious allegations that require some proof. While I am prepared to accept that the Applicant has raised an arguable case, she will need to fully explain and adduce evidence that the member acted in bad faith or conspired against her.

[11] The Applicant contends that the Respondent held the onus of proof to disprove why she was ineligible to receive a disability pension after May 2008, and suggests that the

member erred in requiring her to prove that she remained disabled after May 2008. At paragraph 62, the General Division held that the onus lies with the Respondent to prove on a balance of probabilities that the Applicant ceased to be disabled. At paragraph 76, the member wrote that the Respondent had proven that the Applicant's condition was no longer severe in May 2008. Accordingly, I am not satisfied that the General Division failed to recognize that the Respondent held the onus of proof.

[12] The Applicant maintains that the General Division erred in law in finding she was ineligible for a pension on the basis that she was working, despite the fact that her earnings were approximately half of what she was entitled to earn under the legislation. She denies that her employment met the definition of a "substantially gainful occupation" under the legislation. The Applicant argues that individuals are entitled to work on a part-time basis, even when they are collecting a Canada Pension Plan disability pension. The General Division addressed these issues throughout its analysis. At paragraph 74 of her decision, the member noted that section 68.1 of the *Canada Pension Plan Regulations* did not come into force until 2014,[1] and therefore did not apply when it assessed whether her employment after May 2008 could be considered "substantially gainful." It is clear from her decision that the member accepts that individuals may work on a part-time basis while collecting a disability pension, but that the test remains whether an individual is incapable regularly of pursuing any substantially gainful occupation. In this regard, the member considered the medical evidence and the evidence surrounding the Applicant's employment.

[13] In essence, the Applicant is asking me to reconsider and reassess her eligibility for a disability pension. However, as the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[1] The General Division decision indicates that the section came into force in June 2014. To be more exact, the section came into force and effect on May 29, 2014.

[14] The Applicant argues that, as the Respondent terminated her disability pension, it infringed her constitutional rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* to "life, liberty and security of the person," and to equal treatment under the law. She notes that other disabled persons receive a disability pension and therefore, as a disabled person, she too should receive a disability pension. I note that the Applicant raised these arguments before the General Division and that the member had provided the Applicant with several opportunities to fulfil the notice requirements set out in subsection 20(1) of the *Social Security Tribunal Regulations*. I also note that the member advised the Applicant on at least two separate occasions that if she failed to fulfil the notice requirements, the appeal would proceed as a "regular appeal" and she would not be permitted to raise any constitutional issues. By choosing not to fulfil the notice requirements in the appeal before the General Division, the Applicant cannot now come before the Appeal Division and hope to advance any constitutional arguments, as that avenue is closed.

CONCLUSION

[15] The application to extend the time for filing and the application for leave to appeal are both granted. This decision granting leave does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division