



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 108

Tribunal File Number: AD-15-1173

BETWEEN:

**J. M.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Decision on Request for Extension of Time    Meredith Porter  
and Leave to Appeal by:

Date of Decision:    March 31, 2017

## **REASONS AND DECISION**

### **INTRODUCTION**

[1] On August 14, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) upheld the Respondent's decision to suspend disability pension payments to the Applicant on the basis that he was no longer disabled pursuant to the requirements for determining disability under the *Canada Pension Plan* (CPP). In addition to determining that the Applicant was not entitled to disability pension payments, the General Division dismissed the Applicant's appeal of the Respondent's assessed overpayment in the amount of \$36,810. The Applicant seeks leave to appeal the decision of the General Division.

[2] The Applicant filed a complete application for leave to appeal (application) with the Appeal Division of the Tribunal on April 15, 2016, which was beyond the time limit set out in paragraph 57(2)(b) of the *Department of Employment and Social Development Act* (DESD Act) allowing 90 days for filing an application requesting leave to appeal a decision of the General Division once the decision is communicated to the applicant.

### **ISSUE**

[3] The member must decide whether an extension of time to file the application should be granted.

[4] Since one of the criteria to extend the time to file an application is whether the applicant disclosed an arguable case, the member must also decide whether leave should be granted on the basis of the same criteria.

### **THE LAW**

[5] Pursuant to the DESD Act, an applicant has 90 days from the time the General Division decision is communicated to file a request to appeal the decision.

[6] The member must consider and weigh the criteria as set out in case law. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court stated that the criteria are as follows:

- a) The appellant demonstrates a continuing intention to pursue the appeal;
- b) The matter discloses an arguable case;
- c) There is a reasonable explanation for the delay; and
- d) There is no prejudice to the other party in allowing the extension.

[7] 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*, 2012 FCA 204.

[8] According to subsection 58(1) of the DESD Act, 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 that it made in a perverse or capricious manner or without regard for the material before it.

[9] The Federal Court of Appeal 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 (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

## **APPLICANT'S SUBMISSIONS**

[10] The Applicant submitted that the General Division erred in failing to properly consider that he is ill with HIV Aids and, due to the severe and prolonged nature of his health condition, that he is entitled to disability pension payments as a result of his failing health and inability to work.

[11] The Applicant submitted that, although he did engage in some employment during the time that he was receiving disability pension payments, the employment was not "substantially gainful" and his disability payments should not be suspended.

[12] The Applicant has also argued that the General Division discriminated against him in denying that he is disabled simply because he worked during the respective period from September 2006 until November 2009.

## **ANALYSIS**

[13] The Applicant filed several documents before filing a completed application requesting leave to appeal in April 2016. Documents received by the Tribunal, in addition to the completed application, are date stamped October 20, 2015; December 29, 2015; and March 1, 2017.

[14] Contact was made with the Applicant by telephone on December 1, 2015; January 7, 2016; February 11, 2016; March 10, 2016; March 21, 2015; April 6, 2016; and March 15, 2017 regarding the missing information in the application requesting leave. It is noted that the Applicant continued to be responsive to the requests for additional information and not only did he continually assert his intention to provide additional information, but he routinely noted the reasons for the delay. As a result, I find that the Applicant has demonstrated a continued intention to pursue the appeal.

[15] The Applicant has provided reasons why his application requesting leave was delayed, over the approximately six-month period during which the delay occurred. The Applicant explained that he has suffered deterioration in his health condition since receiving the General Division decision. His health issues included managing his HIV, corneal ulcers in both eyes, which prevented his ability to read documents and write, and an extended bout of the flu. I

accept that struggling with health issues is a reasonable explanation for a reasonably short-term delay.

[16] I cannot find any grounds for which granting an extension would prejudice the Respondent.

[17] To grant leave, I must also consider whether the Applicant has raised an arguable case. At paragraph 7 above, I have noted the Federal Court of Appeal's conclusion that an arguable case is one that has a reasonable chance of success on appeal (*Hogervorst*). The threshold in determining whether leave should be granted imports a lower threshold than that which must be met in determining the appeal on the merits. I must determine whether the reasons for requesting the appeal relate to a ground of appeal under subsection 58(1) of the DESD Act that would have a reasonable chance of success.

[18] The Applicant has asserted three grounds on which he believes the General Division erred. The first ground argued by the Applicant is that he is terminally ill with HIV Aids and, as a result of the severe and prolonged nature of his particular health condition, he falls within the criteria for determining entitlement to a disability pension under the CPP. In fact, he argues that he has received disability payments in the past and, because his health condition has not changed, there are no grounds on which to find that he is no longer disabled. The Applicant argues that the General Division erred in law by misapplying the CPP provisions for determining disability entitlement.

[19] This is not a ground for appeal that has a reasonable chance of success. The determination of "severity" under the CPP is not based on the diagnosis of the particular health condition. Severity is determined based on the applicant's capacity to work; to be "severe" a disability must render a person incapable regularly of pursuing any substantially gainful occupation (see *Klabouch v. Canada (Social Development)*, 2008 FCA 33). In *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, the Federal Court of Appeal held that, although some individuals might experience significant and prolonged health challenges, nonetheless they may not qualify for a disability pension if they are found to be capable regularly of pursuing a substantially gainful occupation. Applicants must adduce medical evidence of their regular incapacity to pursue any "truly remunerative occupation" and, where there is some

capacity to work, an applicant must also show that their efforts at obtaining and maintaining employment have been unsuccessful by reason of their health condition (see *Inclima v. Canada (Attorney General)*, 2003 FCA 117).

[20] As a result, although the Applicant has argued that his health condition is both significant and long-term, this is not the framework for considering entitlement to a disability pension under the CPP, and the General Division has not erred in law by misinterpreting or misapplying the CPP. This is not a ground of appeal that has a reasonable chance of success.

[21] The Applicant has admitted to receiving some income through employment with Cara Operations and the Airport Terminal Services Canadian Company between 2006 and 2009. The fact that he was employed part-time is not the reason for which the Respondent has suspended disability pension payments. The Respondent asserts that the income earned between 2006 and 2009 demonstrates that the Applicant was employed in a “substantially gainful occupation” and this fact is evidence that the Applicant is no longer disabled under the CPP. The Applicant submits that the part-time employment was minor and not “substantially gainful” as referenced by the Respondent.

[22] Jurisprudence does provide some guidance on what constitutes “substantially gainful,” and the General Division has failed to provide any analysis on this issue as raised by the Applicant (see for example, *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Bungay v. Canada (Attorney General)*, 2011 FCA 47). This is a possible error of law and therefore a ground of appeal that has a reasonable chance of success. Leave is granted on this issue.

[23] The final ground for appeal put forward by the Applicant is that the General Division discriminated against him in denying that he is disabled simply because he worked during the respective period from September 2006 until November 2009.

[24] Paragraph 17 above indicates that the capacity of an applicant to work is a factor that must be considered in determining disability under the CPP. The General Division is required to consider an applicant’s capacity to work, and evidence of efforts to obtain and maintain employment. Failure to consider capacity to work is an error of law. The Applicant has not provided any explanation of how he was discriminated against by the General Division, nor has

he provided any legal basis on which his claim could possibly succeed. As a result, this is not a ground for appeal that has a reasonable chance of success. Leave is not granted on this ground.

## **CONCLUSION**

[25] An extension of time to apply for leave to appeal is granted.

[26] The Applicant has demonstrated a continuing intention to appeal and has provided a reasonable explanation for the delay. There is no prejudice to the Respondent in granting leave. Finally, the Applicant has raised at least one ground for appeal that has a reasonable chance of success. I am also satisfied that it is in the interests of justice to extend the time for the Applicant's application requesting leave to appeal to be filed.

[27] The application for leave to appeal is granted. Leave, however, is granted only on the issue of whether the Applicant was employed in a "substantially gainful occupation" from 2006 until 2009.

Meredith Porter  
Member, Appeal Division