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

Citation: *J. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 159

Tribunal File Number: AD-16-535

BETWEEN:

J. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: April 13, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), issued on February 15, 2016, which refused to extend the 90-day time period in which to appeal the reconsideration decision of the Minister of Employment and Social Development (Respondent) denying the Applicant disability benefits under the *Canada Pension Plan* (CPP).

[2] For the reasons that follow, I grant the Applicant's leave to appeal.

BACKGROUND

[3] The Applicant first applied for a CPP disability benefit on February 14, 2012. The Applicant's minimum qualifying period ended on December 31, 2012. By letter dated March 15, 2012, the Respondent denied her application, advising the Applicant that she had 90 days to request that the decision be reconsidered. The Applicant requested reconsideration of the initial decision more than 90 days later. The Respondent advised the Applicant that her request for reconsideration would not be considered because it was outside the 90-day period.

[4] The Applicant applied a second time for a CPP disability benefit on March 8, 2013. The minimum qualifying period remained the same. The Respondent denied her application initially and on reconsideration, finding that her disability was not severe or prolonged in December 2012 and continuously to the date of the reconsideration. The reconsideration decision was dated December 3, 2013.

[5] Under paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an appeal of the Respondent's reconsideration decision must be brought to the General Division within 90 days after the day on which the decision is communicated to an appellant. The Applicant filed for appeal on September 12, 2014, just over six months after the date of the December 2, 2013 reconsideration decision, therefore outside the 90-day deadline. In the form filed on the appeal, the Applicant left blank the space provided to indicate the date on which she received the decision being appealed from. In the space requesting the reasons for

filing a late appeal, she stated, “Applied in April 2014 when I called my info of appeal could not be located [*sic*].”

[6] In its decision dated February 15, 2016, the General Division refused the Applicant’s request for an extension of time to file her appeal. In the application before me, the Applicant seeks leave to appeal that decision.

PRELIMINARY ISSUE – TIMING OF THE LEAVE TO APPEAL APPLICATION

[7] A preliminary issue arises because the application for leave to appeal before me was filed more than 90 days after the deemed date of communication to the Applicant of the General Division’s decision.

[8] Pursuant to paragraph 57(2)*(b)* of the DESD Act, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the General Division decision was communicated to an appellant. The decision of the General Division was issued on February 15, 2016, and mailed to the Applicant on February 17, 2016. Under paragraph 19(1)(*a*) of the *Social Security Tribunal Regulations* (SST Regulations), the decision is deemed to have been communicated to the Applicant 10 days after the day on which it was mailed; here February 27, 2016. Counting from this date, the deadline for filing her application for leave to appeal was May 15, 2016.

[9] The requirements as to form and content of an application for leave to appeal are set out in subsection 40(1) of the SST Regulations. The Applicant filed an incomplete application for leave to appeal on April 6, 2016. On April 11, 2016, the Social Security Tribunal wrote to the Applicant advising that her application was incomplete. The letter advised that the Tribunal required the grounds for leave to appeal, any statements of fact that were presented to the General Division and that she was relying on in her application, and a signed declaration. The Applicant provided some of the missing information on April 29, 2016. The Tribunal wrote to her again on May 2, 2016, to request the signed declaration. The Applicant provided a signed declaration on June 3, 2016. The application was now complete, but this occurred after May 15, 2016. The application was therefore considered late based on the deemed date of communication of the decision to her.

[10] In her application for leave to appeal filed with the Appeal Division, in the box where an applicant is to state the date on which the General Division decision was received, the Applicant wrote March 11, 2016, which is more than three weeks after it was mailed to her. Counting from this date, she was required to make her application for leave to appeal on or before June 9, 2016. The application for leave to appeal was made in time if the deadline for filing is based on March 11, 2016.

[11] However, there is no independent evidence supporting the Applicant's statement that she received the General Division decision on March 11, 2016, and I am left with no explanation for why the Applicant did not receive the decision within the expected postal delivery times for mail in Canada. I find that the Applicant has not rebutted the presumption that the General Division decision was communicated to her on the deemed date of communication.

[12] Paragraph 3(1)(*b*) of the SST Regulations gives me the discretion "if there are special circumstances" to dispense a party from complying with a provision in the SST Regulations, including the requirements as to form and content of an application for leave to appeal that are set out in subsection 40(1) of the SST Regulations. However, I find that there are no special circumstances in the case before me that would warrant the exercise of this discretion on my part.

[13] There is another possible route. Subsection 57(2) of the DESD Act gives me the discretion to allow further time, of no more than one year after the day on which the decision was communicated to an applicant, within which a leave to appeal application may be made.

[14] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out four criteria that should be considered and weighed in determining whether to grant an extension of time:

1. The person requesting the extension has demonstrated a continuing intention to pursue the application or appeal;

2. The matter discloses an arguable case;

3. The moving party has a reasonable explanation for the delay; and

4. There is no prejudice to the responding party in allowing the extension.

[15] Not all four questions need be resolved in favour of the party seeking an extension. Rather, the overriding consideration is that the interests of justice be served: *Canada* (*Attorney General) v. Larkman*, 2012 FCA 204.

[16] Looking at the first of the four criteria, the Applicant filed her (incomplete) application for leave to appeal on April 6, 2016, within the 90-day time limit from the deemed date of communication to her of the General Division decision. She responded to the Tribunal's requests for the missing information in a timely fashion and perfected the appeal by June 3, 2016. Therefore, I accept that the Applicant has demonstrated a continuing intention to pursue the application for leave to appeal.

[17] As to the second criterion, the Federal Court of Appeal has described an arguable case as being akin to the case having a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63. As discussed in the next section, I believe there is a reasonable chance of success on the appeal and the second criterion is made out. Further, there is no prejudice to the Respondent in allowing what amounts to a relatively short extension of time to perfect the application for leave to appeal.

[18] Given that these three criteria are met, and the overriding consideration that the interests of justice be served, I allow the extension of time to file the application for leave to appeal.

[19] I now move to consider whether leave to appeal should be granted.

THE TEST FOR LEAVE TO APPEAL

[20] Appeals to the Appeal Division are governed by Part 5 of the DESD Act. In accordance with subsection 56(1) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) mandates that "[t]he Appeal Division must either grant or refuse leave to appeal."

[21] Under subsection 58(2) of the DESD Act, "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[22] Subsection 58(1) of the DESD Act states that 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.

[23] Therefore, in order to grant leave to appeal, I must be satisfied that an appeal on at least one of the three grounds has a reasonable chance of success. This requires me to consider whether there is any basis on which to conclude that the General Division, when it decided to refuse an extension of time, may have committed a reviewable error within the scope of subsection 58(1) of the DESD Act that has a reasonable chance of success on appeal.

[24] I note that in her leave to appeal application, the Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. In support of this submission she states, "I feel that the basis for which my previous application was declined [here she is referring presumably to the appeal before the General Division] was heavily focused on my application being late rather than focusing on my medical condition. I feel my medical condition was severely overlooked" (AD1A-1). The Applicant should understand that because her application to appeal was made outside the 90-day time limit set out in the DESD Act, it was late and the General Division member had to decide whether to grant or deny an extension of time. He could only move on to consider the merits of her appeal if he concluded that an extension of time was warranted. He refused the extension of time and it is that decision only that is the subject of the leave application before me.

ANALYSIS

[25] The General Division member found that the Applicant had until March 12, 2013, to file an appeal and, as her appeal was not filed until September 12, 2014, it was filed late.

[26] Earlier in these reasons, I set out the test concerning whether an extension of time should be granted. The member correctly stated the relevant law applicable to his exercise of discretion to grant or deny the extension of time. Looking to the four factors, he concluded that the Applicant had an arguable case and that there would be no prejudice to the Respondent in granting the extension of time. However, he found that the Applicant did not provide a reasonable explanation for the delay and that there was no evidence of a continuing intention to pursue the appeal, stating "There is no evidence to suggest that the Appellant had any intention to Appeal within the 90-day period as required under CPP." He stated, "The [Applicant] claims she previously appealed around April 2014 but provided no evidence to support this. The Tribunal does not accept this in the absence of any credible evidence on file."

[27] I note that in the material that was before the General Division (GD2-15 to GD2-16), there is a letter dated March 24, 2014, from Service Canada to the Applicant which states:

> We have received your letter of February 27, 2014 requesting an appeal to the Social Security Tribunal in regards to the amounts on your CPP Disability benefits and Survivor benefits.
>
> We are returning your letter, as you are required to send this appeal request directly to the Social Security Tribunal.
>
> As noted in the reconsideration decision letter of December 2, 2013, you must send your appeal request to the General Division, Income Security Section of the Social Security Tribunal. [Underlining added]

[28] From this there appears to be evidence to substantiate the Applicant's statement on her notice of appeal that she had earlier sent in an appeal. The evidence before the General Division was that the Applicant suffers from poor concentration and depression due mainly to the death of her husband. In the circumstances of her condition, it would not be surprising that she was confused about the date on which she had sent a request for leave to appeal (erroneously to Service Canada).

[29] The General Division's reasons make no reference to the Service Canada letter. Had he considered this letter, the General Division member would have been aware that the Applicant had formed (and acted upon) an intention to appeal within the 90-day window. Had he considered this letter, he would also have been in a position to consider that her reference, made in her appeal materials, to having "previously appealed around April 2014" was accurate as to the fact of sending in her request for an appeal, though inaccurate as to the date. On this basis, the General Division may well have concluded that the Applicant had a continuing intention to appeal and a reasonable explanation for the delay. He may have also assessed the overriding concern to ensure the interests of justice be served would best be met by granting the extension of time.

[30] Based on the fact that the General Division appears to have failed to consider the March 24, 2014, letter from Service Canada, there may be a basis on which to find that the member made an erroneous finding of fact without regard to the evidence before him (paragraph 58(1)(*c*) of the DESD Act) or that he erred in law in making his decision (paragraph 58(1)(*b*)).

[31] I find the appeal has a reasonable chance of success on both these grounds and I grant leave to appeal the decision refusing an extension of time.

CONCLUSION

[32] The application for leave to appeal the General Division's refusal to extend the time to file an appeal is granted. Success at this leave to appeal stage is not, of course, determinative of whether the appeal itself will be successful.

[33] In accordance with section 42 of the SST Regulations, within 45 days after the date of this decision, the parties may (a) file submissions with the Appeal Division, or (b) file a notice with the Appeal Division stating that they have no submissions to file. If submissions are filed, they are to deal only with the matter that is the subject of this appeal, i.e. whether the General Division erred in refusing an extension of time and, in doing so, whether any of the grounds under subsection 58(1) are engaged.

[34] After submissions, if any, have been received, the appeal from the General Division's decision refusing the extension of time will be dealt with on the merits.

Nancy Brooks
Member, Appeal Division