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

Citation: *R. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 174

Tribunal File Number: AD-16-404

BETWEEN:

**R. K.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: April 24, 2017

## REASONS AND DECISION

## INTRODUCTION

[1] On December 29, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Applicant had filed several incomplete applications for leave to appeal with the Tribunal's Appeal Division before receiving confirmation on May 20, 2016, that his application had been determined to be complete.

## ISSUE

[2] The member must determine whether the Applicant is entitled to an extension for filing an application for leave to appeal the General Division decision.

## THE LAW

[3] Pursuant to the *Department of Employment and Social Development Act* (DESD Act), an applicant has 90 days from the time the General Division's decision is communicated to file a request for leave to appeal the decision.

[4] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted," and "The Appeal Division must either grant or refuse leave to appeal."

[5] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Federal Court of Appeal concluded that the question of whether a party has a reasonable chance of success is akin to determining whether that party has an arguable case. (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63).

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

that the appropriate criteria in determining whether an extension should be granted are as follows:

1. A continuing intention to pursue the appeal;

2. The matter discloses an arguable case;

3. There is a reasonable explanation for the delay; and

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

[7] In addition to the foregoing, the weight to be given to each of the *Gattellaro* factors may differ in each case and, in some cases, other factors will be relevant. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

**SUBMISSIONS**

[8] The Applicant submitted that the General Division had erred in law in failing to consider the totality of the evidence in the record before it.

**ANALYSIS**

[9] The Applicant had filed several documents before filing a completed application requesting leave to appeal in May 2016. Documents received by the Tribunal, in addition to the completed application dated May 20, 2016, are date-stamped March 8, 2016, April 7, 2016, and April 27, 2016.

[10] Contact was made with the Applicant by telephone on October 26, 2016, December 20, 2016, January 18, 2017, February 14, 2017, February 28, 2017, and February 28, 2017. The Applicant had continued to respond to the requests for additional information up until the time that his application was confirmed to be complete and, not only did he provide the missing information, but he also routinely contacted the Tribunal in order to receive updated information and clarification on the status of his application. As a result, I find that the Applicant has demonstrated a continued intention to pursue the appeal.

[11] The Applicant did not explain his reasons for filing the application beyond the 90 days allowed. However, it is clear from the communications on file that the Applicant was unclear on exactly what information the Tribunal was requesting. It is also clear that he was making efforts to provide the missing information and necessary clarification. The Applicant has cited various health conditions related to cancer treatment, including nausea, weakness, weight loss, dizziness and vestibular disorder. I accept that struggling with health issues is a reasonable explanation for a reasonable short-term delay.

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

[13] The Applicant must also demonstrate that his matter discloses an arguable case. He has submitted that the General Division failed to consider the totality of the evidence contained in the record before it. He argues that at paragraph 27 of its decision, the General Division, in determining the Applicant's capacity to work, focused its findings on the fact that the Applicant had driven independently from Manitoba to Indiana over a three-day period. He argues that a single road trip to Indiana is not sufficient evidence of regular capacity to pursue any gainful occupation. He also argues that the General Division was incorrect when, in its decision, it found that "[t]here is no medical evidence to substantiate that at the time of [the Applicant's] MQP [minimum qualifying period] that his symptoms of nausea, dizziness or vomiting required any treatment or ongoing care, and that they would have precluded him from all types of work at the time of his MQP." The Applicant states that *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248, requires that severity be assessed in a "whole person" context where the health conditions of an applicant are assessed both individually and cumulatively with regard to how those conditions affect the Applicant's actual employability, and that the General Division failed to do this.

[14] The Appeal Division finds the above arguments put forward by the Applicant carry weight. The General Division considered the single road trip to Indiana in assessing the Applicant's capacity regularly to pursue any gainful occupation. However, in determining an applicant's capacity to "regularly" pursue employment, the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 (CanLII), stated that "[t]he SST explained that

'predictability is the essence of regularity within the CPP definition of disability'". The Federal Court was following the Pension Appeals Board's rationale in *Chandler v. MHRD* (November 25, 1996), CP 4040,[1] where it was stated that "'[r]egularly' means that the applicant must be capable of coming to work as often as is necessary. Predictability is the essence." The Appeal Division notes that *Atkinson* represents two different interpretations of paragraph 42(2)(*a*) of the CPP provisions. In particular, it is possible to interpret the court's interpretation, at paragraph 37 of the decision in *Atkinson*, as being that the word "regularly" is meant to qualify the incapacity to work. In paragraph 38, however, the word "regularly" can also be interpreted as an intended qualifier for assessing capacity to work.

[15] Regarding the matter at hand, it is the Appeal Division's determination that it is implicit that in assessing work capacity the assessed capacity must be demonstrably predictable, regular and ongoing. A single road trip is not suggestive of predictable, regular and ongoing capacity. The General Division erred in law by failing to consider and apply *Atkinson*.

[16] Additionally, there is evidence both in the record and in the General Division's decision that the Applicant suffered ongoing nausea, vomiting, depression and anxiety as a result of his cancer treatment in 2011. His symptoms were noted as being treated, but with little improvement regarding a reduction in their occurrence and degree of severity. There is no indication that the General Division considered the impact that the Applicant's daily struggle with nausea, vomiting and mental health would have on the Applicant's ability to obtain and retain employment in a "real world" context.

[17] Further, aside from the brief mention of the Applicant's age, education and work history at paragraph 9 of the General Division's decision, there is no mention in the analysis of the decision of how the General Division considered these factors. There is, in fact, no suggestion that the Applicant's age, education level, language proficiency, past work experience and life experience were weighed at all or that they were considered in any detail as required by *Villani*. This is an error of law for which I am willing to grant leave to appeal, as it has a reasonable chance of success.

[1] MHRD = Minister of Human Resources Development.

## CONCLUSION

[18] I am satisfied that the Applicant has argued grounds of appeal that have a reasonable chance of success. I am also satisfied that it is in the interests of justice to extend the time for filing the application requesting leave to appeal.

[19] The application is granted.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Meredith Porter
Member, Appeal Division