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

Citation: *A. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 189

Tribunal File Number: AD-16-636

BETWEEN:

A. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Jennifer Cleversey-Moffitt

Date of Decision: April 28, 2017

REASONS AND DECISION

INTRODUCTION

[1] On February 18, 2016, 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 to this Applicant.

[2] The Applicant filed an application for leave to appeal (application) with the Appeal Division of the Tribunal on May 3, 2016. Section 58 of the *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal that may be considered to grant leave to appeal a decision of the General Division. On May 9, 2016, the Tribunal sent the Applicant a letter indicating that the application was incomplete. In that letter, the Tribunal reminded the Applicant of the statutory requirement to file a complete application for leave to appeal within 90 days of receiving the General Division decision as set out in paragraph 57(1)(*b*) of the DESD Act. The letter further instructed that if the Applicant were to provide all of the required information by June 9, 2016, the Tribunal would accept the complete application as having been received on May 3, 2016.

[3] On June 9, 2016, the Applicant's representative provided the missing information and the Tribunal acknowledged receipt on June 9, 2016. On June 13, 2016, the Tribunal wrote to the Applicant indicating that it had received the required information to complete the application, but given the date of completion, the application date was now beyond 90 days after the receipt of the General Division decision.

ISSUE

[4] The Member must decide whether an extension of time to file the application should be granted and, if so, should leave to appeal be granted.

THE LATE FILING OF THE APPEAL

[5] Pursuant to paragraph 57(1)(*b*) of the DESD Act, an application must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the Applicant. A Tribunal member has the authority to extend the time for filing of an

application for leave to appeal pursuant to subsection 57(2) of the DESD Act. In this case, the letter of May 9, 2016, expressly stated that if the Applicant was able to provide the required information to complete her application by June 9, 2016, then the Tribunal would consider her application for leave to appeal filed on May 3, 2016. The Tribunal received the missing information on June 9, 2016.

[6] The additional information was delivered to the Tribunal within the time period requested in the Tribunal's letter of May 9, 2016. The Applicant's lawyer argued in submissions received on February 21, 2017, that the June 13, 2016, letter was sent in error. The submissions were received on June 9, 2016, but the Tribunal did not then determine that the application was received on May 3, 2016. This appears to be a clerical error on the part of the Tribunal; the application was not late.

LEAVE TO APPEAL - SUBMISSIONS AND ANALYSIS

[7] As the application seeking leave to appeal was not late, we must now consider whether the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESD Act.

[8] Subsection 58(1) of the DESD Act sets out the grounds for 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] The General Division decision determined that the Applicant did not prove on a balance of probabilities that she had a severe and prolonged disability on or before her Minimum Qualifying Period as per the definition of "disabled" found in paragraph 42(2)(*a*) of the CPP.

[10] The Applicant argues that the General Division erred in law and based its decision on an erroneous finding of fact that it made in a perverse or capricious manner without regard for the material before it.

[11] Specifically, the Applicant alleges that the General Division erred in law because the Applicant's condition was not assessed using the "real world" approach.

[12] The Applicant also argues that the General Division committed errors of fact and law by disregarding certain aspects of the medical evidence on file.

[13] In the Applicant's submissions provided on February 21, 2017, it was argued that the General Division did not apply the "real world" analysis articulated in *Villani v. Canada (Attorney General),* 2001 FCA 248. This decision of the Federal Court of Appeal indicates that the statutory test for severity be applied with some degree of reference to the "real world." It further instructs that a decision-maker must consider an applicant's particular circumstances, such as age, education level, language proficiency and past work and life experience.

[14] The Applicant argued that, except for the mention of the "real world" test in paragraph 37 of the General Division's decision, the analysis was not conducted.

[15] From reading the General Division decision, it is evident that the paragraphs following paragraph 37 do discuss the *Villani* factors. In paragraph 37 and paragraphs that follow, the Member of the General Division considered her age, her language proficiency and her past work experiences. The General Division decision cited *Villani* and then went on to consider how the Applicant's personal characteristics impacted the Applicant's capacity to regularly pursue any substantially gainful occupation (subparagraph 42(2)(*a*)(i) of the CPP). Disagreeing with the outcome of the analysis does not constitute an error in law.

[16] With respect to the alleged error by the General Division concerning the review of the medical information, the Applicant's representative argues that the General Division "ignored or downplayed much of the relevant medical evidence on file as well as the Applicant's own sworn testimony" (Paragraph 9 of the February 21, 2017, submissions).

[17] The General Division is the trier of fact and an administrative tribunal is presumed to have considered all of the evidence before it. The Member of the General Division was tasked with weighing the evidence, determining the facts and concluding the matter based on an unbiased analysis of the file as well as the oral evidence provided at the hearing. In *Parchment v. Canada (Attorney General)*, 2017 FC 354, the Federal Court again explained the role of the Appeal Division in paragraph 23 of the decision:

> In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing of Mr. Parchment's case. They also do not consider new evidence. The Appeal Division's jurisdiction is restricted to determining if the General Division committed an error (ss. 58(1) (a) through (c) of the *DESDA*) and the Appeal Division is satisfied that an appeal has a reasonable chance of success (58(2) of the *DESDA*). Only if the criteria of ss. 58(1) and (2) are met does the Appeal Division then grant leave to appeal.

[18] The General Division weighed the evidence and a mere disagreement with its decision to place more weight on some pieces of evidence over others does not constitute grounds upon which one can appeal.

[19] The Appeal Division's job, as per subsection 58(1) of the DESD Act, is to determine whether the reasons for appeal fall within any of the specified grounds and whether they have a reasonable chance of success, without delving directly into an adjudication of the merits of the file. The Applicant is requesting a *de novo* hearing and is hoping for a different decision based on the same set of facts and the same applicable law. These reasons do not fall within any of the specified grounds; in other words, there is no arguable case.

[20] The Appeal Division does not have jurisdiction to conduct a *de novo* hearing. An applicant's disagreement with the General Division decision does not constitute a breach of natural justice or an error in law or fact.

CONCLUSION

The Tribunal erred in its June 13, 2016 letter. The Tribunal received the requested information by June 9, 2016, thus dating the completed application May 3, 2016. The application was not late. However, as the Applicant presented no grounds of appeal that would have a reasonable chance of success on appeal, leave to appeal is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division