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

Citation: *D. T. v. Minister of Employment and Social Development,* 2017 SSTADIS 226

Tribunal File Number: AD-16-557

BETWEEN:

D. T.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

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

Date of Decision: May 16, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 21, 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.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 11, 2016, beyond the time limit to do so set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUES

[3] The Member must decide whether an extension of time to file the Application should be granted, and whether leave to appeal should be granted.

THE LAW

[4] Pursuant to paragraph 57(2)*(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 appellant.

[5] 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) 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.

[6] 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.

[7] 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.

[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] 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."

APPLICANT'S SUBMISSIONS

[10] The Applicant submitted that the General Division based its decision on an erroneous finding of fact that it made in a perverse and capricious manner in finding that the Applicant retained capacity to work despite the seriousness of his health condition.

[11] The Applicant also submitted that the General Division unreasonably expected the Applicant to work, whether full or part-time, despite the severity of his health condition and the medications he was required to take.

ANALYSIS

[12] The Applicant filed his Application several days beyond the 90 day limit set out in the DESD Act. The General Division's decision is dated December 21, 2015. Pursuant to section 19 of the *Social Security Tribunal Regulations*, the date on which the Applicant is deemed to have received the decision is December 31, 2015. The Applicant's Application was due, allowing 90 days, on March 31, 2016. The Application was received late, on April 11, 2016, and under such circumstances, the Federal Court, in *Gattellaro*, set out several factors that should be taken into consideration in determining whether an extension to file an application should be granted. Those factors are set out above, in paragraph 5.

[13] I will apply those factors to the present case. Firstly, the Applicant must demonstrate a continuing intention to pursue the appeal. The delay in filing the Application is notably short—only 11 days. The Application document is dated March 28, 2017, which is within the 90-day deadline to file an application requesting leave, although I note that the document is date stamped by the Tribunal on April 11, 2017. He has subsequently provided written correspondence to the Tribunal dated May 17, 2016, providing additional details and information related to his appeal, and dated March 31, 2017, in response to requests from the Tribunal on submissions. I find this demonstrative of his intention to pursue the appeal of the General Division decision.

[14] On request for submissions regarding the reason for the delay in submitting the Application prior to the expiration of the 90-day deadline, the Applicant stated that he was waiting for documents from his insurer indicating his entitlement to benefits through the private insurer. He also enclosed several other documents from the Canada Revenue Agency (CRA), a Dr. DeMarchi, Rehab Plus, and Banyan Health Solutions.

[15] Section 58 of the DESD Act sets out the grounds of appeal to the Appeal Division and the submission of new evidence is not a ground on which leave to appeal can be granted (see *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). As a result, the Appeal Division cannot consider the CRA records or the medical reports filed post-General Division hearing date. As hearings before the Appeal Division are not *de novo* hearings, waiting for additional

new evidence to submit in support of an application requesting leave to appeal is not a reasonable explanation for the delay in filing the request for leave.

[16] The Appeal Division does not find that granting an extension would prejudice the Respondent in any way, particularly as the delay in submitting the Application was very short.

[17] The problematic *Gattellaro* factor in this case is whether the Applicant has advanced an arguable case. The Applicant has submitted that the General Division, in determining his entitlement to disability pension payments, failed to properly consider the seriousness of his medical diagnosis. In his Application, he states:

> Like it was explained in earlier appeals and application, my physical condition prevents me to be comfortable in any position, as of today I still haven't found a comfortable position that I would be comfortable for even 5 minutes besides taking a bath or 2 every day.
>
> This is why I've ask for an appeal and this is why I'm still asking for an appeal today because no doctors or specialists have been able to give me a proper diagnosis yet […]. I'm just looking for answers, I just want to be normal again…

[18] It is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[19] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating that applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and, where there is capacity to work, must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not the Applicant's inability to do his particular job that matters, but his inability to hold any "gainful employment" (*Klabouch*).

[20] The General Division canvassed the medical evidence in the record before it. There was a void of evidence that supported the Applicant's claim that he lacked capacity to work at the time of his MQP. In fact, much of the medical evidence in the record was inconclusive of any relevant medical findings with respect to limitations that the Applicant may have had either before or at the time of his MQP date, other than a recommendation to avoid repetitive back movements and lifting heavy items. In this regard, he was advised to "pace his work." He was not advised that he should not be working at any time.

[21] The General Division does recognize, at paragraph 38 of the decision, that the Applicant experiences chronic pain and has some limitations in performing repetitive back movements and in lifting heavy items. However, considered cumulatively, the evidence does not preclude the Applicant from performing all types of work.

[22] The Applicant stopped working nearly three years prior to his MQP date. There is no evidence that he has attempted to retrain or obtain employment, or that his attempts to further his education and skills or to find employment failed as a result of his health condition (*Inclima*).

[23] The Applicant has asserted that it is unreasonable for the General Division to expect him to work in light of the medications that he is required to take to manage his health condition. However, there was a noted lack of evidence that the treatment provided by the various health care professionals included any advice to limit his personal or professional activity, or limitations that would relate to managing work-related responsibilities.

[24] The Appeal Division finds that the Applicant has not demonstrated a ground of appeal that has a reasonable chance of success.

CONCLUSION

[25] Although the Applicant did not provide a reasonable explanation for filing his Application late, I have found that he demonstrated a continuing intention to appeal the General Division decision. There is no demonstrated prejudice to the other party in allowing the request for an extension of time.

[26] The most significant consideration is that the Applicant has not demonstrated that he has an arguable case. He has not established a ground of appeal on which he has a reasonable chance of success. In particular, I have not found that the General Division failed to consider the seriousness of the Applicant's health condition. Granting leave under these circumstances would not serve the interests of justice as the Applicant's appeal would not be successful.

[27] An extension of time to apply for leave to appeal is refused.

Meredith Porter
Member, Appeal Division