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

Citation: *T. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 262

Tribunal File Number: AD-17-248

BETWEEN:

T. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: June 6, 2017

REASONS AND DECISION

DECISION

An extension of time is granted, leave to appeal is granted, and the appeal is allowed.

INTRODUCTION

[1] The Appellant seeks an extension of time in which to request leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated July 4, 2014.

BACKGROUND

[2] On June 20, 2011, the Appellant submitted an application for disability benefits under the *Canada Pension Plan* (CPP). She indicated that she was 36 years old, held post-graduate degrees and was last employed as a public school teacher, a job she left in June 2006 because of chronic pain and fatigue linked to fibromyalgia.

[3] The Respondent refused the application initially and on reconsideration on the grounds that the Appellant's disability was not severe and prolonged as of her minimum qualifying period (MQP), which ended on December 31, 2013. In May 2012, the Appellant appealed these refusals to the Office of the Commissioner of Review Tribunals. On April 1, 2013, pursuant to the *Jobs, Growth and Long-term Prosperity Act*, the appeal was transferred to the General Division.

[4] On March 4, 2014, the General Division conducted a hearing by teleconference. In a written decision issued on July 4, 2014, it determined that the Appellant was ineligible for CPP disability benefits because her disability was not severe during her MQP.

[5] The Tribunal's records indicate that it mailed a copy of the General Division's decision to the parties under cover of a letter dated July 9, 2014. In a letter dated October 3, 2014, the Appellant's counsel advised the Tribunal that he had not yet received the decision, even though it had been seven months since the hearing. He asked when he could expect to receive a copy of the decision. The Tribunal contacted the Appellant's counsel by telephone on October 16, 2014,

confirming that a copy of the General Division's decision would be mailed to his attention. The Tribunal's records indicate that a copy of the decision was re-sent to the Appellant's counsel on November 17, 2014.

[6] On February 9, 2015, an employee from the office of the Appellant's Member of Parliament contacted the Tribunal by telephone, seeking information on how to appeal the General Division's decision. On February 16, 2015, the Appellant filed an application requesting leave to appeal, beyond the 90-day time limitation. She indicated that she had received the General Division decision on October 27, 2014 and explained that she was late in filing the application for leave to appeal because of medical and legal concerns. She also provided submissions on the merits of her appeal.

[7] On February 20, 2015, the Appellant filed supporting documentation from her family physician, who explained that it had been a priority for her to stabilize the Appellant's health. The Appellant had moved from Halifax to the Ottawa area in August 2014, and the stress had aggravated her fibromyalgia.

[8] In a decision dated March 27, 2015, the Appeal Division refused the Appellant's request to extend the time for filing an application for leave to appeal, finding that she had not offered a reasonable explanation for the delay.

[9] The Appellant applied for judicial review at the Federal Court. In a judgement dated November 6, 2015, the Honourable Justice Robin Camp found the Appeal Division's decision unreasonable and incorrect. He granted the application and ordered that the matter be returned to the Appeal Division.

[10] Another Appeal Division member then considered the application. In a decision dated September 19, 2016, the Appeal Division permitted an extension of time to file the leave to appeal application, but found that none of the grounds of appeal advanced by the Appellant had a reasonable chance of success.

[11] The Appellant again applied for judicial review at the Federal Court. On March 9, 2016, Madam Prothonotary Mandy Aylen granted the application on consent and ordered that the matter be referred back to a different Appeal Division member for redetermination.

[12] In the interests of justice and efficiency, I will combine consideration of the requests for extension and leave to appeal with an assessment of this matter on its merits. I have decided that an oral hearing is unnecessary and that the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file and there is no need for clarification;

(b) The form of hearing respected the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUES

[13] The issues before me are as follows:

(a) Should the Appellant be granted an extension of time in which to request leave to appeal?

(b) Does the appeal have a reasonable chance of success?

(c) If so, should the appeal be allowed?

THE LAW

Department of Employment and Social Development Act

[14] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. Under subsection 57(2), the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[15] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

(a) A continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) There is no prejudice to the other party in allowing the extension; and

(d) The matter discloses an arguable case.

[16] 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 v. Larkman.*[2]

[17] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

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

[19] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing

[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

of the appeal on the merits. At the leave to appeal stage, an applicant does not have to prove the case.

[20] The Federal Court of Appeal has 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 v. Hogervorst*[3]; *Fancy v. Canada*.[4]

Canada Pension Plan

[21] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[22] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[23] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ANALYSIS

Late Application for Leave to Appeal

[24] The evidence indicates that the Appellant did not submit her application requesting leave to appeal until seven months after the General Division's decision was issued. She

[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

attributed the delay to a shift in residence from Halifax to Ottawa in August 2014, after which she became preoccupied with finding a new family physician, psychologist and legal counsel.

[25] I am willing to give the Appellant the benefit of the doubt on this question. Given her change of address, it is certainly possible that correspondence to her was misplaced or lost. The Appellant admits to eventually receiving the General Division's decision on October 27, 2014, in which case her application for leave was still filed after the requisite 90-day deadline—by my calculation, 22 days late. Even so, the delay was not egregious, and it is plausible that the change in her circumstances, combined with symptoms related to her health problems, led to the slow response.

[26] Similarly, I am willing to find that the Appellant had a continuing intention to pursue the appeal. The record shows that her former counsel inquired as to the whereabouts of the General Division's decision on October 16, 2014, just a little more than three months after the Tribunal purportedly mailed it out. I can also see that from December 2014 to February 2015, the Appellant and her husband consulted various parties, including her MP and her former lawyer, as well as prospective legal counsels, in an attempt to determine how best to mount an appeal.

[27] Finally, I find it unlikely that extending the Appellant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

[28] Since the first three *Gattellero* factors favour an extension of time to file an application for leave to appeal, I am prepared, in the interests of justice, to consider the issue of whether the Appellant has advanced an arguable case.

Arguable Case

Alleged Breaches of Natural Justice

[29] The Appellant submits that the General Division failed to observe a principle of natural justice by:

- preventing her family physician from testifying on her behalf;

- offering little guidance regarding the appeals process;
- allowing insufficient time to prepare for the proceedings;
- holding a hearing by teleconference rather than by personal appearance; and
- depriving her spouse of an opportunity to give evidence.

[30] I find all but one of these submissions without merit, but the exception is significant enough to convince me that this appeal must be allowed. It is clear that a major factor motivating this appeal is the Appellant's conviction that she was not afforded an opportunity to fully present her case. Having reviewed the record, I note that the Tribunal mailed its notice of hearing on February 6, 2014, advising the parties of an oral hearing scheduled for March 4, 2014. The Appellant wanted to present her family physician as a witness, presumably to attest to the severity of her fibromyalgia but, in my view, a little more than three weeks was hardly sufficient time arrange for the testimony of a medical professional, whose appearance would have likely required her to upend her schedule and sacrifice a morning for little or no remuneration.

[31] Unsurprisingly, despite the efforts of the Appellant and her counsel, Dr. Natarajan was unable to attend. I acknowledge that it was open to the Appellant to seek an adjournment to allow further time in which to accommodate her intended witness, but the emails made available indicate that Dr. Natarajan cancelled her appearance at the last minute, and if I may speculate, having waited three years for a hearing date, the Appellant and her counsel may have been reluctant to trigger another delay.

[32] I see less merit on the remaining alleged breaches of natural justice and offer the following comments:

(i) Lack of Guidance and Time to Prepare

[33] After the Respondent refused their request for reconsideration in May 2012, the Appellant and her counsel had ample time to apprise themselves of the claims and appeals process. Legislation establishing the Social Security Tribunal was enacted in June 2012, and the Tribunal was operational as of April 2013—more than a year before the Appellant eventually

received her hearing date. The Appellant's counsel filed a Notice of Readiness on November 20, 2013, indicating that he was prepared to proceed with a hearing. As the DESDA and the SST Regulations say little about how hearings are to be conducted, they leave members wide discretion to control their own procedures, provided that they are consistent with the rules of natural justice. In her introductory remarks at the hearing, the General Division member carefully described the format that was to follow, and my review of the audio recording of the hearing indicates that neither the Appellant nor her counsel expressed any discomfort with how the member proposed to proceed. Ultimately, I see no merit in the Appellant's submission that the General Division failed to provide any guidance regarding the appeals process.

(ii) Form of Hearing

[34] The Appellant alleges that the General Division failed to observe a principle of natural justice by holding the hearing by teleconference. Section 21 of the SST Regulations states that the General Division may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance. Use of the word "may" in in the absence of textual qualifiers or conditions suggests that the General Division has discretion to make this decision. The Supreme Court of Canada dealt with the issue of procedural fairness in *Baker v. Canada*,[5] which held that a decision affecting the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and it is to be assessed in the specific context of each case. *Baker* then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case, including the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure. I accept that the issues in this matter are important to the Appellant, but I also place weight on the nature of the statutory scheme that governs the General Division. The Social Security Tribunal was designed to provide for the most expeditious and cost-effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the General Division the discretion to determine how hearings are to be conducted.

[5] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

Such discretion should not be unduly fettered. In this case, the Appellant was given the opportunity to present her case and answer the Respondent.

(iii) Testimony of Appellant's Husband

[35] My review of the audio recording indicates that the General Division offered the Appellant's husband an opportunity to testify at the outset of the hearing, but he declined, with the tacit approval of the Appellant's counsel, who said that he was present mainly for moral support, unless the General Division member had any questions to ask of him. However, at the 1:08 mark, counsel sought to elicit evidence from the Appellant's spouse related to his own employment. The General Division suggested that the Appellant could instead testify as to what her husband did during the day. Counsel responded that he did not have any difficulty with this, and the Appellant proceeded to describe the additional household duties and responsibilities that her husband had assumed since the onset of her medical issues. At no time did the Appellant or her counsel attempt to draw additional evidence from the Appellant's spouse. I hear nothing in the audio recording to suggest that the General Division barred the Appellant's spouse from testifying on behalf of his wife. It must be remembered that the burden of proof rested with the Appellant to show that she was disabled, and there was no duty upon the General Division to actively solicit evidence from her husband. In any event, it seems unlikely that anything turned on whatever evidence he had to offer.

Alleged Errors of Law

(i) Villani

[36] The Appellant submits that the General Division failed to apply the principles set out in *Villani v. Canada*,[6] in that it did not consider the Appellant's particular circumstances such as her age, training, prior work experience and employability in the "real world context."

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[6] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

[37] In its decision, the General Division summarized the Appellant's testimony about her age, education and work history in paragraph 10 and referred to the correct test at paragraph 24. In the words of the Federal Court of Appeal in *Villani*:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[38] The decision indicates that the General Division took into account the Appellant's profile, writing, "In this case, the Appellant is young, well-educated and would have many transferrable skills to apply to another position." I would not overturn an assessment that the General Division has undertaken where it has noted the correct legal test and considered the Appellant's "real world" employment prospects in the context of not only her impairments, but also her personal characteristics. As the Appellant has failed to show that the General Division misapplied this aspect of *Villani*, I see no merit on this ground.

(ii) E.J.B.

[39] The Appellant further submits that the General Division failed to apply the principles set out in *E.J.B. v. Canada*,[7] in that it focused on her physical condition, without due regard for her psychological condition. She maintains that the impairments related to her body and mind are cumulative and must be considered in their totality.

[40] I see no indication that the General Division misapplied this aspect of the law. It is true that the General Division relied on documentary evidence from a pain management specialist and a functional capacity assessor, but it also dwelt at length on reports from a psychiatrist and psychologist, to whom she had been referred for anxiety, chronic pain and fatigue associated with fibromyalgia. In its analysis, the General Division examined the Appellant's physical complaints in tandem with her mental health issues, which were linked to her fibromyalgia: "She has, and continues to see, different mental health professionals, but none of them indicate

[7] *E.J.B. v. Canada (Attorney General)*, 2011 FCA 47.

that her symptoms would prevent her from working in any capacity." In my view, it cannot be said that the General Division failed to consider the cumulative effect of the Appellant's claimed disabilities.

Erroneous Findings of Fact

[41] The Appellant alleges that the General Division based its decision on several erroneous findings of fact.

(i) Attempts to Return to Work

[42] At paragraph 25 of its decision, the General Division wrote that the Appellant had not attempted to return to work, either at her former position or at another teaching position with modified duties. In fact, according to the Appellant, she returned to a modified work schedule and ergonomic accommodations from March to May 2010, and again from August 2010 to January 2011.

[43] I see no error here, much less one that is capricious, perverse or without regard for the record. In paragraph 10, the General Division wrote that the Appellant "stopped for good at the end of the 2009-10 school year" and "made no attempts to return to work after June 2010, nor did she apply for jobs in any other fields." This reflects information that the Appellant disclosed on the questionnaire accompanying her application for a disability pension on June 15, 2011 (GT1-539), wherein she indicated that her "last day on the job" was June 16, 2010. The Appellant's counsel reiterated this information in his written submissions of June 21, 2013 (GT1-554), in which he wrote that the Appellant "tried a gradual return to work but went off permanently in June 2010 and has not been able to return to work." The General Division was entitled to rely on the Appellant's own statements in determining when she ceased to work once and for all.

[44] In my review of the file and the audio recording, I saw no evidence that was before the General Division that the Appellant worked again after June 2010. Moreover, it would appear that the Appellant herself confirmed as much in the very submissions that were intended to argue the opposite:

> Contrary to para 25, Mrs. T. D. made additional efforts to return to work from August 2010 to January 2011 Mrs. T. D. took a deferred leave salary plan period of 6 months so that she could focus on her health in the hopes that she would return to work in February 2011. She was entitled to use here sick leave in lieu of using her deferred leave salary plan however Mrs. T. D. felt that her best chance at returning to work was to take this prolonged leave and focus on her health. Unfortunately, this attempt to improve her health did not work and Mrs. T. D. proceeded on paid sick leave in February 2011 until depleting her leave balance.

[45] This passage plainly indicates that, during the period from August 2010 to

February 2011, the Appellant, by her own admission, did not actually work as a school teacher, but was on leave, after which she gave up hope of returning to her job. I do not think an intention to return to work can be reasonably equated with actually performing work.

(ii) Use of Medications for Chronic Pain

[46] The Appellant alleges that the General Division found she was not taking any pain relief medication, apart from sleeping aids, as of the hearing date. She contend that, in fact, she had been prescribed amitriptyline for pain since mid-2010—information that was documented in the record available to the General Division.

[47] In my view, this ground of appeal has merit. In paragraph 26, the General Division categorically stated: "She is on a low dose of medication to help her sleep but has not been prescribed anything for her pain or to relieve her symptoms." The context in which this sentence appears indicates that the General Division based its decision to deny the Appellant CPP disability benefits, in part, on a finding that her pain was being treated "conservatively." In that sense, it was a material finding of fact—one that I think was also erroneous and without regard for the record.

[48] The question is whether amitriptyline was prescribed for indications beyond the Appellant's sleep dysfunction, and the record shows that it was. First, Dr. Natarajan's medical

report dated June 14, 2011 (GT1-524) indicates that amitriptyline was among the medications prescribed for the Appellant's *main* medical condition, which was identified as fibromyalgia. Second, Dr. Natarajan's June 7, 2011 clinical note indicates that she had seen Dr. Bakowsky (whose specialty is rheumatology, which focuses on autoimmune diseases often characterized by pain symptoms), who "did not recommend any changes to the medications… felt current dose of fluoxetine, amitriptyline and Lyrica were good." Third, Dr. Bond's pain management report dated July 30, 2012 (GT2-14) stated: "Her present *analgesic* [my emphasis] regime is amitriptyline 25 mg at night and fluoxetine one tablet twice daily." All these extracts indicate that, contrary to the General Division's finding, the Appellant had been prescribed medications, including amitriptyline, to address chronic pain.

(iii) Medical Evidence Declaring Appellant Incapable of Work

[49] The Appellant submits that the General Division found that, apart from the opinion of Dr. Natarajan, there was no other medical evidence to support the Appellant's claim that she was unable to work in a full-time capacity. In fact, argues the Appellant, there was ample evidence that she could not work in a full-time capacity, specifically, Dr. Bond's report and the Functional Capacity Evaluation, both from July 2012, as well as remarks from Dr. Bains, Dr. Jefferson and Dr. Cutler. In any case, only Dr. Natarajan, as the primary physician, was in a position to make a prognosis about work capacity, based on her view of the totality of the Appellant's condition. Other medical specialists were, by definition, mandated to focus on only a single complaint or ailment.

[50] I see merit in this argument. In paragraph 26 of its decision, the General Division wrote:

> Only Dr. Natarajan, who supports her disability application, states that she would not be able to perform the duties of her job, but she qualifies this as an inability to work in a full time capacity. However there is no other medical evidence that supports this statement.

[51] Dr. Natarajan's December 2, 2011 letter (GT1-462), which the General Division quoted at length earlier in its decision, contains a description of the Appellant's difficulties in working as a part-time teacher in the final months of the 2009-10 school year, followed by this conclusion:

> Since March 2010, Ms. T. D. has had significant physical and mental impairment that has made it impossible for her to perform the duties of her regular occupation. I do not feel that T. M. would be able to perform substantial duties of any other full-time occupation for which she is reasonably fitted by education, training, and experience. I do not feel that another employer would be likely to hire Ms. T. D. with her current level of impairment.

[52] This statement indicates that Dr. Natarajan did not, as stated, "qualify" her opinion by leaving open the possibility that the Appellant might be capable of part-time work. It is true that Dr. Natarajan ruled out full-time work as a school teacher or equivalent, but she then went on to exclude any possibility of employment.

[53] Dr. Natarajan further refined her opinion in a letter dated August 23, 2012 (GT1-261), in which she specifically declared the Appellant as precluded from all forms of work:

> Ms. T. D.'s disability is currently severe and she would not be able to perform the duties of any substantially gainful occupation. With the performance of regular work duties she would have to endure an unreasonable amount of pain and an increase in her fibromyalgia symptoms. She would not be able to attend work on a consistent or reliable basis due to the severe nature of her pain and other symptoms and her intolerance to sitting or standing for prolonged periods … It is likely that her symptoms will be long continued and of indefinite duration. It is unlikely she will be able to perform substantial duties of any part-time or full-time occupation. I do not feel that any reasonable employer would consider Ms. T. D. for employment with her level of disability.

[54] The Appellant also pointed to certain medical reports from which she suggests the General Division should have inferred a severe and prolonged disability. However, since neither Dr. Jefferson nor Dr. Bains, in their reports dated February 25, 2011 and December 2, 2011, respectively, pronounced specifically on the Appellant's vocational capacity, the General Division was, strictly speaking, correct to note that no other doctor, besides Dr. Natarajan, had ruled out work. Furthermore, the General Division was within its authority to find, as trier of fact, that the opinions of these mental health specialists did not necessarily demand a conclusion that the Appellant was disabled according to the standard set out in the CPP. As for Dr. Cutler's December 2016 report, which I acknowledge did rule out work, it was prepared well after the March 2014 hearing, and the General Division cannot be faulted for failing to consider it. Moreover, as new evidence, it is inadmissible before the Appeal Division.

CONCLUSION

[55] Having weighed the four *Gatellero* factors, I have determined that this is an appropriate case in which to allow an extension of time to appeal beyond the 90-day limitation. I accepted that the Appellant had a continuing intention to pursue her appeal and saw fit to assume that she had a reasonable explanation for the delay in filing her request for leave to appeal. I also thought it unlikely that the Respondent's interests would be prejudiced by extending the deadline.

[56] Above all, I have identified two grounds that not only raise an arguable case, but also demand that the appeal be allowed on its merits. For the reasons discussed above, the appeal succeeds on the grounds that the General Division: (i) breached a principle of procedural fairness by failing give sufficient notice of the hearing to permit the attendance of the Appellant's intended witness; and (ii) based its decision on erroneous findings that the Appellant was not taking any medication for her chronic pain at the time of her MQP and that Dr. Natarajan had in some way qualified her opinion about the Appellant's disability.

[57] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. In this case, it is appropriate that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member.

Member, Appeal Division