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

Citation: *L. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 273

Tribunal File Number: AD-16-828

BETWEEN:

L. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: June 12, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated May 12, 2016. Previously, the Applicant had applied for a Canada Pension Plan (CPP) disability pension. The Respondent refused the application initially and, in a decision letter dated March 17, 2014, refused the application upon reconsideration. The appeal of the reconsideration decision to the Tribunal's General Division was received on December 2, 2015.

[2] The General Division determined that the appeal had not been brought within the prescribed time limit and, therefore, could not proceed.

ISSUE

[3] The Member must decide whether the appeal has a reasonable chance of success.

General Division Decision

[4] The General Division relied on subsection 52(2) of the *Department of Employment and Social Development Act* (DESD Act), which states that "in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant." The General Division determined that the Applicant had received the reconsideration decision on March 27, 2014, assuming the decision had been sent by mail and taking judicial notice that mail in Canada is usually received within 10 days. The General Division dismissed the appeal, as it had been brought outside of the one-year limit.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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."

[6] 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."

[7] 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 made in a perverse or capricious manner or without regard for the material before it.

[8] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[9] An Application Requesting Leave to Appeal to the Social Security Tribunal Appeal Division was not filed. Instead, the Applicant's counsel filed a second Notice of Appeal using the General Division form (the "incorrect form") intending it to be a request for leave to the Appeal Division. The Tribunal contacted the Applicant's legal representative on June 24, 2016, notifying him that the application was incomplete. On July 11, 2016, the Tribunal received the requested information to make the application complete; however, it should be noted that the correct form, an Application Requesting Leave to Appeal to the Social Security Tribunal Appeal Division, was never filed.

[10] The information received on July 11, 2016, identified the issue as:

> […] the Tribunal committed an error in law and failed to observe a principle of notarial justice by refusing the grant an extension to appeal by failing to properly consider the appeal in spite of advising that {the APPLICANT} was represented by representation in letters dated March 27, 2013, June 4, 2013, June 10, 2013, August 9, 2013, November 4, 2013, December 9, 2013, July 21, 2015, August 26, 2015 and October 27, 2015. Mr. L. S.'s CPP file and reconsideration decision was requested in these letters. I have attached a copy for your reference in this regard. The Appellant was represented and were aware that he was represented and that the decision was received at my office well beyond the ninety day time frame.

[11] In addition, it should be noted that the Applicant only supplied the release, authorizing documentation to be sent directly to the legal representative, on July 21, 2015. (GD1-14 of the General Division file.)

ANALYSIS

[12] The legislation states that the one-year period commences after the reconsideration decision is communicated to the appellant (the Applicant) (subsection 52(2) of the DESD Act).

[13] In *Fazal v. Canada (Attorney General*), 2016 FC 487, the Federal Court addressed the issue of filing beyond the one-year mark. In the application before it, the Court held that:

> It is clear that the application for leave was filed more than one year after the date that the decision was communicated to the appellant. The [DESD Act] does not permit any discretion to be applied. On the standard of correctness the decision was correct.

[14] *Fazal* was an application for leave to appeal to the Appeal Division. However, the same principle applies here. There is no discretion provided in the DESD Act for applications filed one year after the date on which the reconsideration decision was communicated to the Applicant.

[15] Attention should also be brought to subsection 74.1(1) of the *Canada Pension Plan Regulations* (CPP Regulations), where the request for reconsideration requirements are enumerated:

> A request for a reconsideration under subsection 81(1) or (1.1) of the Act shall be made in writing to the Minister and shall set out

> (a) the name, address and Social Insurance Number of the contributor;
>
> (b) if the person making the request for the reconsideration is not the contributor, that person's name and address and their relationship to the contributor; and
>
> (c) the grounds for the request for the reconsideration and a statement of the facts that form the basis of that request.

[16] Furthermore, subsection 81(2) of the CPP states that:

> The Minister shall reconsider without delay any decision or determination referred to in subsection (1) or (1.1) and may confirm or vary it, and may approve payment of a benefit, determine the amount of a benefit or determine that no benefit is payable, and shall notify in writing the party who made the request under subsection (1) or (1.1) of the Minister's decision and of the reasons for it.

[17] The question then becomes: Does the Respondent have an obligation to send a copy of the reconsideration decision to the party who made the request and, if so, how does that impact the calculation of the one-year time period? Additionally, it is noted in the file that the release authorizing the legal representative was not signed until July 21, 2015. Was this release required by law, and did it affect who the Minister notified of the reconsideration decision?

[18] The original Notice of Appeal to the General Division indicated that the reconsideration decision had been received on March 17, 2014. On April 7, 2016, the General Division requested clarification as to when the Applicant had received the reconsideration decision. Although the Applicant's counsel responded reiterating that he had requested the Applicant's CPP file and the reconsideration decision, he never answered the Tribunal's question of when the reconsideration decision had been received. Instead, he referred back to a letter that had been written to the General Division on November 26, 2015, stating:

> As counsel for [the Applicant], I was never provided with the reconsideration letter in spite of clearly being identified as [the Applicant's] representative and sending letters dated March 27, 2013, June 4, 2013, June 10, 2013, August 9, 2013, November 4, 2013, December 3, 2013, July 21, 2015, August 26, 2015, and October 27, 2015.

[19] In the second Notice of Appeal (the "incorrect form") sent to the Appeal Division requesting leave to appeal, the Applicant's representative indicated that the reconsideration

decision had been received on May 13, 2016. However, this date was never provided to the General Division. This date is different from the one provided in the original Notice of Appeal filed with the General Division, which indicated the date of receipt as March 17, 2014. It should also be noted that this date seems inconsistent with the timing of the filing of submissions, given that the Tribunal had received the original Notice of Appeal to the General Division on December 2, 2015.

[20] The Applicant's legal representative made the initial application in accordance with subsection 74.1(1) of the CPP Regulations. He identified himself as the Applicant's legal representative on numerous occasions. However, the Applicant did not authorize him until July 21, 2015, in the Applicant's signed release. With respect to subsection 74.1(1) of the CPP Regulations, a representative can make a request for reconsideration. Accordingly, subsection 81(2) of the CPP Regulations indicates that the Minister must communicate the decision to the party who made the request. In this case, the reconsideration decision was sent directly to the Applicant, not to the representative.

[21] It appears that the Respondent has an obligation to send the reconsideration decision to the party who made the application, given the guidance of subsections 74.1(1) and 81(2) of the CPP Regulations. If so, this could potentially have an effect on the one-year time period found in subsection 52(2) of the DESD Act. I find that the appeal has a reasonable chance of success on this ground, and I grant leave to appeal. I invite submissions from the parties on the following issues:

a) What are the Minister's obligations, given subsections 74.1(1) and 81(2) of the CPP Regulations, and how does this affect the one-year time period found in subsection 52(2) of the DESD Act?

b) The Minister did send the reconsideration decision to the Applicant directly but not to the representative. Therefore, was there a breach of natural justice?

CONCLUSION

[22] The application for leave to appeal is granted. In accordance with section 42 of the *Social Security Tribunal 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.

Jennifer Cleversey-Moffitt
Member, Appeal Division