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

Citation: *M. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 323

Tribunal File Number: AD-16-1370

BETWEEN:

M. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 7, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant applied for a Canada Pension Plan (CPP) disability pension on June 2, 2014. The Respondent refused the application initially and on reconsideration in a letter dated January 29, 2015 (the reconsideration letter).

[2] In two separate letters, date-stamped by the Respondent as received on January 21 and January 26, 2016, respectively, the Applicant indicated that she wished to appeal the reconsideration decision in order to receive a disability pension. On February 13, 2016, the Respondent wrote to the Appellant and advised her that it was returning her appeal letters. It enclosed a notice of appeal form and instructed her to send her appeal directly to the Social Security Tribunal of Canada (Tribunal).

[3] The Applicant duly completed and submitted the notice of appeal, which the Tribunal received Tribunal on February 24, 2016. On page four of the form, the Applicant indicated that she had received the reconsideration letter on January 29, 2015.

[4] In a decision dated December 2, 2016, the Tribunal's General Division determined that the Applicant had filed her appeal beyond the 90-day time limit set out in paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). The General Division refused an extension of time for her to appeal, having weighed the four factors set out in *Canada v. Gattellaro*.[1]

[5] On December 15, 2016, within the 90-day time limit set out in paragraph 57(1)(*b*) of the DESDA, the Applicant filed an application for leave to appeal with the Tribunal's Appeal Division.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

ISSUE

[6] In order to grant leave to appeal, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Social Security Tribunal Regulations

[7] Under section 23 of the *Social Security Tribunal Regulations* (SST Regulations), an appeal of a decision to the General Division is brought by filing the appeal at the address, facsimile number or email address—or in accordance with the electronic filing procedure—provided by the Tribunal on its website.

Department of Employment and Social Development Act

[8] Pursuant to paragraph 52(1)(*b*) of the DESDA, an appeal must be brought to the General Division in the prescribed form and manner and within 90 days after the Respondent's reconsideration decision was communicated to the appellant. Under subsection 52(2), the General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[9] 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) provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[10] According to subsection 58(1), 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.

[11] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the applicant does not have to prove the case.

[12] 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*[2] and *Fancy v. Canada.*[3]

SUBMISSIONS

[13] In her application requesting leave to appeal, the Applicant made the following submissions:

(a) She acknowledges that she has been confused by the appeals process. She spent time communicating with government officials in an attempt to submit medical evidence. She was finally told to file her documents with the Tribunal.

(b) The medications that she takes for her pain have affected her memory and caused her confusion. She has altered her medication regime and is doing much better.

(c) She asks for compassion and understanding. Things can fall through the cracks and go unnoticed for a long time.

[14] The Applicant also enclosed a brochure on cognitive behavioral therapy for post-traumatic stress disorder. On June 9, 2017, she submitted a CPP medical report completed in March 2017 by Pierrette Daigle, a general practitioner.

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

ANALYSIS

[15] I have reviewed the Applicant's submissions, as well as the entirety of the file that was before the General Division, and I see no reasonable chance of success on appeal. The General Division determined that the Applicant's notice of appeal was submitted to the Tribunal more than one year after receipt of the Respondent's reconsideration letter, and I see no arguable case that it erred in making this finding.

[16] The General Division noted that it was unlikely that, as she stated, the Applicant received the reconsideration letter on January 29, 2015—the date on which it was mailed. It chose to take judicial notice of the fact that mail in Canada is usually received within 10 days of posting, resulting in a finding that the reconsideration letter was communicated to the Applicant by February 8, 2015. In my view, this presumption was reasonable and consistent with analogous provisions in the law, particularly section 19 of the SST Regulations (which governs deemed communications).

[17] I do not doubt that the Applicant found the appeals process confusing, and it is possible, from what I can see in the record, that the Respondent's conduct may have contributed, in some small part, to the delay in her application to the Tribunal. Still, the fact remains that the Applicant did not make her appeal until February 24, 2016—381 days after the deemed receipt of the reconsideration letter.

[18] The law is unambiguous and permits no discretion. Subsection 52(2) of the DESDA states that *in no case* may an appeal be brought more than one year after the reconsideration decision was communicated to an appellant. Unfortunately, the wording of this provision is so strict that it offers no leeway, not even to someone—such as the Applicant—whose circumstances evoke sympathy.

[19] I note that the General Division undertook an analysis of the four *Gattellaro* factors, finding that, while the Applicant had an arguable case that posed little risk of prejudice to the Respondent, she failed to offer a reasonable explanation for the delay or evince a continuing intention to pursue the appeal. However, it is unclear what role these factors played in the outcome, because the General Division ultimately concluded that an extension of time was

statute-barred by subsection 52(2) of the DESDA. In my view, given the absolute language in subsection 52(2), coupled with the General Division's finding that it had taken the Applicant more than a year to bring her appeal, the *Gattellaro* analysis was superfluous.

[20] It is unfortunate that the Applicant is being denied an opportunity to appeal due to a filing lapse. However, the General Division was bound to follow the letter of the law, and so am I. Mere intention to pursue an appeal is irrelevant where more than one year has elapsed since the reconsideration. If the Applicant is asking me to exercise fairness and reverse the General Division's decision, I must emphasize that I lack the discretionary authority to do so and can exercise such jurisdiction only as granted by the Appeal Division's enabling statute. Support for this position may be found in *Pincombe v. Canada*,[4] among other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker, and therefore not empowered to provide any form of equitable relief.

[21] The remainder of the Applicant's submissions amount to a request that the Appeal Division consider and assess the evidence supporting her disability claim on its merits. This is beyond the parameters of the DESDA, which, in subsection 58(1), sets out very limited grounds of appeal. The Appeal Division is permitted to determine only whether any of an applicant's reasons for appealing a General Division decision fall within the specified grounds of appeal and whether any of them have a reasonable chance of success.

CONCLUSION

[22] In my view, the General Division did not base its decision on an erroneous finding of fact that it made in a capricious or perverse manner or without regard for the record. Nor did it err in law or breach a principle of natural justice. As I see no reasonable chance of success on the grounds of appeal put forward, the application for leave to appeal is refused.

Member, Appeal Division

[4] *Pincombe v. Canada (Attorney General)* (1995), 189 N.R. 197 (F.C.A.).