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

Citation: *E. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 338

Tribunal File Number: AD-16-1041

BETWEEN:

E. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Janet Lew

Date of Decision: July 17, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 27, 2015, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as the General Division had found that her disability had not been "severe" on or before the end of her minimum qualifying period on December 31, 2013.

ISSUES

[2] The two issues before me are as follows:

(1) Should I exercise my discretion and extend the time for filing the leave to appeal application?

(2) If so, does the appeal have a reasonable chance of success?

FACTUAL BACKGROUND

[3] The relevant facts for the purposes of this application are as follows:

- The Applicant indicated on the application requesting leave to appeal that she had received the General Division's decision on March 14, 2016. She did not cite any grounds of appeal in the application. Rather, she sought a reconsideration or a review of her application for a disability pension, noting that, after four years, she had yet to return to work and that she remained on long-term disability.

- The Applicant filed an application requesting leave to appeal on August 18, 2016.

- Upon further review of the matter, the Social Security Tribunal (Tribunal) determined that the application requesting leave to appeal was incomplete. The Tribunal invited the Applicant to identify grounds of appeal and to

explain why she had filed the application late. She filed a response on September 13, 2016. She indicated that she was wrong when she had previously stated that she had received the General Division's decision on March 14, 2016. She claimed that in fact she had received the decision on May 5, 2016, and appeared to suggest that her application requesting leave to appeal had been filed on time. Otherwise, she did not cite any grounds of appeal.

ANALYSIS

(a) Late application

[4] Paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA) requires that 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 an appellant. Subsection 57(2) of the DESDA stipulates that "[t]he 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 appellant."

[5] There is no entitlement as of right to an extension. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court set out four factors that should be considered in determining whether to extend the time period beyond 90 days within which an applicant is required to file his or her application for leave to appeal. The four factors include the following:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[6] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204, the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served, but it also held that not all four questions relevant to the exercise of discretion to grant an extension of time need to be resolved in an applicant's favour. It is clear from *Larkman* that the enquiry into the interests of justice is not confined to the four *Gattellaro* factors and that other considerations can be taken into account.

[7] Irrespective of whether I accept that the application requesting leave to appeal had been filed on March 14, 2016 or on May 5, 2016, the Applicant is nevertheless late— either by 67 days or 15 days. The DESDA still requires that I determine whether it is appropriate to extend the time for filing the application.

[8] There is no prejudice to the Applicant in granting an extension, given the relatively short delay involved, even at 67 days. The Applicant did not explain why her application was late, nor did she demonstrate a continuing intention to pursue her appeal. Of greater significance, however, is whether there is an arguable case before me. If so, generally it would be in the interests of justice to grant an extension of time.

[9] The Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA. The Applicant provided the following reasons for leave to appeal:

> For the past years, I have no signs of remission, no paranoia, and no hallucinations. I rated my mental health capacity, cognition and memory are great at a rate of 10/10. My current achievements are my Voluntary work as one of the Executive Member and elect secretary of the Catholic Women's League of Vancouver, St. Patrick Parish Council. My responsibilities is to write minutes of the Executive Meetings and the General Council meetings. I informed and remind activities to the Executives and members of the General Council. I attended meetings at the other parish Councils, convention and workshop for the organization. I have more Volunteer works, I'm more involved with Church organizations, I'm a choir member every Saturday and a hospitality team on schedule Sunday. Also, I'm a member of the St. Vincent de Paul organization, Vancouver chapter. We have home visit program serving the needy in the community and to help them out with their daily needs "food" and if possible to refer them with regards to health care. Also, my other volunteer is at St. Vincent X "extended care facility" and my responsibilities involves assisting the Physiotheraphyst assistant to porter

> residents to the exercise room and performed motion exercises and report to the staff if residents needing medical attention…[*sic*]

[10] The Applicant also wrote:

> For another chance, I would like to Appeal to reconsider a review of my previous and current application for the [*Canada* CPP disability benefits. For some reasons that I'm not back to work yet and I'm waiting clearance from my doctor and this is my fourth year on longterm disability since February 2012. In consideration, my mental health issues is considered prolong … [sic]

[11] The Applicant's submissions essentially call for a reassessment. As the Federal Court stated in *Tracey v. Canada (Attorney General)*, 2015 FC 1300, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors in order to reach a different conclusion regarding the Applicant's entitlement to a disability pension.

[12] I will assess whether there is an arguable case in the context of the application requesting leave to appeal.

(b) Application requesting leave to appeal

[13] Subsection 58(1) of the DESDA sets out the grounds of 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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[14] Before granting leave to appeal, I would need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA

and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey*.

[15] As I have indicated above, the Applicant seeks a reassessment. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave to appeal should be granted or refused, to reassess the evidence or reweigh the factors that the General Division considered. Neither the leave to appeal nor the appeal provides opportunities to re-litigate or re-prosecute the claim.

[16] Although the Applicant has not identified any reviewable errors under subsection 58(1) of the DESDA, I will nevertheless compare the General Division's decision against the record and the evidence before it. After all, the Federal Court has cautioned the Tribunal against mechanistically applying the language of section 58 of the DESDA when it performs its gatekeeping function: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para. 10. The Federal Court wrote, "If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave."

[17] In June 2012, Dr. Brian Scarth, a consultant in psychiatry, re-assessed the Applicant (GT1-47 to GT1-53). He diagnosed the Applicant with schizophrenia, now in remission. He agreed with the Applicant's treating psychiatrist that she was psychiatrically stable. There had been significant improvements since his original assessment in early March 2012. The absence of symptoms and the Applicant's description of level of activities suggested that there were no significant limitations in her function. Dr. Scarth was of the opinion that the one notable area of concern was the Applicant's lack of insight, which, in turn, raised concerns about compliance issues.

[18] Dr. Scarth recommended that the Applicant undergo cognitive testing by a neuropsychologist to document any subtle cognitive deficits that may have persisted even in the absence of any observable residual symptoms. He was of the opinion that cognitive deficits of this nature, which are common even in optimally treated schizophrenics, were the most significant factor likely to have an impact on the Applicant's function in the

workplace. He expected that the testing would not show sufficient cognitive deficits to have an impact on her ability to function adequately and safely in her profession as a registered nurse. Dr. Scarth also made other recommendations to accommodate a return to work, including a graduated return to work and refraining from working night shifts.

[19] Dr. Josef Zaide, a registered psychologist, conducted a neurological evaluation in September 2012 (GT1-57 to 66). He determined that her cognitive levels were significantly below what would be expected of a registered nurse carrying out duties at a charge or senior level. He wrote that, overall, the nature, number and severity of the Applicant's impairments raised concerns about her ability to carry out her work at previous levels. The difficulties that he observed would have the greatest impact on more complex, non-routine patient situations. As such, he recommended two basic options, in the interim, pending a meeting with the employer, the Applicant, her spouse and him to discuss his findings, from which additional recommendations might emerge. She could either continue her leave of absence or transition into a different type and level of work that was more routine, structured, supervised and that did not involve direct patient care. He was of the opinion that the Applicant demonstrated several strengths that might facilitate an attempt to return to work in a different occupational niche. Regardless of which option she chose, the psychologist was of the view that the Applicant should undergo a cognitive remediation program.

[20] The General Division did not conduct an extensive analysis of the evidence. At paragraph 34, the member indicates that "[t]he Tribunal accords significant weight to the fact that the [Applicant] is in complete remission of her psychological disorder." The member accepted her evidence that she has no limitations and functional impairments, that she was willing and able to return to work, and that she was currently in the process of returning to her previous employment as a registered nurse.

[21] Given that the psychiatrists were unanimous in their view that the Applicant has impaired insight into her own condition, I would likely have exercised more restraint in relying upon the Applicant's own self-assessment of her capabilities, and I would have corroborated it against the documentary evidence. For instance, the member accepted the Applicant's evidence that she no longer has any limitations associated with schizophrenia.

This led the member to find that the Applicant does not have any limitations. Yet, neuropsychological testing showed that the Applicant in fact suffers cognitive impairments such that it makes it unlikely she can ever return to any employment that is complex and non-routine.

[22] The member indicated that the psychiatrist Dr. Scarth was of the opinion that the Applicant should be able to return to her former employment. Yet, this was somewhat misleading, as it failed to acknowledge that the psychiatrist had also recommended neuropsychological testing to rule out any cognitive deficits that could have an impact on the Applicant's function in the workplace. Early on, this psychiatrist was of the view that, if cognitive deficits were identified, even with optimal treatment, the Applicant's ability to return to her own occupation would need to be re-evaluated.

[23] Although Dr. Scarth expected that the testing would not reveal sufficient cognitive deficits to have an impact on the Applicant's ability to function adequately and safely as a registered nurse, testing in fact disclosed that the Applicant has cognitive impairments of such severity that it would have an impact on her ability to carry out the duties of her former profession. One of the interim recommendations was that the Applicant could transition into other work that was more routine, structured, supervised, and that did not involve direct patient care.

[24] Despite the fact that some of the evidence was somewhat misconstrued, overall, the General Division correctly concluded that the evidence supported a residual capacity for some employment, i.e. that she was not "incapable regularly of pursuing any substantially gainful occupation," as set out in paragraph 42(2)(*a*) of the *Canada Pension Plan.* The most recent medical opinions suggested that the Applicant could return to the workforce, albeit with some restrictions, and assuming that she remained compliant with taking her medications. The consulting psychiatrist concluded she could return to work, and her psychologist determined that the Applicant could transition into a different type of work. In this regard, I am not satisfied that the appeal has a reasonable chance of success.

PRORATION

[25] I note that the General Division found that the parties had agreed and that it too had calculated the end of the Applicant's minimum qualifying period as being December 31, 2013. However, in response to the member's request of April 20, 2015 (GT4), the Respondent had provided the Tribunal with an updated record of earnings, along with a recalculation of the Applicant's minimum qualifying period (GT5). In submissions filed on June 1, 2015 (GT7), the Respondent advised that a review of the Applicant's record of earnings showed additional income for 2014, which could be prorated as per section 19 of the *Canada Pension Plan*, giving a possible pro-rated date in 2014.

[26] Hence, if the Applicant was not disabled when the minimum qualifying period had ended in December 2013, then the General Division was required to determine whether the Applicant became disabled by the end of February 2014. The Respondent wrote, "If it is determined that [the Applicant] became disabled in 2014 by the end of February, then her earnings and contributions could be prorated as per section 19 of the [*Canada Pension Plan*] giving her a possible prorated date of February 2014."

[27] The General Division made no reference to the possibility of proration. It failed to assess whether the Applicant might have become disabled by the end of February 2014. Despite this error, I see no utility in granting leave to appeal, as I remain unsatisfied that the appeal has a reasonable chance of success, even with this error. In *Canada (Attorney General) v. Hines*, 2016 FC 112, the Federal Court held that the Appeal Division must assess the evidence and make a finding on the evidence. If there is no evidence in the record to support a finding, then there is no basis to grant leave to appeal. Here, there was no evidence before the General Division to support a finding that the Applicant had become disabled "in 2014, by the end of February."

VILLANI

[28] The General Division referred to but seemingly failed to apply *Villani v. Canada (Attorney General),* 2001 FCA 248 and consider the Applicant's particular circumstances in a "real-world" context.

[29] *Villani* indicates that the statutory test for severity be applied with some degree of reference to the "real world" and that a decision-maker must take into account the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience. *Bungay v. Canada (Attorney General)*, 2011 FCA 47, confirmed that a decision-maker must consider these details, when it wrote:

> [11] . . . Further, aside from brief mention of the applicant's work history, there is no mention of her age, education level, language proficiency and past life experience at all or in any detail as required by *Villani*, *supra*.
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> . . .
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> [14] The dissenting member charged herself properly as to the law as set out in *Villani* (at paragraph 14):
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> > The *Villani* (2001 FCA 248 (CanLII), [2002] 1 F.C. 130) test and the case law requires the Tribunal and this Board to examine an individual's entire physical condition, age, level of education, employability and so on.

[30] The Federal Court of Appeal in *Bungay* allowed the application for judicial review and quashed the decision of the Pension Appeals Board, ordering that a new panel of the Pension Appeals Board "reconsider [the] matter applying the *Villani* test".

[31] Given that the General Division does not appear to have considered the Applicant's particular circumstances, I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may not have applied the *Villani* test. This is not to suggest, however, that even had the General Division considered the Applicant's particular circumstances, that it would have necessarily found her severely disabled for the purposes of the *Canada Pension Plan.* The Applicant should be prepared to demonstrate how any

personal characteristics are relevant when assessing the severity of her disability, otherwise the appeal may fail.

[32] As I have determined that there is an arguable case, it is in the interests of justice to grant an extension of time to file the application requesting leave to appeal.

CONCLUSION

[33] Given the considerations above, both the application requesting an extension of time and the application for leave to appeal are granted. This decision granting leave in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division