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

Citation: *C. C. v. Minister of Employment and Social Development,* 2017 SSTADIS 337

Tribunal File Number: AD-17-2

BETWEEN:

C. C.

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 14, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant applied for a Canada Pension Plan disability pension on July 28, 2011. The Respondent refused the application initially and on reconsideration in a letter dated August 22, 2013 (the reconsideration letter).

[2] On August 22, 2016, the Applicant filed an incomplete appeal with the Social Security Tribunal of Canada (Tribunal). On page four of the appeal notice, the Applicant indicated that she had received the reconsideration letter on September 4, 2013. In a letter dated August 24, 2016, the Tribunal advised the Applicant that her appeal was incomplete because she had neglected to include a copy of the reconsideration letter. On September 1, 2016, the Applicant filed the missing information, at which time the appeal was declared complete.

[3] In a decision dated November 28, 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]

[4] On December 23, 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.

ISSUE

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

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

THE LAW

Social Security Tribunal Regulations

[6] Under section 23 of the *Social Security Tribunal 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

[7] 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.

[8] 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.

[9] 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.

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial 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.

[11] 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

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

(a) She suffers from a severe and prolonged disability, as supported by numerous medical records.

(b) Her appeal was delayed because she was frightened of attending an interview without spousal support.

(c) From 2013 to 2016, she experienced problems with doctors and lawyers. Then, a family matter required her to leave the country in a state of emotional distress.

[13] The Applicant also enclosed a letter of support from her Member of Parliament, as well as copies of airline tickets documenting trips from X to X in 2013 and again in 2015. The Applicant also filed medical records that were prepared after the General Division's decision was issued, and she has continued to periodically submit medical updates to the Tribunal.

ANALYSIS

[14] 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.

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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.

[15] The General Division noted that the Applicant acknowledged receiving the reconsideration letter on September 4, 2013, and that she had not perfected her appeal until September 1, 2016. I see nothing in the record to cast doubt on those dates. It appears that the Applicant has endured her share of personal crises over the past few years, but the fact remains that she did not make her appeal until nearly three years after receiving the reconsideration letter.

[16] 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.

[17] 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 had 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.

[18] While it is unfortunate that the Applicant has lost her opportunity to make an appeal, the General Division was bound to follow the letter of the law, and so am I. A 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.

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

[19] The bulk of the Applicant’s many submissions since she filed her request for leave to appeal 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 has a reasonable chance of success.

[20] 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.

CONCLUSION

[21] 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