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

Citation: *S. M. v. Minister of Employment and Social Development,* 2017 SSTADIS 367

Tribunal File Number: AD-17-16

BETWEEN:

S. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Peter Hourihan

Date of Decision: July 25, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 18, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP*)* was not payable because it found that the Applicant was not disabled, as her disability was not severe.

[2] The Applicant filed an incomplete application for leave to appeal with the Tribunal's Appeal Division on January 4, 2017. The application was completed on April 26, 2017, beyond the time limit set out in paragraph 57(1)*(b)* of the *Department of Employment and Social Development Act* (DESDA).

ISSUES

[3] I must decide whether an extension of time to file the application requesting leave to appeal should be granted.

[4] If I grant an extension of time, I must then decide whether the appeal has a reasonable chance of success

THE LAW

[5] According to paragraph 57(1)*(b)* of the DESDA, an application must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the Applicant.

[6] I must consider and weigh the criteria as set out in case law. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court stated that the criteria are as follows:

a) A continuing intention to pursue the application or appeal;

b) The matter discloses an arguable case;

c) There is a reasonable explanation for the delay; and

d) There is no prejudice to the other party in allowing the extension.

[7] 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 (Attorney General) v. Larkman*, 2012 FCA 204. I will address these factors below in my analysis.

[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 and the Appeal Division must either grant or refuse leave to appeal.

[9] Subsection 58(1) of the DESDA identifies the only grounds of appeal available to the Appeal Division:

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 that it made in a perverse or capricious manner or without regard for the material before it.

[10] 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.

[11] In determining whether leave to appeal should be granted, I am required to determine whether there is an arguable case. The Federal Court of Appeal 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 (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. The Applicant does not have to prove the case at this stage; she has to prove only that the appeal has a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed" (*Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12).

SUBMISSIONS

[12] The Applicant submitted her incomplete application for leave to appeal on January 4, 2017. Her reason for submitting a late application was that she had been visiting family in another city within Canada. The brief reasons for the appeal were illegible on this initial application.

[13] On April 7, 2017, the Applicant sought the assistance and representation of a relative. This representative provided assistance and completed the application on April 26, 2017.

[14] The Applicant, in an email dated April 24, 2017, indicated that the reason for the appeal was that the General Division "made an important error regarding the facts contained in the appeal file." The correspondence indicated that all the medical records had been submitted in regard to her application and she asked that this information be reviewed. Further, in her email, the Applicant noted that she had been having some health issues and difficulty writing and that this was the reason for the illegibility of the initial, incomplete application.

[15] The Applicant made no other submissions.

ANALYSIS

Extension of time to file the application requesting leave to appeal

[16] The General Division decision was made on September 16, 2016. The decision was sent to the Applicant on September 19, 2016. The Application requesting leave to appeal to the Appeal Division was initially filed on January 4, 2017, however, was incomplete. It was completed on April 26, 2017.

[17] The Applicant did not indicate in her application the date she received the General Division decision. Paragraph 19(1)(*a*) of the *Social Security Tribunal Regulations* provides that a decision is deemed to have been communicated to a party "10 days after the day on which it is mailed to the party." This translates to September 29, 2016, in the Applicant's situation.

[18] According to paragraph 57(1)(*b*) of the 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. Given that the General Division decision is deemed to have been communicated on September 29, 2016, the Applicant had until December 28, 2016, to request leave to appeal. The Applicant filed an incomplete application for leave to appeal with the Tribunal on January 4, 2017. This was seven days past the 90-day requirement. Her application was completed on April 26, 2017, well beyond the 90-day limit.

[19] I considered the *Gattellaro* factors, above, and will address each of them separately. Regarding the first requirement, I find that the Applicant did not demonstrate a continuing intention to pursue the application. In respect of the requirement that the Applicant must demonstrate a continuing intention to pursue the application, I find that she did not demonstrate a continuing intention. The General Division decision was made on September 26, 2016. The incomplete Application was initially received after the 90 day requirement, on January 4, 2017. The Tribunal sent the Applicant a letter on January 6, 2017 advising her that the Application was incomplete and that it would consider the Application complete provided the Applicant provide the missing and required information prior to February 6, 2017. The Applicant took no action in this time frame.

[20] The Applicant next contacted the Tribunal on April 7, 2017, by telephone, and authorized a relative to represent her. On April 26, 2017, the Applicant sent a brief email, as prepared by her representative. This email sought permission to file an appeal.

[21] I find that this did not demonstrate a continuing intention to file an appeal. The Applicant took no action within the required 90 days to file an appeal. Further, she took no action to meet the February 6, 2017, deadline and it was not until April 26, 2017, that the Applicant requested reconsideration.

[22] In respect of the *Gattellaro* factor that the matter must disclose an arguable case, I find that it does not. *Canada (Human Resources Development) v. Hogervorst*, 2006 FC 401 held that an arguable case in the context of a request for an extension of time requires that some reasonable chance of success, at law, be established. The Applicant did not identify any grounds for appeal, any errors of fact or law, or any failure to observe a principle of natural

justice. On her initial, incomplete application submitted on April 4, 2017, she provided no reasons. On April 26, 2017, in her email to the Tribunal, she indicated only that the General Division "made an important error regarding the facts contained in the appeal file." She provided no further information, or context, to this statement. Further, she submitted that all the medical evidence had been submitted in her application and she requested that it be reviewed. In essence, the Applicant was seeking to have the same facts or submissions as those that were before the General Division reviewed as she did not agree with the General Division decision.

[23] The Applicant did not appear at her hearing before the General Division on August 15, 2016. There was some confusion, initially, about the start time of the hearing. The Tribunal had contacted her via telephone that same morning, and she advised the Tribunal that she would call in forthwith; however, she did not call back to join the teleconference. She was contacted again later that morning and advised via telephone that she would need to request an adjournment, in writing.

[24] The Tribunal contacted the Applicant via telephone on August 30, 2017, September 1, 2017 and September 2, 2017. The Applicant was encouraged to seek an adjournment in writing. The Applicant advised the Tribunal she would do so in September 2017. However, the Applicant made no request for an adjournment.

[25] The matter proceeded on September 16, 2016, without the attendance of either party. The General Division provided its rationale, indicating that, despite several attempts to communicate with the Applicant, she had made no request for an adjournment and she had shown no effort to have the hearing rescheduled.

[26] The Applicant provided subjective documentary evidence to the General Division, which indicated that she suffered from severe arthritis in her right knee, as diagnosed by her family physician as well as by a surgeon. This caused her "unbearable pain and suffering" and restricted her ability to carry on routine household activities or to lift anything heavy. She walked with the assistance of a cane and she had left her job on April 20, 2013, due to her health. Further, this was impacting her emotional health and she was depressed.

[27] In its decision, the General Division found that the Applicant had started to receive a CPP retirement pension in April 2013 and, as a result, would have to be found disabled the month before she started to receive the CPP retirement pension, as required in subsection 66.1(1.1) of the CPP.

[28] The General Division reviewed all the medical evidence presented, which included a November 5, 2013, medical report completed by her family doctor. This report indicated that the Applicant suffered from severe osteoarthritis in her right knee and possibly had a Baker's cyst. This report also indicated a pituitary tumor, hypothyroidism, an aneurism and hypercholesterolemia. The doctor indicated that the Applicant was being referred for a knee replacement, which was ultimately completed in August 2014.

[29] The General Division considered the Applicant's subjective documentary evidence, where she had indicated in the CPP questionnaire that her knee problems limited her abilities. The Applicant raised no other conditions.

[30] The General Division found that the Applicant did not have a disability that was severe as required by paragraph 42(2)(*a*) of the CPP. It was not satisfied that the Applicant was "incapable regularly of pursuing all substantially gainful occupations on or before March 31, 2013." It found that the Applicant had continued to work beyond March 31, 2013.

[31] The General Division found that there was no evidence to indicate that the Applicant's work after March 31, 2013, was not substantially gainful, not productive, was for a "benevolent employer" and was only due to special accommodations. It considered the medical and subjective evidence.

[32] The General Division considered the severe criterion in a "real world" context, applying *Villani v. Canada (Attorney General)*, 2001 FCA 248. It found that the Applicant's work activity after March 31, 2013, precluded a finding of a severe disability.

[33] The General Division did not consider the requirement that the disability be "prolonged," as this was unnecessary when it found that the disability was not "severe."

[34] I find that the Applicant does not have an arguable case. I find that the General Division appropriately considered all the available evidence. The Applicant began receiving her CPP retirement pension in April 2013. She worked until April 20, 2013. As per *Klabouch v. Canada (Social Development)*, 2008 FCA 33, at paragraph14, it is the capacity to work and not the diagnosis of the disease that determines the severity of the disability under the CPP.

[35] In respect of the *Gattellaro* factor that the Applicant must have a reasonable explanation for the delay, I find that she did not. On the initial, incomplete application, she indicated that she was away visiting with family. She provided no other information as to why this precluded her from completing the application. Further, she took no action until April 26, 2017, and provided no further information as to why she had been delayed in applying.

[36] In respect of the *Gattellaro* factor that the potential for prejudice to the other party must be considered, I find that there is no prejudice to the Respondent. The Respondent would have access to any information and documentation required to present its case.

[37] I find that the Applicant has not met the requirements of the *Gattellaro* factors as explained above. Further, as per *Larkman*, above, I have considered the overall interests of justice and I do not find that the Applicant has met the requirements for an extension of time.

Whether the appeal has a reasonable chance of success

[37] Because I have refused the application requesting leave to appeal, I do not have to consider whether the appeal has a reasonable chance of success.

CONCLUSION

[37] The Application for an extension of time to file the Application Requesting Leave to Appeal is refused.

Peter Hourihan
Member, Appeal Division