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

Citation: *K. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 363

Tribunal File Number: AD-16-1231

BETWEEN:

K. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Meredith Porter

Date of Decision: July 25, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated July 8, 2016, which determined that the Applicant was not entitled to receive payment of a disability pension under the *Canada Pension Plan* (CPP).

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on October 25, 2016, which appears to have been beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[3] The Member must decide whether an extension of time to file the Application should be granted.

THE LAW

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

[5] The Member 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.

[6] 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.

[7] 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.

APPLICANT'S SUBMISSIONS

[8] The Applicant submits the General Division based its decision on an erroneous finding of fact without regard for the material before it, as the General Division failed to properly weigh or consider the medical evidence in the record before it with respect to the Applicant's diagnosed health conditions and the combined effect of the Applicant's health conditions on his ability to work, including the injury to his right foot and ankle, the residual pain in his back and neck, and his suffering from depression.

[9] The Applicant further submits that the General Division erred in law in failing to properly apply the factors set out by the Federal Court of Appeal in *Villani* v. *Canada (Attorney General)*, 2001 FCA 248.

[10] Finally, the Applicant submits that an extension of time ought to be granted, as the factors for considering whether to grant an extension of time, as set out in *Gattellaro*, should be both balanced and resolved in his favour. Further, the interests of justice should be the paramount consideration as indicated in *Larkman*, and the interests of justice would be served only in granting an extension of time in this case.

ANALYSIS

[11] The General Division rendered its decision on July 8, 2016. The decision was communicated to the Applicant on July 18, 2016. Pursuant to paragraph 57(1)(*b*) of the DESD Act, to file an application requesting leave to appeal a General Division decision, applicants have 90 days after the day on which the General Division decision is communicated to them in

which to do so. Therefore, the Applicant had until October 16, 2016, to file a leave to appeal application with the Appeal Division. He filed his application requesting leave on October 25, 2016, which is nine days beyond the time limit. I must consider whether an extension of time to file his application should be allowed. I have set out the *Gattellaro* factors in paragraph 5 above, which are the four factors that should be considered when deciding whether an extension should be granted. However, the overriding consideration is that the interests of justice be served. (*Larkman*)

[12] I find that the Applicant has satisfied several of the factors set out by the Federal Court in *Gattellaro*. In particular, they are: the Applicant has provided a reasonable explanation for the delay; there has been a demonstrated continued intention to pursue the appeal; and there does not appear to be any prejudice that would result to the other party should an extension be granted. However, I do not find that the Applicant's matter discloses an arguable case that has a reasonable chance of success.

Reasonable Explanation for the Delay

[13] The Applicant confirmed that he had received the General Division decision on July 20, 2016. However, his representative (at the time that the General Division decision was communicated) had received the decision on July 26, 2016. On September 8, 2016, the Applicant communicated, to his representative at the time, his intention to pursue an appeal of the General Division, and she believed the application requesting leave to appeal needed to be filed by October 26, 2016, which is 90 days after the day on which the decision had been communicated to her. This is an interpretation error of paragraph 57(1)(*b*) the DESD Act on the representative's part, as paragraph 57(1)(*b*) refers to the date on which the General Division's decision is "communicated to the Applicant."

[14] The Applicant was out of the country from September 9 to October 31, 2016. He was unable to confirm that the representative had filed the application requesting leave to appeal during that period of time.

[15] The Appeal Division finds that this is a reasonable explanation for what is a very short delay in filing an application requesting leave to appeal.

Continued Intention to Pursue the Appeal

[16] The Applicant received the decision on July 20, 2016, and contacted his representative on September 8, 2016, to communicate his desire to appeal the General Division decision. He did so in anticipation of his pending, extended trip out of the country. He was absent for roughly seven weeks, and he had requested that his application seeking leave to appeal be filed during that time. It was filed, but it was filed six days late.

[17] I find that this demonstrates a continued intention to pursue the appeal.

Prejudice to Other Party

[18] The Applicant submits that there was no substantive delay and considers that "the Respondent's ability to respond given its resources, would not be unduly affected by an extension of time to appeal" (citing from the General Division decision for Appeal No. GP-14-4030 (18 August 2014; Schoegl)).

[19] The delay in filing the application was only nine days, and the Appeal Division cannot find any evidence that granting the extension of time would result in prejudice to the Respondent.

Matter Discloses an Arguable Case

[20] This factor has proven most difficult for the Applicant to demonstrate. The Applicant argues that the General Division failed to consider the combined effect of the Applicant's health conditions on his ability to work at a substantially gainful occupation. The Applicant also argues that the General Division failed to consider and apply the *Villani* factors in a meaningful way with respect to the Applicant's circumstances in this case.

[21] The Applicant has submitted that the General Division erred in law by failing to properly apply the *Villani* principles. Specifically, the Applicant argues that the General Division failed to consider evidence that the Applicant was incapable "regularly" of pursuing "substantially" gainful employment. The Applicant bases this argument on several references to medical reports and information contained in the record. I find that, primarily, the Applicant's argument that the General Division erred in law regarding the application of *Villani* is based on

the Applicant's oral evidence—that he is incapable regularly of pursuing any substantially gainful occupation.

[22] The real-world context set out in *Villani* does not refer to an Applicant's subjective assessment of whether in a "real world" they could work. The real-world context in *Villani* means that certain factors should be kept in mind when determining the severity of a person's disability and their subsequent capacity for employment. These factors include the Applicant's age, level of education and language proficiency, as well as past work and life experience. In this case, the General Division considered the *Villani* factors at paragraph 37 of the decision. The Applicant was relatively young at his MQP date, being 47 years old. He had completed a grade 8 education and he had successfully worked for many years at the same job. Although he had relied on the use of an interpreter at the start of his hearing before the General Division, he then answered, on his own, the questions put to him, and there were no issues with his language proficiency. There is no evidence that the Applicant suffered any cognitive impairment at the time of any of the motor vehicle accidents that he experienced that would affect the Applicant's ability to pursue further education or retraining opportunities.

[23] The Applicant argues that he has no additional educational or professional training and that he had attempted to gain some computer skills in 2001, but he had found the course difficult. I note, however, that employability is not limited to the Applicant's chosen field of employment (see *Doucette v. Canada (Minister of Human Resources Development)*, [2005] 2 FCR 44, 2004 FCA 292). The test is not whether the Applicant is unable to do his particular job, but any occupation at all (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). It is the Applicant's duty to adduce evidence of his efforts to work at any job has failed because of his health condition (*Inclima* v. *Canada (Attorney General)*, 2003 FCA 117).

[24] The Federal Court of Appeal in *Villani* also stated that, in addition to adducing evidence of a severe and prolonged disability that renders an Applicant incapable regularly of pursuing any substantially gainful occupation, "medical evidence will still be needed **as will evidence of employment efforts and possibilities**…" [my emphasis]. The General Division based its decision on the lack of evidence of employment efforts and possibilities as is required by case law.

[25] The Applicant cites several diagnoses found in the record. The medical evidence that the Applicant has referred to does confirm that the Applicant suffers from more than one diagnosed health condition. However, determining disability under the CPP is not based on the diagnosed health condition but rather is determined based on the individual's capacity to work (*Klabouch*). Applicants seeking a disability pension must demonstrate that they have attempted to seek employment suitable to their medical condition, and they must diligently pursue their medical problems as well. In this case, the General Division found that the Applicant had been offered alternative, sedentary employment and that the employer had afforded him the opportunity to upgrade his computer skills. The Applicant, on his own volition, did not pursue this opportunity. The General Division acknowledged that the Applicant had attempted to upgrade his computer skills several years earlier in 2001, but the General Division did not find the fact that the Applicant had withdrawn, by his own choice, from upgrading because he had found the upgrading difficult to be persuasive evidence that the Applicant had demonstrated reasonable efforts more recently to retrain or secure gainful employment.

[26] With respect to the assertion that the General Division failed to consider the cumulative effect of the Applicant's health conditions on his ability to work, I do not find that this argument holds much weight. The General Division is required to consider not only an applicant's primary health condition, but also all health conditions from which an applicant suffers and what the cumulative effect of those health conditions are on their ability to work (*Bungay v. Canada (Attorney General),* 2011 FCA 47). At paragraph 36 of the decision, the General Division acknowledges that the Applicant's "main medical conditions as right foot pain, back pain, neck pain, headaches and depression." At paragraphs 39 and 40 of the decision, the General Division provides clear reasons why the medical evidence in the record, paired with the Applicant's oral testimony, does not reflect that the Applicant's health conditions prevent him from seeking work within his limitations:

> [39] […] On January 13, 2011, Dr. Gharsaa described his diagnosis as plantar fasciitis to be treated with cortisone shots. Dr. Gilbert Yee did not find any abnormalities with the Appellant's foot during his examination on February 1, 2011. Dr. Thomas John also noted in his report on April 26, 2012 that the Appellant has been instructed to do isometric stretching and strengthening exercises. The Appellant stated during his testimony that his condition gradually improved from 2010

> to 2011. He was not using crutches any longer and was able to wear shoes on both feet. Dr. Al Saied, who assessed the Appellant on October 30, 2012, did not observe any abnormalities with his right foot.
>
> [40] The Tribunal finds that even though the Appellant suffered a right foot injury in 2009, the medical evidence and his oral testimony shows that he had gradually recovered by 2012.

[27] The General Division has the right as the "trier of fact" to consider evidence and determine which evidence is most credible and reliable. It is not the Appeal Division's role to reassess or reweigh evidence that the General Division has already considered (*Parchment v. Canada (Attorney General)*, 2017 FC 354). Additionally, the General Division must provide reasons for its findings (see *Canada (Attorney General) v. Fink*, 2006 FCA 354; and DESD Act, subsection 53 (2)). The Applicant may disagree with the General Division's findings, but this argument is not sufficient to properly ground an appeal. Leave to appeal cannot be granted simply because an applicant disagrees with the weight that the General Division placed on documentary evidence.

[28] It is not my role to reassess the evidence but rather to determine whether the General Division decision is defensible on the facts and the law. If the Applicant is requesting that I reconsider and reassess the evidence and substitute my decision for the General Division in his favour, I must emphasize that I am unable to do this. The authority of Appeal Division members is to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) of the DESD Act, and whether any of them has a reasonable chance of success.

[29] I cannot find that the Applicant has argued a ground of appeal that has a reasonable chance of success.

[30] In consideration of the other *Gattellaro* factors, and with the acknowledgement that certain factors might be more relevant than others, in this case, the interests of justice would not be served in granting an extension of time or in granting leave to appeal, as the Applicant has no reasonable chance of success going forward. I have attributed greater weight to the fact that the Applicant has not demonstrated that he has an arguable case in deciding whether an extension of time should be granted. The Appeal Division is permitted to determine whether

any of the Applicant's reasons for appealing a General Division decision falls within one of the specified grounds in subsection 58(1) of the DESD Act and whether any of them has a reasonable chance of success. I see no reasonable chance of success on the grounds of appeal that the Applicant has put forward and, although the Applicant asserts that the interests of justice can be served only by granting an extension of time, I do not consider that granting an extension of time to pursue an appeal that fails to disclose an arguable case serves the interests of justice.

CONCLUSION

[31] An extension of time to apply for leave to appeal is refused.

Meredith Porter
Member, Appeal Division