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

Citation: *L. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 369

Tribunal File Number: AD-17-267

BETWEEN:

L. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: July 26, 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 February 23, 2017, which refused the Applicant's request for an extension of time to file her appeal with the General Division.

[2] The Respondent refused the Applicant's initial application for a disability pension under the *Canada Pension Plan* (CPP) by decision dated February 15, 2016, and on reconsideration dated July 18, 2016. The Applicant's representative filed the Notice of Appeal of the Respondent's reconsideration decision on November 22, 2016, which was beyond the 90-day time limit set out in paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act). The General Division refused the Applicant's request for an extension of time to file her Notice of Appeal.

[3] The Applicant filed an application for leave to appeal (Application) the General Division's decision with the Tribunal's Appeal Division on March 29, 2017.

ISSUES

[4] There are two issues before me:

i. Did the General Division inappropriately exercise its discretionary power when it refused to grant an extension of time?
ii. Does the appeal have a reasonable chance of success?

THE LAW

[5] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal." Determining leave to appeal is a preliminary step to a hearing on the merits and is an initial hurdle for an applicant to meet; however, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[6] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal 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).

[7] According to subsection 58(1) of the DESD Act, 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[8] The Applicant submits that 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, based on the following assertions:

i. The General Division erred in finding that "the [Applicant's] representative had sufficient information with which to file an appeal" as the Respondent had failed to provide the Applicant's representative with a copy of the reconsideration decision when it was rendered and the representative could not file a complete Notice of Appeal without reading the reconsideration decision and including a copy of it with the Notice of Appeal.

ii. The General Division erred in finding that the Applicant did not need to meet face-to-face with her representative in order to file a complete Notice of Appeal as the

Applicant needed to sign both her Notice of Appeal and the Authorization to Disclose prior to the Notice of Appeal being filed with the Tribunal and this mandated a face-to-face meeting.

iii. The General Division erred in finding that the Applicant was capable of filing her Notice of Appeal on time, even if her representative was not.

ANALYSIS

[9] Subsection 52(2) of the DESD Act confers the discretionary power to extend the time for filing an appeal on the General Division. In this case, the General Division found that the Applicant had failed to meet one of the criteria for which an additional extension may be granted. According to the General Division, the Applicant had not provided a reasonable explanation for her delay.

[10] For leave to appeal to be granted, the Applicant must demonstrate that the General Division inappropriately exercised its discretionary power when it refused to grant an extension of time. An improper exercise of discretion occurs when a member gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts, or where injustice would result.

[11] For the reasons that follow, I find that the Applicant has sufficiently demonstrated that the General Division may not have appropriately exercised its discretion in this case and, therefore, leave to appeal is granted. The Applicant has sufficiently demonstrated that the General Division may have erroneously misapprehended the facts.

Did the General Division err in finding that the Applicant's representative had sufficient information with which to file an appeal?

[12] The Applicant has submitted that, in finding that "the [Applicant's] representative had sufficient information with which to file an appeal," 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, pursuant to paragraph 58(1)(*c*) of the DESD Act. Specifically, the Applicant's representative argues that the Respondent had failed to provide the Applicant's representative with a copy of the reconsideration decision when it was rendered despite having

filed a Consent to Communicate document with the Respondent by mail on June 14, 2016, and again by fax on June 29, 2016. The representative argues that he could not file a complete Notice of Appeal without first reading the reconsideration decision and including a copy of it with the Notice of Appeal.

[13] Pursuant to paragraph 52(1)(*b*) of the DESD Act, an appeal of a reconsideration decision must be made to the General Division within 90 days after the day on which the decision was communicated to the Applicant.

[14] In this case, the Applicant acknowledged that she had received the Respondent's reconsideration decision on July 25, 2016. Her representative was not sent a copy of the decision, and was informed by the Applicant on August 4, 2016, that the decision denied her a disability pension.

[15] Section 24 of the *Social Security Tribunal Regulations* (SSTR) sets out the form and content that an appeal to the General Division must include in order to be considered complete. That section reads as follows:

> 24 (1) An appeal must be in the form set out by the Tribunal on its website and contain
>
> (a) a copy of the decision that was made under subsection 81(2) or (3) of the Canada Pension Plan, subsection 27.1(2) of the Old Age Security Act or section 112 of the Employment Insurance Act;
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> (b) the date the decision was communicated to the appellant;
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> (c) if a person is authorized to represent the appellant, the person's name, address, telephone number and, if any, facsimile number and email address;
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> (d) the grounds for the appeal;
>
> (e) any documents or submissions that the appellant relies on in their appeal;
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> (f) an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal;
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> (g) the appellant's full name, address, telephone number and, if any, facsimile number and email address; and

> (h) a declaration that the information provided is true to the best of the appellant's knowledge.

[16] At the time when the Applicant filed her appeal with the General Division, she was required to file an Authorization to Disclose along with her Notice of Appeal in order to allow the Tribunal to communicate with her representative. The Applicant's representative had scheduled a meeting with the Applicant within the 90-day time limit in order to obtain a copy of the reconsideration decision, prepare the Notice of Appeal and Authorization to Disclose, and have the Applicant sign both forms. This meeting was cancelled and the representative could not obtain the necessary information and signature on the authorization documents in order to complete the appeal.

[17] I also note that, on reading the information provided on both the Tribunal's forms and website, applicants seeking to appeal a decision to the General Division are provided with instructions. Those instructions read (in part) as follows:

> Section 4
>
> Set out all the reasons why you do not agree with the reconsideration decision and be as specific as possible. You may use additional paper if you do not have enough space on the Form. Please provide as much detail as possible when describing why you do not agree with the reconsideration decision: explain why you think the reconsideration decision is wrong and why the Tribunal member should change it.
>
> Section 5
>
> Send the Tribunal photocopies of documents. Keep the originals in your own file.
>
> Include with the form copies of any documents that support the reasons for your appeal. You may also send documents to the Tribunal later. The Tribunal will send you additional information about the appeal process and include the time limits for sending documents.
>
> Section 6
>
> You must indicate if you will present your own appeal or if someone else will represent you. Your Representative may be a family member, friend, agency worker, lawyer, or another professional. If you have a Representative, Section 6 must be completed. It must be signed by your representative in Section 7.

> Section 8
>
> By signing the "Notice of Appeal" form, you are saying that the information provided - in the Form and the documents you send in with the Form - is true to the best of your knowledge.

[18] The Applicant's representative argues that the General Division was in error when it determined that the representative had sufficient information with which to file an appeal. I find that this argument holds weight. Section 4 above requires applicants to set out the reasons for their appeal. This requires access to and a review of the reconsideration decision, a copy of which was not sent to the Applicant's representative. Therefore, he was not in a position to draft reasons without receiving a copy of the decision from the Applicant (which he asserts he had intended to do at the October meeting). Section 5 invites the filing of documents and any additional evidence in support of an applicant's appeal, and indicates that the time limits for filing documents will be sent in future communication. The Applicant's representative argues that he could not determine what additional information or evidence was necessary to support the Applicant's appeal without having reviewed the reconsideration decision. Section 6 requires that both the Applicant and her representative sign the Notice of Appeal and the section authorizing the Tribunal to communicate with the representative on the Applicant's behalf in the future. Finally, section 8 is a declaration that also requires the Applicant's signature.

[19] The Applicant's representative had attempted to obtain this missing information prior to the expiration of the 90-day time limit but has argued that he was unable to file the Notice of Appeal without it. The Applicant's representative asserts that the General Division's statement at paragraph 26 of its decision, that the Applicant's representative had sufficient information to file the Notice of Appeal, appears to be a misstatement of fact. I find that the Applicant has sufficiently demonstrated that the General Division may not have appropriately exercised its discretion in this case, as the General Division appears to have erroneously misapprehended the facts. This is a ground of appeal for which I am willing to grant leave to appeal, as it may have a reasonable chance of success if proven on its merit.

[20] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 (CanLII), stated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. In *Mette*, Dawson J.A. stated that subsection 58(1) of the

DESD Act "does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." The other grounds of appeal that the Applicant's representative has submitted are interrelated with the analysis of whether her health condition is severe and prolonged. As a result, I am not required to address the other grounds that the Applicant has submitted in her application for leave to appeal.

CONCLUSION

[21] The Application is granted.

[22] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[23] I invite the parties to make further written submissions within the 45-day time limit allowed, including submissions for consideration as to whether a hearing is necessary.

Meredith Porter
Member, Appeal Division