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

Citation: *W. W. v. Minister of Employment and Social Development,* 2017 SSTADIS 364

Tribunal File Number: AD-16-188

BETWEEN:

W. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: July 26, 2017

Canada

REASONS AND DECISION

DECISION

Extension of time to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 4, 2015. The General Division had previously conducted a hearing by videoconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because his disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2014.

[2] On January 20, 2016, the Applicant submitted an incomplete application requesting leave to appeal to the Tribunal's Appeal Division. Following a request for further information, the Applicant completed his request for leave to appeal on November 21, 2016, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

ISSUES

[3] For this application to succeed, I must first determine whether the Applicant's application for leave to appeal was late and, if so, whether it can proceed. Should I decide that the application was late but not statute-barred, only then can I consider whether that the appeal would have a reasonable chance of success.

THE LAW

Department of Employment and Social Development Act

[4] According to subsection 56(1) of the DESDA, an appeal to the Appeal Division may only be brought if leave to appeal is granted.

[5] Pursuant to paragraph 57(1)(*b*), an appeal must be brought to the Appeal Division within 90 days after the day on which the decision was communicated to the appellant. Under subsection 57(2), the Appeal 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.

[6] 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.

[7] 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.

[8] 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.

[9] 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 (Minister of Human Resources Development) v. Hogervorst*[1] and *Fancy v. Canada (Attorney General).*[2]

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Social Security Tribunal Regulations

[10] According to subsection 19(1) of the Social *Security Tribunal Regulations* (SST Regulations), a decision of the General Division made under subsection 54(1) of the DESDA is deemed to have been communicated to a party:

(a) if sent by ordinary mail, 10 days after the day on which it is mailed to the party;

(b) if sent by registered mail or courier, on

(i) the date recorded on the acknowledgement of receipt, or

(ii) the date it is delivered to the last known address of the party; and

(c) if sent by facsimile, email or other electronic means, the next business day after the day on which it is transmitted.

[11] Subsection 19(2) says that subsection (1) also applies to any other document sent by the Tribunal to a party.

[12] According to subsection 40(1) of the SST Regulations, a request for leave to appeal to the Appeal Division must be in the form set out by the Tribunal on its website and must contain:

(a) a copy of the decision in respect of which leave to appeal is being sought;

(b) if a person is authorized to represent the applicant, the person's name, address, telephone number and, if any, facsimile number and email address;

(c) the grounds for the application;

(d) any statements of fact that were presented to the General Division and that the applicant relies on in the application;

(e) if the application is brought by a person other than the Minister or the Commission, the applicant's full name, address, telephone number and, if any, facsimile number and email address;

(f) if the application is brought by the Minister or the Commission, the address, telephone number, facsimile number and email address of the Minister or the Commission, as the case may be;

(g) an identifying number of the type specified by the Tribunal on its website for the purpose of the application; and

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

SUBMISSIONS

[13] In his letter requesting leave to appeal dated January 20, 2016, the Applicant wrote that he had agreed to participate in a videoconference to plead his case, but when the time came, "nobody was present." He was made to feel as though his case was irrelevant.

[14] The Applicant also criticized the General Division's decision, disputing selected findings:

- The General Division found that he was not excluded from all types of work, but it ignored evidence that he suffers from fainting spells and cannot walk even short distances without having to stop and rest. Nobody would hire a person with his limitations.

- The General Division found that his volunteering as a driver for senior citizens indicated capacity, but it disregarded the fact that he had ceased this activity out of concern his health conditions were placing lives in danger.

- The General Division mentioned his divorce as a factor in his depression, but this personal information should not have had any bearing on the decision. The Applicant says that he takes Cymbalta to help reduce—although not cure—his headaches. He has taken a variety of medications in an effort to find something that works.

- The General Division drew an unwarranted conclusion from Dr. Dyck's November 2014 pledge to continue monitoring the Applicant's health with a view to returning him to the workforce. The Applicant submits that his family physician's "hope" that he will regain functionality is not a valid reason for the General Division to dismiss his appeal.

[15] The Applicant maintained that his disability is severe and prolonged and has deteriorated since October 2012. He requires help bathing, dressing and preparing meals. He is subject to blackouts and frequent falls. He longer drives and is afraid to venture outside his home.

[16] In a letter dated January 26, 2016, the Appeal Division staff advised the Applicant that his application requesting leave to appeal was incomplete. It requested him to forward, in writing, the following missing items of information:

- an explanation for why the Applicant believed his application for leave to appeal to the Appeal Division had a reasonable chance of success;
- any statements of fact that were presented to the General Division and that the Applicant is relying on in this Application; and
- a signed declaration from the Applicant that the information provided for the appeal was true to the best of his knowledge.

[17] The record indicates that, on April 11, 2016, the Applicant telephoned the Tribunal seeking an update on the status of his file. He was asked whether he had received the letter of January 26, 2016, to which he replied that he neither he nor his representative had received it. The next day, Tribunal staff mailed a copy of the letter to the Applicant.

[18] On May 9, 2016, the Applicant called the Tribunal to advise it that he had received the copy of the letter advising him that his application was incomplete.

[19] On October 11, 2016, the Applicant's representative called the Tribunal to inquire about the status of the appeal. A Tribunal staff member noted the conversation in a memorandum:

> I informed her that it [the application for leave to appeal] was incomplete. She said her husband, the appellant, had mailed in the response "a good two months ago." I explained that we did not receive it. She said she will review her file in order to try to find the response so she can re-submit. She also asked if we could re-send the incomplete letter, just in case.

[20] A second copy of the "incomplete" letter was mailed to the Applicant on October 14, 2016.

[21] The Tribunal did not receive any written communication from the Applicant or his representative until November 21, 2016, when the Applicant's wife submitted a letter requesting permission to "re-appeal" based on the following points:

- Dr. Krauss stated in a letter that the Applicant is a stay-at-home dad. This is not true, as his children are usually in daycare or at school.

- Their doctor has written a letter stating that he does not ever see her husband going back to work. The Applicant has been diagnosed with chronic fatigue syndrome. In some jurisdictions, this condition is accepted as grounds for disability. She is increasingly required to perform personal care tasks for him because he can no longer do them himself.

- When they had their teleconference [*sic*] before the General Division, they were advised that three people would be in attendance. However, they spoke to only one person. They did not feel as though they had been taken seriously and suspected that the decision had already been made.

[22] Enclosed with this submission was a letter from Dr. Dyck dated December 5, 2015, and a declaration that all the information that the Applicant had provided was true. At this point, the Applicant was notified that his application requesting leave to appeal was deemed complete.

ANALYSIS

[23] This case turns on whether the Applicant fulfilled technical requirements to file an application requesting leave to appeal. Subsection 40(1) of the SST Regulations set outs a series of specific tasks for anyone seeking to challenge a General Division decision. Subsection 57(2) of the DESDA establishes a hard deadline of one year by which those tasks must be fulfilled.

[24] Having reviewed the record, I must, regretfully, find that the Applicant is barred from pursuing his application for leave to appeal. The General Division's decision was issued on November 4, 2015 and mailed the same day to the Applicant at his last known residential address. According to paragraph 19(1)(*a*) of the SST Regulations, a decision is deemed to have been communicated to a party 10 days after the date on which it was mailed. From that point,

according to section 57, an applicant has 90 days in which to submit a request for leave to appeal, but under no circumstances may an extension be granted after one year has elapsed.

[25] In this case, an application for leave to appeal was submitted to the Appeal Division on January 20, 2016, less than 90 days after the issuance of the General Division's decision, but Tribunal staff deemed it incomplete. Having reviewed the Applicant's submission from that time, I am compelled to agree that it was missing, at the very least, the requisite declaration, under paragraph 40(1)(*h*) of the SST Regulations that the information provided was true to the best of his knowledge. The record indicates that the Applicant and his authorized representative both claimed to have never received the Tribunal's January 26, 2016 letter advising them that their application was incomplete; however, they had certainly received a copy of said letter as of May 9, 2016, yet it took more than six months for them to reply, by which time the hard deadline had come and gone.

[26] For applications for leave to appeal submitted more than one year after the issuance of a General Division decision, the law is strict and unambiguous. In this case, the clock began running on November 14, 2015—10 days after the mailing of the General Division's decision—and it stopped on November 21, 2016, the date on which the Applicant fulfilled the filing requirements under subsection 40(1) of the SST Regulations. While the Applicant succeeded in completing his application for leave to appeal only a week after the one-year mark, the fact remains that he missed the hard deadline enshrined in statute. In prior correspondence, the Applicant suggested that his response to the request for missing information was lost in transmission at some point during the summer of 2016, but I find this explanation unlikely and, moreover, the Applicant was given notice as of October 11, 2016—more than a month before the hard deadline—that his application remained incomplete. In any case the wording of subsection 57(2) all but eliminates scope for a decision-maker to exercise discretion or consider extenuating circumstances once a year has elapsed.

[27] It is indeed unfortunate that a filing lapse may have denied the Applicant an appeal, but I am bound to follow the letter of the law. My authority as an Appeal Division member permits me to exercise only such jurisdiction as granted by its enabling statute; I cannot simply waive a filing deadline, however sympathetic the applicant may be. Support for this position may be

found in *Pincombe v. Canada*,[3] 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.

CONCLUSION

[28] As the Applicant's application for leave to appeal comes more than one year after the General Division's decision was communicated to him, I need not consider whether the Applicant would stand a reasonable chance of success on appeal.

[29] The application is refused.

Member, Appeal Division

[3] *Pincombe v. Canada* (Attorney General), [1995] F.C.J. No. 1320 (F.C.A.) (QL).