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

Citation: *F. Y. v. Minister of Employment and Social Development,* 2017 SSTADIS 423

Tribunal File Number: AD-16-1367

BETWEEN:

F. Y.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: August 21, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) issued on April 15, 2016. The General Division refused an extension of time to appeal the Respondent's reconsideration decision that had determined that the Applicant's disability was not "severe" at the time of his minimum qualifying period (MQP) of December 31, 1992.

[2] The General Division found that the Applicant had completed his appeal on February 15, 2016, which was over one year after the Applicant had received the reconsideration decision. Since subsection 52(2) of the *Department of Employment and Social Development Act* (DESD Act) states that in no case may an appeal be brought more than one year after the reconsideration decision was communicated to an appellant, the Tribunal cannot grant an extension of time and the appeal will not proceed.

[3] The Applicant takes the position that the General Division erred in its finding of the date of the Applicant's receipt of the reconsideration decision and the time it takes for delivery of mail from Canada to X, Chile. The Applicant's representative argues that the General Division made serious errors in its finding of facts. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

SUBMISSIONS

[4] The Applicant seeks leave to appeal on the following grounds:

a) The General Division made erroneous findings of fact without regard to the material before it by:

   1. failing to consider the real mailing time for correspondence sent from Canada to arrive in X, Chile (the Applicant's residence); and

   2. failing to assess the evidence on whether the Applicant's mental illness establishes that he had a severe and prolonged disability in or before December 1992.

THE LAW

[5] Although a leave to appeal application is an initial and lower hurdle to meet than the one that must be met on the hearing of the appeal on the merits, for leave to appeal to be granted, some arguable ground upon which the proposed appeal might succeed is required: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (QL). In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, the Federal Court of Appeal found that an arguable case at law is akin to determining whether, legally, an applicant has a reasonable chance of success.

[6] Subsection 58(1) of the DESD Act states that 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.

ANALYSIS

[7] Before leave to appeal can be granted, the Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal, and at least one of the reasons has to have a reasonable chance of success.

[8] The General Division found that the Applicant's appeal to the Tribunal had been filed more than one year after he had received the reconsideration decision. Therefore, by operation of subsection 52(2) of the DESD Act, the appeal that the Applicant had been seeking to bring could not be brought; it was time-barred by subsection 52(2).

[9] The reconsideration decision that the Applicant seeks to appeal is dated May 9, 2014. The General Division found that the reconsideration decision had been communicated to the Applicant by June 10, 2014, and that the Applicant had filed a complete appeal with the

Tribunal on February 15, 2016. These two dates—the date on which the Applicant received the reconsideration decision and the date on which the Applicant filed a complete appeal with the Tribunal—are central to an analysis of whether the appeal was "brought more than one year after the reconsideration decision was communicated to an appellant."

[10] The General Division referred to the Applicant's Notice of Appeal filed on December 9, 2014. In that Notice, the Applicant states that he could not appeal within the appeal period because "the letter arrived over a week ago" and "the mailing system in Chile is very slow."

[11] The Tribunal sent letters to the Applicant informing him that his appeal was incomplete and that, in order to complete the appeal, he must file: (1) a copy of the reconsideration decision being appealed; and (2) the date that that decision was communicated to him.

[12] The Applicant's representative replied by email on February 2, 2015, that the Applicant "does not remember what date he received the letter." In a letter that the Tribunal received on March 24, 2015, the Applicant had enclosed a copy of the reconsideration decision and a copy of a letter to Service Canada replying to the reconsideration decision dated July 25, 2014.

[13] The General Division decision does not explain why it found that the reconsideration decision had been communicated to the Applicant by June 10, 2014, and that the Applicant had filed a complete appeal on February 15, 2016, when the material before it could have supported a finding that the reconsideration decision had been communicated to the Applicant in July 2014 and that a complete appeal had been filed with the General Division in March 2015.

[14] In *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13, the Federal Court of Appeal cautioned that if a board (or tribunal) decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision. Failing to do so presents a risk that its decision will be marred by an error of law or that it will be qualified as capricious.

[15] By not addressing the contradictory evidence pertaining to these two dates, the General Division's finding on one or both of these dates may be qualified as capricious.

[16] In the words of paragraph 58(1)(*c*) of the DESD Act, the General Division may have 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 by finding that:

a) the Applicant had received the reconsideration decision by June 10, 2014; and

b) the Applicant had filed a complete appeal only on February 15, 2016.

CONCLUSION

[17] The Application is granted pursuant to paragraphs 58(1)(*c*) of the DESD Act.

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

Shu-Tai Cheng
Member, Appeal Division