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

Citation: *V. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 431

Tribunal File Number: AD-16-1316

BETWEEN:

V. L.

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: August 23, 2017

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] In a decision dated August 16, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant, because she did not have a severe and prolonged disability prior to the end of the minimum qualifying period (MQP), which ended on December 31, 2014.

[2] On November 18, 2016, the Applicant filed an incomplete application requesting leave to appeal with the Tribunal's Appeal Division. Following two requests for additional information, the Applicant perfected her application for leave to appeal on February 24, 2017, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[3] The Appeal Division must decide whether an extension of time to file the application for leave to appeal should be granted.

THE LAW

Department of Employment and Social Development Act

[4] Pursuant 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. Under subsection 57(2), the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[5] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

(a) The applicant demonstrates a continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) There is no prejudice to the other party in allowing the extension; and

(d) The matter discloses an arguable case.

[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 v. Larkman.*[2]

[7] 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. The Appeal Division must either grant or refuse leave to appeal. 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] According to subsection 58(1) of the DESDA, 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.

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

hearing of the appeal on the merits. At the leave to appeal stage, an applicant does not have to prove the case.

[10] 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 v. Hogervorst*;[3] *Fancy v. Canada.*[4]

Canada Pension Plan

[11] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[12] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[13] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

APPLICANT'S SUBMISSIONS

[14] In a letter dated November 9, 2016,[5] the Applicant advised the Tribunal that she wanted to appeal the General Division's decision because she believed "her mental state was not ready to perform." She said that her mood had been very low, and that her memory had been very poor. She had been changing her medications every month because of side effects and, although

[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[5] Received by the Tribunal on November 18, 2016.

her latest trial had caused her no harm, it had failed to help her mood or memory. She had been off work for more than five years and did not know when she would recover.

[15] On November 29, 2016, the Tribunal advised the Applicant that her application put forward insufficient grounds and was missing required information. In a letter dated December 9, 2016,[6] the Applicant acknowledged the Tribunal's request for additional material and argued that the General Division failed to evaluate important medical information. She disputed the General Division's finding that, at one point, she had received benefits from medications. It did not mention that, when the doses were increased, she suffered side effects, including sleepiness, headaches, rashes and an upset stomach. Dr. Tran, her psychiatrist, has since changed her medications, and she has been free of side effects in the last three months, although her mood, memory and powers of concentration remain poor.

[16] The Applicant also complained that the General Division requested information from her family physician, Dr. Cheng, that was irrelevant or insufficient to explain her condition. The Applicant contends that Dr. Cheng is not aware of her entire mental state and has not received reports from Dr. Tran, who sees her every month. She asks the General Division to request updated medical reports from Dr. Tran so it can evaluate her mental state. She claims that she is incapable of working at all because she does not want to see people. She feels sad all the time, and she is motivated only to take care of her son and daughter.

[17] In a letter dated January 11, 2017, the Tribunal advised the Applicant that her application was still missing, as required, a signed declaration that the information she had provided was true to the best of her knowledge. On February 24, 2017, the Applicant submitted the declaration, and her application was declared complete.

ANALYSIS

[18] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the General Division issued its decision on August 16, 2016, and that the Tribunal received the Applicant's incomplete request for leave to appeal to the Appeal Division on November 18, 2016. The application was not perfected until February 24, 2017—192 days

[6] Received by the Tribunal on January 10, 2017.

after the General Division's decision was mailed, and well after the 90-day filing deadline set out in subsection 57(1) of the DESDA.

[19] In deciding whether to allow further time to appeal, I considered and weighed the *Gattellaro* factors.

Continuing Intention to Pursue the Appeal

[20] Although the Applicant did not file a complete application for leave to appeal until more than three months after the expiry of the statutory limitation, I am willing to assume that she had a continuing intention to pursue the appeal, since her first submission to the Appeal Division came within the filing period, and she responded fairly diligently to the Tribunal's request for information thereafter.

Reasonable Explanation for the Delay

[21] The Applicant did not explain why she filed her appeal late, although I note that the Tribunal never asked her to provide reasons. Since her file documents a lengthy history of psychological illness and treatment, I am willing to give her the benefit of the doubt on this question and find that she had a reasonable explanation for the delay.

Prejudice to the Other Party

[22] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests, given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

Arguable Case

[23] It must be noted that much of the Applicant's submissions recapitulate evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that falls into the grounds of appeal

enumerated in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[24] That said, the Applicant did advance one ground that demands closer scrutiny. She alleges that, while ignoring her evidence that her medications also produced unwanted side effects, the General Division erred in finding that she had benefitted from them.

[25] It is an established principle of administrative law that a tribunal is presumed to have considered all the evidence and need not refer to each and every item of evidence before it.[7] Nevertheless, I have reviewed the General Division's decision against the record but can find no indication that it ignored or misrepresented any significant aspect of the Applicant's evidence. In paragraph 66, the General Division found that some medications had produced positive effects, while recognizing that they came with drawbacks:

> The Appellant has been off work since July 2011. She has been on various medications under the care of Dr. Tran. The Tribunal notes that the doctor found a good combination of medications that benefitted the Appellant. According to Dr. Tran's report dated July 5, 2013, she reported her medicines were good and they were the best thing so far. The medications had calmed her down and she did not have headaches anymore. Her mood had been controllable although sleep was poor with initial and terminal insomnia. The Appellant's energy was better than before. Even though her concentration and memory remained poor, she felt hopeless more than helpless as opposed to being completely hopeless and helpless earlier. By August 2, 2013, the Appellant had reported more progress to Dr. Tran. She reported that things were getting better. She was able to tolerate her daughter better and her mood was still sad, but not depressed. The Appellant had stopped taking Temazepam as she was sleeping too much. Her energy was better and she did not feel helpless or hopeless. She had also started walking two or three times a week, 30 minutes each time. In analyzing the above evidence, the Tribunal finds that the Appellant was clearly benefitting from her medications as is evidenced by Dr. Tran's progress notes and had found an effective mix of medications in Zoloft and Abilify.

[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[26] I can detect no inaccuracies in the above passage, which, in my view, provided a fair overview of the evidence before the General Division. The record contains numerous reports from Dr. Tran that document a two-year effort to find a combination of psychoactive medication that would produce the maximal therapeutic benefit while minimizing side effects. The evidence shows that the psychiatrist eventually arrived at an optimal regime, although the Applicant stopped her medication intake after she became pregnant in 2013.

[27] As for the Applicant's complaint that the General Division considered irrelevant or incomplete information from her family physician, I see no chance of success on this ground. It was the Applicant who submitted Dr. Cheng's reports, and the General Division was acting within its authority to rely on them, within the parameters of subsection 58(1). In any case, the Applicant has failed to demonstrate that Dr. Cheng's reports were in fact irrelevant or that the General Division relied on them to the exclusion of Dr. Tran's reports. Any suggestion that the General Division should have solicited additional material from Dr. Tran signifies a misunderstanding of its function as an impartial adjudicator; the burden of proving entitlement to the CPP disability lies entirely with the Applicant.

[28] I would not interfere with a finding of the General Division where it has weighed the evidence and taken into account the submissions of both parties. As it has done so here, I see no arguable case on this ground

CONCLUSION

[29] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I accepted that the Applicant had a continuing intention to pursue her appeal and found it appropriate, under the circumstances, to assume that she had a reasonable explanation for the delay in filing her request for leave to appeal. I also thought it unlikely that the Respondent's interests would be prejudiced by extending time. However, I could find no arguable case on appeal, and it was this last factor that was decisive; I see no point in advancing this application to a full appeal that is doomed to fail.

[30] In consideration of the *Gattellaro* factors and in the interests of justice, I would refuse an extension of time to appeal pursuant to subsection 57(2) of the DESDA.

Member, Appeal Division