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

Citation: *C. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 435

Tribunal File Number: AD-17-109

BETWEEN:

C. O.

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 29, 2017

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated July 12, 2016. The General Division had conducted a hearing by videoconference and determined that the Applicant was ineligible for the disability benefit under the *Canada Pension Plan* (CPP) because her disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2013.

[2] On February 7, 2016, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), the Applicant filed an incomplete application requesting leave to appeal with the Tribunal's Appeal Division. Following a request for additional information, the Applicant perfected her application for leave to appeal on February 21, 2017.

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 the application requesting leave to appeal to the Appeal Division, dated February 2, 2017, the Applicant's authorized representative advised the Tribunal that his client's submissions were late because there had been a marked deterioration in her condition since the General Division's decision. On December 12, 2016, she underwent emergency surgery—a right hip core decompression—and enclosed medical records from Dr. Omar Khan indicating

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

that there was only a 35 percent chance that the procedure would be successful. The Applicant maintained that her condition met the CPP criteria for a severe and prolonged disability.

[15] On February 10, 2017, the Tribunal advised the Applicant that her application put forward insufficient grounds. In a letter dated February 21, 2017, the Applicant's representative acknowledged the Tribunal's request for additional material and argued that the General Division made an important error regarding the facts contained in the appeal file**.** She reiterated that there had been a marked deterioration in her client's condition since the General Division's dismissal on July 13, 2016. The Applicant had been diagnosed with early avascular necrosis and underwent emergency right hip core decompression surgery in December 2016. She had been left with a severe disability that prevented her from working.

ANALYSIS

[16] 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 July 12, 2016, and that the Tribunal received the Applicant's incomplete request for leave to appeal to the Appeal Division on February 7, 2017. The application was not perfected until two weeks later—224 days 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.

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

Continuing Intention to Pursue the Appeal

[18] Although the Applicant did not file a complete application for leave to appeal until more than four months after the expiry of the statutory limitation, I am willing to assume that she had a continuing intention to pursue the appeal, but was waylaid by illness.

Reasonable Explanation for the Delay

[19] The Applicant's representative submitted that she was late in filing an application for leave to appeal because of a sudden deterioration in her health. I am willing to give the Applicant the benefit of the doubt on this question and accept this explanation for the delay.

Prejudice to the Other Party

[20] 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

[21] The Applicant's submissions recapitulate evidence and arguments that 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.

[22] In the absence of a specific allegation of error, I must find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the General Division's in her favour, I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[23] The Applicant also submitted a number of medical reports with her application for leave: some were already presented to the General Division; others were prepared after the issuance of its decision. I am unable to consider any of them, given the constraints of subsection

58(1) of the DESDA, which confers no authority on the Appeal Division to assess the merits of disability claims. Once a hearing has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[24] 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 found the Applicant's explanation for the delay in filing her request for leave reasonable and assumed that she had a continuing intention to pursue her 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.

[25] 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.

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Member, Appeal Division