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

Citation: *C. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 440

Tribunal File Number: AD-16-1265

BETWEEN:

C. S.

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: August 30, 2017

REASONS AND DECISION

INTRODUCTION

[1] On August 15, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant was not entitled to an extension of time to file an application to appeal the Respondent's reconsideration decision, which had denied the Applicant a disability pension under the *Canada Pension Plan* (CPP).

[2] The Respondent's reconsideration decision was dated December 8, 2015. Pursuant to paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), applicants have 90 days to appeal a reconsideration decision to the Tribunal's General Division. The Applicant filed her appeal to the General Division on July 5, 2016, which was beyond the 90-day time limit. The General Division was tasked with determining whether to allow an extension of time for filing the appeal.

[3] After considering the relevant factors for determining whether an extension of time should be granted, the General Division found that the Applicant had an arguable case and that no prejudice to the other party would result should an extension be granted. The General Division denied the extension of time on the basis that the Applicant had not demonstrated a continuing intention to pursue the appeal and that she had not provided a reasonable explanation for the delay.

[4] The Applicant filed an application for leave to appeal (Application) the General Division's decision with the Tribunal's Appeal Division on November 4, 2016.

ISSUES

[5] The member must decide whether the General Division erred in its decision refusing an extension of time to file the appeal.

THE LAW

[6] Pursuant to paragraph 52(1)(*b*) of the DESD Act, an application must be made to the General Division within 90 days after the day on which the reconsideration decision was communicated to the Applicant. Under subsection 52(2), an extension of time to file a Notice of Appeal may be granted by the General Division, but in no case may an appeal be brought more than one year after the day on which the reconsideration decision was communicated.

[7] The member must consider whether the General Division properly considered and weighed the criteria, as set out in the case law, for determining whether an extension of time should be allowed. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court stated that the criteria are as follows:

- A continuing intention to pursue the application or appeal;
- The matter discloses an arguable case;
- There is a reasonable explanation for the delay; and
- There is no prejudice to the other party in allowing the extension.

[8] 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 (Attorney General) v. Larkman*, 2012 FCA 204.

[9] In deciding the second *Gattellaro* factor, the Federal Court of Appeal 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*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[10] Should an applicant seek leave to appeal a General Division decision to the Tribunal's Appeal Division, 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

[11] The Applicant submitted that, in failing to consider correspondence in the record, which demonstrates the Applicant's intention to pursue the appeal, the General Division based its decision on an erroneous finding of fact without regard for the material before it, pursuant to paragraph 58(1)(*c*) of the DESD Act. Specifically, the Applicant refers to two letters dated October 20, 2015, and November 3, 2015, respectively.

[12] The Applicant further submits that the General Division found that she had been "given clear instructions" regarding the process for filing a Notice of Appeal, but evidence in the record showed that the instructions had not been "clear" to the Applicant and that she had not understood the process of appealing a reconsideration decision to the General Division. This, she argues, is an erroneous finding of fact made without regard for the material before the General Division, pursuant to paragraph 58(1)(*c*) of the DESD Act.

[13] The Applicant further submits that the General Division breached a principle of natural justice in failing to provide the Applicant with an opportunity to explain the delay in filing her appeal. The Applicant bases this argument on the fact that she speaks Punjabi and that she does not have a sophisticated understanding of English. As a result, she was not able to argue her case fully and fairly with respect to both filing a complete appeal before the time limit for doing so had ended and arguing her case before the General Division with respect to her request for an extension of time to file.

[14] The Respondent was invited to make submissions on the late appeal, but, by response dated July 19, 2016, the Respondent indicated that no further submissions would be forthcoming.

ANALYSIS

[15] A brief summary of relevant facts is necessary:

- The Respondent refused the Applicant's disability application initially.
- The Applicant requested a reconsideration of that decision by letter dated October, 20, 2015.
- In the October 20, 2015, letter, she indicated that she had requested further medical evidence from specialists but that the requested reports had been delayed. She stated that she was scheduled for an MRI and that the results of that testing would be forwarded to the Respondent as well. She asked the Respondent to wait for those reports before making its reconsideration decision.
- The Respondent rendered its reconsideration decision denying the Applicant a disability pension by letter dated December 18, 2015.
- The Applicant confirms that she received the letter on December 27, 2015.
- The Applicant had 90 days—from the time she received the decision—to file a Notice of Appeal with the General Division, which means the time limit to file her Notice was March 29, 2016.
- The Respondent received several documents by mail on May 11, 2016, which included several reports from the Applicant's attending physicians and specialists.
- The Respondent contacted the Applicant by phone on May 19, 2016, and informed her that the Respondent could not receive the documents, as well as that the time limit for appealing to the Tribunal had passed. The Applicant was told that she would have to contact the Tribunal regarding an extension to file a Notice of Appeal. A letter dated that same day was sent to the Applicant with instructions on how to contact the Tribunal regarding the filing of a late appeal.

- The Applicant submitted an access to information request dated June 13, 2016, for a copy of the reconsideration decision. A copy dated June 16, 2016, was sent to her.

- The Applicant filed her Notice of Appeal with the Tribunal on July 5, 2016.

[16] In assessing the Applicant's request for an extension, the General Division applied the *Gattellaro* factors to the Applicant's case. In doing so, the General Division accepted that the Applicant had an arguable case, and it was found that no prejudice would result should an extension be granted. However, in assessing whether the Applicant in this case had demonstrated a continuing intention to pursue the appeal, the General Division found that she had not. Additionally, the General Division did not find that she had provided a reasonable explanation for the delay in filing her Notice of Appeal. Of all four *Gattellaro* factors, the fact that the Applicant had not demonstrated a continued intention to pursue the appeal and that she had not provided a reasonable explanation for the delay carried the most weight in the General Division's opinion, and the appeal was subsequently dismissed.

[17] The central question before me is whether the General Division erred in any way by refusing to extend the time limit.

[18] It is not in dispute that the Applicant`s Notice of Appeal was filed late. The Applicant conceded that the deadline for filing her Notice of Appeal was March 29, 2015, and that she had not filed until July 5, 2016. However, she submits that, in assessing whether she had demonstrated a continuing intention to pursue the appeal, the General Division failed to consider the details that she had provided in correspondence sent to the Respondent regarding medical evidence from her attending physicians and specialists that she had hoped would support her disability application. Specifically, she refers to the letter dated October 20, 2015, in which she requests that the Respondent wait for her medical testing to be completed before a reconsideration of her application is done. The letter reads, in part, as follows:

> I have requested the specialist many times to forward my report to you, or even give me a copy. But they have delayed in that, but they have now given me a date for a MRI for my shoulder and will be forwarding all the reports to you a well. I have also requested a MSP detail of my account and will be receiving that in 6 weeks and will be forwarding that as well.

> Please wait for my specialist and MSP reports before considering my decision…

[19] The Applicant has submitted that the General Division erroneously found that "[t]he [Applicant] took no steps to appeal during the period between December 27, 2015 and March 29, 2016," which was the 90-day appeal period allowed under paragraph 52(1)(*b*) of the DESD Act. The Applicant submits that a letter dated November 3, 2015, confirms that the Applicant had an MRI scheduled for March 11, 2016, and that this reflects the Applicant's intention to pursue the appeal by gathering further supporting evidence. However, I have reviewed the record in its entirety and could not locate any letter by that date. Regardless, a letter dated November 3, 2015, is not within the 90-day appeal period (December 27, 2015, to March 29, 2016) applicable to an appeal in this case to the General Division. I cannot find that the General Division's finding is incorrect. The General Division does acknowledge the October 20, 2015, letter requesting that the Respondent delay a reconsideration of her disability application until further medical evidence is available, but the Respondent's decision on this issue is not an issue for the Tribunal's consideration. The fact remains that the Applicant did not take steps to pursue her appeal between December 27, 2015, and March 29, 2016.

[20] Leave to appeal is not granted on this ground.

[21] The Applicant has further submitted that the General Division found that the Applicant had been "given clear instructions" regarding the process for filing a Notice of Appeal, but the Applicant argues that evidence in the record showed that the instructions were not "clear" to her and that she did not understand the process of appealing a reconsideration decision to the General Division.

[22] I agree that there is some evidence that the Applicant appeared not to understand the appeal process following receipt of the reconsideration decision. On October 20, 2015, she indicated to the Respondent that she had further medical documents to file following the initial refusal decision. She requested that the reconsideration be delayed, as it was her intention to have copies of the MRI reports sent directly to the Respondent once these medical reports were available. Her request to delay the reconsideration was not honoured. The reconsideration decision was rendered on December 18, 2015, and she received the decision on December 27,

2015. As she had indicated in her October letter, she proceeded with her stated intention and had the medical reports sent directly to the Respondent, which received them on May 11, 2016.

[23] There is evidence in the record that confirms that the Applicant knew her MRI scheduled on March 11, 2016, was close to the expiration of the 90-day time limit. The General Division did not find that the Applicant, knowing that the deadline was soon after her scheduled MRI, had taken reasonable steps to file her appeal on time. The General Division also found that the Applicant had not taken reasonable steps to have her doctor forward the MRI results when or before the 90-day time limit ended. The General Division's position on this issue was that there was sufficient information in the correspondence sent to the Applicant indicating that it was the Tribunal—not the Respondent—that had to receive both the Notice of Appeal and any further medical evidence following the rendering of the reconsideration decision. Even when this error was brought to the Applicant's attention, she failed to take timely steps to correct the mistake.

[24] There is also evidence in the record that indicates that the Applicant was told verbally, as well as in writing by letter dated May 19, 2016, that she needed to contact the Tribunal regarding a late appeal, but that she did not do so until she had filed a late Notice of Appeal on July 5, 2016.

[25] While I do believe that there may be some merit to the Applicant's assertion that the instructions were not "clear" to her, there is also evidence in the record that substantiates the General Division's findings. The findings do not appear to be patently unreasonable. I am not able to substitute my decision for the General Division's decision simply because I might have decided the matter differently. The Applicant's disagreement with the General Division's finding is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority conferred upon the Appeal Division to grant leave to appeal on grounds not included in subsection 58(1) of the DESD Act, including a reconsideration of evidence that the General Division has already considered (see *Canada (Attorney General) v. O'keefe*, 2016 FC 503).

[26] Leave to appeal is refused on this ground, as I do not believe it has a reasonable chance of success.

[27] The Applicant has submitted that the General Division breached a principle of natural justice in failing to provide the Applicant with an opportunity to explain relevant factors regarding the delay in filing her appeal at a hearing. The Applicant argues that, without a hearing, she was prevented from arguing her case fully and fairly with respect to filing a complete appeal before the time limit for doing so had ended and with respect to arguing her case before the General Division with respect to her request for an extension of time to file.

[28] The principles of natural justice are concerned with ensuring that parties to litigation are able to present their case full and fairly, and that they are able to know and answer the case against them. I note that the principles of natural justice include procedural fairness, which generally pertains to how hearings proceed and which includes certain guarantees such as: the parties will be notified of hearing dates; they know their case to meet; and parties are provided adequate time to prepare their case and time to prepare for the case being brought in reply. Parties are also entitled to a decision, with clearly articulated reasons for how the case was decided. The concept of procedural fairness means that parties before the Tribunal can expect certain procedural guarantees, but that they cannot expect any substantive ones (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC)).

[29] I am mindful that whether or not the General Division allows an extension of time to file an appeal is a discretionary decision, as is the decision on whether or not a hearing is required as part of the fact-finding process. The *Social Security Tribunal Regulations* (Regulations) do not provide any guidance on how the General Division is to decide whether a hearing ought to be held. As this is a discretionary decision, deference is to be given to the General Division, and I may intervene in the General Division's exercise of that discretion only if the General Division member erred in law, considered irrelevant factors or failed to consider relevant factors, or if an obvious injustice would result.

[30] In *Baker*, the court determined that when a decision that affects an individual's rights, privileges or interests is rendered, this triggers the application of the duty of fairness. The court

further found, however, that procedural fairness is variable and that its content is to be decided in the specific context of each case. The court listed a number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme and the terms of the statute in question;
- the importance of the decision to the individual affected;
- the legitimate expectations of the person challenging the decision; and
- the choices of procedure made by the agency itself, particularly when legislation permits the decision-maker to choose the procedure.

[31] In applying these factors to this case, I find that the General Division's decision on whether the Applicant may be granted an extension to file an appeal affects the Applicant's privileges. A decision on whether a hearing should be held, as well as on the form that a hearing should take, also affects the Applicant's privileges. I also find that, although the nature of the decision in question in this case is procedural, whether a hearing is held may change the fact that an applicant has the opportunity to present her case and fully argue the relevant issues.

[32] I further find that that the issues in this matter are important to the Applicant.

[33] With respect to the statutory scheme that regulates the Tribunal, I note that the Tribunal is guided by a regulatory framework designed to provide for the most expeditious and most cost- effective resolution of disputes before it. As a result, General Division and Appeal Division members have the discretion to determine whether a hearing is held and, if so, how hearings are to be conducted. The discretion to decide whether a decision on the written record will be made or whether a hearing will take place should not be unduly fettered. Such decisions are framed within the considerations of fairness and natural justice (see, for example, section 3 of the Regulations).

[34] In considering the concept of legitimate expectations, while the Applicant may not have had the right to a particular form of hearing, I do find that the Applicant's legitimate

expectations did extend to include the right to be heard. The concept of legitimate expectations refers to procedural expectations similar to those that I have set out in paragraph 28. It does not extend to substantive expectations, such as the outcome of a case (*Baker*).

[35] This brings me to consider the choice of procedure made by the General Division in this case. The General Division in this case proceeded with a decision on the written record. There were no reasons provided for the decision to forego holding a hearing, or even requesting further details from the Applicant in the form of written questions and answers. On this issue, the Applicant has alleged that the General Division improperly exercised its discretion when it decided to proceed without a hearing, particularly with regards to the Applicant's opportunity to fully address the explanation for the delay and her continued intention to pursue the appeal. The Applicant has argued that the General Division failed to consider appropriate factors when it decided to proceed on the record. The appropriate factors that, she asserts, should have been considered are her ability to understand the process for appealing decisions to the Tribunal and the extent to which she understood the correspondence, as well as other written material that both the Respondent and the Tribunal had sent to her.

[36] There may be a basis on which to find that the General Division member failed to exercise discretion properly. This argument may have a reasonable chance of success, and leave to appeal is therefore granted.

Additional Considerations: Error of Law

[37] Pursuant to paragraph 58(1)(*b*), the Appeal Division is required to consider whether the General Division, in rendering its decision, erred in law, regardless of whether the error appears on the face of the record. In this case, I find that the General Division may have erred in law with respect to considering the interests of justice.

[38] The Federal Court of Appeal in *Larkman* acknowledged that, although the four *Gattellaro* factors "guide the Court in determining whether the granting of an extension of time is in the interests of justice," the "overriding consideration is that the interests of justice be served."

[39] The General Division, at paragraph 25 of the decision, states that "[i]n consideration of the *Gattellaro* factors **and in the interests of justice**, the Tribunal refuses an extension of time

to appeal […].” [my emphasis] Although the General Division makes reference to the interests of justice in this final paragraph, I am not convinced that the General Division actually considered whether it would be in the interests of justice to allow the extension of time, as the decision contains no discussion on this point.

[40] I find that the General Division may have erred in law in failing to consider or reflect in the decision that consideration was given, regarding whether it is in the interests of justice to grant an extension. It does not appear that *Larkman* was properly applied.

[41] This is an argument that may have a reasonable chance of success on its merits. Leave to appeal is granted on this ground.

CONCLUSION

[42] The Application is granted.

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

[44] The parties are invited to file additional submissions within the 45-day time limit allowed.

Meredith Porter
Member, Appeal Division