



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 536

Tribunal File Number: AD-17-202

BETWEEN:

R. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Extension of Time and Leave to Appeal

Decision by: Kate Sellar

Date of Decision: October 16, 2017

REASONS AND DECISION

INTRODUCTION

[1] On December 23, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] The Applicant filed an incomplete application for leave to appeal (Application) with the Tribunal's Appeal Division, which was received on March 7, 2017. The Tribunal received an additional submission from the Applicant in response to its letter dated June 16, 2017. As a result, the Application was filed after the 90-day deadline.

ISSUE

[3] The Appeal Division must decide whether to extend the time to bring the application for leave to appeal and, if the extension is granted, it must also decide whether the appeal has a reasonable chance of success for the purposes of granting leave to appeal.

THE LAW

Timeliness

[4] For CPP decisions, s. 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA) states that an applicant must make an application for leave to appeal to the Appeal Division within 90 days of the Tribunal communicating the decision to the applicant (the 90-day mark). According to s.57(2) of the DESDA, the Appeal Division may allow further time for an applicant to request leave to appeal, but in no case can an application be made more than one year after the day on which the Tribunal communicates its decision to the applicant (one-year limit).

[5] The Appeal Division may grant an extension of time for an application that is submitted after the 90-day mark but before the one-year limit outlined in the DESDA. There are four criteria the Appeal Division must take into account [see *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833]:

- Whether there was a continuing intention to pursue the application or appeal;
- Whether the matter discloses an arguable case;
- Whether there is a reasonable explanation for the delay; and
- Whether there is prejudice to the other party in allowing the extension.

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

Leave to Appeal

[7] According to ss. 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[8] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

[9] According to s. 58(1) of the DESDA, the following are the only grounds of appeal:

- (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

Timeliness

[10] The Applicant submits that her application was late because the Tribunal sent her the wrong form and documentation.

Leave to Appeal

a) Allegation of error in failing to observe natural justice at the telephone hearing

[11] The Applicant submits that the General Division failed to observe a principle of natural justice under s. 58(1)(a) of the DESDA. She indicated that she was “unfairly judged and treated horribly by the individual [she] spoke to on the phone on December 20, 2016.” The Applicant indicated that during the telephone hearing, the General Division member, “was extremely rude, continued to interrupt [her] and yell at [her]. [She] was so distraught and in tears the majority of the conference call.”

b) Evidence relating to disability

[12] The Applicant also provided a document that appeared to be completed by Dr. Ibrahim (a urologist). The document is undated and is a certification related to the disability tax credit. The Applicant argues that this document assists her in establishing a disability that qualifies her for a disability pension.

ANALYSIS

Timeliness

[13] The Applicant’s request for leave to appeal is late. The Applicant is unrepresented and filed her initial application for leave to appeal on March 7, 2017, which was well within the 90-day requirement in the DESDA. However, the initial application was incomplete and when the Tribunal requested further information from her in a letter titled “Incomplete application for leave to appeal – wrong form/insufficient grounds for appeal” (“incomplete letter”), the Applicant did not provide further information until June 16, 2017, which was outside the 90-day

mark but before the one-year limit. It was also past the 30-day grace period the Tribunal provides to applicants responding to incomplete letters.

[14] The Appeal Division is satisfied that the Applicant had a continuing intention to pursue the appeal, as signalled by her initial application within the time limit, and her attempt to respond to the Tribunal's incomplete letter in a timely way.

[15] There does seem to be a reasonable explanation for at least some of the delay in this matter. The Applicant is unrepresented and submits that the delay was caused because the Tribunal provided her with the wrong form. The Applicant received the letter because the Tribunal required more information about the grounds of appeal and her submission about whether she had a reasonable chance of success, and because she used the wrong form when she filed her incomplete application. The Appeal Division infers from the Applicant's initial and incomplete submissions with the Tribunal that she has not always understood everything that the Tribunal has communicated to her. So to at least some extent, that confusion provides a reasonable explanation for the delay in this case.

[16] The Tribunal does not identify any prejudice to the Respondent in allowing the extension. The delay is not so significant in length as to prejudice the Respondent's ability to respond to the appeal if leave to appeal were granted. In any event, the Respondent's participation in any eventual appeal about whether natural justice was served during the hearing would likely be in the form of submissions rather than evidence (as the Respondent was not present at the General Division hearing).

[17] The matter poses an arguable case in the sense that there is a reasonable chance that a breach of natural justice can arise at a teleconference hearing if an unrepresented applicant is interrupted enough during her submissions to result in a breach of the right to be heard. 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 [see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

[18] Taking all four of these factors into account, the Appeal Division grants the extension of time to request leave to appeal.

Leave to Appeal

a) Allegation of error in failing to observe natural justice at the telephone hearing

[19] The Applicant alleges that the General Division failed to observe principles of natural justice during her telephone hearing, and therefore requests leave to appeal under s. 58(1)(b) of the DESDA. Specifically, the Applicant alleges that the General Division member was rude, yelled at her, interrupted her, and that she was crying during the hearing.

[20] The right to be heard is a critical component of natural justice, and the Applicant had a right during her telephone hearing to present submissions on relevant issues. She also had a right to an independent decision-maker who is impartial and at arm's length from the issues and the parties to the appeal. The Supreme Court of Canada has indicated that part of the duty to act fairly is to allow for the right to be heard [see *Therrien (Re)*, 2001 SCC 35]. The right to be heard is about allowing a person the opportunity to answer the questions put to him or her and to make submissions on every fact or factor likely to affect the decision [see *Kouama v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC), at para. 15].

[20] If the rudeness or the interrupting that the Applicant submits she experienced had an impact on her ability to provide submissions or somehow belied a lack of impartiality on the part of the General Division member, then this could lead to an arguable case for an error under s.58(1)(b).

b) Evidence relating to disability

[22] The Applicant has failed to raise a ground of appeal under s. 58(1) of the DESDA relating to this submission. The Appeal Division reviewed the record and concludes that the document the Applicant seeks to rely on about her disability tax credit is new—it was not before the General Division. Generally, the Appeal Division does not hear new evidence, [see *Mette v. Canada (Attorney General)*, 2016 FCA 276] and does not hear re-argument of the merits of a case absent a ground of appeal. The Applicant's document relating to the tax credit

will not be considered as it is new evidence that does not fall under any exception that would allow the Appeal Division to consider it. The general submission about the Applicant as a person with a disability is not connected to any ground under s. 58(1) of the DESDA and cannot form the basis for leave to appeal.

CONCLUSION

[23] The application for an extension of time and the application for leave to appeal are both granted.

Kate Sellar
Member, Appeal Division