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

Citation: *S. J. v. Minister of Employment and Social Development,* 2017 SSTADIS 552

Tribunal File Number: AD-16-1146

BETWEEN:

S. J.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: October 25, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension on February 28, 2014. Her application was denied initially and upon reconsideration. The reconsideration decision was conveyed to the Applicant by letter dated December 1, 2014. As stated in her Notice of Appeal, the Applicant received the decision on December 10, 2014.[1]

[2] The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal) on September 3, 2015. As her appeal was filed 178 days after the 90-day limit set out in s. 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), the General Division was required to consider whether to exercise its discretion to grant an extension of time pursuant to s. 52(2) of the DESDA. In a decision dated August 15, 2016, the General Division refused to grant an extension of time. On this application, the Applicant asks for leave to appeal that decision.

[3] Pursuant to s. 58(1) of the DESDA, the only grounds of appeal to the Appeal Division are that:

(i) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(ii) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(iii) 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.

[4] The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100, at para. 72.

[5] An appeal to the Appeal Division may only be brought if leave to appeal is granted: DESDA, s. 56(1). The requirement to obtain leave to appeal to the Appeal Division serves the

[1] As stated in the Applicant's Notice of Appeal to the General Division, GD1-2.

objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

SUBMISSIONS

[6] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction because the member should have taken into account that it is not "the client's fault if required medical information cannot be obtained in a timely manner".[2] If established, this would constitute an error under s. 58(1)(*a*) of the DESDA.

DISCUSSION

[7] The issue before me is whether the proposed appeal has a reasonable chance of success. In order for the proposed appeal to succeed, the Applicant would need to demonstrate that the General Division inappropriately exercised its discretion when it refused to grant the extension of time, thereby committing an error falling within the scope of s. 58(1) of the DESDA.

[8] The Federal Court of Appeal has held that an improper exercise of discretion occurs where the decision-maker gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts or where an obvious injustice would result: *Oyenuga v. Canada (Attorney General)*, 2013 FCA 230.

[9] In her reasons, the General Division member noted that the Applicant stated she received the reconsideration decision on December 10, 2014. The member correctly found that under s. 52(1)(*b*) of the DESDA, the Applicant had until March 10, 2015 to file her appeal. The appeal was not filed until September 3, 2015, and the member noted that the appeal was filed 178 days late (i.e. 178 days after the 90-day period expired).

[2] AD1A-1.

[10] The General Division member correctly cited the factors she was to consider and weigh in accordance with *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The factors are:

1. The person requesting the extension has demonstrated a continuing intention to pursue the application or appeal;

2. The matter discloses an arguable case;

3. The moving party has a reasonable explanation for the delay; and

4. There is no prejudice to the responding party in allowing the extension.

[11] The member also correctly instructed herself that, in accordance with *Canada (Attorney General) v. Larkman*, 2012 FCA 204, the overriding consideration is that the interests of justice be served.

[12] The member concluded there was an arguable case on the appeal and that the extension of time would cause no prejudice to the Respondent.

[13] With respect to the issue of whether the Applicant had a continuing intention to pursue the appeal, the Federal Court of Appeal in *Grewal v. Minister of Employment and Immigration*, [1985] 2 FC 263 at para. 23 has stated:

> Among the matters to be taken into account in resolving the first of these questions is whether the applicant intended within the 10-day period to bring the application and had that intention continuously thereafter. Any abandonment of that intention, any laxity or failure of the applicant to pursue it as diligently as could reasonably be expected of him could but militate strongly against his case for an extension. The length of the period for which an extension is required and whether any and what prejudice to an opposing party will result from an extension being granted are also relevant. [underlining added]

[14] In accordance with *Grewal*, the Applicant bore the onus to demonstrate a diligent, continuing intention to pursue her appeal. The member noted that the Applicant did not take any steps that indicate an intention to appeal until she had filed the notice of appeal on September 3, 2015. This was 267 days after she had received the reconsideration decision. The member also noted that there was no evidence that the Applicant had contacted the Tribunal or the

Respondent in the months after receiving the reconsideration decision to indicate she had a continuing intention to appeal. The member's conclusion that the Applicant did not demonstrate a continuing intention to appeal is well-founded on the evidence.

[15] The Applicant also bore the onus to demonstrate she had provided a reasonable explanation for the delay. In *Doray v. Canada*, 2014 FCA 87, the Federal Court of Appeal refused a motion for an extension of time where there was an unexplained 57-day delay. The Court stated "a long delay must be fully explained" (at para. 2).

[16] In her analysis of whether the Applicant had provided a reasonable explanation for the delay, the member noted that the Applicant had not explained why her doctor's maternity leave delayed her ability to file her appeal. The member noted that the Applicant had not stated that she thought she had to file additional evidence in support of her appeal.

[17] In the application for leave to appeal, the Applicant states that she was waiting for reports from her family doctor, who was on maternity leave, and also states she had been referred to the Women's College Hospital (WCH) and it took several months to obtain an appointment and then further time to have a report sent to her doctor. She says that once her family doctor had returned to work, the additional information was submitted.

[18] The Applicant filed her Notice of Appeal on September 3, 2015. Although she argued she was late because she was waiting for her family physician's report, in fact, she filed the appeal without including any report from her physician (i.e. Dr. Tracy) or any other documentation. It was only on October 9, 2015, more than one month after she had filed her Notice of Appeal, that the Applicant filed a letter from Dr. Tracy.[3]

[19] The fact that the Applicant filed her Notice of Appeal without a report from her physician casts doubt on her contention that she filed her appeal late because she was waiting for a report from the physician.[4] I also note that, although the Applicant submits in her application for leave to appeal that she was late in filing her appeal because she was awaiting a report from the WCH, there is no reference in Dr. Tracy's letter, which was before the General

[3] GD3-2 to GD3-3.
[4] AD1A-1.

Division, to the WCH or a report from the WCH. The General Division member concluded that the Applicant had not provided a reasonable explanation for the delay and, given the evidence before her, I see no basis to interfere with this finding.

[20] In her analysis of whether an extension should be granted, the General Division member correctly noted that the Applicant was not required to satisfy all four *Gattellaro* factors. She weighed the four factors and concluded that the extension of time should be refused in the interests of justice.

[21] As noted above, the Courts have held that an improper exercise of discretion occurs where the decision-maker gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts or where an obvious injustice would result. Having considered these factors in the present application, I see no basis to find that the member exercised her discretion improperly or that she committed an error falling within s. 58(1) of the DESDA. I conclude this does not present an arguable ground upon which the proposed appeal might succeed. I also conclude that the arguments that the member failed to observe a principle of natural justice or that she acted beyond or refused to exercise her jurisdiction do not have a reasonable chance of success.

DISPOSITION

[22] The Applicant has not identified any ground of appeal falling within the scope of s. 58(1) of the DESDA that has a reasonable chance of success. Pursuant to s. 58(2) of the DESDA, the application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division