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

Citation: *S. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 523

Tribunal File Number: AD-17-272

BETWEEN:

S. T.

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: October 15, 2017

Canada

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 21, 2016. The General Division decided the appeal on the basis of the documentary record, finding that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was not "severe" during his minimum qualifying period (MQP). The General Division determined that the Applicant's qualified earnings and contributions established an MQP ending, by application of the CPP's proration provision, on September 30, 1996.

[2] On March 29, 2017, 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 his application for leave to appeal on April 26, 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] In deciding whether to grant an extension of time to make an application for leave to appeal, 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

[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 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.

[12] Paragraph 44(1)(*b*) 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.

[13] 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.

[14] Paragraph 44(2)(*a*) states that an applicant may satisfy the contributions requirement if, during the contributory period, they have:

(a) paid into the CPP for at least four of the last six years;

(b) made valid CPP contributions for at least 25 years, including three of the last six years; or

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

(c) paid into CPP in each year since the previous CPP disability benefit was cancelled.

[15] Subparagraph 44(1)(*b*)(ii) allows a "late applicant" to meet the minimum contributory requirements any time during their contributory period. According to the rules in effect between 1987 and 1997, a minimum contributory requirement was establish by valid contributions in two out of the prior three years.

[16] Subsection 44(2.1) provides for the possibility of an MQP based on prorated contributions:

> For the purposes of determining the minimum qualifying period of a contributor referred to in subparagraph (1)(*b*)(ii), the basic exemption for the year in which they would have been considered to have become disabled, and in which the unadjusted pensionable earnings are less than the relevant Year's Basic Exemption for that year, is an amount equal to that proportion of the amount of that Year's Basic Exemption that the number of months that would not have been excluded from the contributory period by reason of disability is of 12.

[17] Section 95 requires the Respondent to maintain a record of earnings in respect of each contributor to the CPP to permit the determination of the amount of any benefit that may be payable under the CPP to any contributor.

[18] Subsection 97(1) provides that an entry in a contributor's record of earnings shall be conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made.

APPLICANT'S SUBMISSIONS

[19] In his application requesting leave to appeal dated March 17, 2017, the Applicant stated that he suffered from severe depression and bipolar disorder. He submits that, having lived and worked in Canada for 27 years, he was entitled to the CPP disability benefit. After waiting for the General Division's decision for more than a year, he was disappointed that it had not treated him fairly.

[20] The Applicant, who now resides in Poland, added that he did not receive the General Division's decision until December 17, 2016. He acknowledged that his appeal might be late

and asked the Tribunal to accept it, because the General Division's decision had left him devastated and contributed to a worsening of his health.

[21] On April 3, 2017, the Tribunal advised the Applicant that his application put forward insufficient grounds. In a written response dated April 21, 2017, the Applicant took issue with the General Division's finding that there was no medical evidence to indicate that his mental illness was continuously severe since 1996. He expressed his strong belief that reports from Canadian and Polish medical specialists would prove the severity of his bipolar disorder.

ANALYSIS

[22] 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 November 21, 2016, and that the Tribunal received the Applicant's incomplete request for leave to appeal to the Appeal Division on March 29, 2017. The application was not perfected until April 26, 2017—156 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.

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

Continuing Intention to Pursue the Appeal

[24] Although the Applicant did not file a complete application for leave to appeal until more than two months after the expiry of the statutory limitation, I am willing to assume that he had a continuing intention to pursue the appeal, but his application was delayed by illness and the uncertainties of international post.

Reasonable Explanation for the Delay

[25] The Applicant submits that, because of a sudden deterioration in his health, he was late in filing an application for leave to appeal. I am willing to give the Applicant the benefit of the doubt on this question, and I accept this explanation for the delay.

Prejudice to the Other Party

[26] 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

[27] For the most part, 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.

[28] 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 he is requesting that I reconsider and reassess the evidence and substitute my decision for the General Division's in his favour, I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing falls within the specified grounds of subsection 58(1) and whether any of them has a reasonable chance of success.

[29] Apart from the Applicant's allegations, I have reviewed the General Division's decision against the evidentiary record and can find no signs of error. As the General Division noted, the Applicant's Record of Employment revealed valid contributions and earnings, for CPP purposes, in the years 1990, 1995, 2011, 2012 and 2013. Under the rules, regardless of whether those rules were before January 1, 1998, or after, the Applicant fell short of the number of years required to establish an MQP unless he was able to take advantage of the proration provision. The record shows that he had below-threshold earnings in 1996 (reaching the requisite third year under the pre-1998 rules) but not 2014 (the fourth year under the post-1997 rules). Therefore, by application of the formula in subsection 44(2.1) of the CPP, the Respondent

determined that an MQP ending September 30, 1996, had been established, although the Applicant was then required to show that he became disabled at some point during the first nine months of that year.

[30] The General Division agreed with this MQP, and I can see no error in how it was calculated. The challenge for the Applicant was that he had to furnish evidence that his medical conditions led to a disability that became "severe and prolonged" during the relatively brief window between January 1 and September 30, 1996. However, as the General Division noted, none of the available documentary medical evidence predated 2014, and the Applicant's record of earnings showed that he earned at least $50,000 in each of 2011, 2012 and 2013. The General Division found this to be convincing evidence that the Applicant was not continuously disabled from substantially gainful employment after September 1996, and I see no reason to interfere with this finding. As trier of fact, the General Division has the discretion to weigh the evidence as it sees fit, so long as it does not commit a material factual error that is "perverse, capricious or without regard for the material." There is no indication that happened here.

CONCLUSION

[31] 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 his request for leave to be reasonable and assumed that he had a continuing intention to pursue his 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 do not see how the interests of justice would be served in advancing an appeal that is doomed to fail.

[32] In consideration of the Gattellaro factors and in the interests of justice, I am refusing an extension of time to appeal pursuant to subsection 57(2) of the DESDA.

Member, Appeal Division