



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 565

Tribunal File Number: AD-17-215

BETWEEN:

J. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Kate Sellar

Date of Decision: October 30, 2017

REASONS AND DECISION

INTRODUCTION

[1] On November 25, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable.

[2] The Applicant filed an incomplete application for leave to appeal (Application) with the Tribunal's Appeal Division on March 8, 2017, beyond the time limit set out in s. 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA). The Tribunal wrote to the Applicant requesting further information. The Tribunal indicated that if it received the information by April 14, 2017, the Application would be considered received on March 8, 2017. The Applicant responded on April 17, 2017. The Application was still incomplete, so the Tribunal wrote to the Applicant on April 19, 2017, asking the Applicant to complete the Application. On June 21, 2017, the Tribunal received further information from the Applicant. The Tribunal wrote to the Applicant on June 22, 2017, confirming receipt of the Application as complete and noting that it was filed more than 90 days after the decision was communicated to the Applicant.

ISSUE

[3] The Appeal Division must decide whether to grant an extension of time to file the Application.

THE LAW

[4] An appellant must make an application for leave to appeal to the Appeal Division within 90 days after the day on which the decision was communicated to him or her [see s. 57(1)(b) of the DESDA]. When the 90-day limit expires on a Sunday, an appeal can be filed on the next day that is not a holiday [see *Interpretation Act*, R.S.C., 1985, c. I-21, ss. 35(1) and 26].

[5] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court set out the factors the Appeal Division must consider in determining whether to extend the time under s. 57(1)(b). Those factors are as follows:

- a) A continuing intention to pursue the application or appeal;
- b) The matter discloses an arguable case;
- c) There is a reasonable explanation for the delay; and
- d) There is no 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 2014].

[7] 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].

APPLICANT'S SUBMISSIONS

[8] The Applicant submits that she received the General Division decision on December 5, 2016. The Applicant stated the following reasons for her late appeal: "not understanding the forms to be filled out. Needing someone to represent me." The Applicant's initial Application contains no reasons for appeal. On April 17, 2017, she provided submissions that indicate essentially that she is a person with a disability who continues to receive treatment and continues to experience chronic pain. The Applicant provided an X-ray dated December 13, 2016; a communication from the Ontario Ministry of Community and Social Services dated February 5, 2016, indicating that she is a person with a disability for the purpose of the Ontario Disability Support Program; and a physician's note dated January 25, 2012, stating that she has two problems, both of which significantly limit her ability to work. On June 21, 2017, the Applicant provided a submission stating that she is a person with a disability who experiences limitations. None of the Applicant's submissions provided a ground of appeal under the DESDA.

ANALYSIS

No Extension of Time

[9] The Applicant claims she received the General Division decision on December 5, 2016. The Tribunal finds that December 5, 2016, is the day the General Division decision was communicated to her. The Application was late because the Tribunal first received materials from the Applicant on March 8, 2017. To fall within the 90-day limit, the Application would need to have been received by Monday, March 6, 2017 (because the 90-day limit expired on March 5, 2017, which was a Sunday). The Applicant provided additional information at the Tribunal's request on two subsequent occasions, once in April 2017 and once in June 2017, and the Tribunal confirmed that the Application was complete on June 22, 2017. The Appeal Division will not grant the request to extend the time to appeal because although there was a continuing intention to pursue the appeal, the reason for the delay was reasonable, and there is no prejudice to the Respondent, the matter does not disclose an arguable case and this is the key factor in this matter.

Continuing Intention to Pursue Appeal

[10] The Applicant should show an intention to bring an appeal within the 90-day limit and continuously thereafter; the Applicant is to pursue the appeal as diligently as can reasonably be expected [see *Doray v. Canada (Attorney General)*, 2014 FCA 87]. The length of the delay was not by any means significant, as the Tribunal received the Applicant's incomplete Application within days after the 90-day limit had expired. The Tribunal accepts that the Applicant had a continuing intention to pursue the appeal within the 90-day limit, as evidenced by her indication that she needed assistance to complete the forms. Her subsequent communications with the Tribunal signalled the same intention continuously thereafter.

Reasonable Explanation

[11] The Appeal Division accepts the Applicant's submission that she did not understand the forms to fill out, given that the Tribunal wrote to her twice requesting that she provide missing information to complete the Application. The Applicant's explanation for the delay is a reasonable one, because although she had representation before the General Division, she is

without representation before the Appeal Division. It seems her stated need for representation remains unmet.

No Prejudice

[12] The Appeal Division does not identify any prejudice to the Respondent in granting the extension of time, as the initial Application documents were only several days late.

No Arguable Case

[13] Although the “arguable case” factor is a low threshold, the Applicant does not meet this aspect of the test, and it is the determinative factor in this instance. The Tribunal provided the Applicant with two opportunities to identify the ground or grounds of appeal she seeks to rely on, and to explain how it was that she had a reasonable chance of success on appeal. The Applicant has not identified a ground of appeal under s. 58(1) of the DESDA that she seeks to rely on. The Applicant has not alleged that the General Division committed an error in rendering its decision.

[14] The Applicant’s submissions do not raise any ground of appeal. She seeks to reargue the question of the impact of her disabilities on her capacity for work. The Appeal Division does not reweigh evidence in order to come to a new conclusion on the facts. At its highest, the Applicant’s submission amounts to a request to find that she had a severe disability on or before her minimum qualifying period, which does not fit within a ground of appeal.

[15] The Applicant provided the Appeal Division with new evidence in support of her appeal. The X-ray, the letter about the Ontario Disability Support Program, and the 2012 letter from the supporting physician all appear to be new. The Appeal Division does not normally grant leave to appeal on the basis of new evidence [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The Applicant has no arguable case, and that factor is determinative in this matter. It is not in the interests of justice for the Appeal Division to grant an extension of time to apply for leave to appeal where there is no arguable case and where the Applicant has not identified any grounds of appeal under the DESDA.

CONCLUSION

[15] An extension of time to apply for leave to appeal is refused.

Kate Sellar
Member, Appeal Division