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

Citation: *T. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 600

Tribunal File Number: AD-17-336

BETWEEN:

T. D.

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: November 2, 2017

REASONS AND DECISION

INTRODUCTION

[1] On October 7, 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 two documents, each dated April 11, 2017. It appears that the Tribunal received one on April 18, 2017, and the other on April 21, 2017. On April 25, 2017, the Tribunal confirmed receipt of both documents and indicated that the Application was incomplete due to insufficient grounds for appeal and missing information. The Applicant provided more information on April 27, 2017, and the Tribunal wrote to the Applicant again on April 28, 2017, indicating that the Application was still incomplete. On May 8, 2017, the Tribunal received a response from the Applicant that included information about why the Application had been filed more than 90 days after the General Division decision. On May 10, 2017, the Tribunal acknowledged receipt of a complete Application received more than 90 days after the General Division had issued its decision—beyond the time limit set out in s. 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

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 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 883], namely:

- 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 the Appeal Division grants leave to appeal, 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.

APPLICANT'S SUBMISSIONS

[10] The Applicant submits that he was not aware that he needed to provide medical evidence either to Service Canada or to the Tribunal, and that his first representative before the General Division did not advise him that he needed medical evidence in this process. The Applicant submits that his first representative asked him only following the hearing (and not before) to provide medical information in furtherance of his case. When the Applicant provided that medical evidence, the first representative did not file it with the Tribunal or seek leave to appeal on his behalf.

[11] The Applicant's new representative indicates she met with the Applicant three weeks prior to April 11, 2017. The new representative sought out and then filed numerous medical documents with the Application, not all of which were before the General Division. The new representative filed two other documents: a written notice the Applicant that says he had received from his first representative that he would no longer be able to continue with his CPP disability matter (dated March 18, 2017); and written confirmation from his Long-Term Disability (LTD) insurer that he was receiving benefits and would continue to do so until December 22, 2029, "providing [you] satisfy the definition of disability [dated December 19, 2016]." The Applicant argues that this document from the LTD insurer "clearly indicates" that he has a severe disability that qualifies him for the disability pension.

[12] The Applicant submits that he is not relying on any of the three grounds of appeal set out in the DESDA, but that he instead requests a fair opportunity for the Appeal Division to review some new evidence that, through no fault of his own, was not before the General Division. The Applicant takes the position that the General Division did not commit an error in his case.

[13] The Applicant's submission is silent as to whether the first representative specifically advised the Applicant or sought instruction from the Applicant on filing the Application. The submission is also silent specifically about whether the first representative advised the Applicant about the timeline for filing the Application. However, the Applicant does submit more generally that he relied on his first representative to address the issue, that the first

representative did not work with the necessary due diligence and that he should not be responsible for the late Application.

[14] The Applicant requests that the new medical evidence be considered or that a new hearing be allowed so that all the evidence can be admitted.

ANALYSIS

[15] The General Division issued its decision in October 2017, and the Applicant communicated with the Tribunal about an Application beginning in April 2017. The Application was filed well beyond the 90-day mark but before the one-year limit. Therefore, the Application is late, and the Appeal Division must decide whether to grant an extension of time.

[16] The Applicant is expected to pursue the appeal as diligently as could reasonably be expected [see *Caisse Populaire Desjardins Maniwaki v. Canada* (*Attorney General)*, 2003 FC 1165]. The Applicant indicates that he provided his first representative with additional medical information when he had been asked, i.e. after the hearing. Although the first representative did not file an Application, it appears that when the Applicant received word that the first representative had ended the retainer, the Applicant acted without delay to secure the new representative in March 2017. That new representative filed an Application quickly (although it was incomplete) in April 2017. The Applicant has demonstrated a continuing intention to appeal.

[17] The Applicant has a reasonable explanation for the delay, as it appears that he relied on his first representative to his detriment, and it seems that he was not aware that any Application filed after the 90-day mark would be late.

[18] There is no prejudice to the Respondent, as the delay is in the order of months and is well within the one-year limit.

[19] However, the matter does not disclose an arguable case. That factor is determinative in this matter, and the Appeal Division will not grant an extension of time. It is not in the interests of justice to grant an appeal for which there is no arguable case. The Applicant has expressly not raised a ground of appeal under s. 58(1) of the DESDA, and he takes the position that the

General Appeal Division did not commit an error in its decision. Rather, the Applicant requests a fair opportunity for the Appeal Division to review some new evidence that, through no fault of his own, was not before the General Division.

[20] The Appeal Division does not have the power to order a new hearing absent leave to appeal, and the Appeal Division cannot grant leave to appeal in the absence of an arguable case for an error under s. 58(1) of the DESDA. Submitting new evidence is not a ground of appeal under the DESDA. Even if the Applicant identified a ground of appeal and the Application for an extension of time was granted, the Appeal Division does not normally consider new evidence [see *Mette v. Canada (Attorney General)*, 2016 FCA 276].

[21] Not all the factors in *Gattallero* need to be satisfied in order to grant an extension of time. It is relevant that the Applicant demonstrated a continuing intention to appeal, that he has a reasonable explanation for the delay and that the Respondent is not prejudiced as a result of the delay. However, considering all the factors here, it is not in the interest of justice to grant an extension of time where the Applicant takes the position that the General Division has not committed an error under the DESDA and where he asks the Appeal Division instead to undertake a review of new evidence, which is not the Appeal Division's role. There is no arguable case, and that is the most important factor here, as that question is controlling on any Application before the Appeal Division in any event.

[22] The Applicant's new representative can (and likely has) advised the Applicant as to the options for addressing the issues he raises in relation to the work completed by the first representative.

[23] The Appeal Division should go beyond a mechanistic review of the grounds of appeal [see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615]. The Appeal Division has examined the record and is satisfied that the General Division did not overlook or misconstrue any of the evidence. The General Division's decision reflects a complete review of the evidence that was before it—both documentary evidence and the Applicant's oral testimony. During the hearing, the General Division also gave the Applicant an opportunity to highlight and clarify specific aspects of the evidentiary record (including a clarification about the Applicant's medications, an update on the outcome of his gastric banding surgery and some clarifications

about activities of daily living). The General Division invited the Applicant's representative to highlight which medicals in the record were the most important to the Applicant's case, and the representative did so. The decision reflects a solid review of the relevant medical evidence in the record—the General Division did not overlook or misconstrue evidence.

CONCLUSION

[24] An extension of time to request leave to appeal is refused.

Kate Sellar
Member, Appeal Division