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

Citation: *Minister of Employment and Social Development v. L. B.,* 2017 SSTADIS 648

Tribunal File Number: AD-16-952

BETWEEN:

Minister of Employment and Social Development

Appellant

and

L. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Meredith Porter

~~DATE OF DECISION: November 15, 2017~~

CORRIGENDUM DATE: November 21, 2017

Canada

REASONS AND DECISION

DECISION

The appeal is ~~dismissed~~ [**allowed]**. No extension of time to file the appeal is granted.

OVERVIEW

[1] The Respondent filed three applications for a disability pension between June 2012 and November 2013. All three applications were denied by the Appellant. The second application was denied by the Appellant by reconsideration decision dated June 17, 2014, and it is the subject of this appeal.

[2] The Respondent then had 90 days to file a notice of appeal with the General Division, pursuant to paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act).

[3] On April 22, 2015, the Respondent filed a notice of appeal of the reconsideration decision of June 17, 2014. He was advised by letter, dated May 4, 2015, from the Social Security Tribunal (Tribunal) that a complete notice of appeal must be received within 90 days after the day the reconsideration decision was communicated to him. The letter also requested a statement from the Respondent confirming the date on which he had received the reconsideration decision and the missing information necessary to perfect the notice of appeal.

[4] The letter notified the Respondent that a Tribunal member would then have to decide whether an extension of time should be granted before the appeal could proceed. It also indicated that any extension granted could not exceed one year past the date on which the reconsideration decision was communicated. Finally, the letter stated that if the Tribunal received all of the missing information for the notice of appeal by June 4, 2015, it would accept the notice of appeal as complete and deem the notice received on April 22, 2015.

[5] No communication was received from the Respondent following this correspondence and a second notice letter was sent, dated September 11, 2015. Again, no communication was received from the Respondent. The Tribunal received a complete application on October 2, 2015.

[6] The Tribunal logged a telephone conversation from the Respondent's representative on October 1, 2015, in which the representative requested an explanation of the incomplete notice of appeal letter dated September 11, 2015. Following this telephone call, the Tribunal received a complete application on October 2, 2015.

[7] The General Division rendered a decision on April 18, 2016, granting the Respondent an extension of time to file his notice of appeal, and deemed the notice complete on April 22, 2015.

[8] The Appellant requested leave to appeal the General Division decision on the basis that a notice of appeal is statute barred when filed more than one year past the date on which the reconsideration decision is communicated. The Appellant argues that the Respondent must request an extension of time to file before the one-year time limit ends. There is a provision in the *Social Security Tribunal Regulations* (SSTR) that allows members of the Tribunal to dispense individuals from complying with the provisions of the SSTR but this case does not include any special circumstances. Therefore, the General Division erred in law by failing to apply subsection 52(2) of the DESD Act, which states that in no case can an extension of time to file exceed one year after the reconsideration decision was communicated.

[9] The Appellant argues that the General Division failed to consider the evidence in the record, which clearly shows that the Respondent failed to file a complete notice of appeal until October 2, 2016, which was nearly 15 months after the reconsideration decision was communicated to him.

[10] On July 14, 2017, I granted leave to appeal on the grounds that the General Division may have erred in law when an extension of time was granted to the Respondent that appeared to be beyond the one-year time limit.

[11] I must decide whether the General Division erred in law in its decision granting the extension of time to file the appeal, or dismiss the decision granting the extension of time based on one of the grounds enumerated in subsection 58(1) of the DESD Act.

[12] I find that the appeal should be granted as the General Division erred in granting the extension of time, as the application for leave to appeal was completed beyond the one-year time limit for doing so.

ISSUES

[13] The issues before me include the following:

i. Are there "special circumstances" to allow paragraph 3(*b*) of the SSTR to apply in this case?

ii. Did the General Division err in granting an extension of time in this case?

PRELIMINARY MATTERS

[14] Pursuant to paragraph 42(*a*) of the SSTR, parties have 45 days to file additional submissions after the day on which leave to appeal is granted. The Respondent filed additional submissions with the Tribunal, dated August 22, 2017. The Respondent's submissions included another copy of the notice of appeal, which had been previously filed with the General Division, a copy of the Appeal Division's leave to appeal decision, and copies of medical records from Health Sciences North, from Dr. Allison and Dr. Laforest.

[15] The medical reports submitted by the Respondent cannot be admitted into the record and cannot be considered in deciding whether to allow the appeal. The evidence was not included in the record before the General Division, and the filing of new evidence is not a ground for appeal enumerated under subsection 58(1) of the DESD Act. The Appeal Division is limited to the grounds of appeal enumerated in subsection 58(1) of the DESD Act, and the Appeal Division has no authority to intervene or hear appeals on a *de novo* basis.

ANALYSIS

[16] Subsection 58(1) of the DESD Act provides for only limited grounds of appeal. The only reviewable errors are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

[17] Subsection 52(1) of the DESD Act provides that an appeal of a decision regarding a disability pension must be brought to the General Division in the prescribed form and manner

and within 90 days after the day on which the decision is communicated to the appellant. The General Division may allow further time within which an appeal may be brought. However, in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[18] On reading paragraph 58(1)(*b*), this provision permits the Appeal Division to intervene where the General Division has erred in law. There is no qualification restricting the Appeal Division from intervening when such errors are alleged. There is no indication that the Appeal Division should show any deference to the General Division's findings. In this case, an error of law has been argued. I must determine whether the law has been properly applied to the facts.

[19] Paragraph 58(1)(*c*) of the DESD Act refers to errors of fact. If the General Division has based its decision on an erroneous finding of fact, or has ignored factual evidence before it, then I must consider whether that error is "perverse" or "capricious." Errors of fact are, therefore, qualified. Only where errors of fact are found to be perverse or capricious should I intervene with the General Division's findings. This means that I should intervene only where the General Division failed to account for any evidence, misconstrued evidence, or overlooked evidence that it ought to have considered in reaching its decision.

Issue 1: Are there "special circumstances" to allow paragraph 3(*b*) of the SSTR to apply in this case?

[20] Paragraph 3(1)(*b*) of the SSTR allows Tribunal members, if there are special circumstances, to vary a provision of the regulations or dispense a party from compliance with a provision.

[21] I do not find that "special circumstances" exist or ought to be considered to apply here. I find that paragraph 3(1)(*b*) of the SSTR applies only to provisions found in the SSTR and does not apply to those of the DESD Act, even if special circumstances were found to exist. Moreover, subsection 52(2) of the DESD Act mandates an absolute one-year time limit for bringing an appeal.

[22] The General Division allowed the Respondent to dispense with compliance with section 24 of the SSTR, which lists the information that must be filed in order to complete a notice of

appeal with the Tribunal. The General Division cited "special circumstances" it found to exist, and the special circumstances were that the Respondent had filed the missing information "within a relatively short period of time" once he had retained the assistance of a representative.

[23] The Appellant argues that this does not constitute "special circumstances." I agree.

[24] Correspondence sent to the Respondent dated May 4, 2015, clearly stated that the notice of appeal was not complete, and that the missing information was required within 90 days (although the 90-day time limit had already been exceeded). The letter clearly stated that should the information be received outside of the allowable 90 days, a member of the Tribunal would have to grant an extension of time before the appeal could proceed. The letter also stated that if the information was received more than one year beyond the date on which the decision was communicated, then no appeal would be allowed. The missing information included a copy of the reconsideration decision and confirmation of the date on which the decision was communicated to him. The Respondent has not provided any reason why he was not able to provide the required information within the one-year timeframe.

[25] I acknowledge that the second notice letter sent to the Respondent on September 11, 2015, was beyond the one-year time frame for providing the information. I am not guided by miscommunications made by Tribunal staff, but I am guided by the legislative provisions of the SSTR, which include time limits for providing complete notices of appeal.

[26] Paragraph 3(1)(*b*) of the SSTR does not define what is to be considered "special circumstances," and no direction for what constitutes special circumstances can be found in the SSTR. It would seem appropriate, however, that special circumstances should encompass some distinguishing or unusual aspect or reason that justifies a departure from following a normal rule that one is usually expected to follow.

[27] My Appeal Division colleague addressed this very issue in *A.M. v. Minister of Employment and Social Development*, 2016 SSTADIS 68. Although I am not bound by decisions of other Appeal Division members, I find her position that "special circumstances ought not be loosely defined" and "should not be widely available" is consistent with the SSTR, which require that matters be conducted as quickly and informally as the considerations of justice and fairness permit. It may logically be drawn from the wording of the SSTR that the

intent of Parliament was to proceed expeditiously and to avoid the routine granting of time extensions.

[28] The Respondent in this case bears the burden of demonstrating that special circumstances, as referred to in paragraph 3(*b*) of the SSTR, exist that are so convincing that he should not be required to comply with the requirements of section 24 of the SSTR. The fact that his representative eventually filed the required information is not sufficiently convincing to justify a departure from the normal rules for perfecting a notice of appeal with the Tribunal. Perhaps if some unusual circumstances existed that explained why the Respondent was not able to secure the assistance of a representative before September 2015, or if there was evidence that the Respondent had made efforts to provide the missing information on his own, but there existed some unusual reason why he had been prevented from perfecting the notice of appeal prior to October 2015, then there may be a basis for applying paragraph 3(*b*) of the SSTR to this case. I do not find that any circumstances or reasons have been demonstrated by the Respondent.

[29] If provisions of the SSTR were easily disregarded, and appellants were not required to set out compelling, peculiar circumstances to justify dispensing with such requirements as providing necessary information or complying with stated time limits found in the SSTR, proceedings before the Tribunal would likely be prejudicial in the absence of full disclosure and Tribunal members would resultantly be provided with general authority to extend limitation periods. I do not find that this would be compatible with the requirements of the SSTR to "secure the just, most expeditious and least expensive determination of appeals and applications."[1]

[30] While it may be the case that paragraph 3(*b*) of the SSTR could be invoked in order to dispense the Respondent from complying with subsection 24(1) of the SSTR, I have found that there are no special circumstances that exist to justify invoking paragraph 3(*b*).

[31] I also think it relevant to consider that it is subsection 52(2) of the DESD Act that mandates an absolute one-year time limit for bringing an appeal and not a provision found within the SSTR. I find that paragraph 3(1)(*b*) of the SSTR does not extend to provisions under

[1] *Social Security Tribunal Regulations*, SOR/2013-60, s. 2.

the DESD Act, even if special circumstances were found to exist. Paragraph 3(1)(*b*) specifically refers to provisions of the SSTR.

[32] For the foregoing reasons, I do not find that paragraph 3(*b*) of the SSTR applies in this case.

Issue 2: Did the General Division err in granting an extension of time in this case?

[33] Yes. I find that the General Division erroneously granted an extension of time.

[34] The Appellant argues that the General Division erred in law in exercising its discretion and granting the extension of time. The Appellant asserts that an extension of time is not a matter of right. The Appellant argues that the General Division must first grant an extension of time to file a notice of appeal, and that discretionary decisions must be initiated by a request for an extension made by the Respondent. Because the Respondent never properly requested an extension of time within the one-year time limit, the Respondent is statute barred from bringing his appeal. The Appellant argued that the one-year time limit for appealing the second reconsideration decision dated June 17, 2014, was June 17, 2015, and no request for an extension of time to file was received by June 17, 2015.

[35] I have already found that the Respondent did not bring his appeal in the prescribed form and manner until October 2, 2015. I have also found that there was no basis in law to properly grant an extension of time for the Respondent to file his appeal before the General Division.

[36] At paragraph 18 of the General Division decision, the member concludes the following:

> In consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal allows an extension of time to appeal pursuant to subsection 52(2) of the DESD Act. In this case the fact that there is an arguable case outweighs the lack of a continuing intention and a reasonable explanation. Justice as between the parties requires that the matter proceed to be determined on its merits.

[37] The General Division had no legal basis to find that an extension of time **could** be granted "pursuant to subsection 52(2) of the DESD Act." Regardless of whether the *Gattellaro*[2]

[2] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

factors had been considered, and regardless of whether it was in the interests of justice to proceed to determine the Respondent's case on its merits, I find that the General Division exceeded its jurisdiction in allowing the appeal to proceed outside of the legislative provisions to which the General Division is bound in deciding matters before it.

CONCLUSION

[38] The appeal is ~~refused~~ [**allowed]**.

[39] Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, or refer the matter back to the General Division for reconsideration. Considering the circumstances of this case, it is appropriate for me to render the decision that the General Division should have given.

[40] I find that the General Division does not have the discretion to grant an extension of time. The General Division cannot extend the appeal period beyond the limitation period set by subsection 52(2) the DESD Act. The Respondent failed to file an appeal in the prescribed form and manner within the time limits allowed for doing so, and no extension of time to file can be granted by the Appeal Division in this case.

Meredith Porter
Member, Appeal Division