



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 667

Tribunal File Number: AD-17-488

BETWEEN:

**J. L.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

---

**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

---

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: November 20, 2017

## **DECISION AND REASONS**

### **DECISION**

[1] The application for leave to appeal (Application) is granted.

### **OVERVIEW**

[2] The Applicant, J. L., seeks a disability pension under the Canada Pension Plan (CPP). He maintains that his fibromyalgia, muscle spasms, insomnia, chronic pain, memory loss, poor concentration, headaches and anxiety prevent him from working. He last worked in 2013 and has not worked since then.

[3] The Respondent, the Minister of Employment and Social Development, denied his request because, while the Applicant had certain restrictions due to his medical condition, the information did not show that those limitations continuously prevented him from doing some type of work.

[4] The Applicant's appeal to the General Division of the Social Security Tribunal of Canada (Tribunal) was filed late. The General Division refused to grant an extension of time, because it concluded that appeal was filed more than one year after the Applicant had received the Respondent's decision.

[5] The Applicant filed an Application to the Appeal Division arguing that the General Division had not taken into consideration the reasons for the delay in filing the appeal.

[6] I find that the appeal has a reasonable chance of success, because the appeal was not filed at the General Division more than one year after the Applicant had received the Respondent's decision.

### **ISSUES**

[7] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success (on the issue of whether the General Division had exercised its discretion

judiciously in refusing to extend the time for filing the late application). In other words, is there an arguable ground upon which the proposed appeal might succeed?<sup>1</sup>

[8] The General Division's decision turns on its conclusion that the appeal was filed more than one year after the Applicant had received the decision. Did the Applicant file his appeal more than one year late?

## **ANALYSIS**

### **Meaning of Reasonable Chance of Success**

[9] An appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.<sup>2</sup>

[10] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success<sup>3</sup> based on a reviewable error.<sup>4</sup> 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 had made in a perverse or capricious manner or without regard for the material before it.

[11] The law confers on the General Division the discretionary power to extend the time for appeal. The factors that are taken into account in determining whether to allow further time to appeal are whether there is a continuing intention to pursue the appeal, whether there is a reasonable explanation for the delay, whether there will be prejudice to the other party and whether there is an arguable case,<sup>5</sup> with the overriding consideration being that the interests of justice be served.<sup>6</sup>

---

<sup>1</sup> *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Murphy v. Canada (Attorney General)*, 2016 FC 1208, at para. 36; *Glover v. Canada (Attorney General)*, 2017 FC 363, at para. 22.

<sup>2</sup> *Department of Employment and Social Development Act* (DESD Act) at subsections 56(1) and 58(3).

<sup>3</sup> DESD Act at subsection 58(1).

<sup>4</sup> DESD Act at subsection 58(2).

<sup>5</sup> *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

<sup>6</sup> *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[12] The General Division did not consider these factors because it found that the appeal had been filed more than one year late, and the law does not permit the Tribunal to grant an extension of time for a period exceeding one year.

[13] In order to successfully appeal the General Division decision, the Applicant would need to demonstrate that the General Division: (a) was wrong when it found that the appeal was filed more than one year late; and (b) improperly exercised its discretionary power. An improper exercise of discretion occurs if a member gives insufficient weight to relevant factors, proceeds on a wrong principle of law or erroneously misapprehends the facts, or where an obvious injustice would result.

[14] The Applicant submits that the General Division did not take into consideration the reasons for the delay in filing his appeal. Although the Applicant does not refer to one of the reviewable errors, I read his grounds of appeal as either breach of natural justice or an error of law.<sup>7</sup>

#### **Did the Applicant File his Appeal More Than One Year Late?**

[15] The Applicant did not file his appeal more than one year late.

[16] The Applicant filed a Notice of Appeal (NoA) with the General Division on November 21, 2016. The NoA stated as the reasons for filing late that there is a new medical report and that he had debilitating pain that prevented him from doing anything.

[17] The General Division calculated the Applicant's appeal period as having expired on July 6, 2016.<sup>8</sup> This finding of fact was incorrect.

[18] The Respondent's reconsideration decision was dated April 7, 2016, and the General Division found that it had been communicated to the Applicant by April 17, 2017 (deemed date).

---

<sup>7</sup> Under paragraphs 59(1)(a) and (b) of the DESD Act.

<sup>8</sup> General Division decision at paragraph 5.

[19] The appeal period is 90 days,<sup>9</sup> and July 6, 2016 is 80 days from the deemed date that the Applicant received the decision. The appeal period ended on July 16, 2016, not July 6, 2016. Therefore, the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[20] On November 21, 2016, when the Applicant filed the NoA, the appeal was 128 days late and had been brought 218 days after the reconsideration decision had been communicated to the Applicant.<sup>10</sup> The NoA was incomplete, in that a copy of the reconsideration decision was not attached.<sup>11</sup> However, I find that the appeal had been brought to the General Division on November 21, 2016.

[21] As the appeal had been brought after the appeal period but before the one year limit, the General Division ought to have taken into consideration the Applicant's reasons for delay.

[22] According to the case law, the General Division should have taken into account whether there is a reasonable explanation for the delay, whether there was a continuing intention to pursue the appeal, whether there will be prejudice to the other party and whether there is an arguable case,<sup>12</sup> with the overriding consideration being that the interests of justice be served.<sup>13</sup> The General Division did not take any of these factors into consideration, because it found that the appeal was filed more than one year after the decision appealed from had been communicated to the Applicant and that the law does not allow for an extension of time beyond one year.

[23] However, the appeal was brought 218 days late—not more than 365 days (one year) late. The General Division erred when it found that the appeal had been filed more than one year late, and it erred in law in making its decision by improperly exercising its discretionary power because it did not weigh the relevant factors at all.

[24] I am satisfied that the appeal has a reasonable chance of success on the basis of a serious error in the General Division's findings of fact and an error of law.

---

<sup>9</sup> DESD Act at paragraph 52(1)(b).

<sup>10</sup> April 17, 2016 to November 21, 2016 is 218 days or 7 months, 4 days.

<sup>11</sup> General Division decision at paragraph 6.

<sup>12</sup> *Gattellaro, supra*.

<sup>13</sup> *Larkman, supra*.

## **CONCLUSION**

[25] The Application is granted pursuant to paragraphs 58(1)(a) and (b) of the DESD Act.

[26] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Shu-Tai Cheng  
Member, Appeal Division