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

Citation: *J. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 681

Tribunal File Number: AD-17-383

BETWEEN:

J. P.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Extension of Time and Leave to Appeal
Decision by: Kate Sellar

Date of Decision: November 24, 2017

REASONS AND DECISION

INTRODUCTION

[1] On February 28, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 11, 2017. On May 12, 2017, the Tribunal wrote to the Applicant indicating that her Application was incomplete, and identifying the information the Tribunal required in order to acknowledge the Application as complete. The Tribunal indicated that if the Applicant sent the missing information by June 12, 2017, the Tribunal would consider her complete Application as having been received on May 11, 2017. On June 21, 2017, the Applicant provided additional information to the Tribunal. On July 13, 2017, the Tribunal acknowledged the Application as deemed complete on the day it received the missing information, which was June 21, 2017. The Tribunal indicated that the Application appeared to be late.

ISSUE

[2] The Appeal Division must decide whether to extend the time to bring the Application. If it grants the extension, the Appeal Division must also decide whether the appeal has a reasonable chance of success for the purposes of granting leave to appeal.

THE LAW

Extension of Time

[3] Paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA) provides that an application for leave to appeal a decision of the General Division, Income Security Section, must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant.

[4] 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.

[5] The Appeal Division may therefore grant an extension of time for an application that is submitted after the 90-day limit but before the one-year limit outlined in the DESDA. There are four criteria that the Appeal Division must take into account in deciding whether to grant an extension of time [see *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833]:

- 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 leave to appeal is granted, 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 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[10] The Applicant is unrepresented before the Appeal Division. She submits that her Application was late because she had been waiting on documentation from her physiotherapist, and because she had filed incorrect paperwork with the Tribunal initially in May 2017.

[11] The Applicant submits that the General Division made an error of fact under s. 58(1)(*c*) of the DESDA in finding that she was capable of sedentary work.

[12] On June 21, 2017, the Applicant filed a document of the same date prepared by a physiotherapist. The document provides various updates on the Applicant's treatment regime and limitations, and some arguments about a functional capacity evaluation that was before the General Division (GD8-1 to 19) when it made its decision.

ANALYSIS

[13] The General Division's decision was communicated on March 1, 2017 (the date the Applicant indicates she received the decision). The Tribunal deemed the Application complete as of June 21, 2017. The Application was complete more than 90 days after the decision was communicated. The Application is late.

[14] The Applicant has demonstrated a continuing intention to pursue the Application. She submitted her initial Application within the 90-day limit. When she was asked to provide further information in order to complete the Application, she did so. She was only nine days outside of the grace period the Tribunal provided for in its May 12, 2017, correspondence. The Applicant is unrepresented, and acted as diligently as could reasonably be expected [see *Caisse Populaire Desjardins Maniwaki v. Canada (Attorney General)*, 2003 FC 1165].

[15] The Applicant has a reasonable explanation for the delay. She believed she completed an incorrect form initially (although the initial form was in fact the correct form). The Tribunal advised her that information was missing, and she took steps to correct that problem. She had an upcoming appointment with a physiotherapist, and believed that the information she would receive as a result of that appointment would assist her with her Application. The Applicant filed her additional information with the Tribunal on the same day that she received the information from the physiotherapist.

[16] There is no prejudice to the Respondent in allowing the extension, particularly given the brief duration of the delay.

[17] The matter discloses an arguable case. This is a very low threshold. An arguable case in the context of a request for an extension of time requires that there be some reasonable chance of success [see *McKinney v. Canada (Attorney General)*, 2008 FCA 409].

[18] Arguably, the General Division's decision contains an error under s. 58(1)(*b*) and/or (*c*) of the DESDA. In its analysis, the General Division notes that the Applicant was 54 years old at the time of hearing, with a high school education and work experience in the food services industry. The General Division indicates that the functional capacity evaluation in the record (GD8) stated that the Applicant would be capable of sedentary work (para. 19). At para. 20, the General Division found that the Applicant's family physician, Dr. MacMillan, "noted that the Appellant is unable to work, but the evidence in the file does not fully support this claim." The Tribunal then concludes the following (at para. 26):

> The Tribunal acknowledges that the Appellant has limitations due to her medical condition. However, considering her age, education, work experience, capacity to work in a sedentary job, and that all treatment options have not been attempted, the Tribunal finds that the Appellant does not have a severe disability that renders her incapable regularly of pursuing any substantially gainful occupation on or before the date of this hearing that continues to this day.

[19] The General Division concluded that the Applicant had capacity to work in a sedentary job. This is a key issue on which it seems there was competing evidence. The family physician

indicated that the Applicant could not work, and that her condition will continue to worsen if she does any amount of standing or walking/sitting (paras. 10 and 20). The Applicant's evidence was that she cannot sit for more than an hour and a half (see para. 12). The General Division decision contains no express effort to weigh competing evidence on this key issue in order to reach a decision about whether, on a balance of probabilities, the Applicant had a severe disability at the time of the hearing. The only note about the family physician's evidence was that the other evidence did not "fully support" this claim. There is no requirement that the evidence "fully support" the physician's claim, but the General Division did need to explain how it weighed the evidence and why it preferred one report over another.

[20] The General Division must analyze relevant conflicting evidence and provide an explanation as to what evidence is rejected or given less weight and why [see *Atri v. Canada (Attorney General)*, 2007 FCA 178; *Canada (Attorney General) v. Ryall*, 2008 FCA 164; and *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92]. The Federal Court has found that overlooking crucial evidence that goes to the heart of the Applicant's claim (medical evidence that supported a severe disability) is an error of fact made in a perverse and capricious manner and without regard to the materials before the General Division [see *Joseph v. Canada (Attorney General)*, 2017 FC 391].

[21] The Appeal Division has characterized a failure to weigh and provide reasons for preferring one medical report over another as a potential error of mixed law and fact [see *B. M. v. Minister of Employment and Social Development*, 2017 CanLII 60467 (SST); and *B.M. v. Minister of Employment and Social Development*, 2015 SSTAD 111], or as a potential error of law [see *S. N. v. Minister of Employment and Social Development*, 2015 SSTAD 991].

[22] The adequacy of reasons is not a stand-alone basis for quashing a decision. Reasons must be read together with the outcome [see *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26; and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62].

[23] It is arguable that the General Division failed to weigh relevant evidence and properly explain why certain evidence was preferred.

[24] Given that all of the *Gattellaro* factors are met (including the existence of an arguable case, which is an important factor here), overall it is in the interests of justice to grant the extension of time. The extension of time is therefore granted. For the same reasons considered above (at paras. 17 through 22), the Application has a reasonable chance of success, and therefore the Application is granted.

[25] Given that the Appeal Division/Applicant has identified a possible error under s. 58(1) of the DESDA, the Appeal Division does not need to consider any other grounds raised by the Applicant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The Applicant is not restricted in her ability to pursue the grounds raised in her Application—with one exception.

[26] The Applicant attached new evidence in the form of the June 21, 2017, report to her Application. The Appeal Division does not grant leave to appeal based on new evidence and, with some limited exceptions, does not consider new evidence on appeal. Generally, the Appeal Division makes its decisions based on the evidentiary record that was before the General Division [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. No exception applies to the general rule in this case, therefore the Appeal Division does not allow the June 21, 2017, report to be admitted as evidence in this appeal.

CONCLUSION

[27] The extension of time is granted, and the Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division