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

Citation: *D. S. v. Minister of Employment and Social Development,* 2017 SSTADIS 705

Tribunal File Number: AD-17-289

BETWEEN:

D. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: December 5, 2017

Canada

REASONS AND DECISION

DECISION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated March 20, 2017, which refused an extension of time to appeal the Respondent's reconsideration decision.

[2] For the reasons that follow, the application for leave to appeal is refused.

BACKGROUND

[3] The Applicant's application for a *Canada Pension Plan* (CPP) disability pension was denied by the Respondent initially and upon reconsideration by a decision dated September 16, 2015.

[4] The Applicant sent an undated letter to the Respondent requesting an appeal, which was received by the Respondent on October 5, 2016.[1] On October 21, 2016, the Respondent returned this letter to the Applicant and advised her that any appeal needed to be made to the Tribunal.[2]

[5] The Applicant filed incomplete appeal documents with the Tribunal on November 29, 2016. Her appeal was deemed perfected (i.e. complete) on December 21, 2016. In a letter provided to the Tribunal,[3] the Applicant stated that she estimated she had received the reconsideration decision in late September, 2015.

[6] In his decision dated March 20, 2017, the General Division member concluded the Applicant's appeal was brought more than one year after she had received the reconsideration decision. He noted that he was bound by s. 52(2) of the *Department of Employment and Social Development Act* (DESDA), which states that in no case may an appeal be brought more than one year after the reconsideration decision was communicated to the Applicant. He held that there were "no exceptions or extensions that [could] be applied in order to provide relief from

[1] GD1-15.
[2] GD2-4.
[3] GD1B-2.

that strictly worded provision".[4] He accordingly refused an extension of time to file the appeal and the appeal did not proceed.

SUBMISSIONS

[7] The Applicant filed an application for leave to appeal the General Division decision on April 3, 2017.

[8] In her application, the Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, an allegation falling within the scope of s. 58(1)(*a*) of the DESDA.

[9] The Applicant submits that her family doctor had been trying to get her in to see a pain specialist since 2012 but that, due to delays in identifying an appropriate specialist, she did not see a specialist until December 7, 2016. She states she therefore could not file an appeal within the one-year time frame. She submits that there was nothing she could do to speed up this process given the wait times of between one and a half and two years in Nova Scotia. With her application for leave, she has included two letters, dated October 16, 2012 and June 9, 2015, from her family physician to the specialists in question, as well as a document itemizing outgoing correspondence from her family physician's office listing the above-noted correspondence to the specialist physicians.[5]

DISCUSSION

[10] Pursuant to s. 58(1) of the DESDA, there are only three grounds to appeal a General Division decision: first, it failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; second, it made an error in law; and third, it based its decision on an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before it. The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100, at para. 72.

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[4] Reasons, para. 15.
[5] AD1-6 to AD1-8.

[11] In order for me to grant leave to appeal, I must be satisfied that the proposed appeal has a reasonable chance of success. In the context of an application for leave to appeal, having a reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[12] Pursuant to s. 52(1)(*b*) of the DESDA, an appeal of a decision must be brought to the General Division within 90 days after the day on which the decision was communicated to the appellant. Under s. 52(2), the General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[13] In the present case, the General Division member found that the reconsideration decision was communicated to the Applicant on September 28, 2015.[6] He noted that this date was consistent with the estimated date of receipt that had been provided by the Applicant in her materials.[7]

[14] Subsection 52(2) of the DESDA states that *in no case* may an appeal be brought more than one year after the reconsideration decision was communicated to the appellant. The legislation is strict and unambiguous.

[15] The DESDA requires that the appeal be filed with the General Division (not the Respondent), therefore the General Division member correctly held that the letter sent to the Respondent on October 5, 2016 did not meet the requirements of the DESDA and, in any case, it was also beyond the one-year absolute limit set out in s. 52(2) of the DESDA.[8]

[16] The Applicant did not file any appeal documents with the Tribunal until November 29, 2016, when she filed an incomplete appeal. Her appeal was not perfected until December 21, 2016. As noted by the General Division member, both these dates were well outside the one-year limitation period.

[6] Reasons, para. 11.
[7] See GD1B-2.
[8] Reasons, para. 13.

[17] In her Notice of Appeal to the General Division the Applicant wrote, "I honestly did not realize I only had a 90 day appeal period". I note that the reconsideration decision stated on its face that the Applicant had a right to appeal to the Tribunal's General Division and that the Tribunal must receive her appeal within 90 days of the date she received the decision.[9]

[18] The Applicant did not make any submissions to the General Division concerning not being able to obtain an appointment with a specialist until December 7, 2016. Also, the documentation enclosed with her application for leave to appeal was not in evidence before the General Division. Therefore, this information constitutes new evidence that was not before the General Division when it made its decision. The Federal Court recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23, "In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing. […] They also do not consider new evidence." (See also *Marcia v. Canada (Attorney General)*, 2016 FC 1367.) There are limited exceptions to the rule barring new evidence, none of which is applicable to the new information.

[19] In any event, as the Applicant filed her appeal to the General Division more than one year after the reconsideration decision was communicated to her, the General Division member was bound to apply s. 52(2). He could not do otherwise. He had no authority to exercise any discretion to grant an extension of time on the basis of the Applicant's claim she was unaware of the timeline for bringing an appeal, or indeed on any other basis. Even if the Applicant had made him aware of the delays she faced in obtaining an appointment with a specialist, he would not have been able to grant an extension of time. Accordingly, the argument that the General Division member failed to observe a principle of fundamental justice or improperly exercised his jurisdiction when he refused to grant an extension of time does not raise an arguable ground and has no reasonable chance of success.

[9] GD1A-4.

DISPOSITION

[20] I conclude that the Applicant has not provided an arguable ground upon which the proposed appeal might succeed. As the proposed appeal has no reasonable chance of success, pursuant to s. 58(1) of the DESDA, the application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division