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

Citation: *D. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 703

Tribunal File Number: AD-16-586

BETWEEN:

D. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: December 4, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] On December 2, 2013, the Respondent cancelled the Applicant's *Canada Pension Plan* (CPP) disability pension as of January 31, 2007, and demanded return of an overpayment. The Respondent maintained that decision on reconsideration. The Applicant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). In a decision dated February 5, 2016, the General Division member determined that the Applicant had ceased to be disabled as of June 2007 instead of January 31, 2007.

[2] The Applicant states that she received the General Division decision on February 18, 2016. On April 19, 2016, the Applicant's representative notified the Tribunal that the Applicant had secured legal representation and had requested an extension of time to July 2016 for filing an Application for Leave to Appeal (Application) (AD1).

[3] On April 27, 2016, the Tribunal wrote to the Applicant's representative allowing an extension of time to July 7, 2016, to file a complete Application.

[4] On July 7, 2016, the Tribunal received an Application (AD1A).

[5] On July 18, 2016, the Tribunal wrote to the representative acknowledging that the Application was complete but noting that it was filed more than 90 days after the date on which the General Division decision had been communicated to the Applicant (and her representative).

[6] On July 20, 2016, the Tribunal wrote to the representative (the first July 20, 2016, letter) stating:

> On April 19, 2016, the Appeal Division of the Social Security Tribunal of Canada (Tribunal) received your incomplete application to appeal a General Division decision. Appeals to the Appeal Division are usually not automatic; you must first request the permission of the Appeal Division to file an appeal (also referred to as an Application Requesting Leave to Appeal). There is one exception: if the General Division summarily dismissed an appeal, a party can appeal that decision to the Appeal Division without first obtaining permission. Because your appeal was not summarily dismissed by the General Division, you need first to request permission to appeal to the Appeal Division. If permission is refused, your appeal will not go forward. Your file

> will be closed and the matter in dispute will be at an end. Your application is missing required information. The Tribunal cannot register your application until all the required information is received.
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> Information needed to complete your application
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> To complete your application, the Tribunal needs the following information in writing:
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> - A signed declaration that the information provided is true to the best of your knowledge. You may send a declaration to the Tribunal by indicating, on a blank piece of paper:
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> - Your full name; and
>
> - The Tribunal Number (refer to number in subject line);
>
> and
>
> - The following declaration: "I, [full name of Applicant], declare that the information provided for appeal number [number of appeal] is true to the best of my knowledge."

[7] On July 20, 2016, the Tribunal sent another letter (the second July 20, 2016, letter) to the representative noting that the July 18, 2016, letter was incorrect. This letter further states that a "correct letter is attached." In the submissions, the representative states that neither she nor the Applicant ever received the "correct letter."

[8] Additionally, the representative states in submissions that neither she nor the Applicant ever received the first July 20, 2016, letter.

[9] On October 5, 2016, the representative called the Tribunal for an update. The representative states in submissions that this phone call was the first time she learned that the Tribunal had sent a letter on July 20, 2016 (the first July 20, 2016, letter) requesting additional information (the Declarations) to complete the Application. The representative claims that she never received the request to provide the declaration (the first July 20, 2016, letter).

[10] On October 6, 2016, the Applicant's representative executed the Authorization to Disclose.

[11] On October 20, 2016, the Tribunal reissued the July 20, 2016, letter (the first July 20, 2016, letter) to the representative requesting the missing information.

[12] On November 4, 2016, the Tribunal received both a declaration that the representative had executed and a declaration that the Applicant had executed.

[13] On November 8, 2016, the Tribunal acknowledged that the Application was complete and that the Applicant had authorized her legal representative to act on her behalf, but it noted that the Application was late, as it had exceeded the 90-day time limit.

ISSUE

[14] The Appeal Division must decide whether an extension of time to make the Application should be granted and, if so, whether the appeal has a reasonable chance of success.

PRELIMINARY MATTER—WAS THE APPLICATION LATE?

[15] Pursuant to section 57(1)(*b*) of the the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the Applicant. The requirements as to form and content of an application for leave to appeal are set out in section 40(1) of the *Social Security Tribunal Regulations* (Regulations).

[16] A Tribunal member has the authority to extend the time for filing of an application for leave to appeal pursuant to subsection 57(2) of the DESDA.

[17] Within the 90-day period, the Applicant obtained a legal representative, who wrote to the Tribunal asking for an extension of time. This extension was granted in the Tribunal's letter of April 27, 2016. The representative was given until July 7, 2016, to file the application for leave to appeal. The representative did file the application for leave to appeal by July 7, 2016; however, the application was incomplete because of a missing declaration. It appears that the representative received the Tribunal's notice of the missing declaration sometime in October 2016. The representative filed declarations, which the Tribunal received in November of 2016.

[18] In accordance with paragraph 3(1)(*b*) of the Regulations, the Tribunal may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision. Given that the Tribunal received the Applicant's incomplete application by the July 7, 2016, deadline, and given that the Applicant provided the missing declaration shortly after being notified of the missing information, the Appeal Division finds that special circumstances exist to rely on paragraph 3(1)(*b*) of the Regulations. The Applicant is dispensed from full compliance with section 24 of the Regulations, which required a declaration to be included with the application at the time it was filed.

[19] As a result, the Appeal Division finds that the Applicant's application was filed on time, that is, within the deadline of July 7, 2016.

LEAVE TO APPEAL

[20] According to subsections 56(1) and 58(3) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted," and "The Appeal Division must either grant or refuse leave to appeal."

[21] Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[22] According to subsection 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 made in a perverse or capricious manner or without regard for the material before it.

[23] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that

would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[24] The Applicant has submitted that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction in determining that she had ceased to be disabled in 2007. Her submissions are that, after receiving the same decision from the Minister to cancel his benefits, her husband appealed, and his benefits were reinstated. The argument is that,

> [i]t is perverse and procedurally unfair for the Tribunal to make a decision reinstating her husband's CPP disability pension and not reinstate her pension when many of the facts, law involved and the issues decided were virtually the same." (AD1A-16)

ANALYSIS

[25] Although framed as a potential breach of procedural fairness, this alleged error more appropriately falls under section 58(1)(*b*)—an alleged error in law. There should be consistency in the approach by all Tribunal members, in both procedure and decision making. If another General Division member decided her husband's case, which she claims is based on an identical set of facts as hers, and the outcome was different, then perhaps there would be a potential error of law.

[26] The determination that she had capacity to work was derived from evidence that she and her husband owned and operated, with the assistance of family, an "inn." From a review of the record, it does appear that she and her husband were both engaged in the business together. In fact, much of the General Division decision discusses their combined work and effort.

[27] There is a duty to ensure consistency in a tribunal's decisions. The Federal Court of Appeal quite clearly articulated this point in *Canada (Attorney General) v. Bri-Chem Supply Ltd*., 2016 FCA 257 :

> [40] The starting point for tribunals is that while they should try to follow their earlier decisions, they are not bound by them: IWA v. Consolidated Bathurst Packaging Ltd., 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282 at pages 327-28 and 333; Tremblay v. Quebec (Commission des affairs sociales), 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952 at pages 974; Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756 at pages 798-799. Further, within limits, it is possible for one tribunal panel to disagree with another and still act reasonably: Wilson v. Atomic Energy of Canada, 2016 SCC 29 (CanLII), 399 D.L.R. (4th) 193.
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> [41] However, that is only the starting point. Other principles come to bear. To name one, a tribunal is constrained by any rulings and guidance given by courts that govern the facts and issues in the case: Canada (Attorney General) v. Canadian Human Rights Commission, 2013 FCA 75 (CanLII), 444 NR 120 at paras. 18-19.
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> [42] Another principle is that, in a case like this, Parliament—with a view to furthering efficient and sound management over an area of administration—has passed a law empowering a tribunal to decide certain issues efficiently and once and for all. Certainty, predictability and finality matter. Allowing tribunal panels to disagree with each other without any limitation tears against the need for a good measure of certainty, predictability and finality.
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> [43] In some contexts, certainty, predictability and finality arguably matter even more. Here, for example, we are dealing with commercial importation and international trade, an area where the CBSA, customs brokers and others are deluged every day by millions of goods seeking quick, efficient and predictable entry to our domestic market: see the Tribunal decision at para. 37, quoted in para. 13, above.
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> [44] Therefore, while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is good reason.

[28] If the facts in both cases are identical, there may be a potential error of law, because the General Division arrived at a different result in this particular case. The Applicant has satisfied me that the appeal has a reasonable chance of success on this ground.

[29] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 (CanLII), indicated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. At paragraph 15 of that decision, the Federal Court of Appeal explained that "[t]he provision [section 58(2) of the DESDA]does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave."

[30] This application is one of the situations described in *Mette*. The alleged error in law and the analysis of whether the Applicant's medical condition was severe and prolonged may be interrelated. Therefore, it is unnecessary at this stage to deal with the other arguments raised by the Applicant.

CONCLUSION

[31] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[32] In accordance with s. 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, I would invite the Applicant to file submissions with the Appeal Division on how the facts in the two cases are the same. Additionally, within 45 days after the date of this decision, a copy of the General Division's decision relating to the Applicant's husband's appeal should be filed with the Appeal Division for consideration in this appeal.

Jennifer Cleversey-Moffitt
Member, Appeal Division