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

Citation: *L. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 706

Tribunal File Number: AD-17-429

BETWEEN:

**L. D.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: December 7, 2017

## DECISION AND REASONS

### DECISION

[1] Extension of time and leave to appeal are refused.

### OVERVIEW

[2] This appeal concerns a claim for disability benefits that was made long after the end of the coverage period.

[3] The Applicant, L. D., who is now 63 years old, has held a variety of clerical and secretarial jobs over the years but has worked only intermittently since the early 1990s. She complains of longstanding widespread pain and claims that she has been disabled since 1995.

[4] In September 2014, Ms. L. D. applied for disability benefits under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister) denied her application because it found insufficient evidence that she suffered from a severe and prolonged disability during her minimum qualifying period (MQP), which ended on December 31, 1997.

[5] Ms. L. D. appealed this decision to the General Division of the Social Security Tribunal of Canada (Tribunal). Following a hearing by teleconference, the General Division dismissed the appeal in a decision dated January 13, 2017, finding that she had failed to submit any pre-1998 medical evidence that would have substantiated her claim.

[6] On June 1, 2017, after the statutory 90-day deadline, Ms. L. D. submitted a request for leave to appeal to the Tribunal's Appeal Division, alleging that the General Division failed to adequately consider the available medical evidence. I have reviewed the record and concluded that, since Ms. L. D.'s grounds of appeal would have no reasonable chance of success, this is not a suitable case in which to permit an extension of time.

## ISSUES

[7] I must decide the following related issues:

Issue 1: Should Ms. L. D. receive an extension of time in which to file her application for leave to appeal?

Issue 2: Does Ms. L. D. have an arguable case that the General Division erred in

(i) disregarding medical evidence?

(ii) mischaracterizing her failed attempts to return to work?

(iii) finding various facts?

## ANALYSIS

### Issue 1: Should Ms. L. D. receive an extension of time?

[8] Pursuant to the *Department of Employment and Social Development Act* (DESDA),[1] 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 Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[9] The record indicates that the General Division issued its decision on January 13, 2017, and that the Tribunal received Ms. L. D.'s application for leave to appeal to the Appeal Division on June 1, 2017. This was more than four months after the General Division's decision had been mailed, and well after the 90-day filing deadline set out in the DESDA.

[10] Having reviewed the submissions, I have come to the conclusion that an extension of time is not warranted in this case. In *Canada v. Gattellaro*,[2] the Federal Court set out four factors to consider in deciding whether to allow further time to appeal:

(i) Whether there is a reasonable explanation for the delay;

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[1] Section 57 of the DESDA.
[2] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

(ii) Whether the applicant demonstrates a continuing intention to pursue the appeal;

(iii) Whether allowing the extension would cause prejudice to other parties; and

(iv) Whether the matter discloses an arguable case.

[11] The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.[3]

***(i) Reasonable explanation for the delay***

[12] Ms. L. D. offered the following reasons for submitting a late application for leave to appeal:

- She could not remember the stamped date on which she received the General Division's decision;
- Parts of her file had been tampered with and she had to request missing pages; and
- She was awaiting test results, including the results of an MRI of her spine.

[13] I understand that preparing and filing an appeal can be an onerous task for an unrepresented claimant, particularly one who may be struggling with a number of health conditions, but I do not find any of Ms. L. D.'s explanations for the delay convincing. The date on which the General Division issued its decision is not "stamped," but printed on the title page, and it should have provided Ms. L. D. with at least some guidance as to when the clock started running. She has not specified what parts of her file were tampered with or who might have done the tampering, nor has she explained why such tampering would have interfered with her ability to appeal. I note, however, that the record contains a memo, dated March 5, 2017, by a Tribunal staff member documenting a telephone request from Ms. L. D. to "resend her the GD [General Division] documents because she lost some of them." Finally, pending medical results are not a valid justification for delay since, as we will see, the Appeal Division is not

[3] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

empowered to consider disability claims on their merits and cannot assess evidence that was not accessible to the General Division.

### *(ii) Continuing intention to pursue the appeal*

[14] Although Ms. L. D. did not file a complete application for leave to appeal until more than a month after the expiry of the statutory limitation, I am willing to assume that she had a continuing intention to pursue the appeal. This is supported by a series of memos on file from February to May 2017 documenting Ms. L. D.'s requests, by telephone, for appeal forms and for help in completing those forms.

### *(iii) Prejudice to the other party*

[15] I find it unlikely that permitting Ms. L. D. to proceed with her appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

### *(iv) Arguable case*

[16] An applicant seeking an extension of time must show that they have at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[4]

[17] For the reasons that follow, I find that Ms. L. D. has failed to put forward grounds that would have a reasonable chance of success on appeal.

## Issue 2: Does Ms. L. D. have an arguable case that the General Division erred?

[18] There are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the

[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

material. An appeal may be brought only if the Appeal Division first grants leave to appeal.[5] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[6]

### *(i) Alleged disregard for medical evidence*

[19] Ms. L. D. submits that the General Division did not consider all the evidence in her appeal. She maintains that she has been unable to perform substantially gainful employment because of chronic back pain caused by a Tarlov cyst, as well as related fatigue, anxiety, vertigo and incontinence. She enclosed two spinal imaging reports—a May 2015 X-ray and an April 2017 MRI.

[20] For the most part, Ms. L. D.'s claimed grounds of appeal recapitulate arguments that were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that falls within the grounds of appeal enumerated in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[21] In the absence of a specific allegation of error, I find Ms. L. D.'s submissions to be so broad that they amount to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the General Division's in her favour, I am unable to do this. My authority permits me to determine only whether any of her reasons for appealing fall within the specified grounds of appeal and whether any of them have a reasonable chance of success.

[22] Ms. L. D. also submitted with her application for leave two medical reports that were not made available to the General Division—indeed, one of them was prepared after it had issued its decision. I am unable to consider either of them, given the constraints of the DESDA,

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[5] DESDA at subsections 56(1) and 58(3).
[6] DESDA at subsection 58(1).

which confers no authority on the Appeal Division to assess the merits of disability claims. Once a hearing has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

***(ii) Alleged mischaracterization of attempts to work***

[23] Ms. L. D. suggests that the General Division failed to recognize that financial imperatives forced her to take on jobs beyond her physical capacity.

[24] I do not see an arguable case on this ground. In its decision, the General Division relayed Ms. L. D.'s testimony that she had long experienced mounting pain and emotional distress, noting at paragraph 32 that she had not carried on any full-time work since 1993:

> After 1993, all the work she did was part-time, usually secretarial, because of her pain and the fact that she was sleeping a lot. She had lived on her savings. The work that she was doing in 2014 involved helping brain-injured people plant flowers and took up only two or three hours a week. At the present time, she sometimes ("once in a blue moon") did housekeeping or looked after elderly ladies "to help ends meet."

[25] Despite this, the General Division found that Ms. L. D.'s pattern of part-time work could not be linked to a severe and prolonged disability. The General Division noted that the onus was on Ms. L. D. to prove that she became disabled prior to December 31, 1997, and it found that she had not produced any evidence to discharge that burden.

[26] I do not see an arguable case that the General Division erred in coming to this conclusion, particularly where it has exercised its authority as trier of fact to assess the available evidence and come to a defensible conclusion.

### *(c) Alleged factual errors*

[27] Much of Ms. L. D.'s submissions consisted of paragraph-by-paragraph annotations of the General Division's decision, some of them pointing out errors, others merely adding commentary or supplemental information. Here, I will address only specific allegations of factual inaccuracy.

- Ms. L. D. suggests that the Record of Employment (GD2-33) produced by the Minister was inaccurate or incomplete, and she listed additional contributions that she claims to have made over the years. I see no arguable case on this ground, because the General Division was entitled to rely on this particular document. According to section 97 of the *Canada Pension Plan Regulations*, a record of earnings is presumed to be accurate and may not be called into question after four years have elapsed from the year in which a given entry was made.

- Ms. L. D. claims that the General Division found—incorrectly—that she worked "three hours a day from May to August 2014 and two hours a day from September to October 2014."[7] In fact, says Ms. L. D., the General Division neglected to note that she disclosed in the questionnaire accompanying her application for CPP benefits (GD2-118) that she worked only two days per week during the first period and one day per week in the second. In my view, this error, if it can be so characterized, does not rise to the standard demanded by paragraph 58(1)(*c*) of the DESDA, which permits a decision to be overturned only if it was *based* on an error that was *capricious or without regard for the material*. In this case, I am satisfied that the General Division did not base its decision on the length of Ms. L. D.'s work week 17 years after the MQP. In any event, I note that, a few paragraphs later,[8] the General Division accurately characterized her hours when it wrote, "The work that she was doing in 2014 […] took up only two or three hours a week."

[7] Paragraph 23 of the General Division's decision.
[8] Paragraph 32.

- Ms. L. D. claims that the General Division erred in finding that she is allergic to both ibuprofen and codeine[9] whereas, in fact, she takes the former and is allergic only to the latter. Again, an error must be material—that is, the decision must be based on it—and it does not appear to me that Ms. L. D.'s recent medication regime played any part in the General Division's analysis.

**CONCLUSION**

[28] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. Although I found that Ms. L. D. had a continuing intention to pursue her appeal, I did not find her explanations for the delay in requesting leave to appeal reasonable. I thought it unlikely that the Minister's interests would be prejudiced by extending time, but I could find no arguable case for any of the grounds advanced by Ms. L. D. It was this last factor that was decisive; I see no point in advancing this application to a full appeal that is doomed to fail.

[29] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.

Member, Appeal Division

[9] Paragraph 30.