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

Citation: *V. N. v. Minister of Employment and Social Development*, 2018 SST 755

Tribunal File Number: AD-18-124

BETWEEN:

V. N.

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: July 20, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application is refused.

OVERVIEW

[2] The Applicant, V. N., began receiving a retirement pension in October 2015. The Applicant applied for a disability pension under the *Canada Pension Plan* (CPP). Her application was denied by the Respondent, the Minister of Employment and Social Development (Minister), initially and upon reconsideration. The reconsideration decision is dated April 24, 2017. The Applicant states she received the reconsideration decision on April 25, 2017.

[3] The Applicant appealed that decision to the General Division of the Social Security Tribunal of Canada (Tribunal) on October 10, 2017, beyond the 90-day limit set out in s. 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act).

[4] In a decision dated November 27, 2017, the General Division refused an extension of time to appeal under s. 52(2) of the DESD Act.

[5] The Applicant appealed this decision to the Appeal Division and in the application received on February 22, 2018, the Applicant submitted that she is appealing a summary dismissal which would mean that no leave to appeal is required.[1]

[6] After a review of the General Division decision of November 27, 2017, it is evident that the decision was not a summary dismissal, so this decision is a leave to appeal decision.

[7] Given the instructions in *Gattellaro*,[2] to allow for an extension of time to appeal, the member must consider whether there is an arguable case. The Applicant made her application for a disability pension more than 15 months after receiving her retirement pension, which means disability benefits cannot be paid under s. 42(2)(*b*) of the CPP. The Tribunal is bound by the language of the CPP.

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[1] DESD Act, s. 56(2).
[2] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

[8] Leave to appeal is refused because there is no arguable case.

PRELIMINARY MATTERS – SUMMARY DISMISSAL

[9] In the application to the Tribunal's Appeal Division (received February 22, 2018), the Applicant submits that the General Division decision was a summary dismissal.[3] This would mean that no leave to appeal is required, as there is an appeal as of right when dealing with a summary dismissal from the General Division.[4]

[10] To determine whether this was a summary dismissal, I look to s. 53 of the DESD Act, which reads:

> (1) The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.
>
> (2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.
>
> (3) The appellant may appeal the decision to the Appeal Division.

[11] On November 17, 2017, the Respondent requested that the General Division summarily dismiss the appeal. However, based on the record, the General Division did not proceed in this manner.

[12] Subsection 53(1) of the DESD Act allows for summary dismissal if the General Division is satisfied that an appeal has no reasonable chance of success. Prior to delivering the decision, however, the General Division is required to send notice to the appellant as per s. 22 of the *Social Security Tribunal Regulations*.[5] After a review of the file, I have determined that no such notice was sent.

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[3] DESD Act, ss. 53(1) and 53(3).
[4] DESD Act, s. 56(2).
[5] Section 22 of the *Social Security Tribunal Regulations*, SOR/2013-60 requires that "[b]efore summarily dismissing an appeal pursuant to subsection 53(1) of the Act, the General Division must give notice in writing to the appellant and allow the appellant a reasonable period of time to make submissions."

[13] In the decision of *W. W. v. Minister of Employment and Social Development*[6], my colleague very succinctly explained the various ways the test for summary dismissal is interpreted to determine whether it can be used. She examined the case before her and asked whether it was plain and obvious on the face of the record that the appeal was bound to fail, regardless of the evidence or arguments that could be presented at a hearing.[7] She went on to further explain that summary dismissal is not used for "weak" cases,[8] noting that "[i]t is also clear that this is not a 'weak' case but rather an 'utterly hopeless' one, as it does not involve assessing the merits of the case or examining the evidence."

[14] It is clear in this file that the General Division did not summarily dismiss the appeal, despite the Respondent's request. The member did not:

a) provide notice to the Applicant that he was contemplating a summary dismissal of the appeal;

b) apply the test for a summary dismissal (looking to see if it is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at hearing);[9] or

c) rely on s. 53(1), nor did he claim to "summarily dismiss" the appeal.

[15] The General Division reviewed the arguments and evidence submitted and decided that the appeal could not proceed based on that analysis. This does not mean the decision was a summary dismissal.

[16] Because the General Division decision was not a summary dismissal, I shall now consider whether leave to appeal should be granted.

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[6] *W. W. v. Minister of Employment and Social Development, 2007 CanLII 31749 (SST).*
[7] *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.
[8] *AD-15-236 (C.S. v. Minister of Employment and Social Development*, 2015 SSTAD 974), *AD-15-297 (A.P. v. Minister of Employment and Social Development*, 2015 SSTAD 973), and *AD-15-401 (A.A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178
[9] *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.

ISSUES

[17] In a letter dated April 9, 2018, I wrote to the Applicant asking for submissions as to why leave should be granted it if were determined that the decision of November 27, 2017, was not a summary dismissal.

[18] The Applicant has advanced a number of arguments as to why the extension of time should be granted. I have determined that the issue can be addressed as follows:

> Issue: Is there an arguable case that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it when the General Division member determined that:
>
> a) the Applicant made her application for a disability pension more than 15 months after receiving her retirement pension;
>
> b) the Applicant's last day of work was December 31, 2016; and
>
> c) the Applicant's receipt of a disability tax credit from Revenue Canada did not automatically qualify her for a CPP disability pension?

[19] In order to grant leave to appeal, I must consider whether there is an arguable case that the General Division, when it decided to refuse an extension of time, committed an error within the scope of s. 58(1)(*c*) of the DESD Act.

ANALYSIS

[20] According to ss. 56(1) and 58(3) of the DESD Act, "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 DESD Act 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 s. 58(1) of the DESD Act, 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;
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> (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.

[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 has 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 stage.[10]

[24] Under s. 52(1)(*b*) of the DESD Act, an appeal of the Respondent's reconsideration decision must be brought to the General Division within 90 days after the day on which the decision is communicated to an appellant.

[25] Subsection 57(2) of the DESD Act gives the General Division discretion to allow further time—though not more than one year beyond the day on which the decision was communicated to an applicant—within which a leave to appeal application may be made.

[26] In *Gattellaro,*[11] the Federal Court set out four criteria that should be considered and weighed in determining whether to grant an extension of time:

1. The person requesting the extension has demonstrated a continuing intention to pursue the application or appeal;

2. The matter discloses an arguable case;

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[10] *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC); *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[11] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

3. The moving party has a reasonable explanation for the delay; and

4. There is no prejudice to the responding party in allowing the extension.

[27] Not all four questions need be resolved in favour of the party seeking an extension. Rather, the overriding consideration is that the interests of justice be served.[12]

[28] The member correctly stated the relevant law applicable to his exercise of discretion to grant or deny the extension of time. In his analysis, the General Division member correctly cited the factors he was to consider and weigh in accordance with *Gattellaro*. The member also correctly instructed himself that the overriding consideration is that the interests of justice be served, citing the Federal Court of Appeal's decision in *Larkman*. Looking to the four factors, he concluded that the Applicant did not have an arguable case, and, ultimately, the extension of time request was refused.

Is there an arguable case that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it when the General Division member determined that:

a) the Applicant made her application for a disability pension more than 15 months after receiving her retirement pension;

b) the Applicant's last day of work was December 31, 2016; and

c) the Applicant's receipt of a disability tax credit from Revenue Canada did not automatically qualify her for a CPP disability pension?

[29] I find that there is no arguable case that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. These arguments have no reasonable chance of success on appeal.

[30] The Applicant submits that her application for a disability pension was made within 15 months of receiving her retirement pension and that her last day of work due to disability was actually December 7, 2016, or December 9, 2016, and not December 31, 2016. She also submits

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

that because she was receiving a disability tax credit from Revenue Canada, this would qualify her for a CPP disability pension. She argues that the General Division erred in its analysis by not properly considering these three facts when it considered whether she had an arguable case.

[31] The Respondent provided no submissions.

[32] In his decision issued on November 27, 2017, the General Division member considered the factors set out by the Federal Court in *Gattellaro*. Although the member concluded that the Applicant had a continuing intention to pursue the appeal and a reasonable explanation for the delay and that the Respondent's interests did not appear to be prejudiced, he found that there was no arguable case on the appeal. Citing *Larkman*, the member refused the extension of time in the interests of justice, giving greatest weight in his analysis to the lack of an arguable case. Essentially, he found that because the Applicant applied for a disability pension more than 15 months after she began receiving her retirement pension, she was ineligible for a disability pension.

[33] Subsection 70(3) of the CPP states that once a beneficiary starts to receive a CPP retirement pension, that beneficiary cannot apply or re-apply, at any time, for a disability pension except as provided in s. 66.1 of the CPP. In accordance with s. 66.1(1.1), an individual can cancel a retirement pension in favour of a disability pension only if the individual is deemed to have become disabled before the month the retirement pension became payable. Paragraph 42(2)(*b*) of the CPP states that in no case may a person be deemed to have become disabled earlier than 15 months before the time of the making of the disability application.

[34] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an appellant must:

> a) be under 65 years of age;
>
> b) not be in receipt of the CPP retirement pension;
>
> c) be disabled; and
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> d) have made valid contributions to the CPP for not less than the minimum qualifying period.

[35] The Applicant began receiving her CPP retirement pension in October 2015. Her application for a CPP disability pension was received on January 20, 2017. In paragraph 11 of the General Division decision, the member concludes:

> While there is medical evidence related to the [Applicant's] medical conditions at the time around the commencement of her CPP retirement pension, her application for CPP disability benefits was not received until January 20, 2017. This is a critical issue, as s. 42(2)(*b*) of the Canada Pension Plan states that the deemed disability date cannot be more than 15 months before the time that an application is made. This means that, regardless of the medical merit of her case, she cannot be deemed to be disabled prior to October 2015. However, this appears to make it impossible for the [Applicant] to establish a deemed disability date on or before September 30, 2015.

[36] Additionally, the General Division member writes that the evidence does not support a different filing date of the application for a disability pension. In paragraph 12 of the General Division decision, the member notes that the legislation does not provide for discretion in the timing of filing an application for a disability pension in favour of a retirement pension. He writes:

> The [Applicant] has not suggested that her current application was filed prior to January 20, 2017. She did suggest that she was unaware of the provisions in s. 42(2)(*b*) of the Canada Pension Plan prior to December 2016. She also suggested that the delays often encountered during the holiday season impacted her ability to apply sooner than she actually did. However, there is no statutory authority permitting these factors to be relied upon by the Tribunal, in determining when her application was filed. There also has been no suggestion that there was any kind of potential incapacity, as contemplated by ss. 60(8) or (9) of the Canada Pension Plan.

[37] The finding that the Applicant filed the application for a disability pension more than 15 months after she began receiving her retirement pension is the issue. The Applicant's assertion that she filed within the 15-month period time, without providing any evidence of a different filing date, is not enough to determine that the General Division member made an erroneous finding of fact. In her application to the Appeal Division, she did not specify the date on which she claims to have made her application nor did she point to any evidence in the file that would

support her assertion. In fact, in the Reasons for Appeal of her Notice of Appeal of the reconsideration decision, the Applicant confirms that the application was late, stating:

> When I first learned that I could still receive a disability pension if applied within 15 months of starting my CPP it was in the 15th month. This was in December 2016. I needed to get my doctor's report and by the time I saw him, received the report and submitted it I believe it was just two weeks late. December is not a good month to get things in order due to the vacation and holiday time that causes office closures during the Christmas and New Year Season. My application was rejected not because I did not meet the qualifications but because I was just two weeks late.[13]

[38] I have reviewed the file. There was no evidence to suggest that the application was made on an earlier date.

[39] The Applicant's submission that her last day of work was actually December 7, 2016, or December 9, 2016, instead of the date that the General Division noted in its decision—December 31, 2016—is immaterial to the question of when the disability application was made. The evidence supports that the application for a disability pension was received on January 20, 2017.

[40] The Applicant's argument that she was receiving a disability tax credit and that this should qualify her for a disability pension is also irrelevant to the question of whether the application for a disability pension was made within the required 15 months of receiving a retirement pension.

[41] Although the General Division member found that the Applicant satisfied the other three *Gattellaro* factors, he concluded that substantial weight be given to the "arguable case factor." The member then concluded the appeal did not disclose an arguable case. In my view, there is no arguable basis on which to find the member committed a reviewable error within the scope of s. 58(1) of the DESD Act when he made this finding.

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[13] GD1-4.

[42] I bear in mind the Federal Court's decision in *Griffin*,[14] where Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under s. 58(1) of the DESD Act:

> [20] It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 (CanLII) at para 52, [2016] FCJ No 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 (CanLII) at para 10, [2016] FCJ No 615.

[43] I have reviewed the underlying record and have not identified any instance of where the General Division Member failed to properly account for any portion of the evidence.

[44] This application raises no arguments that would have a reasonable chance of success on appeal. Leave to appeal is refused.

CONCLUSION

[45] The application is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division

SUBMISSIONS BY:	V. N., self-represented

[14] *Griffin v. Canada (Attorney General)*, 2016 FC 874