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

Citation: *J. Q. v. Minister of Employment and Social Development*, 2018 SST 840

Tribunal File Number: AD-18-252

BETWEEN:

J. Q.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Kate Sellar

Date of Decision: August 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] An extension of time to apply for leave to appeal is refused.

OVERVIEW

[2] J. Q. (Claimant), worked in security and later as a foreman for a cleaning company. He bought and sold two small businesses that were run by his common-law partner. In 2009, he bought a store that they both worked in for a period of time. As of October 2012, the Claimant reports that he was too sick to work in the store and the partner took over for a time. When the relationship soured, the Claimant continued to work very minimal hours, opening the store by request. In 2017, his gross income was approximately $10,000. The Claimant states he has depression, chronic and traumatic osteoarthritis, and difficult-to-treat hypertension.

[3] The Claimant applied for a disability pension under the Canada Pension Plan (CPP), and the Minister denied his application both initially and upon reconsideration. The Claimant appealed to this Tribunal, and the General Division denied his appeal in February 2018. The General Division found that there was no medical evidence to support that the Claimant's medical conditions were disabling prior to his break-up with his partner in January 2013, which was a year after the Claimant's minimum qualifying period (MQP). The General Division noted that the Claimant did not provide testimony at the hearing and that the Claimant's designated representative, no matter how sincere, did not provide a sufficient basis to support a finding of disability in the absence of supporting medical documentation.

ISSUES

1. Is the application for leave to appeal late?
2. Considering the relevant criteria, should the Appeal Division grant an extension of time?

ANALYSIS

Issue 1: Is the application for leave to appeal late?

[4] The application for leave to appeal is late.

[5] A claimant must make an application for leave to appeal to the Appeal Division within 90 days of the Tribunal communicating the decision to that claimant (the 90-day mark).[1] Section 40 of the *Social Security Tribunal Regulations* (SST Regulations) lists the information that must be provided to the Tribunal in order to file a complete application. The Appeal Division may allow further time for claimants 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 (the one-year limit).[2] The Appeal Division may grant an extension of time for an application that is submitted after the 90-day mark but before the one-year limit outlined in the *Department of Employment and Social Development Act* (DESDA).

[6] The General Division's decision is dated February 2, 2018, and the decision letter is dated February 5, 2018. The Claimant does not remember when he received the General Division's decision.[3] According to s. 19(1) of the SST Regulations, the decision is deemed to have been communicated to a party 10 days after the day on which it is sent by ordinary mail, which in this case is February 15, 2018.

[7] The Claimant filed an incomplete application for leave to appeal (Application) with the Tribunal's Appeal Division, which the Tribunal received on April 20, 2018. The Tribunal wrote to the Claimant, indicating that his appeal was incomplete and requesting additional information.[4] The Tribunal indicated that if it received the missing information by May 28, 2018, the Application would be deemed received on April 20, 2018. The Claimant provided more information on May 23, 2018.

[8] On May 25, 2018, the Tribunal wrote to the Claimant again, indicating that the Application was still incomplete.[5] On June 26, 2018, the Claimant provided more information. On June 29, 2018, the Tribunal wrote to the Claimant, acknowledging receipt of a complete application and stating that it appeared the Application was late.

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[1] *Department of Employment and Social Development Act*, (DESDA), s. 57(1)(*b*)
[2] *Ibid.*, s. 57(2)
[3] AD1-4
[4] *Bossé v. Canada (Attorney General)*, 2015 FC 1142
[5] As is consistent with *Bossé v. Canada (Attorney General)*, 2015 FC 1142

[9] The completed application for leave to appeal was filed on June 26, 2018, well beyond the 90-day mark, so it is late. However, it is within the one-year limit, so the Appeal Division can consider granting an extension of time.

Issue 2: Considering the relevant criteria, should the Appeal Division grant the Claimant an extension of time?

[10] The Appeal Division will not grant the extension of time. There are four criteria the Appeal Division must consider in order to determine whether to grant an extension of time: (i) whether there was a continuing intention to pursue the application; (ii) whether the matter discloses an arguable case; (iii) whether there is a reasonable explanation for the delay; and (iv) whether there is prejudice to the other party in allowing the extension.[6]

[11] The weight to be given to each of these four criteria 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.[7]

(i) Continuing intention to pursue the application

[12] The Claimant has demonstrated a continuing intention to pursue the Application.

[13] A claimant should show an intention to bring an application before the 90-day mark and continuously thereafter.[8] A claimant is to pursue the appeal as diligently as could reasonably be expected.[9]

[14] Using the date that the decision was deemed to have been communicated to the Claimant, it is clear that the Claimant's initial incomplete Application was filed by the 90-day mark. He showed a continuing intention continuously thereafter by providing additional information in response to the Tribunal's requests to complete the Application in both May and June of 2018.

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[6] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883
[7] *Canada (Attorney General) v. Larkman*, 2012 FCA 204
[8] *Doray v. Canada*, 2014 FCA 87
[9] *Caisse Populaire Desjardins Maniwaki v. Canada (Attorney General)*, 2003 FC 1165

[15] The Claimant has had assistance from a personal support worker who is also a friend. He appears to have done his best to communicate with the Tribunal in writing and by phone in a timely manner, signalling a continuing intention to pursue his application for leave to appeal.

(ii) Explanation for the delay

[16] The Claimant has provided a reasonable explanation for the delay.

[17] It is clear that the Claimant and his representative (a friend and personal support worker) have struggled to comply with the requirements for an application for leave to appeal. In response to the Tribunal's request for an explanation as to why the Application was late, the representative stated that he was sure he had complied with the Tribunal's deadlines. This explanation is accurate in the sense that the representative responded to requests from the Tribunal to provide more information in order to complete the Application. However, the Application was deemed complete after the 90-day mark had passed, so the Application is, in fact, late. Based on the communication between the representative, the Claimant, and the Tribunal, it appears that the actual explanation for the delay is a genuine difficulty on the part of the Claimant and his representative in understanding what information was required. The Claimant has contacted the Tribunal for an update and appears to have genuinely struggled with the Tribunal's processes to date. That explanation is reasonable.

(iii) Arguable case

[18] The Claimant does not have an arguable case for an error under the DESDA.

[19] An arguable case, in the context of a request for an extension of time, requires that there be some reasonable chance of success. This is a very low threshold.[10]

[20] In the application for leave to appeal, the Claimant checked the box indicating that the General Division made an error of fact under the DESDA. However, the Claimant did not make the nature of that alleged error clear. The Tribunal wrote to the Claimant twice to provide him with the opportunity to explain more about how he has a reasonable chance of success in his

[10] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63

appeal. However, the Claimant has not provided any further information that would explain how he has a reasonable chance of success on appeal.

[21] The Claimant has provided, through his representative, an update on his medical conditions. The Appeal Division does not normally grant leave to appeal based on new evidence.[11] New evidence about the Claimant's health cannot form the basis for an arguable case on appeal. The Appeal Division has not considered this evidence in reaching this decision.

(iv) Prejudice to the Minister in allowing the extension

[22] There is no prejudice to the Minister in allowing the Claimant an extension of time. The Appeal Division anticipates that at the next stage of the proceedings, the Minister would not be prejudiced in providing a submission on the appeal based on the existing record.

Application for Extension of Time Refused

[23] Having considered all of the criteria, the Appeal Division refuses to grant the application for an extension of time.

[24] Most of the factors are in favour of granting an extension of time: there is a continuing intention to pursue the application, a reasonable explanation for the delay, and no prejudice to the Minister. However, there is no arguable case. The overall consideration is that the interests of justice be served, but allowing the Claimant an extension of time on an appeal that has no reasonable chance of success does not serve the interests of justice.[12] Although the Claimant checked the box for an error of fact, the Claimant has not provided anything that points to an arguable case that the General Division reached any finding that was perverse or capricious or without regard for the record.

[25] The Appeal Division has reviewed the record and is satisfied that the General Division did not ignore or misconstrue the evidence.

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[11] *Mette v. Canada (Attorney General)*, 2016 FCA 276
[12] *McCann v. Canada (Pension Plan Disability Benefit)*, 2016 FC 878; *Maqsood v. Canada (Attorney General)*, 2011 FCA 309

[26] To be eligible for a CPP disability pension, the Claimant had to show that he had a severe and prolonged disability on or before the end of his MQP.[13] Medical evidence is required.[14]

[27] The General Division heard and considered evidence that the Claimant has had post-traumatic stress disorder since 2011, and that he had been diagnosed with osteoarthritis, and that initially he tried to "combat" his illness alone.[15] The General Division heard and considered evidence that before 2011, the Claimant chose to be treated at the X Community Hospital rather than by his family doctor.[16] The General Division allowed the Claimant to produce medical records from that hospital after the hearing, but the General Division considered those records and decided that they did not show that the Claimant had a severe disability according to the CPP.[17] The Claimant chose not to testify at the General Division hearing, and, as a result, the General Division had to rely on the documents before it and the information provided by the Claimant's representative. The General Division concluded that the evidence did not support a finding that the Claimant was incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2011, when his MQP ended. The General Division did not ignore or misconstrue the evidence in reaching that conclusion.

CONCLUSION

[28] An extension of time to apply for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVES:	J. Q., Applicant Jeff Snider, for the Applicant

[13] *Canada Pension Plan*, s. 42(2)(*a*)(i)
[14] *Warren v. Canada (Attorney General)*, 2008 FCA 377
[15] General Division decision, para. 16
[16] *Ibid*., para. 17
[17] *Ibid*., paras. 19, 20