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

Citation: *S. P. v. Minister of Employment and Social Development*, 2018 SST 845

Tribunal File Number: AD-18-473

BETWEEN:

S. P.

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 27, 2018

DECISION AND REASONS

DECISION

[1] The application for an extension of time for leave to appeal is refused.

OVERVIEW

[2] S. P. (Applicant) applied for a disability pension under the Canada Pension Plan. Her claim is based on several mental health conditions, shoulder and back pain, and bilateral thoracic outlet syndrome. She has a financial planning qualification and seasonal experience with a company that prepares income tax returns.

[3] The Minister denied the Applicant's application both initially and on reconsideration. This Tribunal dismissed the Applicant's appeal on March 29, 2018. The General Division found that the Claimant had a capacity for work during her minimum qualifying period (MQP), which ended on December 31, 2017. The General Division found that there was no evidence that the Claimant's functional limitations associated with her medical conditions have made her efforts at obtaining and maintaining employment unsuccessful.

[4] The Claimant made an application for leave to appeal the General Division's decision. The Appeal Division must decide whether that application for leave to appeal is late. If it is late, the Appeal Division must decide, in light of all the relevant factors, whether to extend the time for filing the application.

[5] The application for leave to appeal is late, and the Appeal Division will not grant an extension of time to file the application. Although the other relevant factors weigh in favour of granting the request for an extension of time, the Applicant does not have an arguable case, and overall it would not be in the interests of justice for the case to proceed.

ISSUES

[6] Is the application for leave to appeal late?

[7] Considering the relevant criteria, should the Appeal Division grant the Applicant an extension of time?

ANALYSIS

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

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

[9] An applicant must make an application for leave to appeal to the Appeal Division within 90 days of the Tribunal communicating the decision (the 90-day mark).[1] Section 40 of the *Social Security Tribunal Regulations* lists the information that must be provided to file a complete application. The Appeal Division may allow further time for an applicant 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 to the applicant (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). When the Tribunal sends a decision to a party by ordinary mail, it is deemed to have been communicated to a party 10 days after the day it is mailed.[3]

[10] The General Division decision is dated March 29, 2018. The Applicant does not remember when she received the decision.[4] The Tribunal's decision letter addressed to the Applicant is dated April 4, 2018, so it is deemed to have been communicated to the Applicant on April 14, 2018. The Applicant filed an application for leave to appeal on July 25, 2018, almost two weeks after the 90-day mark.

[11] The application for leave to appeal is late. However, the application for leave to appeal was filed 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 Applicant an extension of time?

[12] The application for an extension of time to file the application for leave to appeal is refused.

---

[1] *Department of Employment and Social Development Act* (DESDA), s. 57(1)(*b*)
[2] DESDA, s. 57(2)
[3] *Social Security Tribunal Regulations*, s. 19(1)(*a*)
[4] AD1-3

[13] 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 there is a reasonable explanation for the delay, (iii) whether the matter discloses an arguable case, and (iv) whether there is prejudice to the other part in allowing the extension.[5]

[14] 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.[6] The overriding consideration is that the interests of justice be served.[7]

(i) Continuing intention to pursue the application

[15] The Applicant has shown a continuing intention to pursue the application.

[16] An applicant should show an intention to bring an application by the 90-day mark and continuously thereafter.[8] An applicant is to pursue the appeal as diligently as could reasonably be expected.[9]

[17] The Applicant is unrepresented. English is not her first language. She contacted the Tribunal by phone before the 90-day mark on May 24, 2018, and received guidance in locating the form she needed online in order to make an application for leave to appeal to the Appeal Division. After the 90-day mark, on July 24, 2018, she contacted the Tribunal again by phone to request a copy of the record from the General Division, which she had lost. The Applicant was less than two weeks late in filing her application, and her contact with the tribunal both before and after the deadline shows that she acted as diligently as can reasonably be expected.

(ii) Explanation for the delay

[18] The Applicant has provided a reasonable explanation for the delay.

---

[5] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883
[6] *Pentney v. Canada (Attorney General)*, [2008] 4 FCR 265
[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

[19] The Applicant is unrepresented and appears to have been waiting on some further medical information that she believed would be important before filing her application for leave to appeal. The Applicant also says that she has been experiencing some side effects from medications that have further impacted her health.

[20] The Appeal Division accepts the Applicant's explanation. It does not seem that the Applicant is aware that the Appeal Division does not provide a new hearing on the merits in which the Appeal Division would consider new medical evidence. The information she has provided about recent side effects of her medications is not disputed. The Applicant appears to have genuinely struggled somewhat with the Tribunal's processes since receiving her decision from the General Division, and she is unrepresented. The Appeal Division accepts her explanation for the short delay as sufficiently reasonable.

(iii) Arguable case

[21] The Applicant does not have an arguable case.

[22] The Appeal Division grants leave to appeal General Division decisions only where there is an arguable case that the General Division has made an error. The only errors that allow the Appeal Division to grant leave to appeal are those that are listed in the DESDA. These errors are referred to as the "grounds of appeal." One of the grounds of appeal listed in the DESDA occurs when the General Division makes an error of fact that is either capricious or perverse or made without regard for the evidence.[10]

[23] The test for an arguable case is a very low threshold.[11] An arguable case in the context of an application for an extension of time requires that the Applicant show some reasonable chance of success.[12]

[24] The Applicant argues that the General Division has made several errors of fact in its decision. None of these arguments has a reasonable chance of success.

---

[10] DESDA, s. 58(1)(*c*)
[11] *McKinney v. Canada*, 2008 FCA 409
[12] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41

[25] First, the Applicant seems to argue that the General Division reached its decision about her work capacity without regard for the fact that her efforts to stay employed have gone beyond her "medical requirements." This argument does not give rise to an arguable case under the DESDA.

[26] At the General Division, the Applicant relied on a letter from Dr. Kohli dated August 23, 2017. Dr. Kohli diagnosed the Applicant's severe bilateral thoracic outlet syndrome. Dr. Kohli stated that the Applicant was currently unable to work due to her symptoms.[13] The Applicant testified that she completed seasonal work (during the tax season) in 2017, and again in 2018. It is true that, in completing this seasonal work, the Applicant has exceeded her stated medical restriction from Dr. Kohli, which states that she cannot work, but the General Division did not ignore the evidence that the Applicant exceeded those "medical requirements."

[27] Instead, in weighing that evidence, the General Division considered that, despite Dr. Kohli's opinion about her ability to work, the Applicant was actually working, although seasonally. The General Division relied in part on the evidence of the work the Applicant completed to be evidence of a capacity to work.[14] The Applicant has no reasonable chance of success on this ground. The General Division did not reach this finding in a perverse or capricious manner, and the finding about work capacity was made with regard for both the evidence from Dr. Kohli and the actual work the Applicant completed.

[28] Second, the Applicant seems to argue that the General Division did not have regard for the evidence that showed that the work she has been doing seasonally was not substantially gainful. This argument does not give rise to an arguable case for an error under the DESDA. The General Division did not make a finding that the work she was doing was substantially gainful. Instead, the General Division focused on the Applicant's personal circumstances and the fact that she was completing the seasonal work to find that she was employable.[15]

---

[13] GD8-2
[14] General Division decision, para. 36
[15] The General Division found that there was no evidence that the Claimant would be unable to do similar work at least part time on a non-seasonal basis (para. 36), and that, in any event, when considering her personal circumstances in a "real world" context, the Applicant had skills and a work history consistent with employability (para. 35).

[29] The Applicant provided several other statements about the General Division's decision that do not fall under a ground of appeal and therefore cannot form an arguable case.[16]

(iv) Prejudice to the Minister in allowing the extension

[30] There is no prejudice to the Minister in allowing the Applicant 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, which is its usual practice.

Application for extension of time refused

[31] Having considered all of the criteria, the application for an extension of time is refused.

[32] The Applicant demonstrated a continuing intention to pursue the application, she provided a reasonable explanation for the fact that the application was late, and there is no prejudice to the Minister in granting the extension. However, the Applicant has not demonstrated an arguable case. Considering all the factors, it is not in the interests of justice to proceed to an appeal in this matter where the Applicant cannot show a reasonable chance of success.

[33] The Appeal Division has reviewed the record and is satisfied that the General Division did not ignore or misconstrue the evidence.[17] At the General Division, the Applicant had to show that she has a severe and prolonged disability on or before the end of her MQP.[18] The Applicant clearly has disabilities that impact her functioning. However, the General Division weighed the available evidence about the improvements in her mental health, and her demonstrated ability to work seasonally despite her physical pain, and concluded that there was evidence of capacity to work. The General Division then required the Applicant to show that efforts to obtain and maintain employment were unsuccessful by reason of her health condition, and the General Division found that the Applicant could not meet that requirement on the evidence.

---

[16] For example, she states that her pain is getting worse and that she is now experiencing other health issues after increasing her medications.
[17] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615
[18] *Canada Pension Plan*, s.42(2)(*a*)(i)

CONCLUSION

[34] The application for an extension of time to apply for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	S. P., self-represented