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

Citation: *A. R. v. Minister of Employment and Social Development*, 2018 SST 944

Tribunal File Number: AD-18-310

BETWEEN:

A. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision by: Jude Samson

Date of Decision: September 24, 2018

DECISION AND REASONS

DECISION

[1] The applications for an extension of time to apply for leave to appeal and for leave to appeal are both refused.

OVERVIEW

[2] The Applicant, A. R., applied for a disability pension under the *Canada Pension Plan* (CPP), saying that her ability to continue working as a nurse was impaired by rheumatoid arthritis, chronic bronchiectasis, and the removal of multiple cervical discs, all of which caused chronic pain and coughs, along with stiffness, headaches, fatigue, and depression, to name some of her symptoms. Though she had been working reduced hours and modified duties for some time, she stopped working altogether in May 2016.

[3] The Respondent, the Minister of Employment and Social Development (Minister), denied the Applicant's application for a disability pension initially and upon reconsideration. The Applicant appealed the Minister's reconsideration decision to the Tribunal's General Division, but it dismissed her appeal.

[4] The Applicant now wants to appeal the General Division decision to the Tribunal's Appeal Division, but she has two preliminary hurdles to overcome for the matter to proceed. First, because the application requesting leave to appeal was filed after the 90-day deadline had expired, an extension of time is required. Second, like most appeals before the Tribunal's Appeal Division, it can proceed only if leave (or permission) to appeal is granted.

[5] Unfortunately for the Applicant, I have concluded that she has not overcome either of these preliminary hurdles.

ISSUES

[6] As part of this decision, I have considered the following questions:

a) Was the application requesting leave to appeal to the Appeal Division filed late?

b) Should the Applicant be given an extension of time to request leave to appeal?

c) Should the Applicant be granted leave to appeal?

ANALYSIS

Issue 1: Was the application requesting leave to appeal to the Appeal Division filed late?

[7] Yes, the application requesting leave to appeal was filed late.

[8] Applications requesting leave to appeal are due within 90 days of when claimants receive General Division decisions; however, the Appeal Division can allow extensions of time, so long as the application is filed less than a year late.[1]

[9] In this case, the General Division decision and the cover letter that accompanied it are both dated June 6, 2017, and normally would have been sent to the Applicant by ordinary mail on or around that day. The Applicant's materials do not clearly state when she received the General Division decision; however, section 19 of the *Social Security Tribunal Regulations* (SST Regulations) deems that she received it 10 days after it was sent: on June 16, 2017. As a result, her application requesting leave to appeal was due on September 14, 2017, but I can grant an extension of time so long as her application was received by the Tribunal on or before June 18, 2018.[2]

[10] The Tribunal received the Applicant's application requesting leave to appeal on May 4, 2018, but it was incomplete because she had not provided all of the information set out in section 40(1) of the SST Regulations. On May 10, 2018, the Tribunal sent the Applicant a letter describing the information that was missing from her application, and the Applicant provided that information to the Tribunal on July 13, 2018, which is the day her application was considered complete.

[11] Because the Applicant's application requesting leave to appeal was completed more than a year after she received the General Division decision, I would not normally have the power to grant an extension of time. However, the Applicant claims not to have received the Tribunal's

[1] *Department of Employment and Social Development Act* (DESD Act), ss 57(1)(*b*) and 57(2).
[2] June 16, 2018, was a Saturday.

standard letter that normally accompanies General Division decisions and describes how those decisions can be appealed. In addition, the Applicant says that, once she learned that she could appeal the General Division decision, she received a good deal of conflicting information about where to send her appeal, which led to the significant delay.

[12] As a result, I am satisfied that special circumstances exist and that I should exercise my discretion to waive the requirement that the Applicant fully comply with section 40(1) of the SST Regulations.[3] I find, therefore, that the application requesting leave to appeal was filed on May 4, 2018, meaning that it was less than a year late and that it is within my powers to grant the Applicant the extension of time that she needs.

Issue 2: Should the Applicant be given an extension of time to request leave to appeal?

[13] Unfortunately for the Applicant, however, I have concluded that she has not satisfied the legal test required for obtaining an extension of time.

[14] When deciding whether to allow an extension of time, I considered and weighed the following four factors:[4]

a) Has the Applicant shown a continuing intention to pursue her appeal?

b) Has she provided a reasonable explanation for the delay?

c) Would any other party be prejudiced by the granting of the extension?

d) Is there an arguable case on appeal?

[15] Not all four factors need to be met; the overriding consideration is that the interests of justice be served.[5]

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[3] SST Regulations, s 3(1)(*b*).
[4] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.
[5] *Canada (Attorney General) v Larkman*, 2012 FCA 204.

a) A continuing intention to pursue her appeal

[16] According to the Applicant's letter dated April 27, 2018, the first letter that she wrote asking to appeal the General Division decision was sent on October 18, 2017, after the 90-day deadline for bringing an appeal had already expired.[6] Since that time, however, I recognize that the Applicant claims to have written numerous letters to the Tribunal and to the Minister expressing her desire to appeal the General Division decision.

[17] Given the lack of evidence demonstrating that the Applicant had formed the intention of appealing the General Division decision before the 90-day deadline, I find that this factor has not been met.[7]

b) A reasonable explanation for the delay

[18] The cover letter that the Tribunal sends with General Division decisions explains how those decisions can be appealed. Nevertheless, the Applicant denies that she was told how to appeal the General Division decision and asserts that she only learned of her appeal rights when speaking to someone in her member of parliament's office. Afterwards, the Applicant says that there was even more delay, since she kept receiving conflicting advice about where to send her appeal documents. In the circumstances, I am satisfied that she has provided a reasonable explanation for the delay.

c) Prejudice to another party

[19] Given the Minister's resources and the availability of relevant documents, there is no obvious reason why the Minister's ability to respond to the appeal would be unduly affected by allowing the extension of time.

d) Arguable case

[20] In my view, the Applicant has not raised an arguable case on appeal.

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[6] AD1-1.
[7] *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263, 1985 CarswellNat 43 at para 23 (FCA).

[21] In order to be eligible for a CPP disability pension, the Applicant had to show that she had a severe and prolonged disability on or before a specific date. A disability is considered severe if the claimant is incapable regularly of pursuing any substantially gainful occupation and is considered prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.[8]

[22] Proving her entitlement to a disability pension was challenging for the Applicant largely because of two uncontested facts:

a) the Applicant started receiving her CPP retirement pension in April 2015; and

b) she continued to work until May 2016.

[23] March 31, 2015, became the date by which the Applicant had to prove the existence of a severe and prolonged disability, based on the date when she started to receive her retirement pension.[9]

[24] And while the General Division acknowledged that the Applicant was struggling at work towards the end of her career, regardless of the fact that she was being accommodated in the form of reduced hours and modified duties, it also found that her income remained reasonably high. Indeed, the General Division concluded that the Applicant's income remained well above the "substantially gainful" threshold.

[25] The challenge arising from the Applicant's case was well described by the Federal Court of Appeal when it wrote that "the capacity of an applicant for a disability benefit to regularly engage in remunerative employment is the very antithesis of a severe and prolonged disability."[10] Nevertheless, the General Division considered various factors when reaching its decision and not just the Applicant's income.

[26] When trying to challenge a General Division decision, claimants must be mindful of the narrow role that the *Department of Employment and Social Development Act* (DESD Act) has given to the Appeal Division. The Appeal Division's job is limited to determining whether the

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[8] CPP, s 42(2)(*a*).
[9] CPP, ss 44(1)(*b*), 66.1(1.1), and 70(3).
[10] *Miller v Canada (Attorney General)*, 2007 FCA 237 at para 4.

General Division committed one or more of the three errors (or grounds of appeal) set out in section 58(1) of the DESD Act. Generally speaking, the only relevant errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

c) 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.

[27] The reasons why the Applicant was challenging the General Division decision were not clearly expressed in her letter dated April 27, 2018.[11] As a result, the Tribunal sent her a letter on May 10, 2018, explaining the relevant grounds of appeal under the DESD Act and asking her to provide as much detail as possible concerning the errors that the General Division was alleged to have committed in her case. In response, the Applicant wrote that her appeal was based on the General Division's failure to observe a principle of natural justice and that some of the medical documents that she submitted might have been overlooked.[12]

[28] In spite of the Tribunal's request, it remains unclear in what way the General Division is alleged to have breached a principle of natural justice, and no such breach is immediately obvious to me. Similarly, the Applicant has not specified which documents the General Division might have overlooked. To the contrary, the General Division provided a detailed summary of all the evidence, and I was unable to identify any relevant documents that were arguably overlooked or misconstrued.[13]

[29] At a minimum, applicants should provide some detail about the error they believe the General Division has committed and about how that error falls within one of the three grounds of appeal set out in section 58(1) of the DESD Act.[14] In this case, the Applicant has not done so,

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[11] AD1.
[12] AD1A.
[13] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.
[14] *Marcia v Canada (Attorney General)*, 2016 FC 1367.

and there are no relevant errors in the General Division's analysis that are immediately obvious to me.

Conclusion on the extension of time

[30] Though the factors above are relatively balanced, I have also made an overall assessment of what the interests of justice might require. In this respect, I acknowledge that the refusal to grant an extension of time means that the Applicant's appeal ends here, but I must weigh that against the extent to which the interests of justice would be served by allowing an appeal to proceed even though it is bound to fail.

[31] I am aware of cases in which the Federal Court and Federal Court of Appeal have given particular weight to the arguable case factor, and I have come to the conclusion that that factor is entitled to particular weight in this case too.[15]

[32] Having considered the four factors above and the interests of justice, I conclude that the extension of time needed to request leave to appeal should be refused.

Issue 3: Should the Applicant be granted leave to appeal?

[33] Strictly speaking, it is not necessary to answer this question in light of the conclusion above. However, I have decided to touch on it briefly in the event that I am wrong and that an extension of time should have been granted.

[34] According to the DESD Act, leave to appeal should be granted unless the appeal has "no reasonable chance of success."[16]

[35] I previously considered whether the Applicant has "an arguable case on appeal." While the wording of these two legal tests is different, courts have interpreted them as being the same

[15] *McCann v Canada (Attorney General)*, 2016 FC 878; *Maqsood v Canada (Attorney General)*, 2011 FCA 309.
[16] DESD Act, ss 58(2) and 58(3).

in substance.[17] In both cases, the threshold is a low one: is there any arguable ground upon which the appeal might succeed?

[36] Since I previously concluded that there were no arguable grounds on which the appeal might succeed, leave to appeal should also be refused.

CONCLUSION

[37] The Applicant requires an extension of time and leave to appeal before this matter can proceed. I have refused both, although with sympathy for the Applicant's circumstances.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	A. R., self-represented

[17] *Osaj v Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Ingram v Canada (Attorney General)*, 2017 FC 259, at paragraph 16; *Fancy v Canada (Attorney General)*, 2010 FCA 63.