



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. Y. v. Minister of Employment and Social Development*, 2018 SST 958

Tribunal File Number: AD-18-316

BETWEEN:

N. Y.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: September 27, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] N. Y. (Claimant) came to Canada from Guyana and worked at a McDonald's restaurant beginning in 1999. She submits that, when she was approaching 60 years of age and her health conditions were such that she was experiencing significant pain in her shoulders, elbows, and hands, she was still spending the first few hours of each shift carrying food up the stairs, moving meat from the freezer (in 50-pound boxes), and cooking. She was diagnosed with chronic pain disorder. She has chronic bilateral shoulder strain, osteoarthritis in her right knee, bilateral elbow strain, and chronic mechanical low-back pain.

[3] She turned 60 years old and applied for her retirement pension early in December 2015. She stopped working on December 22, 2015. The Minister received her application for a disability pension under the *Canada Pension Plan* (CPP) on January 25, 2016. The Minister denied her application both initially and on reconsideration. The General Division dismissed her appeal in March 2018, concluding that her disability was not severe within the meaning of the CPP on or before November 30, 2015. The Claimant now appeals that decision to the Appeal Division.

[4] The Appeal Division must decide whether the Claimant's application is late. If it is late, the Appeal Division must decide whether an extension of time should be granted.

[5] The Appeal Division refuses an extension of time to file the application for leave to appeal. Considering all of the relevant factors, and focusing particularly on the "arguable case" factor, the Appeal Division finds it is not in the overall interests of justice for the case to proceed to appeal as it has no reasonable chance of success.

ISSUES

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

[7] Considering the relevant criteria, should the Appeal Division grant the Claimant 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] A claimant must submit an application for leave to appeal to the Appeal Division within 90 days of the Tribunal communicating the decision to the claimant—referred to here as the 90-day mark.¹ Section 40 of the *Social Security Tribunal 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 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—referred to here as 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, as outlined in the *Department of Employment and Social Development Act (DESDA)*.

[10] The General Division decision letter is dated March 6, 2018. The Claimant stated she received this letter on March 14, 2018.

[11] The Claimant filed an incomplete application for leave to appeal with the Tribunal's Appeal Division. The Tribunal received this on May 8, 2018. The Tribunal wrote to the Claimant, indicating that her appeal was incomplete and requesting additional information.

[12] The Claimant filed the completed application for leave to appeal on June 21, 2018. Because this was one week after the end of the 90-day mark of June 14, 2018, the application is late. However, it is within the one-year limit, so the Appeal Division can consider granting an extension of time.

¹ *Department of Employment and Social Development Act (DESDA)*, s. 57(1)(b)

² *DESDA*, s. 57(2)

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

[13] An extension of time is refused.

[14] There are four criteria the Appeal Division must consider in order to determine whether to grant an extension of time. These are (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.³

[15] 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.⁴

i. Was there a continuing intention to pursue the application?

[16] The Claimant has demonstrated a continuing intention to pursue the application by the 90-day mark and continuously thereafter.

[17] A claimant should show an intention to bring an application by the 90-day mark and continuously thereafter. A claimant is to pursue the appeal as diligently as can reasonably be expected.⁵

[18] Based on the date the Claimant says she received the General Division decision, it is clear that the Claimant's initial incomplete application was filed by the 90-day mark. She showed a continuing intention to pursue the application by providing additional information in response to the Tribunal's request. This then completed the application.

[19] The Claimant is unrepresented and appears to have done her best to communicate with the Tribunal in a timely manner. This shows an intention to pursue her application for leave to appeal before the 90-day mark and continuously thereafter.

³ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833

⁴ *Canada (Attorney General) v. Larkman*, 2012 FCA 2014

⁵ *Caisse Populaire Desjardins Maniwaki v. Canada (Attorney General)*, 2003 FC 1165

ii. Does the matter disclose an arguable case?

[20] The Claimant does not have an arguable case.

[21] An arguable case in the context of a request for an extension of time requires that there be some reasonable chance of success.⁶ This is a very low threshold.

[22] At first, the Claimant stated that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. The Claimant did not provide an argument supporting that allegation of an error. The Claimant also did not explain how this argument had a reasonable chance of success on appeal.

[23] The Tribunal wrote to the Claimant explaining that her application was incomplete and explaining what was required from claimants in support of an application for leave to appeal. The Claimant responded by stating that the General Division made an error of fact under the DESDA.⁷

[24] The Claimant argues essentially that she provided sufficient evidence to the General Division to show that she met the test for a severe disability.⁸ She provided medical information and her own evidence about the challenges she faced both at work and in completing household chores.

[25] However, the Claimant does not have an arguable case because she has not pointed to any specific finding of fact that forms the basis of the alleged error. She has also not pointed to any specific aspect of the evidence that she thinks was not considered.

[26] It seems that the Claimant would like the Appeal Division to weigh the evidence that was before the General Division again in order to come to a different conclusion about her eligibility for the disability pension under the CPP.

[27] However, the General Division is the trier of fact, not the Appeal Division. At this stage, the Appeal Division's role is to decide whether an extension of time can be granted, and one of

⁶ *McKinney v. Canada*, 2008 FCA 409

⁷ DESDA, s. 58(1)(c):

⁸ that, on or before the end of her MQP, she was incapable regularly of pursuing any substantially gainful occupation, see *Canada Pension Plan*, s. 42(2)(a)

the factors it must consider is whether there is an arguable case. The Appeal Division cannot find an arguable case based on the Claimant's interest in having the Appeal Division reweigh all of the evidence from the General Division.

iii. Is there a reasonable explanation for the delay?

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

[29] The Claimant explained on June 21, 2018, that her appeal was late due to her illness. She stated she was not feeling well enough to fill out her application and was in the hospital.

[30] Although the Claimant did not provide the specific dates as to when she was hospitalized, the Appeal Division is satisfied with her undisputed evidence that her ill health was the reason for the delay.

iv. Is there prejudice to the Minister in allowing the extension?

[31] 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

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

[33] The Claimant signaled her intention to appeal before the 90-day mark and continuously thereafter. The Claimant has a reasonable explanation for the delay that involves her health. There is no prejudice to the Minister in allowing her application to proceed. However, in this case, the fact that the Claimant does not have an arguable case for an error weighs heavily in the analysis. The overall consideration is that the interests of justice be served. It does not serve the interests of justice for the Claimant to proceed with an application for leave to appeal where there is no arguable case.

[34] The Claimant disagrees with the conclusion the General Division reached about her eligibility for the disability pension. However, she has no reasonable chance of success here

because the focus at the Appeal Division is not on hearing the case again from the beginning but on addressing any errors contained in the General Division decision, as outlined in the DESDA.

[35] The Appeal Division has reviewed the record and is satisfied that the General Division did not ignore or misconstrue the evidence.⁹

[36] The Claimant gave evidence that she was told her employer did not provide accommodation in circumstances outside of workplace injuries, that she did not have long-term disability coverage from her employer because she could not afford to pay into that plan, and that, at some point, her employer began requiring physician's notes for every absence which discouraged her from missing work. The Claimant gave evidence that, in light of her circumstances, she pushed herself to work, despite her pain, because she understood that if she could not do her duties, she would have to go home. The Claimant included evidence in the record that explained why she forced herself to work and earned the income that she did in 2015.

[37] The General Division considered the medical evidence about the Claimant's conditions, the evidence about the Claimant's work (including the income she earned at McDonald's in 2015), and her personal circumstances. The General Division expressed sympathy for the Claimant's plight (perhaps because of the timing of her application for a retirement pension and perhaps also because of some of the evidence she gave explaining why she had earned income at McDonald's and was still seeking a disability pension under the CPP).

[38] It was for the General Division to weigh the evidence and make a decision. The General Division determined that the Claimant failed to show that she was incapable regularly of pursuing any substantially gainful occupation on or before November 30, 2014. The Appeal Division is satisfied the General Division did not ignore or misconstrue the evidence in reaching that conclusion. The Appeal Division cannot simply substitute the General Division's decision with its own.

⁹ Consistent with *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	N. Y., Self-represented
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