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

Citation: *A. H. v Minister of Employment and Social Development*, 2019 SST 607

Tribunal File Number: AD-19-196

BETWEEN:

A. H.

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: June 24, 2019

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] A. H. (Claimant) has Meniere's disease and depression. She experiences tinnitus and vertigo. She explains that her medical condition became unmanageable while she was working for a temp agency in an office. She stopped working in August 2006. She applied for a disability pension under the *Canada Pension Plan* (CPP) on May 30, 2017. The Minister denied her application initially and on reconsideration.

[3] According to the *Department of Employment and Social Development Act* (DESDA), the Claimant had 90 days to appeal the reconsideration decision to this Tribunal. The Claimant appealed much later, on November 13, 2018. On February 6, 2019, the General Division refused to give the Claimant an extension of time.

[4] The Claimant is asking for permission (leave) to appeal the General Division's decision that refused to give her an extension of time. The Appeal Division must decide whether there is an arguable case that the General Division made an error under the DESDA that would justify granting leave to appeal.

[5] I find that the there is no arguable case that the General Division made an error under the DESDA. The application for leave to appeal is refused.

ISSUE

[6] Is there an arguable case that the General Division made an error that would justify granting the Claimant leave to appeal?

ANALYSIS

[7] 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. Basically, the DESDA says that the General Division can make three types of errors: errors involving a failure to provide fair process, errors of law, and errors of fact.[1]

[8] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.[2] A claimant needs to show only that there is some arguable ground on which the appeal might succeed.[3]

Is there an arguable case that the General Division made an error that would justify granting the Claimant leave to appeal?

[9] There is no arguable case that the General Division made an error under the DESDA that would justify granting leave to appeal.

[10] General Division decided that the Claimant's appeal was late,[4] described the factors that must be considered in order to grant an extension of time,[5] and applied those factors to the Claimant's case.[6] The General Division refused to give the Claimant an extension of time.

[11] The General Division decided that the Claimant did not show a continuing intention to appeal, that she did not have a reasonable explanation for the delay, that the Minister was not prejudiced by the delay, and "most notably" that the Claimant did not have an arguable case.[7]

[12] To get a disability pension, the Claimant had to show that she had a severe disability on or before December 31, 2002, when her minimum qualifying period (MQP) ended. The General Division member found that the Claimant did not have an arguable case because:

a) the Claimant continued working until 2006 (almost four years after the end of the MQP);

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[1] DESDA, s 58(1).
[2] DESDA, s 58(2).
[3] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[4] General Division decision, para 3.
[5] The factors are: The claimant has shown a continuing intention to pursue the appeal; the matter discloses an arguable case; there is a reasonable explanation for the delay; there is no prejudice to the Minister in allowing the extension. These factors are listed in a case called *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883. The General Division made note of this case at para 6 of its decision.
[6] General Division decision, paras 7-16.
[7] General Division decision, paras 8, 13, 15 and 16.

b) there was no medical evidence related to the Claimant's conditions at the time around the MQP; and

c) the Claimant's doctor who completed the medical report for CPP has known the Claimant for 15 years but stated that he did not begin treating the Claimant for her main medical condition until 2015.[8]

[13] In her application for leave to appeal, the Claimant checked the boxes to state that the General Division made all three types of errors listed in the DESDA. The Claimant provided the reasons why she says her appeal was filed late to the General Division:

a) the Claimant was overwhelmed with the process and was unaware of the deadline;

b) the Claimant got help from her MP's office and gathered more medical evidence in support of her claim; and

c) the Claimant's functional limitations made it difficult for her to appeal in time.[9]

[14] The Claimant also provided information about how supportive her doctor is of her application for disability benefits, and provided some information about her work history and her medical history.[10]

[15] The Tribunal asked the Claimant to provide arguments that deal with the grounds of appeal, and to explain why the appeal should be granted (that is, how her appeal has a reasonable chance of success).[11] The Claimant responded. She said that she had the symptoms of Meniere's disease (even though she was not yet diagnosed) when she was working during and after the MQP, which made that work more difficult.[12]

[16] The Claimant must provide all evidence and arguments required for a successful application for leave to appeal under the DESDA.[13] The Claimant has not raised any argument

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[8] General Division decision, paras 9-13.
[9] AD1-5 and AD1-3 to 5.
[10] AD1-3.
[11] This request is consistent with the principle in *Bossé v Canada (Attorney General)*, 2015 FC 1142.
[12] AD1B.
[13] The case that contains that principle is *Tracey v Canada (Attorney General)*, 2015 FC 1300.

about an error in the General Division's decision that would justify granting leave to appeal. The Claimant takes the position that she had an arguable case at the General Division. But she does not point to an error of fact or an error of law that the General Division might have made in its decision.

[17] The Claimant has not pointed to any evidence that was before the General Division member that they ignored or misconstrued such that there would be any error of fact. The General Division considered the information the Claimant provided about the delay.

[18] Similarly, the Claimant has not pointed to any sign of an error of law. The General Division stated the factors it must consider according to the law in deciding an extension of time request, and decided not to grant the extension.

[19] The Claimant has not pointed to any error in terms of failing to provide her with a fair process. It seems that the issue for the Claimant is more about the result that the General Division member reached when they applied the law about granting extensions to the facts in the Claimant's file, rather than whether they made any errors in reaching that result.

[20] However, the Appeal Division should go beyond what the Federal Court of Appeal has called a "mechanistic" review of the grounds of appeal.[14] I have reviewed the record at the General Division so that I can decide whether the General Division ignored or misconstrued any of the evidence.

[21] I am satisfied that the General Division did not ignore or misconstrue the evidence. When the General Division member denied the request for an extension, they seemed to put more weight on the factor about whether the Claimant had an arguable case than the other factors. That means that the arguable case factor is an important part of the decision for me to consider when reviewing the evidence. The General Division did not have medical evidence about the Claimant that discussed her condition at time of the MQP, and there was also evidence from the Claimant's doctor that although he had been treating the Claimant during the MQP, he did not start treating the Claimant for her main medical condition until many years after the MQP. The General Division did not ignore any evidence that might have filled that gap in the evidence, and

[14] The decision in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 requires that I take this approach.

did not misconstrue this evidence, either. The Claimant's file lacked evidence to meet the arguable case threshold, even though that threshold is low.[15]

CONCLUSION

[22] The application for leave to appeal the decision that refused the extension of time is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	A. H., self-represented

[15] In a case about a request for an extension of time to file a notice of appeal from a judgement in an area outside of CPP law, the Federal Court of Appeal has held that an arguable case is a "very low threshold.", see *McKinney v Canada*, 2008 FCA 409, para 13.