



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. O. v Minister of Employment and Social Development*, 2019 SST 1354

Tribunal File Number: AD-19-691

BETWEEN:

A. O.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: November 18, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, A. O., was born in Ghana, where she received the equivalent of a high school education. She came to Canada in 1992 and has since worked in a series of low skilled jobs obtained through temporary placement agencies. She eventually earned a post-secondary diploma in business administration. Her most recent employment was in a factory, where she packaged and labelled clothes. She not worked since August 2015 and is now 56 years old.

[3] In January 2017, the Applicant applied for a Canada Pension Plan (CPP) disability pension, claiming that she could no longer work because of chronic pain, depression, loss of concentration, and shortness of breath. The Respondent, the Minister of Employment and Social Development, refused the application because it found that the Applicant had failed to demonstrate a “severe and prolonged” disability as of the minimum qualifying period (MQP), which ended on December 31, 2003.

[4] The Applicant appealed the Minister’s refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated May 10, 2019, dismissed the Applicant’s claim, finding insufficient medical evidence that she was disabled as of the MQP. The General Division placed weight on the fact that, between 2004 and 2009, the Applicant attended college and graduated with an advanced diploma in business administration.

[5] On October 13, 2019, after the 90-day time limitation set out in the *Department of Employment and Social Development Act* (DESDA), the Applicant submitted an application requesting leave to appeal to the Appeal Division. In it, she alleged various errors on the part of the General Division, specifically:

- It failed to consider her slow thinking process and its effect on her work productivity;

- It failed to consider evidence that she is unemployable, such as the many times that she has been fired from jobs because she cannot do extended work;
- It found that her psychiatrist discharged her from his care without mentioning that he did so because he was retiring; and
- It did refused her an opportunity to submit additional evidence, including information from her college about accommodations and an updated report from her new psychiatrist about her mental health.

[6] I have reviewed the file and concluded that, since the Applicant's reasons for appealing would no have reasonable chance of success, this is not a suitable case in which to permit an extension of time.

ISSUES

[7] I must decide the following related questions:

- Issue 1: Should the Applicant receive an extension of time in which to file her application for leave to appeal?
- Issue 2: Is there a reasonable chance of success on appeal for the Applicant's submissions?

ANALYSIS

Issue 1: Should the Applicant receive an extension of time?

[8] According to section 57(1)(b) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[9] The record indicates that the General Division issued its decision on Friday, May 10, 2019, and on the following Tuesday it was sent by regular mail to the Applicant at her last

known residential address. The Appeal Division did not receive the Applicant's application for leave to appeal until October 13, 2019—156 days after the decision date and 66 days after the filing deadline. Even allowing for the 10-day delivery period deemed under the *Social Security Tribunal Regulations*, the Applicant's application was nearly two months late.

[10] Having reviewed the submissions, I have come to the conclusion that a further extension of time is not warranted in this case. In *Canada v Gattellaro*,¹ the Federal Court set out four factors to consider when deciding whether to allow further time to appeal:

- (i) whether there is a reasonable explanation for the delay;
- (ii) whether the applicant demonstrates a continuing intention to pursue the appeal;
- (iii) whether allowing the extension would cause prejudice to other parties; and
- (iv) whether the matter discloses an arguable case.

[11] The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.²

(i) Reasonable explanation for the delay

[12] The Applicant explained that she was late in submitting her application for leave to appeal because she has a problem with concentrating and it takes a long time for her to make a decision.

[13] In view of all circumstances, including the Applicant's documented medical issues, I find this explanation reasonable.

(ii) Continuing intention to pursue the appeal

The record indicates that, on three occasions³ between issuance of the General Division's decision and receipt of the leave to appeal application, the Applicant called the Tribunal seeking information on the appeal process. Although the Applicant did not actually file an application for

¹ *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

² *Canada (Attorney General) v Larkman*, 2012 FCA 204.

³ Telephone memos dated June 24, 2019, September 23, 2019 and October 9, 2019.

leave to appeal until well after the expiry of the statutory limitation, her regular contact with the Tribunal in the preceding period convinces me that she had a continuing intention to pursue the appeal.

(iii) Prejudice to the other party

[14] I find it unlikely that permitting the Applicant to proceed with his appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

(iv) Arguable case

[15] Applicants seeking an extension of time must show that they have at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.⁴

[16] For the reasons that follow, I find that the Applicant has failed to put forward reasons for appealing that would have a reasonable chance of success.

Issue 2: Is there a reasonable chance of success on appeal for the Applicant's submissions?

[17] Under section 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal.⁵ Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.⁶

[18] The Applicant argues that the General Division did not adequately consider evidence that proves she has a severe and prolonged disability. However, the General Division, in its role as

⁴ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁵ DESDA at ss 56(1) and 58(3).

⁶ DESDA at s 58(2).

fact finder, is presumed to have considered all the evidence before it,⁷ and I do not see an arguable case that the member in this case ignored any item of significant information. While the Applicant may not agree with its conclusions, the General Division was within its authority to weigh the available evidence and make findings of fact, so long as there was a rational basis for those findings.

[19] The Applicant claims that the General Division ignored evidence that she was able to complete her college training only through special accommodations that recognized her inability to focus. I have reviewed the audio recording of the General Division hearing, and it reveals that the General Division questioned the Applicant extensively on this subject.⁸ In the end, the General Division concluded:

Between 2004 and 2009, the [Applicant] completed a business degree. Clearly the [Applicant] has a strong work ethic and commitment to upgrading her education. I acknowledge she was accommodated in school and took a significantly longer time to complete her degree, but she was able to finish a course which required prolonged sitting and concentration. I find her ability to attend school 3 to 4 days a week between 2004–2009, demonstrates she had work capacity on or before her MQP.⁹

[20] The Applicant also suggests that the General Division denied her an opportunity to submit post-hearing evidence. My review of the record indicates otherwise. As the General Division noted in its decision, the Applicant filed several documents with the Tribunal on April 17, 2019, including two reports¹⁰ by Dr. Addah, her former family physician, and a newspaper article indicating that Dr. Addah passed away in 2006. The General Division's decision clearly indicates that it considered those documents.¹¹ The recording of the hearing indicates that the General Division heard the Applicant's testimony that she made a determined, but ultimately unsuccessful, effort to obtain Dr. Addah's medical records.¹²

⁷ *Simpson v Canada (Attorney General)*, 2012 FCA 82.

⁸ Audio recording of General Division hearing, 25:00 to 30:30.

⁹ General Division decision, para 17.

¹⁰ Ministry of Community and Social Services Statement of Attending Physician signed by Dr. S.K. Addah on May 5, 2003; Information Request Form signed by Dr. Addah on March 11, 2005; and article entitled, "Dr. Addah, 61, passes away," Ghanaian News, June/July 2006, GD7.

¹¹ General Division decision, paras 11 and 12.

¹² Audio recording of General Division hearing, 40:50.

[21] Otherwise, the General Division came to its decision after conducting what appears to be a reasonably thorough survey of the evidentiary record. It confirmed that the Applicant was required to show that she became disabled before December 31, 2003. It analyzed the Applicant's health issues—including depression, hypertension, osteoarthritis, and diabetes mellitus—and how they affected her capacity to regularly pursue substantially gainful employment during the relevant period. In doing so, the General Division found insufficient evidence that the Applicant was disabled when she was last eligible for the CPP disability pension.

[22] In short, I see no indication that the General Division misrepresented, ignored, or inadequately considered any significant component of the evidence that was before it.

CONCLUSION

[23] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I found that the Applicant had a reasonable explanation for the delay and a continuing intention to pursue her appeal. I also thought it unlikely that the Minister's interests would be prejudiced by extending time. However, I could find no arguable case for any of the grounds advanced by the Applicant and it was this last factor that was decisive; I see no point in advancing an application that is doomed to fail.

[24] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.



Member, Appeal Division

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| REPRESENTATIVE: | A. O., self-represented |
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