



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. K. v Minister of Employment and Social Development*, 2020 SST 153

Tribunal File Number: AD-20-52

BETWEEN:

T. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time, Valerie Hazlett Parker
Leave to Appeal and the Appeal by:

Date of Decision: February 21, 2020

DECISION AND REASONS

DECISION

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

[2] The appeal is allowed based on the parties' agreement.

OVERVIEW

[3] T. K. (Claimant) worked for many years in physically demanding jobs. He stopped working in August 2017, due to fibromyalgia. He applied for a Canada Pension Plan disability pension and claimed that he was disabled by this condition.

[4] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division allowed the appeal. It decided that the Claimant had a severe and prolonged disability in October, 2018.

[5] The Claimant applied for leave (permission) to appeal the General Division's decision regarding when he became disabled to the Tribunal's Appeal Division. The Application to the Appeal Division was filed late.

[6] Time to file the Application to the Appeal Division is extended.

[7] The parties attended a Settlement Conference. At this teleconference the parties reached an agreement and asked that the Appeal Division make a decision in accordance with their agreement. That decision is made. Leave to appeal is granted, and the appeal is allowed. The Claimant was disabled in September 2017.

ISSUES

[8] Was the Application to the Appeal Division filed late?

[9] If so, should the time to file the Application be extended?

[10] Does the appeal have a reasonable chance of success because the General Division based its decision on an important factual error regarding the date that the Claimant became disabled, without regard for all of the medical evidence?

[11] If so, should the appeal be allowed, and what remedy should the Appeal Division give?

ANALYSIS

Late application

[12] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It states that an appeal to the Appeal Division must be made within 90 days of the General Division decision being communicated to the claimant.¹

[13] The General Division decision is dated May 14, 2019. The *Social Security Tribunal Regulations* say that a decision is deemed to have been communicated to a person ten days after it was mailed to them. Therefore, the decision is deemed to have been communicated to the Claimant on May 24, 2019.

[14] The Application to the Appeal Division was filed with the Tribunal on January 23, 2020. This is more than 90 days after May 24th. Therefore, the appeal was filed late with the Tribunal.

[15] The DESD Act says that the time to file the Application can be extended.² When deciding whether to extend time to file an application I must consider a number of factors, including:

- a) Is there a continuing intention to pursue the application;
- b) Is there is a reasonable explanation for the delay;
- c) Is there any prejudice to the other party in allowing the extension; and
- d) Does the appeal have a reasonable chance of success?³

¹ DESD Act s. 52

² DESD Act s. 52(2)

³ *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883

The weight to be given to each of these factors 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

[16] It is in the interest of justice to extend time to this Application to be made. The Claimant had a continuing intention to make the application and a reasonable explanation for his delay in doing so. He asked for help from his Member of Parliament, and the application was sent to the wrong address.

[17] There is no suggestion that the Minister would be prejudiced if this appeal proceeds.

[18] For the reasons set out below, the appeal has a reasonable chance of success.

The appeal

[19] The DESD Act provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or
- d) based its decision on an important factual error.⁵

[20] However, before I can decide an appeal, I must decide whether to grant leave (permission) to appeal. The DESD Act says that leave to appeal must be refused if the appeal does not have a reasonable chance of success.⁶ Therefore, to be granted leave to appeal the Claimant must present at least one ground of appeal (reason for appealing) that falls under the DESD Act and on which the appeal has a reasonable chance of success.

⁴ *Canada (Attorney General) v. Larkman*, 2012 FCA 204

⁵ This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

⁶ DESD Act s. 58(2)

[21] At the Settlement Conference, the parties reached an agreement as follows:

- a) Leave to appeal should be granted. The appeal has a reasonable chance of success on the basis that the General Division based its decision on an important factual error regarding when the Claimant became disabled. This error was made without regard to all of the medical evidence.
- b) The Claimant became disabled in September 2017.
- c) Under the *Canada Pension Plan* payment of the disability pension starts four months after the Claimant became disabled. This is January 2018.

[22] The parties also request that the Appeal Division make a decision based on this agreement.⁷

[23] I am satisfied that the General Division based its decision on an important factual error regarding when the Claimant became disabled. The Claimant's family doctor wrote a number of letters that outlined the Claimant's limitations from fibromyalgia. The symptoms began a number of years ago and worsened over time. The Claimant was no longer able to work because of fibromyalgia in August 2017. His condition became severe under the *Canada Pension Plan* in September, 2017.

[24] The Claimant's disability is also prolonged. It has persisted for many years in spite of treatment. There is no reasonable prospect that it will improve.

CONCLUSION

[25] An extension of time to apply for leave to appeal is granted.

[26] Leave to appeal is granted.

[27] The appeal is allowed in accordance with the parties' agreement. The Claimant became disabled and entitled to a *Canada Pension Plan* disability pension in September 2017.

⁷ *Social Security Tribunal Regulations* s. 18

[28] Under the *Canada Pension Plan* payments start four months after the Claimant became disabled.⁸ Payment will start in January 2018.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVE:	T. K., Self-represented Hilary Perry, for the Minister of Employment and Social Development
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⁸ *Canada Pension Plan* s. 69