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

Citation: *K. B. v Minister of Employment and Social Development*, 2020 SST 154

Tribunal File Number: AD-20-91

BETWEEN:

K. B.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time and Leave to Appeal by: Neil Nawaz

Date of Decision: February 20, 2020

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Claimant is a 64 year-old woman who had been diagnosed with a number of medical conditions, including fibromyalgia, chronic obstructive pulmonary disorder, anxiety disorder, osteoporosis, osteoarthritis, hypothyroidism, lumber spondylosis, and gastroesophageal reflux disorder. She was last employed in the late 1990s and has worked as a hairdresser, meatpacker, and cashier.

[3] In July 2017, the Claimant applied for a Canada Pension Plan (CPP) disability pension, claiming that she had been unable to work since 1986. This was her fourth such application. Like the others, the Minister refused it because, in its view, the Claimant had failed to demonstrate that she had a "severe and prolonged" disability as of her minimum qualifying period (MQP), which ended on December 31, 1995.[1]

[4] The Claimant 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 Claimant's claim, finding insufficient medical evidence that she was disabled as of the MQP. The General Division noted that much of the Claimant's medical information documented problems that had arisen well after December 31, 1995. It also found that the evidence from the MQP did not show that the Claimant incapable of work before 1996.

[5] On February 11, 2020, well after the 90-day deadline specified by the law, the Claimant 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:

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[1] Minimum Qualifying Period is the term used in the *Canada Pension Plan* to describe the period in which an applicant for disability benefits has coverage for those benefits.

(i) It ignored evidence that the Claimant was involved in several motor vehicle accidents (MVAs) in the 1980s;

(ii) It ignored evidence that some of the documents in the hearing file were altered; and

(iii) It ignored the fact that Dr. Gavin Daniels contradicted himself when he opined about the Claimant's capacity to work.

[6] I have reviewed the hearing file and concluded that, since the Claimant'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 Claimant 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 Claimant's submissions?

ANALYSIS

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

[8] According to section 57(1)(b) of the *Department of Employment and Social Development Act* (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 Claimant. 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 Claimant.

[9] The record indicates that, on May 10, 2019, the Tribunal mailed the General Division's decision to the Claimant at her home address. The Appeal Division did not receive the Claimant's application for leave to appeal until February 11, 2020—nine months after the

decision date and six months after the filing deadline. I find that the Claimant submitted her application late.

[10] I have reviewed the Claimant's submissions, and I have come to the conclusion that a further extension of time is not warranted in this case. In *Canada v Gattellaro*,[2] 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 Claimant 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.[3]

(i) Reasonable explanation for the delay

[12] The Claimant completed a form to apply for leave to appeal. The form contained a section that plainly asked the Claimant to explain, if the 90-day deadline had passed, why it was being submitted late. Since the Claimant left this section blank, I find that the Claimant has failed to provide a reasonable explanation for the delay.

(ii) Continuing intention to pursue the appeal

[13] The record indicates that, during the nine months between the issuance of the General Division's decision and the submission of her leave to appeal application, the Claimant had no contact with the Tribunal. This gap suggests to me that the Claimant did not have a continuing intention to pursue her appeal.

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[2] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.
[3] *Canada (Attorney General) v Larkman*, 2012 FCA 204.

(iii) Prejudice to the other party

[14] I find it unlikely that permitting the Claimant 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] Claimants 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 Claimant 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 Claimant's submissions?

[17] Under section 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division. An applicant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[5]

[18] An appeal may be brought only if the Appeal Division first grants leave to appeal.[6] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[7]

[19] The Claimant argues that the General Division did not adequately consider evidence that she is disabled. However, the General Division is presumed to have considered all the evidence before it,[8] and I do not see an arguable case that the member in this case ignored any item of significant information. While the Claimant may not agree with its conclusions, the General

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[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[5] The formal wording for these grounds of appeal is found in section 58(1) of the DESDA.
[6] DESDA, sections 56(1) and 58(3).
[7] DESDA, section 58(2).
[8] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

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.

[20] My review of the file indicates that the General Division came to its decision after conducting what appears to be a thorough survey of the evidentiary record. It confirmed that the Claimant had to show that she became disabled during the MQP. It analyzed the Claimant's many health issues and how they affected her capacity to regularly pursue substantially gainful employment during the relevant period. In the end, the General Division simply did not find enough evidence of a severe and prolonged disability before December 31, 1995. I see no reason to interfere with this conclusion.

[21] The Claimant also made three specific allegations of error, which I will briefly address:

(i) There is no arguable case that the General Division ignored the Claimant's MVAs

[22] As mentioned, the General Division is presumed to have considered all available evidence, and it is allowed considerable leeway in how it weighs that evidence. In this case, I do not need to presume that the General Division considered the Claimant's MVAs, because I can see that the General Division explicitly referred to them in its decision. In paragraph 8, the General Division noted that the Claimant had had "several motor vehicle accidents causing her various injuries, including one in 1988 while on her way to work."

[23] The Claimant clearly believes that the General Division should have given these MVAs more weight. However, the General Division was within its authority to place less emphasis on specific injuries and more emphasis on the long-term health conditions resulting from those injuries. The General Division devoted more of its attention to the available medical reports from the late 1980s and early 1990s and came to the defensible conclusion that the Claimant was, more likely than not, regularly capable of substantially gainful employment in that period.

(ii) There is no arguable case that the General Division ignored evidence tampering

[24] The Claimant believes that a number of medical reports in the hearing file were "fabricated," "plagiarized," or "hacked." She suggests that the General Division ignored her

allegation that someone "compromised" the evidence, in particular Dr. Melenchuk's reports, which were often written in pencil and thus easily erased.

[25] I do not see an arguable case here. Again, the General Division did not ignore the Claimant's concerns about altered evidence. In fact, it squarely addressed them in paragraph 10 of its decision:

> I considered the Claimant's submission that documents in GD2 of the appeal file were compromised and "whited out." I asked her to specify which documents. She directed my attention to GD2-275. Although, this document is difficult to read, it is legible. Further, Dr. Melenchuck [*sic*] refers to this x-ray and its findings in GD2-73 [*sic*].[9] I agree with the Claimant that due to the age of several documents, they are difficult to read. However, I find that they are legible and information has not been "whited out" or compromised.

The Claimant may not agree with its conclusion, but she cannot reasonably claim that the General Division ignored her allegations of evidence tampering. My review of the record indicates that the Claimant offered no evidence in support of her allegations other than the allegations themselves. I carried out my own examination of the documents that the Claimant claims were altered and saw nothing to suggest that the General Division erred when it dismissed the Claimant's concerns.

(iii) There is no arguable case that the General Division ignored contradictions in Dr. Daniels' reports

[26] The Claimant alleges that the General Division disregarded the fact that her family physician, Dr. Daniels, put forward contradictory opinions about her ability to work.

[27] I do not see an arguable case on this point. In April 2017, Dr. Daniels wrote that the Claimant remained "significantly symptomatic" and "unable to work."[10] Three months later, Dr. Daniels wrote that she was "able to perform light physical labour as well as sedentary or any supervisory type work."[11] I agree that these statements appear to be at odds with each other, but I

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[9] The General Division's page reference appears to be mistaken. In fact, Dr. Melenchuk's letter was at GD2-273.
[10] Medical Report for Saskatchewan Assured Income for Disability benefits prepared by Dr. Daniels on April 21, 2017, GD2-16.
[11] CPP Medical Report prepared by Dr. Daniels on July 22, 2017, GD2-178. The Minister later relied on this statement to refuse the Claimant benefits (GD2-19)

also see that the General Division went to some lengths to address the apparent contradiction in its decision:

> Although it was his opinion in April 2017 that the Claimant was significantly symptomatic and unable to work, he did report in December 2015 and July 2017, that despite her functional limitations, the Claimant retained capacity to work in light physical labour as well as sedentary or any supervisory type work. However, she could not perform hard physical labour. I gave more weight to the reports of December 2015 and July 2017 for the following reasons:
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> - These reports (December 201510 and July 2017) provide more detail and explanation of the Claimant's conditions and limitations, which support his opinion. The report of April 2017 for the Saskatchewan government was primarily a "yes or no" questionnaire. Further, in this report Dr. Daniels does not provide any information regarding the Claimant's limitations or function ability. He simply says, "she remains significantly symptomatic and unable to work".
> - Also, Dr. Daniels' opinion that the Claimant retains capacity to work is in agreement with the medical evidence and other caregivers. Even if I were to disregard Dr. Daniels opinion that the Claimant had capacity to work at December 2015 and July 2017, the Claimant's family physician, Dr. Melenchuk, who was her family doctor at the time of her MQP, stated in November 1996 that the Claimant was capable of light duty work, although she was recovering from a wrist fracture.[12]

[28] I am not sure the apparent contradiction even matters, since it arose from reports dated years after the MQP, written by a doctor who did not start seeing the Claimant until 2008. Still, it is clear from the passage above that the General Division weighed the reports and explained why it chose to give more weight to one over the other. In its role as fact finder, it was entitled to do so, as long as it did not ignore or misrepresent any significant component of the evidence that was before it.

CONCLUSION

[29] 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 Claimant

[12] General Division decision, paragraph 12.

did not have a reasonable explanation for the delay or a continuing intention to pursue her appeal. Although I thought it unlikely that the Minister's interests would be prejudiced by extending time, I could not find an arguable case for any of the grounds of appeal advanced by the Claimant. It was this last factor that was decisive; I see no point in advancing an application that is doomed to fail.

[30] 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

REPRESENTATIVE:	K. B., self-represented