



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. D. v Minister of Employment and Social Development*, 2020 SST 771

Tribunal File Number: AD-20-714

BETWEEN:

R. D.

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: September 11, 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 former yard maintenance and snow removal contractor who last worked in April 2015. He is currently 46 years old.

[3] In December 2016, the Claimant applied for Canada Pension Plan (CPP) disability benefits, claiming that he could no longer work because of pain in his lower back and right big toe. The Minister refused the application because, in its view, the Claimant had not shown that he had a severe and prolonged disability during his minimum qualifying period (MQP), which ended on December 31, 2012.

[4] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and, in a decision dated February 10, 2020, dismissed the appeal, finding insufficient medical evidence that the Claimant was incapable regularly of a substantially gainful occupation as of the MQP. In particular, the General Division found nothing to prevent the Claimant from retraining for another occupation that did not require him to be on his feet all the time.

[5] On July 13, 2020, after the 90-day deadline set out in the *Department of Employment and Social Development Act* (DESDA), the Claimant submitted a letter requesting leave to appeal from the Tribunal's Appeal Division. In it, he alleged that the General Division ignored the CPP medical report prepared by his family doctor. He also suggested that the General Division should have taken into account his pastor's advice to stay at home and take care of his children.

[6] The Tribunal then sent a letter to the Claimant reminding him that the Appeal Division can only look at specific errors on the part of the General Division. The Tribunal asked the Claimant to explain why his leave to appeal application was late and to provide further reasons

why he was appealing. The Tribunal set a deadline of August 21, 2020 but, to date, it has not received any response from the Claimant.

[7] I have reviewed the file and concluded that, since the Claimant's reasons for appealing would not have a reasonable chance of success, this is not a suitable case in which to permit an extension of time.

ISSUES

[8] I must decide the following related questions:

Issue 1: Should the Claimant receive an extension of time in which to file his application for leave to appeal?

Issue 2: Do the Claimant's submissions raise an arguable case on appeal?

ANALYSIS

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

[9] According to 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.¹ 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.

[10] The record indicates that the General Division issued its decision on February 10, 2020. The following day, it was sent to the Claimant by email and by regular mail at his last known residential address. The Appeal Division did not receive the Claimant's application for leave to appeal until July 13, 2020—well after the filing deadline.

[11] In *Canada v Gattellaro*,² the Federal Court set out four factors to consider when deciding whether to allow further time to appeal:

¹ DESDA, section 57(1)(b).

² *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

- (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.

[12] 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

[13] The Claimant has not explained why his application for leave to appeal was filed late, despite the Tribunal's request that he do so.

(ii) Continuing intention to pursue the appeal

[14] The record indicates that, after the General Division issued its decision, the Claimant contacted the Tribunal at least twice—on February 15, 2020 and again on March 6, 2020. I don't have access to the contents of that correspondence, but I'm willing to assume that they show a continuing intention on the Claimant's part to pursue his claim in the period leading up to his application for leave to appeal.

(iii) Prejudice to the other party

[15] 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

[16] 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

³ *Canada (Attorney General) v Larkman*, 2012 FCA 204.

[17] For the reasons that follow, I find that the Claimant has not put forward reasons for appealing that would have a reasonable chance of success.

Issue 2: Do the Claimant's submissions raise an arguable case on appeal?

[18] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.⁵

[19] I do not see an arguable case for any of the Claimant's reasons for appealing.

[20] To succeed at the Appeal Division, a claimant must do more than simply disagree with the General Division's decision. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the three grounds of appeal permitted under the law.

[21] The Claimant argues that the General Division dismissed his appeal in the face of medical evidence showing that he suffers from disabling pain. I do not see a reasonable chance of success for this argument. In its role as fact finder, the General Division is entitled to some leeway in how it chooses to weigh the evidence. My review of its decision indicates that the General Division meaningfully analyzed the available information and came to the defensible conclusion that the Claimant did not have a condition that prevented him from regularly pursuing a substantially gainful occupation.

[22] The Claimant suggests that the General Division should have paid more attention to the December 2016 medical report,⁶ prepared by Dr. Wassif, that accompanied his application for benefits. However, the General Division addressed this report in its written reasons, noting that the family doctor had said that the Claimant was limping and using a cane as a result of his toe injury. The General Division chose to place more weight on a report from Dr. Hamour, who wrote that an in-grown toenail, such as the one the Claimant had, could not cause a deformity in the joint or limitation of movement needed to have disability approval.⁷ In the end, the General Division

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 See GD2-155.

⁷ Ambulatory Care Report dated March 2, 2016 by Dr. Faisal Hamour, general surgeon, GD2-87.

concluded that the Claimant's impairments, regarded through the lens of his age, education, and language proficiency, would not prevent him from pursuing less physically demanding work. In any event, the Claimant should be aware that a single doctor's word is not conclusive in these kinds of cases. Disability, as defined under the *Canada Pension Plan* is a legal question as much as it is a medical question.

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. The Claimant offered no explanation for his late application, but he did have, from what I could determine, a continuing intention to pursue his appeal. I also thought it unlikely that the Minister's interests would be prejudiced by extending time. However, 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 appeal 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

REPRESENTATIVE:	R. D., self-represented
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