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

Citation: *DO v Minister of Employment and Social Development*, 2021 SST 37

Tribunal File Number: AD-21-18

BETWEEN:

D. O.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Mnister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: February 4, 2021

DECISION AND REASONS

DECISION

[1] The Claimant's application for leave to appeal was late, but I decided to consider it anyway. However, I am refusing the Claimant leave to appeal because he did not raise an arguable case.

OVERVIEW

[2] The Claimant is a former bricklayer who stopped working after sustaining head and back injuries in a November 2012 motor vehicle accident. He is now 35 years old.

[3] In June 2019, the Claimant applied for Canada Pension Plan (CPP) disability benefits, claiming that he could no longer work because of a number of medical conditions, including chronic pain syndrome, myofascial pain syndrome, thoracic outlet syndrome, and post-concussion syndrome.

[4] The Minister refused the application after determining that the Claimant had not contributed enough to the CPP. As a result, it found that he did not have any disability coverage under the Plan.

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division commenced a hearing but then suspended proceedings to give Claimant an opportunity to show that he had spent time providing care for his children and could therefore benefit from the child-rearing provision (CRP). The Claimant returned with a ruling from the Canada Revenue Agency (CRA) confirming that, if he had applied for the Canada child benefit, he would have qualified for it from August 2008 to April 2010.

[6] In a decision dated October 13, 2020, the General Division dismissed the appeal, because the Claimant had valid earnings and contributions in only three years—2007, 2012, and 2013.

The General Division found that, even with the assistance of the CRP, the Claimant had not made sufficient CPP contributions to establish a minimum qualifying period (MQP).[1]

[7] On January 16, 2021, the Claimant requested leave to appeal from the Appeal Division, alleging that the General Division committed an error in coming to its decision. The Claimant noted that the CRA had deemed him eligible to receive the child tax benefit from August 2008 to April 2010, since he had been the primary caregiver for his child during that period. He suggested that the last five months of 2008 should have been dropped from his contributory period, since he was taking care of his child at the time. He said that his earnings for 2008 were only a few hundred dollars short of the minimum threshold, so they should have been valid for the purpose of calculating his MQP. He argued that the CRP and the proration provision would have given him an MQP if 2008 had been counted among his other years of valid earnings and contributions.

ISSUES

[8] I have to answer the following related questions:

(i) Was the Claimant's application for leave to appeal late? If so, should I allow the Claimant an extension of time in which to file his application?

(ii) Do any of the Claimant's reasons for appealing have a reasonable chance of success on appeal?

ANALYSIS

The Claimant's application for leave to appeal was late but it deserves an extension

[9] An application for leave to appeal must be submitted to the Appeal Division within 90 days after the day on which the decision was communicated to the Claimant.[2] In this case, the General Division issued its decision on October 13, 2020, and the Tribunal emailed it to the

[1] Coverage for disability benefits is established by working and contributing to the CPP. The MQP is the period in which a claimant last had coverage. A valid MQP is present when a claimant has made sufficient contributions for four out of six calendar years or, if the claimant has 25 or more years of valid contributions, three out of six years.
[2] *Department of Employment and Social Development Act* (DESDA), s. 57(1)(b).

parties the following day. The Appeal Division received the Claimant's application for leave to appeal on January 16, 2021—three days after the 90-day filing deadline.[3]

[10] Although the Claimant submitted his application for leave to appeal late, I will accept it anyway, bearing in mind four factors set out in a case called *Gattellaro*.[4] The weight to be given to each of the *Gattellaro* factors may differ from case to case, but the overriding consideration is that justice be served.[5]

[11] First, the Claimant offered a reasonable explanation for the delay; his representative said that she noted the wrong due date in her diary. Second, the Claimant demonstrated a continuing intention to pursue the appeal; his application was only three days late, and he and his representative were in regular contact with the Tribunal in the weeks and months after they received the General Division's decision.[6] Third, allowing a filing extension won't prejudice the other party's interests; I don't believe that the Minister, given its resources, will suffer significant harm by allowing the Claimant additional time to pursue his appeal.

[12] The fourth *Gatellero* factor asks whether the party seeking an extension of time has an arguable case on appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[7] As it happens, this is also the test for leave to appeal.

[13] The first three *Gatellero* factors favour the Claimant, so I am willing to accept the Claimant's leave to appeal application, even though it was late. However, since the Claimant does not have an arguable case, I cannot allow his appeal to proceed.

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[3] Under s. 19(1)(c) of the *Social Security Tribunal Regulations*, a decision of the Tribunal sent by email or other electronic means is deemed to have been communicated to a party the next business day after the day on which it was transmitted.
[4] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.
[5] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[6] The record shows that the Claimant's representative telephoned or emailed the Tribunal at least six times between October 14, 2020 and December 16, 2020.
[7] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

The Claimant does not have an arguable case

[14] 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.[8]

[15] An appeal can proceed only if the Appeal Division first grants leave to appeal.[9] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success. This is a relatively easy test to meet, and it means that a claimant must present at least one arguable case.

[16] Whether or not the Claimant's application for leave to appeal was late, I am obliged to consider whether he has raised an arguable case. For the reasons that follow, I find that he has failed to do so.

[17] 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.

[18] In this case, the Claimant is asking me to take another look at evidence that the General Division has already considered. At the General Division, the Claimant showed that he was the primary caregiver for his young son between August 2008 and April 2010. He submitted that he should be given credit for, not just 12 months that he acted as caregiver in 2009, but also the five- and four-month periods that he did so in 2008 and 2010, respectively. The General Division considered this submission but concluded that, for the purpose of the CRP, the Claimant could drop only one calendar year—2009—from his MQP calculation.

[19] I don't see an arguable case that the General Division erred, either in law or fact, in coming to this conclusion. The CRP allows claimants to remove from their contributory period years in which they were the primary caregiver for a child under the age of seven.[10] The general

[8] The formal wording for these grounds of appeal is found in s. 58(1) of the DESDA.
[9] DESDA, ss. 56(1) and 58(3).
[10] *Canada Pension Plan*, s. 44(2)(b)(iv).

rule is that only full years may be removed. Thanks to the CRP, 2009 was dropped from the Claimant's contributory period, leaving 2008, 2010, 2011, 2012, 2013, and 2014. However, among those six years, the Claimant only had two (2012 and 2013) with valid earnings and contributions. As such, he still did not have an MQP.

[20] At the General Division, the Claimant argued that his earnings for 2008 should go toward his MQP calculation, even though they fell short of the $4,400 minimum threshold for that year. The General Division considered and rejected this argument too, adding: "If the Claimant believes the amount from that year is incorrect, he may seek a ruling from the tax court. If the result was positive, he may then have a valid pro-rated MQP."[11] Again, I don't see an arguable case that the General Division erred on this point. The General Division was entitled to rely on the Claimant's record of earnings,[12] which plainly showed that the Claimant had only three years of valid earnings and contributions in total.

[21] Finally, the General Division considered whether the Claimant could establish an MQP by including 2014 through the so-called "proration" provision.[13] This provision is designed to ensure that an applicant is not disadvantaged by insufficient earnings and contributions in the year they become disabled. Under proration, a claimant's required earnings and contributions are reduced in proportion to the number of months that they were able to work in the final year of their contributory period. In this case, the General Division found that the Claimant could not take advantage of the proration provision because he would still have had only three of six valid years during his contributory period, even if his below-threshold 2014 earnings and contributions were counted. I don't see an arguable case that the General Division erred in making this determination.

[22] An appeal to the Appeal Division is not an opportunity for a claimant to re-argue their case and ask for a different outcome. I can't overturn a decision unless I am satisfied that the General Division committed an error under one or more of the three specified grounds of appeal. From what I can see, the General Division did what it could to find an MQP but was unable to do

[11] General Division decision, para 14.
[12] *Canada Pension Plan*, s. 97.
[13] *Canada Pension Plan*, ss. 19 and 44(2.1).

so, based on the available evidence and the applicable law. I don't see an arguable case that it erred in its analysis.

CONCLUSION

[23] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	Amanda Byrne, for the Claimant