



Citation: *MR v Minister of Employment and Social Development*, 2022 SST 1361

Social Security Tribunal of Canada Appeal Division

Extension of Time Decision

Applicant (Claimant): M. R.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated May 23, 2022
(GP-19-1967)

Tribunal member: Kate Sellar

Decision date: November 22, 2022

File number: AD-22-742

Decision

[1] I am refusing an extension of time for the Claimant's application for permission to appeal. The appeal will not go ahead to the next step. These reasons explain why.

Overview

[2] M. R. (Claimant) injured his left shoulder while working as an Emergency Medical Technician (EMT). He received worker's compensation benefits. In July 2010, he was capable of retraining to return to work. He studied Integrated Disability Management. He completed that program around 2014. He returned to work as a painter from March to October 2015. He worked as a baker from September 2016 to November 2017. He last worked as a personal care worker from October 2017 to March 2018 when he injured his right shoulder and stopped working completely.

[3] The Claimant applied for a Canada Pension Plan (CPP) disability pension on December 12, 2018. The Minister of Employment and Social Development (Minister) refused his application. The Claimant appealed the Minister's decision to this Tribunal. The General Division decided that the Claimant wasn't eligible for a disability pension. He didn't have functional limitations that made him incapable of working by December 31, 2010 (which was the last day of his coverage period).

[4] The Claimant applied for permission to appeal the General Division's decision to the Appeal Division.

Issues

[5] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) If so, should I extend the time for filing the application?

Analysis

The application was late

[6] The General Division decision is dated May 23, 2022. The Tribunal created a cover letter to go with the decision to the Claimant by email. That cover letter is dated May 24, 2022. The Claimant had 90 days from the day the Tribunal communicated the decision to him to request permission to appeal.¹ The Claimant requested permission to appeal on October 11, 2022.

[7] The Claimant states that he did not receive notification of the decision until October 3, 2022.² It appears that the Claimant contacted the Tribunal on October 3, 2022 to follow up about the decision. He asked the Tribunal to email him a copy and the Tribunal confirmed the email address and sent the decision.

[8] Absent more information, I cannot conclude that the Tribunal failed to communicate the decision on May 24, 2022. I don't have any information at the Tribunal to suggest that the Claimant's email address was incorrect or that the email did not send on May 24, 2022. Accordingly, I conclude that the application is late as the Claimant filed it more than 90 days after May 24, 2022.

I am not extending the time for filing the application

[9] When deciding whether to grant an extension of time, I have to consider the following factors:

- a) Was there a continuing intention to pursue the application?
- b) Is there a reasonable explanation for the delay?
- c) Is there prejudice to the other party?

¹ See section 57(1)(b) of the *Department of Employment and Social Development Act* (Act).

² See AD1-6

d) Does the application show that the Claimant has an arguable case?³

[10] The importance of each factor may be different depending on the case. Above all, I have to consider whether it serves the interests of justice to grant the extension.⁴

– **Continuing intention**

[11] There is no evidence that the Claimant had a continuing intention to appeal between May 24, 2022 and when the 90-day deadline expired. The communication the Claimant had with the Tribunal occurred when he followed up long after the 90-day timeline expired, in October 2022.

– **Reasonable explanation for the delay**

[12] The Claimant's explanation for the delay was that he did not receive the decision until October 3, 2022. The Claimant gave no other information. In light of the information I have that suggests the Tribunal sent the decision by email the day after it was issued in May 2022, I don't accept the Claimant's explanation as reasonable.

– **Prejudice to the Minister**

[13] There is no prejudice to the Minister if I grant the extension of time. The length of the delay is not such that either party would have difficulty in making its case at the Tribunal.

– **Arguable case**

[14] The Claimant does not have an arguable case on appeal.

[15] Having no arguable case is the same as saying that the Claimant has no reasonable chance of success on appeal.

[16] The Claimant argues that he had a left frozen shoulder and chronic pain after his accident in July 2009. He says that his disability was severe and prolonged by

³ The Federal Court set out this test in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 833.

⁴ The Federal Court of Appeal outlined this test in *Canada (Attorney General) v Larkman*, 2012 FCA 204.

December 31, 2010. He relies on disability as being any condition of the body or mind that makes it more difficult for the person to do certain activities and interact with the world around them. He says he has a permanent functional impairment because of his injury, and that disability is prolonged.⁵

[17] The Claimant does not have a reasonable chance of success on appeal. The problem is that the Claimant needed to show that his disability was severe and prolonged within the CPP definitions of those words by December 31, 2010.

[18] The CPP definition of a severe disability means that a claimant is incapable regularly of pursuing any substantially gainful occupation.⁶ So the correct question for the General Division to ask, according to the law, involves considering whether the Claimant has functional limitations and personal circumstances that make him incapable regularly of any substantially gainful work.

[19] A person could have a permanent functional impairment (as the Claimant does) and still not have a severe disability within the meaning of the CPP. The question is what that permanent functional impairment means for the Claimant's capacity for work.

[20] In this case, the General Division found that despite the Claimant's injury, the medical evidence showed that the Claimant had some capacity for work other than his old job as an EMT. He retrained, and then he returned to work in different jobs until he stopped completely in 2018 due to another shoulder injury.

[21] The General Division applied the CPP's definition of a severe disability to the facts the Claimant provided in his appeal. The Claimant does not have a reasonable chance of showing that the General Division applied the wrong test for a severe disability.

[22] The Claimant does not have a reasonable chance of showing that the General Division made an error of fact, either. I've reviewed the record.⁷ I see no fact that the

⁵ See AD1-4.

⁶ See section 42(2) of the *Canada Pension Plan*.

⁷ This kind of review is consistent with *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

General Division may have ignored or misunderstood that was important enough that it could change the outcome of the appeal. There is no doubt that the Claimant had an injury and that it meant that he could no longer continue working as an EMT. The issue is what impact that had on the Claimant's capacity to work in any substantially gainful job. The record was clear about the Claimant's abilities and the work he completed after his 2010 injury.⁸

[23] The Claimant has not argued and I see no basis for an argument that General Division made an error in terms of fair process.

No extension of time

[24] The Claimant has not shown a continuing intention to appeal and he has not provided a reasonable explanation for the delay. There would be no prejudice to the Minister if I were to grant the extension of time.

[25] However, the most important factor in this appeal is that the Claimant does not have an arguable case on appeal. It would not be in the interests of justice for me to give the Claimant an extension of time in a case in which the Claimant has no argument with a reasonable chance of success on appeal.

No permission to appeal

[26] Even if the Claimant had provided more information that led me to believe either that the appeal was not late or that there was a reasonable explanation for the lateness, I would not have granted the Claimant permission to appeal for the same reason that I did not grant the extension of time: the appeal has no reasonable chance of success.

[27] I have no doubt that the Claimant's shoulder injuries have resulted in impairment. However, to be eligible for CPP disability pension, claimants have to show that their disability is severe and prolonged within the meaning of the CPP. This is a more specific and more difficult test to meet.

⁸ See especially GD4-1 to 3.

[28] There's no arguable case here that the General Division got the law wrong, misunderstood or ignored the facts, or failed to give the Claimant's a fair process.⁹

Conclusion

[29] An extension of time is refused. This means that the appeal will not go ahead.

Kate Sellar

Member, Appeal Division

⁹ See section 58(1) of the *Department of Employment and Social Development Act (Act)*.