Citation: *M. C. v. Minister of Employment and Social Development*, 2015 SSTAD 1364

Appeal No: AD-15-1061

BETWEEN:

M. C.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: November 27, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 29, 2015. The General Division conducted a teleconference hearing on June 23, 2015 and maintained the commencement date of payment of a survivor's allowance under the *Old Age Security Act*, based on the maximum retroactivity of eleven months permitted under the *Old Age Security Act*. The General Division determined that the application for a survivor's allowance could not be deemed to have been made any earlier than it had been made, as it did not find that she was incapable of forming or expressing an intention to make the application the before the day on which it was actually made, and that this period of incapacity was continuous. The Applicant filed an application requesting leave to appeal on September 25, 2015. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] The Applicant submits that the General Division failed to observe a principle of natural justice by greatly misjudging the severity of the symptoms of her illness. She submits that the decision was based more on speculation rather than on actual evidence. She acknowledges that her symptoms are not continuous in the sense that they affect her on a daily basis, however, once symptomatic, the symptoms can be continuous for short or long durations. The applicant relies on an opinion of Dr. Johny Van Aerde, set out in a newspaper column on chronic fatigue syndrome, to show that her disability is severe, as he attested from his own personal experience to the physical and mental devastation that can occur. She submits that if severe symptoms had not been present, she would have set aside the application or given it to a caretaker to process.

[4] The Applicant submits that she was denied an adequate opportunity to present her case before the General Division. Although she was provided with 90 days to prepare for the hearing, she submits that, as a result of her illness, her ability to fully utilize the 90 days was greatly diminished.

[5] The Applicant further submits that the elderly relative who retrieved her mail when she was ill sometimes forgot to deliver it to her, so possibly she lost her mail, including one of the OAS applications. In 2011, she received the OAS application when she was relatively well, so was able to recognize it as important, and therefore completed the form and filed it.

[6] The Respondent has not filed any written submissions.

ANALYSIS

[7] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General),* 2010 FCA 63.

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out that the only grounds of appeal are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

[10] The Applicant alleges that the General Division misjudged the severity of her symptoms. This does not speak to any of the grounds of appeal under subsection 58(1) of the DESDA, as it calls for a reassessment of the medical evidence. That said however, the General Division did in fact accept the testimony of both the Applicant and her daughter, and described it as being "devastating". The General Division also accepted that the Applicant's illness limited her for many years and that it had left her bedridden for continuous periods of up to one year. The General Division also acknowledged that it was extremely difficult for the Applicant to deal with her affairs, even when she was not suffering a relapse, as she remained weak and was understandably preoccupied with attending to matters of survival that would not necessarily include completing applications.

[11] However, the General Division found that the Applicant uses the time when she is feeling better to catch up on tasks that she has neglected, such as opening mail, paying bills and preparing meals for the freezer. The General Division determined that although these times were difficult, the Applicant was at least "capable of forming or expressing an intention to make an application, and in fact she did so in November 2011 in spite of there being no change in her overall condition". I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division misjudged the severity of her symptoms.

[12] The Applicant alleges that the General Division failed to provide her with an adequate opportunity to prepare for the hearing, as her illness precluded her from fully utilizing the 90 days with which she had been provided. This is the first instance of which I am aware in which this allegation has arisen, and there is no indication that the General Division was aware of this allegation and no indication from the Applicant as to how any additional time might have impacted upon her preparation. For instance, she does not allege that she might have secured any additional witnesses or obtained any supporting medical documentation to evidence a continuous incapacity. Had the Applicant sought an adjournment of the proceedings and had the General Division been made aware of the

Applicant's concerns that she had inadequate preparation time, this might have been an appropriate ground of appeal, but this allegation comes late and was not made at the earliest opportunity, either prior to or during the hearing. The courts have consistently held that the failure to raise any objections at the earliest opportunity amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[13] The fact that the Applicant may not have received all of her mail does not fall into any of the grounds of appeal under subsection 58(1) of the DESDA. It may be that mail might have been lost, but there is no obligation in any event on the Respondent or other entities to have provided the Applicant with a form for the survivor's allowance. The fact that the Applicant may not have received all of her mail does not show that the General Division erred or failed to fulfill any duties it might have owed to the Applicant. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[14] Given the considerations above, the Application is dismissed.

Janet Lew
Member, Appeal Division