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

Citation: *A. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 68

Tribunal File Number: AD-15-1316

BETWEEN:

A. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 4, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated September 18, 2015. The General Division refused to allow further time within which the Applicant could bring her appeal before it, as it determined that she had brought her appeal more than one year after the day on which the decision of the Respondent had been communicated to her. The Applicant filed an application requesting leave to appeal on December 7, 2015. The Applicant provided additional reasons for her appeal to the Appeal Division, by letter filed on January 20, 2016, in response to a request from the Social Security Tribunal. 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?

HISTORY OF PROCEEDINGS

[3] The General Division set out the history of proceedings at paragraphs 5 to 11. The key dates for the purposes of this leave application are as follows:

(a) January 9, 2013 – the Applicant applied for an Old Age Security pension (GD2-30). On February 4, 2013 and March 4, 2013, the Respondent wrote to the Applicant requesting additional information. In its letter of March 4, 2013, the Respondent wrote that if it did not hear from the Applicant within 30 days, her application would be denied and a new application would be required (GD2-27 and GD2-24/26);

(b) April 5, 2013 – the Respondent advised the Applicant that its requests for information had not been met and that as such, her application had been cancelled and benefits denied. The Respondent also advised the Applicant that she could seek a reconsideration of its decision (GD2-28);

(c) April 26, 2013 – the Applicant wrote a letter to Immigration Canada addressed “to whom it may concern”, requesting the information sought by the Respondent (GD2-23);

(d) April 26, 2013 – the Applicant wrote to the Respondent advising that she was still trying to obtain information. She explained that she had not provided the requested information on time as she had been in the process of moving and did not pick up her mail until April 4, 2013. She sought an appeal of the Respondent’s decision (GD2-22). (It seems plausible that the Applicant might not have received the February and March 2013 correspondence from the Respondent, as the Applicant had provided a different mailing address from her residential address in the initial application, and also indicated in the leave application that she had moved in early 2013. However, this does not explain why she did not immediately contact the Respondent after retrieving the Respondent’s March 4, 2013 letter in early April 2013.);

(e) May 1, 2013 – the Respondent advised the Applicant that it had received her letter (of April 26, 2013) requesting a reconsideration (GD2-20);

(f) July 2, 2013 – the Respondent wrote to the Applicant advising that it had received her application for benefits under the *Old Age Security Act.* The Respondent advised that more information was required before it could determine her eligibility. In particular, the Respondent requested the Applicant provide a copy of her Canadian Immigration Record (GD2-9);

(g) October 1, 2013 – the Respondent confirmed that it had yet to receive the requested information. The Respondent advised the Applicant that if she did not respond within 30 days, her request for a reconsideration would be denied and a new application for an Old Age Security pension would be required (GD2-8);

(h) March 21, 2014 – the Respondent denied the Applicant's request for reconsideration, as she had not provided the information requested by the Respondent on July 2, 2013 and October 1, 2013. The Respondent advised that if the Applicant chose to reapply, her rights to an Old Age Security pension would be based on her new application. The General Division was satisfied that the reconsideration decision had been communicated to the Applicant within ten business days after the day on which it had been mailed to her (GD2-7);

(i) June 2, 2014 – the Respondent finally received the requested information from the Applicant. The Respondent advised the Applicant however that it had cancelled her application on April 5, 2013 and that she would be required to complete a new application for benefits. It provided her with a new form and invited her to complete and return a new application. It is unclear whether the Applicant filed a new application for an Old Age Security pension. (The General Division indicated that the Applicant submitted a second application and that a copy could be found at GD2-4 of the hearing file, but this document is in fact a copy of the Applicant's Consent to Exchange Information with Citizenship and Immigration Canada.);

(j) November 13, 2014 – the Applicant wrote to the Respondent advising that she had contacted Immigration Canada on November 6, 2014 to confirm her arrival to Canada, but had been informed that her file was closed. She requested some assistance from the Respondent in obtaining this information and also asked that her file be re-opened. She explained that she was under much stress as she had been waiting for and had undergone open heart surgery and that she also suffered from post-traumatic stress disorder (GD2-14 to GD2-16);

(k) January 13, 2015 – the Respondent wrote to the Applicant advising her that the reconsideration decision had been made on March 21, 2014 and that she had a right of appeal (GD2-10);

(l) February 6, 2015 – the Applicant filed a letter with the Social Security Tribunal, requesting a "second leave of appeal";

(m) February 10, 2015 – the Social Security Tribunal wrote to the Applicant, advising that her appeal was incomplete as she had not submitted certain information, including a copy of the reconsideration letter from the Respondent. The Social Security Tribunal also wrote that a completed Notice of Appeal had to be received within 90 days of the date that the reconsideration decision had been communicated to her, otherwise she would have to request an extension of time to file a complete notice of appeal, without delay, and address: whether there was a continued intention to pursue the appeal, whether the matter discloses an arguable caser, whether there was a reasonable explanation for the delay and whether there would be prejudice to the other parties in extending the deadline;

(n) March 11, 2015 – the Social Security Tribunal wrote to the Applicant a second time, advising that although it had received some of the requested information, the Notice of Appeal remained incomplete, as a copy of the reconsideration decision remained outstanding. The Social Security Tribunal wrote that "[a]n appeal is not properly filed until [it had] received all of the required information". The Social Security Tribunal again wrote that a completed Notice of Appeal had to be received within 90 days of the date that the reconsideration decision had been communicated to her, otherwise she would have to request an extension of time to file a complete notice of appeal, without delay, and address the four factors it had identified in its letter of February 10, 2015;

(o) April 29, 2015 – the Social Security Tribunal wrote to the Applicant a third time. The contents of the letter were the same as its letter of March 11, 2015;

(p) May 25, 2015 – the Social Security Tribunal wrote to the Applicant a fourth time, confirming that her Notice of Appeal remained incomplete as it was missing mandatory information. The Social Security Tribunal also wrote:

> An appeal is not filed and cannot proceed until the Tribunal receives all of the mandatory information.
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> Without delay, please provide to the Tribunal:
>
> - A copy of the March 21, 2014 letter from Service Canada. This is the reconsideration decision needed to complete your appeal. The January 13, 2015 letter is not considered the reconsideration decision.
>
> **Timeframe for Filing your Notice of Appeal**
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> The Tribunal must receive a complete Notice of Appeal within 90 days after the day the Department of Employment and Social Development Canada's reconsideration decision was communicated to you. If the Tribunal receives a complete Notice of Appeal beyond the 90-day time limit, a Tribunal Member must decide if an extension of time should be granted before the appeal can proceed. An extension cannot be granted if more than 1 year has passed since the reconsideration decision was communicated to you.

(q) June 15, 2015 – the Applicant filed the outstanding information with the Social Security Tribunal; and

(r) September 18, 2015 – the General Division rendered its decision. It found that the Applicant had brought the appeal to the General Division more than one year after the reconsideration had been communicated to her. It held that, notwithstanding the Applicant's health reasons, it had to apply subsection 52(2) of the *Department of Employment and Social Development Act* (DESDA), "which clearly states that in no case may an appeal be

> brought more than one year after the reconsideration decision was communicated to the [Applicant]".

SUBMISSIONS

[4] In the initial leave application filed on December 7, 2015, the Applicant submitted that the appeal should be considered for reasons of health. She explained that she had gone through open heart surgery and had been unable to cope with many things, including post-traumatic stress disorder. She advised that she continued to struggle to complete tasks.

[5] The Social Security Tribunal wrote to the Applicant on December 23, 2015, advising that she should identify any grounds of appeal under subsection 58(1) of the DESDA. In response to the letter, the Applicant submitted that the General Division erred as it failed to consider the substantive merits of her appeal. She submitted that she has a reasonable chance of success as her serious health problems caused the delay in filing her application, and because these same health problems need to be taken into consideration.

[6] The Respondent did not file any written submissions in respect of this leave application.

ANALYSIS

[7] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[8] 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. The Federal Court of Canada recently approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[9] The Applicant continued to cite health issues for the delay in filing the appeal with the General Division, though did not provide any supporting medical reports or notes. The Applicant also did not address how the General Division could overcome the requirements of subsection 52(2) of the DESDA and sections 23 and 24 of the *Social Security Tribunal Regulations*, to enable it to proceed with a consideration of the substantive merits of the appeal.

[10] In this case, the Applicant cited a number of "special circumstances" which the General Division may or may not have taken into consideration. The General Division may have erred if it did not consider whether there were any "special circumstances" contemplated under paragraph 3(1)(b) of the *Regulations* that might have justified varying any provisions of the *Regulations* or dispensing the Applicant from compliance with them.

[11] In *L.N. v. Minister of Employment and Social Development*, 2015 SSTAD 538, I dealt with a similar situation in which the applicant there had filed an application requesting leave to appeal with the Appeal Division within 90 days after the decision had been communicated to her. The applicant in that case did not perfect her leave application within one year of having the decision communicated to her, as she had not provided a copy of the decision of the Review Tribunal to the Social Security Tribunal within the year. I addressed the issue as to whether the leave application in that case had been properly brought and whether it met the general requirements set out in section 57 of the DESDA.

[12] There, I determined that the language in subsection 57(1) of the DESDA that "an application for leave to appeal must be made in the prescribed form and manner" is mandatory, and that reference to subsection 40(1) of the *Regulations*, which sets out the form and contents required for a leave application, was required. Otherwise, if the leave

was not made in the “prescribed form and manner”, it would render subsection 57(1) of the DESDA meaningless.

[13] It seems that the same analysis which I undertook in *L.N.* applies to the proceedings before me, given that the language of subsection 52(1) of the DESDA is similar to the language of subsection 57(1) of the DESDA, and the requirements set out under subsection 24(1) of the *Regulations* are similar to the requirements under subsection 40(1) of the *Regulations.*

[14] Subsection 52(1) of the DESDA reads:

> **52**(1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within, . . .
>
> (b) . . . 90 days after the day on which the decision is communicated to the appellant.

[15] If the subsection did not contain the words “prescribed form and manner” it would seem that one could simply file a notice of appeal and preserve one’s “cause of action” or appeal. The existence of these words however suggests that it is not enough to simply file a notice of appeal. An appeal must be brought in the “prescribed form and manner” and within 90 days after the day on which the decision is communicated to the appellant. This also suggests that the subsection is to be read conjunctively with subsection 24(1) of the *Regulations.* (Subsection 52(2) of the DESDA of course allows the General Division to extend this time, but in no case is an appeal to be brought more than one year after the day on which the decision is communicated to an appellant.) Subsection 24(1) of the *Regulations* requires that an appeal be in the form set out by the Social Security Tribunal on its website and that it contain a number of items.

[16] While I found that the application had not been properly made, I determined that I could vary the provisions of the *Regulations* under paragraph 3(1)(b) of the *Regulations,* provided that there were “special circumstances”. Ultimately, I found that “special circumstances” existed in that case to warrant varying subsection 40(1) of the *Regulations.* At subparagraph 42 d), I wrote:

> Oversight and neglect do not qualify as "special circumstances", however, if the impact of oversight or neglect could lead to prejudice and a gross injustice, such as here, and if the Respondent consents to the merits of the application for disability benefits and acknowledges that the Applicant is disabled, this could, in these very limited and unique circumstances, qualify as "special circumstances".

[17] In *L.N.*, I indicated that "special circumstances" ought not to be loosely defined, nor did I think that "special circumstances" should be widely available. I continue to subscribe to that view.

[18] It seems in this particular case that there may been sufficiently compelling "special circumstances" to warrant considering whether paragraph 3(1)(b) ought to be relied upon by the General Division to dispense a party from compliance with a provision under the *Regulations*. Here, the Applicant indicates that she had been on disability up until April 30, 2013 (GD2-22 and GD2-23), she had serious health issues including open- heart surgery and post-traumatic stress disorder, she had changed residences so did not receive correspondence from the Respondent in a timely manner, she did not have any control over when she might receive the information or documentation which she had requested of a third party to prove her entry into Canada and finally, she submitted the requested information which the Respondent had been seeking in June 2014, to enable it to determine her eligibility to an Old Age Security pension.

[19] While most of these "special circumstances" do not directly explain the Applicant's delay in providing a copy of the reconsideration decision to the Social Security Tribunal, neither too did the "special circumstances" cited in *L.N.* There, the Respondent consented to the merits of the applicant's application for disability benefits, in a case where the applicant's counsel had neglected to file a copy of the decision of the Review Tribunal, despite requests from the Social Security Tribunal.

[20] While the Respondent has not indicated whether it would otherwise have determined the Applicant eligible to receive either a full or partial Old Age Security pension, it seems that the Applicant may well be eligible to a pension, based on the documentation accompanying her application (GD2-29), provided that she can establish her date of entry into Canada. The Department of Immigration, Refugees and Citizenship

retains this information, and as the Respondent has the Applicant's consent to exchange information with Citizenship and Immigration Canada, it should be able to readily obtain this information.

[21] It is worthwhile revisiting paragraphs 40 and 41 of the *L.N.* decision:

> [40] However it seems that prejudice and a gross injustice could well result from counsel's oversight, mistake and neglect. I do not think that an application should be so readily defeated by virtue of the fact that an applicant's counsel failed to attach a copy of the decision in respect of which leave to appeal is being sought, particularly when the Appeal Division might have ready access to copies of those decisions. It would be contrary to the interests of justice that a leave application be so readily defeated, without any consideration of the merits of the matter. **While it is desirable that an applicant produce a copy of the decision in respect of which leave to appeal is being sought, its absence ought not to be the sole basis upon which a leave application should be rejected or dismissed, when that applicant has, in all other respects, seemingly complied with the requirements of the DESDA and the *Regulations*.**
>
> [41] It seems that a plain reading and application of subsection 57(1) of the DESDA and sections 3, 39 and 40 of the *Regulations* should lead me to dismiss this leave Application, but as I have indicated above**, it would seem to lead to an absurd and unjust result that an application is dismissed because it either lacks a copy of the decision in respect of which leave to appeal is being sought, or the applicant is late in producing a copy of that decision.** (My emphasis)

[22] I note also that the Social Security Tribunal did not notify the Applicant that an extension of time for filing the notice of appeal could not be granted if more than one year had passed since the reconsideration decision had been communicated to her, until May 25, 2015. This appears to have been the first instance whereby the Social Security Tribunal informed the Applicant of this, despite having written to her on at least three previous occasions, dating back as early as February 10, 2015. In other words, had the Social Security Tribunal notified the Applicant of this, the Applicant may have provided a copy of the reconsideration decision on time. But, by the time she received the letter of May 25, 2015 from the Social Security Tribunal, it was by then too late for her to file a copy of the reconsideration decision on time to enable her to request an extension.

[23] Had the General Division considered the Applicant's "special circumstances", it may well have dispensed with the requirement that the Applicant provide a copy of the reconsideration decision within one year from the day that the decision had been communicated to her, and thereby proceeded to hear the appeal of the Respondent's decision regarding her eligibility to an Old Age Security pension.

[24] I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[25] The application for leave to appeal is allowed.

Janet Lew
Member, Appeal Division