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

Citation: *C. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 441

Tribunal File Number: AD-16-960

BETWEEN:

C. S.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: November 16, 2016

Canada

REASONS AND DECISION

DECISION

Extension of time and leave to appeal is refused.

INTRODUCTION

[1] In a decision dated April 27, 2016, the General Division (GD) of the Social Security Tribunal of Canada determined that the Applicant was entitled to a partial Old Age Security (OAS) pension at a rate of 14/40 of the full pension and the Guaranteed Income Supplement (GIS) effective March 2012.

[2] On July 22, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal. Following written and telephone requests from the AD for further information, the Applicant completed his application for leave on September 22, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[3] I must decide if an extension of time to make the application for leave should be granted.

THE LAW

DESDA

[4] Pursuant to paragraph 57(1)(b) of the DESDA, an application for leave to appeal must be made to the AD within 90 days after the day on which the decision was communicated to the Applicant.

[5] The AD must consider and weigh the criteria as set out in case law. In *Canada (MHRD) v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

---

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

(a) The Applicant must demonstrate a continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) The matter discloses an arguable case; and

(d) There is no prejudice to the other party in allowing the extension.

[6] The weight to be given to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada (A.G.) v. Larkman.*[2]

[7] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted. The AD must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[8] According to subsection 58(1) of the DESDA 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] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

---

[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[10] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada (MHRD) v. Hogervorst*;[3] *Fancy v. Canada (A.G.).*[4]

***Old Age Security Act* (OASA) and Associated Regulations**

[11] Under section 3 of the OASA, a person must have resided in Canada for at least 40 or more years after his or her 18th birthday in order to receive a full OAS pension.

[12] To receive a partial pension, an applicant must have resided in Canada for at least ten years if he or she resides in Canada on the day before the application is approved. An applicant who resides outside of Canada on the day before the application is approved must prove that he or she had previously resided in Canada for at least 20 years.

[13] Once a person meets the eligibility requirements for the OAS pension and GIS, there are rules governing payment of the benefits. According to subsection 8(2) of the OASA, and paragraph 5(2)(a) of the OAS Regulations, the maximum retroactivity of OAS pension payments is 11 months before the month the Respondent received the OAS pension application. According to paragraph 11(7)(a) of the OASA, the maximum retroactivity of GIS payments is 11 months before the month the Respondent received the GIS application. According to paragraph 11(7)(b) of the OASA, no GIS may be paid to a pensioner for any month for which no OAS pension may be paid to the pensioner.

[14] Section 28.1 of the OASA provides an exception to the maximum retroactivity rules respecting payment of benefits under the OASA. This provision allows an application to be deemed to have been made earlier than when it was actually made, provided it can be shown that the person to whom the application relates was incapable of forming or expressing an intention to apply for the benefit. Subsections 28.1(1) to (3) set out the requirements for incapacity:

> (1) Where an application for benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an

[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

> intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later…
>
> (3) For the purposes of subsections (1) and (2), a period of incapacity must be a continuous period except as otherwise prescribed.

APPLICANT'S SUBMISSIONS

[15] The Applicant 's application requesting leave to appeal was effectively complete on September 22, 2016, 148 days after the GD's decision was mailed to him and well after the requisite 90-day filing deadline. Neither the Applicant nor his authorized representative offered any specific reasons why they were late in submitting a perfected request for leave to appeal, other than to blame a delay in the mail.

[16] In his letter dated July 6, 2016, counsel for the Applicant explained why he believed the appeal had a reasonable chance of success. He submitted that the GD based its decision on an erroneous finding of fact when it determined that the Applicant was incapable of forming or expressing an intention to apply for the OAS pension and GIS prior to February 11, 2013.

[17] Counsel further submitted that the date of the Applicant's eligibility for OAS and GIS would have been either March 2007 (had his 2006 application to the Respondent been decided correctly) or February 2011 (had his 2011 application been decided correctly). Counsel acknowledged that the GD did not consider the Respondent's earlier decisions because it felt it had had no jurisdiction to do so.

[18] Counsel also acknowledges that retroactive payment is restricted under the OASA unless an applicant can show he or she was incapable of forming or expressing an intention to apply. In determining that the Applicant had the requisite capacity prior to February 11, 2013, the GD failed to take into account the following facts:

- Had there been an oral hearing, Applicant's inability to speak and understand English would have been evident to the GD member who adjudicated the appeal;

- The provisions in the OASA relating to retroactivity are complex and difficult for even an English-speaking layman to understand, much less someone in the Applicant's position. He previously lacked the ability and resources to hire counsel qualified to assist him with his applications.

- The Applicant was able to pursue his OAS-GIS claim as far as an appeal to the GD only because his current counsel was willing to offer translation, fact and document gathering, communications with the Respondent and financial assistance.

ANALYSIS

[19] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that on April 27, 2016 the GD's decision was mailed to the Applicant and his authorized representative at their last known addresses. According to subsection 19(a) of the *Social Security Tribunal Regulations* (SST Regulations), a decision is deemed to have been communicated to a party 10 days after the date on which it was mailed. The Respondent received an incomplete application requesting leave to appeal on July 22, 2016, and the AD requested the missing information by way of a letter dated July 26, 2016. In early September, having received no reply from the Applicant or his counsel, AD staff attempted to contact them by telephone, without success. On September 13, 2016, counsel called the AD to let it know he had only recently received the July 26, 2016 letter. The missing information was submitted on September 22, 2016 and the application requesting leave was deemed perfected—nearly five months after the GD's decision was mailed.

[20] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[21] The record indicates that the Applicant's representative responded to the GD's decision within the 90-day deadline, but did not respond to the request for additional information until six weeks later. He did, however, submit the missing information, as requested, within a reasonable period. As not a great deal of time passed before the request for leave was perfected,

I am willing to give the Applicant the benefit of the doubt on this factor and find that he had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[22] The Applicant's representative was asked to explain why he failed to submit a complete application on time, and he responded by citing a delay in the mail. I find this explanation unlikely and incomplete. I note that counsel has changed his address more than once, and it seems likely that he neglected to notify the AD of a move, as he was obligated to do under section 6 of the SST Regulations.

Arguable Case

[23] Counsel rightly noted that the GD had no jurisdiction to consider the Respondent's denials of November 2006 and October 2011, as the appeal limitations for those decisions expired long ago. The issue is whether, as claimed, the Applicant lacked the capacity to form or express an intention to apply for the OAS pension and GIS benefit.

[24] It must be noted that the test in section 28.1 of the OASA is strict: An applicant is required to prove not just that he lacked the capacity to apply for benefits, but that he lacked the capacity *to form or express an intention* to apply. The examination must be focused not on an applicant's capacity to make, prepare, process or complete an application for disability benefits but only on his capacity to form or express an intention to make an application (*Canada (A.G.) v. Kirkland*;[5] *Canada (A.G.) v. Danielson.*[6]

[25] In this present case, no evidence was presented to the GD to suggest the Applicant was suffering from dementia or any other mental infirmity that might interfere with his ability to form an intention to apply. Instead, counsel submitted essentially the same arguments that he is now making before the AD—that his client lacked facility in English, sophistication in legal matters and financial resources to hire representation. These factors are not in themselves sufficient to support a finding that the Applicant lacked capacity as it is defined in the OASA. In paragraph 16 of its decision, the GD wrote:

---

[5] *Canada (Attorney General) v. Kirkland* 2008 FCA 144.
[6] *Canada (Attorney General) v. Danielson* 2008 FCA 78.

> The evidence substantiated the Appellant was a priest and teacher in February 2013, and his only medical condition related to shingles in 2011 and a history of dental problems. There is no medical documentation the Appellant suffered from any physical or mental condition that rendered him incapable of forming or expressing an intention to make an application. The evidence substantiated the Appellant in fact made prior applications.

[26] I am reluctant to interfere with a finding of the GD where it has considered and weighed the available evidence and appropriately applied the law. In alleging that the GD failed to give adequate consideration to essentially the same facts and arguments that were presented to the GD, the Applicant's representative is in effect requesting that I retry the entire claim on its merits and decide in his favour. I am unable to do this, as my authority as a member of the AD permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[27] I also wish to address counsel's suggestion that the GD did the Applicant an injustice in deciding not to hold an oral hearing, which he submits would have highlighted his inability to speak and understand English. As already discussed, the Applicant's language skills are an irrelevant consideration to whether he had capacity to apply and, in any event, section 72 of the SST Regulations gives the GD wide discretion to hold a hearing as it sees fit.

[28] I see no arguable case on any of the claimed grounds.

Prejudice to the Other Party

[29] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

CONCLUSION

[30] Having weighed four *Gattellaro* factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. While I presumed the Applicant had a continuing intention to pursue his appeal, I did not find reasonable his representative's explanation for the delay. It is true that the Respondent's interests would not likely be prejudiced by extending time, but all other factors were ultimately outweighed, in my estimation, by the Applicant's lack of an arguable case: I saw no grounds—whether a breach of natural justice or an error in law or fact—on which the Applicant would have a reasonable chance of success on appeal.

[31] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing an extension of time for leave to appeal pursuant to subsection 57(2) of the DESDA.

Member, Appeal Division