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

Citation: *A. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 521

Tribunal File Number: AD-17-132

BETWEEN:

A. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 6, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] This is an appeal of a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), which determined that the Respondent's decision to refuse the Applicant's late reconsideration request was discretionary and made both judicially and judiciously. The Applicant has now filed an application requesting leave to appeal the General Division's decision.

BACKGROUND

[2] The Applicant is an Old Age Security (OAS) pension recipient. On December 31, 2010, he applied for the Guaranteed Income Supplement (GIS) for the 2009/2010 payment period. The Respondent advised him that his application was missing information, but he did not provide it. Instead, on July 20, 2011, he submitted a second GIS application for 2009/2010. On March 7, 2012,[1] he submitted a third GIS application for 2010/2011. [2]

[3] The Respondent again requested additional information and, having not received it, ultimately denied each of the Applicant's GIS applications at the initial stage. There is no record of the Applicant requesting reconsideration within 90 days of any of the initial denials. On March 27, 2013, the Applicant wrote to the Respondent to request an extension of the 90-day time limit to apply for reconsideration. The Respondent advised the Applicant that it would review his file but eventually refused the request in a letter dated October 14, 2014. The Applicant then appealed this refusal to the General Division.

---

[1] The General Division's decision indicates that this application was received May 22, 2012, but this appears to refer to a duplicate application with that date stamp (see GD2-63 and GD2-64).

[2] On the same date, the Applicant also submitted a GIS application for 2011/2012. As the Respondent approved this application on February 12, 2013, it is not a subject of the current appeal.

[4] The General Division decided that an oral hearing was unnecessary and proceeded on the basis of the documentary record. In a decision dated November 7, 2016, the General Division found that the Respondent had exercised its discretion judicially in refusing to consider the Applicant's request for an extension of time.

[5] On February 20, 2017, the Applicant requested an extension of time to file an appeal of the General Division's decision to the Tribunal's Appeal Division. Tribunal staff acknowledged the request and granted the Applicant until April 18, 2017 to file a complete notice requesting leave to appeal. The Applicant duly complied, and the Tribunal declared his application complete.

THE LAW

Old Age Security Act

[6] Section 27.1 of the *Old Age Security Act* (OASA) states that a person who is dissatisfied with a decision or determination made under the Act with respect to payment of a benefit or the amount of a benefit may, within 90 days after receipt of the Minister's decision or determination, request a reconsideration of the decision or determination. The Minister may, either before or after the expiration of those 90 days, allow the request to be submitted in the proper form within a longer period of time.

[7] Subsection 28(1) of the OASA allows a party to appeal the Minister's decision to deny further time to make a request for reconsideration to the Tribunal.

[8] Subsection 29.1(1) of the *Old Age Security Regulations* (OAS Regulations) states that the Minister may allow a longer period to make a request for reconsideration if the Minister is satisfied that there is a reasonable explanation for requesting a longer period and that the person has demonstrated a continuing intention to request reconsideration.

[9] Subsection 29.1(2) of the OAS Regulations states that, where the request for reconsideration is made more than a year after the initial decision, the Minister must also be satisfied that the request for reconsideration has a reasonable chance of success, and that no prejudice would be caused to any party by allowing a longer period to make the request for reconsideration.

Department of Employment and Social Development Act

According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* **(**DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[10] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[11] 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 made in a perverse or capricious manner or without regard for the material before it.

[12] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[3] 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.*[4]

[13] 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 to appeal stage, the Applicant does not have to prove the case.

SUBMISSIONS

[14] In his application requesting leave to appeal, received on April 12, 2017, the Applicant submitted that the General Division committed the following errors:

---

[3] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (QL).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(a) It based its decision on erroneous findings of fact by ignoring his education level and mental/medical condition.

(b) It erred by depriving him of the opportunity to fully present his case in person.

(c) It failed to observe a principle of natural justice by deciding the case before the deadline to respond to documents. In a letter dated October 2016, the General Division allowed the parties until November 18, 2016, to respond but then issued its decision on November 7, 2016.

[15] The Applicant made further submissions on April 13, 2017. He reiterated the grounds set out above and added that he was 74 years old with serious health problems. He complained that he had not received his claimed monies, even though the GIS was designed for low income seniors like himself. He had visited Service Canada centres hundreds of times and spent just as many hours on the telephone, only to be met with abuse and mistreatment.

[16] On June 21, 2017, the Applicant's wife made further submissions by way of email. She attached a seven-page statement dated November 14, 2016, that had originally been prepared for the General Division, although it was not accepted because, as she claimed, the presiding member issued its decision prematurely. The statement alleged, among other things, that the Respondent was "trying to prove a case by duplicating the same information numerous times." She cited medical evidence on file that she said proved her husband was incapacitated from completing paperwork. She insisted that the Respondent had mishandled her husband's applications and that he had no reason not to respond to Service Canada's requests for additional information.

ISSUE

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

ANALYSIS

[18] At this juncture, I will address only the argument that, in my view, offers the Applicant his best chance of success on appeal.

[19] The Applicant alleges that the General Division decided his appeal before its own submission deadline, thereby denying him an opportunity to make further submissions. In its notice of hearing dated September 16, 2016, the General Division advised the parties of the following timelines:

> **FILING PERIOD**
>
> If parties have additional documents or submissions to file, they must be received by the Tribunal no later than **October 19, 2016**. A copy of any new documents received by the Tribunal will be provided to the other parties and they will be given an opportunity to respond.
>
> **RESPONSE PERIOD**
>
> The Filing Period is followed by a Response Period. If a party wishes to respond to any documents filed during the Filing Period, the response must be received by the Tribunal no later than **November 18, 2016**.
>
> **DOCUMENTS FILED AFTER THE RESPONSE PERIOD**
>
> The Tribunal Member will issue a decision to either allow or dismiss the appeal after the end of the Response Period, or possibly sooner if no documents or submissions are filed during the Filing Period. Accordingly, any documents not filed within the appropriate timelines indicated, may not be considered by the Tribunal Member in making the decision. If documents are filed late, but before a decision is issued, they will be considered **only** at the Tribunal Member's discretion.

[20] The record indicates that on August 5, 2016, the Applicant filed a 17-page package of documents (GD5) with the Respondent, which then forwarded it to the Tribunal in late September 2016. On October 6, 2016, the Respondent filed with the Tribunal a document entitled "Additional Information on Appeal to the Social Security Tribunal," dated September 20, 2016 (GD6). It restated the Respondent's position and addressed various items of evidence that the Applicant had previously submitted, such as certificates of incapacity. It also addressed clinical records that the Respondent had solicited directly from the Applicant's family physician. At that point, it did not appear that the Respondent had filed these latter documents with the Tribunal or forwarded them to the Applicant himself.

[21] Those records were apparently not submitted until October 12, 2016, when the Tribunal received a 115-page package of documents (GD7). It included correspondence indicating that the Respondent, using a previously signed consent form, had directly requested Dr. Khai Phan,

the Applicant's family physician, to provide it with a copy of his complete clinical records. Dr. Phan complied with this request on September 9, 2016.

[22] As indicated by the notice of hearing, the submission period ended on October 19, 2016, and, at that point, a one-month response period commenced. However, it does not appear that the Applicant was allowed the benefit of the full month, as the General Division proceeded to issue its decision on November 7, 2016, having considered the evidence before it up to that date. The record indicates that the Applicant attempted to make a post-decision submission in late November but was advised that the General Division's decision was final. It appears that this post-decision submission was the same written argument, dated November 14, 2016, that the Applicant submitted to the Appeal Division this past June. At this point, the contents of that document are of limited relevance to me, but its existence does indicate that the Applicant had prepared a "response" of some kind to Dr. Phan's clinical records, and to the Respondent's commentary on them, prior to the expiration of the Respond Period on November 18, 2016. I see an arguable case that the General Division, having established filing deadlines, precipitously issued its decision without affording the Applicant a full opportunity to be heard, in a possible violation of the rules of procedural fairness.

CONCLUSION

[23] For the above reasons, I am granting leave to appeal on all grounds claimed by the Applicant. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[24] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division