Federal Court Cour fédérale

Date: 20160115

Docket: T-523-15

Citation: 2016 FC 43

Ottawa, Ontario, January 15, 2016

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NOEL DUBE

Applicant

And

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of the January 27, 2015 refusal of the Social Security Tribunal [SST] to grant an extension of time in which to appeal the denial of Canada Pension Plan [CCP] disability benefits to Mr. Noel Dube [the applicant] in the reconsideration decision dated November 13, 2012 and in respect of the Appeal Division of the SST [SST-AD] denying leave to appeal on March 12, 2015. The applicant requests an order granting an extension of time in which to appeal the SST-AD's denial of Canada Pension Plan disability benefits, and an order granting the applicant CPP disability benefits and costs.

I. Background

A. *Facts*

[2] The applicant is in his 50s. He suffered head trauma while operating large machinery in 2006, which left him in constant pain. His symptoms include inability to sleep, limited physical activity and inability to concentrate at will.

[3] This application looks at the period starting in 2011; the applicant applied for CPP disability benefits and was denied at the application, reconsideration and SST stages.

[4] At the same time he started applying for benefits through CPP, the applicant was litigating a matter with Manulife Financial to claim insurance benefits in a similar amount as those offered through CPP disability. If this litigation had been successful for the applicant, the CPP disability benefits would not have been necessary.

[5] The applicant applied for CPP disability benefits on December 29, 2011. He was denied on reconsideration on November 13, 2012.

[6] The applicant received a negative outcome for his pending litigation with Manulife Financial. On August 20, 2013, the applicant's representative sent a letter to Service Canada requesting a review of the decision dated November 13, 2012. The applicant's representative sent a letter to the respondent on October 16, 2013, indicating his intention of appealing the November 13, 2012 decision.

B. *Law and Procedure*

[7] Pursuant to section 81 of the *Canada Pension Plan*, RSC, 1985, c C-8, the applicant had 90 days in which to appeal the reconsideration decision. This period expired February 11, 2013.

[8] The SST may grant exemptions to this time extending the period up to a maximum of one year from the date the decision was received by the applicant, subject to a test being met at the decision maker's discretion.

[9] The SST rejected the applicant's request for an extension of time to file the notice of appeal on January 27, 2015. This rejection was based on the applicant not having shown that he had an intention to pursue the appeal and not having provided reasonable explanation for the delay and there may be prejudice to the other party.

[10] The SST-AD rejected the applicant's leave to appeal on March 12, 2015. The decision was based on the applicant not having presented a valid ground for appeal (limited to three grounds under the *Department of Employment and Social Development Act*, SC 2005, c 34, subsections 58(1) and (2)).

[11] The applicant applied to this Court for judicial review of both of these decisions.

II. Decision Under Review

[12] The SST General Division [SST-GD] refused to grant an extension of time in which to bring an appeal on January 27, 2015. The SST-GD determined that the applicant had not demonstrated a continuing intention to pursue the appeal, or a reasonable explanation for the delay. The SST-GD further found that the respondent may be prejudiced if the extension were allowed. Finally, the SST-GD found that the applicant presented an arguable case.

[13] The applicant then applied to the SST-AD for leave to appeal the decision on February 20, 2015. Leave was denied on March 12, 2015, as there was no section 58 Act ground for the appeal alleged. The SST-AD explained that the decision to grant an extension of time is a discretionary one which ought to be given deference; the applicant did not allege the SST-GD exercised its discretion inappropriately.

III. Issues

[14] The applicant raises one issue: Did the designated member of the tribunal err by refusing the applicant an extension of time and leave to appeal?

[15] The respondent states the issue slightly differently and asks whether the SST-AD's decision refusing leave to appeal was reasonable.

[16] This application raises three issues:

1. What is the standard of review?

2. Was the SST-GD's decision to deny an extension of time reasonable?

3. Was the SST-AD's decision otherwise reasonable?

IV. Applicant's Written Submissions

[17] The applicant submits the standard of review is reasonableness on this question of mixed fact and law, where the issue is the application of the law to the particular facts of this case (*Canada (Attorney General) v Landry*, [2008] FCJ No 1084).

[18] Citing to *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883, [2005] FCJ No 1106 [*Gattellaro*], the applicant provides the following test for the board member to decide whether to grant an extension of time to appeal; the applicant must demonstrate:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[19] The applicant also submits that the test is a flexible one, which must be applied in such a way that justice is served and where it is not necessary for the applicant to meet all four criteria (*Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 [*Hogervorst*]).

[20] The applicant agrees with the SST that an arguable case was presented.

[21] The applicant submits that it was not reasonable for the SST to conclude that there was no demonstration of the applicant's continuing intention to pursue the application, that the explanation for the delay was not reasonable and that the sole evidence of delay was enough to support a finding that there would be prejudice to the respondent should the extension of time be granted.

A. *Continuing Intention*

[22] The applicant submits the respondent's finding that the applicant did not intend to pursue the application or appeal is not reasonable. At the time of receiving the initial denial, the applicant was suffering from a number of ailments and was on several strong medications. He was also involved in a civil litigation matter with Manulife Financial at the time.

B. *Reasonable Explanation for the Delay*

[23] The applicant submits that the respondent's finding that the explanation provided by the applicant was not reasonable is itself not reasonable. Importantly, if the applicant's parallel litigation with Manulife Financial had been successful, there would have been no need to pursue any further appeal for CPP. This was a sufficiently reasonable explanation for the delay, such that it should have been accepted by the SST.

[24] In the alternative, the applicant argues this prong of the four part test ought not to be perfectly met in order for the SST to grant an extension of time to file an appeal. Case law states that not all prongs need be met when the four factors are weighed.

C. *Prejudice to the Respondent*

[25] The applicant submits the only prejudice to the respondent would be diminished memory. Here, as in *Leblanc v Canada (Minister of Human Resources and Skills Development)*, 2010 FC 641, the only witnesses would be the applicant and his health practitioners, who presumably kept adequate records to refresh their memories. The memories could therefore not be so diminished with time as to prejudice the other party. Therefore, as in *Leblanc* at paragraph 12, this finding falls outside the range of possible acceptable outcomes and was unreasonable.

V. Respondent's Written Submissions

[26] The respondent submits that the SST-AD's decision to deny leave to appeal was reasonable. In the alternative, the respondent submits the SST-GD's decision to deny granting an extension of time to appeal was reasonable.

[27] The respondent further argues that there are documents in the applicant's application which are inadmissible on judicial review, including the August 20, 2013 letter from the applicant's representative, the January 7, 2014 letter to the applicant's representative from the SST and the February 25, 2014 letter to the applicant's representative from the SST. These were not before the decision maker and therefore should not be admitted on judicial review.

A. *SST-AD's Decision*

[28] The respondent submits there was no error in identifying the test for granting leave or for the extension of time. Moreover, in light of the SST-GD's decision, the applicant had failed to present a ground of appeal with a reasonable chance of success.

[29] The respondent submits that the only grounds to grant leave to appeal are the statutory grounds outlined in section 58 of the Act. The applicant did not assert any of the available grounds, and therefore the SST-AD could not grant leave to appeal.

[30] The respondent submits that the SST-GD's decision to refuse an extension of time to file an application for leave is discretionary. The SST-AD owes deference to the SST-GD, especially where the applicant did not allege that the SST-GD exercised its discretion inappropriately.

B. *SST-GD's Decision*

[31] The respondent submits that the SST-GD conducted a review of the evidence before it, as was outlined in the SST-GD reasons for decision. The SST-GD also found that the explanation was not reasonable for the delay, because the applicant could have notified the tribunal in a timely manner to request an extension of time to appeal, but failed to do so.

[32] As enunciated in case law, there must be a balancing of the four factors to grant an extension of time and the trier of fact is in the best position to carry out this balancing exercise. It was reasonable for the SST-GD to find that there was no continuing intention to appeal, because

at best, the intention to appeal was conditional on the outcome of the litigation with Manulife Financial. Conditional is not the same as continuing. It was reasonable for the SST-GD to find that the explanation for the delay was not reasonable, because the applicant focused on the litigation instead of the appeal. This is merely a tactical decision, which cannot reasonably justify failure to timely pursue an appeal.

[33] For the reasons above, the SST-GD's decision was justified, transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

VI. Preliminary Issue

[34] The respondent objected to certain documents on this application that were not before the decision makers. At the hearing of this matter, the applicant indicated that he did not object to the documents not being included in the hearing. As a result, I need not deal with this issue.

VII. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[35] With respect to the standard of review for the SST-AD's decision, the parties agree that the standard of review is reasonableness per *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 SCR 190, because the issue is one of mixed fact and law.

[36] The parties submit that the standard of review for the SST-GD's decision on extension of time to appeal is also reasonableness as it is a question of mixed fact and law.

[37] I agree that the issues presented by both decisions should be reviewed on a reasonableness standard, that is, to determine whether the decisions fall within the range of possible, acceptable outcomes in light of the facts and the law.

B. *Issue 2 - Was the SST-GD's decision to deny an extension of time reasonable?*

[38] As the basis of the SST-AD's decision was that the SST-GD's decision was clear and that it had reviewed the law and applied it to the facts before it (see paragraph 9), I must look at the SST-GD's decision to see if it is reasonable.

[39] The decision as to whether to grant an extension of time is discretionary.

[40] The SST-GD has endorsed case law, specifically *Gattellaro* at paragraph 9, whereby the test to grant an extension of time is based on a balancing of the following four factors as demonstrated by the applicant:

1. Whether the applicant had a continuing intention to pursue the application or appeal;
2. Whether the matter discloses an arguable case;
3. Whether there is a reasonable explanation for the delay; and
4. Whether there is prejudice to the other party in allowing the extension.

[41] This test is flexible; it aims at achieving justice for the parties (*Canada (Attorney General) v Blondahl*, 2009 FC 118 at paragraph 18).

[42] Also in *Hogervorst*, the Court stated at paragraphs 32 and 33:

> 32 There is no dispute as to what the correct legal test is on a motion for an extension of time to file an application for leave to appeal: see *Marshall v. Canada*, [2002] F.C.J. No. 669, 2002 FCA 172; *Neis v. Baksa*, [2002] F.C.J. No. 832, 2002 FCA 230. What is required is that
>
> a) there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;
>
> b) the subject matter of the appeal discloses an arguable case;
>
> c) there is a reasonable explanation for the defaulting party's delay; and
>
> d) there is no prejudice to the other party in allowing the extension.
>
> 33 This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied: see *Grewal v. Canada*, *supra*, at pages 278-279.

[43] The parties agree that the subject matter of the application discloses an arguable case.

[44] The SST-GD found at paragraph 23 that with respect to prejudice to the other party:

> The Tribunal finds that whether the Appellant requested review of the reconsideration decision from Service Canada nine months from the reconsideration decision as stated in the letter of March 31, 2014, or contacted the Tribunal eleven months from the

> reconsideration date as evidenced in the letter of October 16, 2013, either period is a substantive delay in requesting and appeal may result in a prejudice to the Minister.

[45] With respect to prejudice to the Minister, I stated at paragraph 32 of *Leblanc v Canada (Minister of Human Resources and Skills Development)*, 2010 FCJ No 784:

> The Board found that the Minister would be prejudiced in preparing her response to the appeal due to the passage of nine months. The Board stated that witnesses' memory would be diminished and that their power of recollection would decrease. The Board was also concerned that there be finality to proceedings under the Canada Pension Plan. I would note that the witnesses in this case will likely be the applicant and her medical witnesses. In my opinion, a nine month delay would not affect the applicant's memory with respect to her medical condition as I believe a person is quite capable of remembering her medical condition. As to the medical witnesses, they would have notes and reports on which they could rely. In my view, the Board's determination that there was prejudice to the Minister falls outside the range of possible acceptable outcomes and was unreasonable.

[46] I am of the opinion that the same reasoning would apply in the present case. The delay would not affect the applicant's memory and there are medical records for the doctors' evidence.

[47] In addition, I would note that the SST-GD only stated that the delay "may result in a prejudice to the Minister". There are no specifics of what the prejudice might be.

[48] In my view, the finding with respect to prejudice falls outside the range of possible acceptable outcomes and is therefore unreasonable.

[49] I need not deal with the other factors as the SST-GD must weigh the factors in coming to a decision. As well, I have no way of knowing what the SST-GD's decision would have been with a different finding with respect to prejudice.

[50] Since the SST-AD relied on the SST-GD's conclusions, its decision is also unreasonable and as a result, I need not deal with Issue 3.

[51] As a result, both the SST-GD's decision and the decision of the SST-AD must be set aside and the matter referred back to a different panel of the SST-GD for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that the decisions of the SST-GD and the SST-AD are set aside and the matter is referred to a different panel of the SST-GD for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Department of Employment and Social Development Act*, SC 2005, c 34**

English	Français
52. (1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,	52. (1) L'appel d'une décision est interjeté devant la division générale selon les modalités prévues par règlement et dans le délai suivant :
(a) in the case of a decision made under the Employment Insurance Act, 30 days after the day on which it is communicated to the appellant; and	a) dans le cas d'une décision rendue au titre de la Loi sur l'assurance-emploi, dans les trente jours suivant la date où l'appelant reçoit communication de la décision;
(b) in any other case, 90 days after the day on which the decision is communicated to the appellant.	b) dans les autres cas, dans les quatre-vingt-dix jours suivant la date où l'appelant reçoit communication de la décision.
(2) The General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.	(2) La division générale peut proroger d'au plus un an le délai pour interjeter appel.
53. (1) The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.	53. (1) La division générale rejette de façon sommaire l'appel si elle est convaincue qu'il n'a aucune chance raisonnable de succès.
(2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.	(2) Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et, selon le cas, au ministre ou à la Commission, et à toute autre partie.
(3) The appellant may appeal	(3) L'appelant peut en appeler

the decision to the Appeal Division.	à la division d'appel de cette décision.
54. (1) The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given.	54. (1) La division générale peut rejeter l'appel ou confirmer, infirmer ou modifier totalement ou partiellement la décision visée par l'appel ou rendre la décision que le ministre ou la Commission aurait dû rendre.
(2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.	(2) Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et, selon le cas, au ministre ou à la Commission, et à toute autre partie.
…	…
57. (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,	57. (1) La demande de permission d'en appeler est présentée à la division d'appel selon les modalités prévues par règlement et dans le délai suivant :
(a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and	a) dans le cas d'une décision rendue par la section de l'assurance-emploi, dans les trente jours suivant la date où l'appelant reçoit communication de la décision;
(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.	b) dans le cas d'une décision rendue par la section de la sécurité du revenu, dans les quatre-vingt-dix jours suivant la date où l'appelant reçoit communication de la décision.
(2) The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in	(2) La division d'appel peut proroger d'au plus un an le délai pour présenter la demande de permission d'en

no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

appeler.

58. (1) The only grounds of appeal are that

58. (1) Les seuls moyens d’appel sont les suivants :

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

a) la division générale n’a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d’exercer sa compétence;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

b) elle a rendu une décision entachée d’une erreur de droit, que l’erreur ressorte ou non à la lecture du dossier;

(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.

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

(2) La division d’appel rejette la demande de permission d’en appeler si elle est convaincue que l’appel n’a aucune chance raisonnable de succès.

(3) The Appeal Division must either grant or refuse leave to appeal.

(3) Elle accorde ou refuse cette permission.

(4) The Appeal Division must give written reasons for its decision to grant or refuse leave and send copies to the appellant and any other party.

(4) Elle rend une décision motivée par écrit et en fait parvenir une copie à l’appelant et à toute autre partie.

(5) If leave to appeal is granted, the application for leave to appeal becomes the notice of appeal and is deemed

(5) Dans les cas où la permission est accordée, la demande de permission est assimilée à un avis d’appel et

to have been filed on the day on which the application for leave to appeal was filed.

celui-ci est réputé avoir été déposé à la date du dépôt de la demande de permission.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Peter Denton	FOR THE APPLICANT
Hasan Junaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wallbridge, Wallbridge Barristers and Solicitors Timmins, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT