Federal Court Cour fédérale

Date: 20180503

Docket: T-1051-17

Citation: 2018 FC 467

Ottawa, Ontario, May 3, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

GARY LAZURE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On June 17, 2013, Gary Lazure (the Applicant) asked Service Canada to reconsider the decision it made on February 24, 2009, to refuse his application for Canada Pension Plan (CPP) disability benefits. Due to the amount of time that had passed, the Applicant needed to meet the four-part test in section 74.1 of the *Canada Pension Plan Regulations*, CRC, c 385 [*CPP*

Regulations] before his request could be considered. His request was refused by a Service Canada Medical Adjudicator, who found he only satisfied one part of the test.

[2] The Applicant appealed that decision to the Social Security Tribunal General Division (the General Division). The General Division upheld the Medical Adjudicator's decision on January 28, 2016.

[3] On April 15, 2016, the Applicant filed an application for leave to appeal to the Social Security Tribunal Appeal Division (the Appeal Division) under section 55 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the DESDA]. To obtain leave, there must be a reasonable chance of success on appeal. The Applicant largely argued that there was a reasonable chance because the General Division made erroneous findings of fact, applied the wrong test, and breached his right to procedural fairness. The Appeal Division refused leave to appeal on June 19, 2017.

[4] On July 18, 2017, the Applicant applied for judicial review of the Appeal Division decision refusing leave to appeal. I will grant the application for the reasons that follow.

II. Background

[5] In December of 2008, the Applicant applied for a CPP disability pension after suffering a workplace injury when his coworkers dropped him during a team building exercise. In addition, he made a claim with the Alberta's Workers' Compensation Board (WCB) related to the incident. The WCB first denied his claim, but later discredited the original medical opinion it had

relied on along with another medical opinion and concluded he was entitled to benefits retroactive to July 2006.

[6] On February 24, 2009, a Service Canada representative phoned the Applicant to tell him that his CPP disability pension application was denied. This much is confirmed in the CPP call log. What is not in the call log, and what is factually disputed in this case, is the Applicant's assertions including: 1) he told the Service Canada representative he was contesting the WCB outcome; and 2) the Service Canada representative told him to come back when he was finished the WCB appeal. The Applicant says this conversation indicated (and is evidence of) his continued intent to appeal the CPP decision. Neither the Applicant nor Service Canada made contemporaneous notes of the telephone conversation save the brief one referred to above, although his sworn evidence on this judicial review is that it happened.

[7] After the phone call, the Applicant received a letter dated February 24, 2009, confirming his application was denied. The letter advised the Applicant that he had a 90 day period within which he could make a reconsideration request. The letter did not mention any conversation nor stay the 90 days to bring the reconsideration request until his WCB process was finished.

[8] As explained above, the WCB eventually overturned its original refusal and found in favour of the Applicant. Once that happened, on June 17, 2013, the Applicant's counsel made a CPP reconsideration request to Service Canada. Since this request was outside the usual statutory 90 day period and more than 365 days after being notified of the original decision, the Medical

Adjudicator reviewing the request proceeded to consider whether discretion to reconsider could be exercised under section 74.1 of the *CPP Regulations*.

[9] On April 17, 2014, the Medical Adjudicator denied the Applicant's reconsideration request. The Medical Adjudicator did find that there was a reasonable chance of success based on specialist and WCB medical information that was recently submitted. But she also found that the other three 74.1 factors were not satisfied. Those factors being there was no reasonable explanation for the delay, no continuing intention to request an appeal, and the delay had prejudiced the Minister.

[10] The Applicant appealed that decision to the General Division pursuant to section 82 of the *Canada Pension Plan*, RSC 1985, c C-8 and section 44 of the DESDA.

[11] The General Division upheld the Medical Adjudicator's decision without providing the Applicant an oral hearing and instead decided on the record. The reasons given for proceeding on the record were: a) the member decided that a hearing was not required; b) there were no gaps in the information in the file or need for clarification; c) credibility was not a prevailing issue; and d) this method of proceeding respects the requirement under the *Social Security Tribunal Regulations*, SOR/2013-60, to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[12] In its decision dated January 28, 2016, the General Division said "[t]he Tribunal must determine whether the Respondent exercised its discretion judicially and judiciously when it

made the decision to refuse to allow a longer period of time for the Appellant to request a reconsideration of the initial decision to deny his disability benefit application." The General Division decision dismissed the appeal.

[13] The Applicant requested leave to appeal the General Division's decision to the Appeal Division under section 56(1) of the DESDA. To successfully obtain leave, the Applicant needed to show his appeal had a reasonable chance of success. He made arguments under each ground of appeal in section 58(1) in the DESDA including: the General Division erred in law by applying the wrong test, made erroneous findings of fact, and breached his right to natural justice.

[14] In its decision dated June 16, 2017, the Appeal Division refused to grant leave to appeal, finding the Applicant's appeal had no reasonable chance of success.

III. Issues

[15] The issues are:

i. Did the Appeal Division (and by extension the prior decision makers) err in its application of the four-part-test for allowing a late reconsideration?

ii. Was the Appeal Division's decision reasonable?

IV. Standard of Review

[16] On these facts, the Appeal Division's decision to refuse leave to appeal included an analysis of whether the General Division had applied the correct legal test. At the judicial review

hearing, the Court questioned the Respondent about the standard of review of this portion of the Appeal Division's decision. The Respondent argued that the Appeal Division's role was to determine whether the General Division had erred about one of the grounds of appeal in section 58(1) of the DESDA, and the decision about whether to grant leave to appeal was not one subject to the correctness standard at this stage.

[17] I disagree. Whether or not the correct legal test was applied in this case involves statutory interpretation of a codification of the common law. This question of law involves statutory interpretation outside the special expertise of the Appeal Division. No deference is owed by this Court, and I will review this on the standard of correctness (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 55).

[18] If the correct legal test has been used, the Appeal Division's decision is afforded deference in its application of that test on the facts and law. The Appeal Division's decision about whether the Applicant has an arguable ground of appeal is reviewed for reasonableness (*Tracey v Canada (Attorney General*), 2015 FC 1300 at paras 19-22; *Marcia v Canada (Attorney General),* 2016 FC 1367 at para 23).

V. Analysis

[19] According to section 58(2) of the DESDA, leave to appeal is refused when an appeal has no reasonable chance of success. Justice Zinn defined "reasonable chance of success" in *Osaj v Canada (Attorney General),* 2016 FC 115 at paragraph 12, to mean the applicant must show "some arguable ground upon which the proposed appeal might succeed."

A. *Did the Appeal Division (and by extension the prior decision makers) err in its application of the four-part-test for allowing a late reconsideration?*

[20] The Minister's discretion to grant requests for reconsideration is governed by subsections 74.1(1) to 74.1(4) of the *CPP Regulations.* A request submitted more than 365 days after a decision is rendered engages the following four factors:

1. The Minister is satisfied that there is a reasonable explanation for requesting a longer period;
2. The person has demonstrated a continuing intention to request a reconsideration;
3. The Minister is satisfied that the request for reconsideration has a reasonable chance of success; and
4. The Minister is satisfied that no prejudice would be caused to the Minister or a party by allowing a longer period to make the request.

[21] The Appeal Division interpreted the statutory language to mean that all four factors are mandatory—they must all be present before the Minister may exercise discretion. The Applicant argues this was an error in law. He submits the jurisprudence such as *Canada (Attorney General) v Larkman*, 2012 FCA 204 at paragraph 61 [*Larkman*] and *Dube v Canada (Attorney General)*, 2016 FC 43 at paragraphs 47-51 [*Dube*], illustrate that all four factors are not mandatory. He argued that because the wording in section 74.1 mirrors the wording in the common law, the section 74.1 factors are not mandatory.

[22] The Respondent pointed out that although the cases cited by the Applicant say that all the factors are not mandatory, the law has changed since *Larkman* was decided. Before March 28, 2013, the test for reconsideration was a flexible common law test (for example see *MacTavish Estate v Canada (Attorney General)*, 2010 FC 236 at paras 7-8). After this date, Parliament

codified the common law test and the factors are now found in subsections 74.1(3) to (4) of the *CPP Regulations*. As a result, the Respondent submits that all four factors are now mandatory.

[23] I agree with the Respondent as the common law requirements have now been codified in the *CPP Regulations*. The cases cited by the Applicant are unhelpful because they apply the common law test and do not involve section 74.1 of the *CPP Regulations.*

[24] Looking to the *CPP Regulations* itself, the wording of the section is not permissive. Section 74.1(3) states that the Minister "must be satisfied" of two particular factors before the Minister may exercise discretion, and then goes on in section 74.1(4) to say the Minister "must also be satisfied" of the last two factors:

> 74.1(3)…..determination if the Minister **is satisfied** that there is a reasonable explanation for requesting a longer period **and** the person has demonstrated a continuing intention to request a reconsideration.
>
> (4) 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 the Minister or a party by allowing a longer period to make the request, if the request for reconsideration…
>
> [Emphasis added]

[25] Parliament made the test conjunctive and nowhere does the legislation say there is to be weighing of factors. For that reason, I find the Appeal Division correctly interpreted section 74.1 of the *CPP Regulations* to mean the four requirements are now mandatory as a result of the codification.

B. *Was the Appeal Division's decision reasonable?*

[26] Leave to appeal is refused if the Appeal Division determines the Applicant has no reasonable chance of success on appeal (DESDA at 58(2)). On judicial review, the Applicant argues that the Appeal Division unreasonably decided he had no reasonable chance. I agree.

[27] It is helpful to review the procedural history to understand why the Appeal Division decision is unreasonable. The Medical Adjudicator found that just one of the factors in section 74.1 was in favor of the Applicant. Specifically, the Medical Adjudicator was only satisfied that the Applicant's request for reconsideration had a reasonable chance of success. As only one factor of the four-part test was satisfied, his request for reconsideration was denied.

[28] When the Applicant appealed the decision, the General Division determined the Medical Adjudicator had not explained how an extension of time would prejudice the Minister, saying "the Respondent's rationale in this regard is not apparent from the record. There is no indication, for example, that the Appellant's file had been lost or destroyed or was otherwise inaccessible." So whether like in *Dube* not explaining what the prejudice was, or just finding the adjudicator had not explained how an extension of time would prejudice the Minister, this was a reviewable error. The General Division explained it upheld the Medical Adjudicator's decision particularly because the other two factors in the four-part test (reasonable delay and continued intention) were not satisfied.

[29] So at this point, two of the criteria in section 74.1 were determined in favour of the Applicant: The Medical Adjudicator had found the request for reconsideration had a reasonable chance of success, and the General Division had found the Medical Adjudicator had no evidence to support finding the Minister would be prejudiced by the delay.

[30] The Applicant requested leave to appeal to the Appeal Division, and submitted arguments related to the remaining two factors. For instance, the Applicant argued under section 58(1)(c) of the DESDA that the General Division decision about the factor "reasonable explanation for requesting a longer period" is based on an erroneous finding of fact made without regard to the material before it. He says the General Division repeated the error made by the Medical Adjudicator because they too disregarded the Applicant's evidence that he was told to wait until his WCB matter was resolved. The General Division only based their decision on the call log and ignored his evidence.

[31] Although the argument fell under a ground of appeal in section 58(1) of the DESDA, the Appeal Division stated that the Applicant's argument was outside the General Division's jurisdiction. It did not consider the question before it, which was whether the Applicant's argument had a reasonable chance of success on appeal. Therefore, the Appeal Division decision is not reasonable.

[32] Similarly, no assessment is conducted of the Applicant's argument under section 58(1)(a). Under that section, the Applicant argued that the General Division failed to observe natural justice by deciding the matter on the record instead of holding an oral hearing. Although

the General Division said credibility was not an issue and no oral hearing was required, the Applicant argued that credibility was an issue. His argument on leave to appeal was that by not believing his evidence of his conversation with Service Canada (who he says told him to wait until the WCB appeal was dealt with), his credibility was put in issue. The decision makers do not say the Applicant is not credible, they do not say they do not believe his story, nor do the decision makers exercise discretion to have a hearing to make those determinations. Rather than assessing this argument, the Appeal Division stated the argument was outside of the General Division's jurisdiction.

[33] The Appeal Division decision is silent and we are left not knowing why the Applicant's argument had no reasonable chance of success on appeal.

[34] This failure to consider the explanation for the requesting a longer period overlaps the reasonableness of the factor of a continued intent to request reconsideration. As the decision makers found two of the conjunctive factors are made out, and the Appeal Division's decision regarding the remaining two factors is unreasonable, I cannot cumulatively find the decision was reasonable, and I will grant the application.

[35] I am not granting the relief sought by the Applicant. He requested this Court reverse the Appeal Division's refusal to grant leave to appeal, and order an appeal to take place before the Appeal Division. Alternatively, the Applicant asked for a re-hearing before the General Division. The relief I am granting is to have his request for leave re-determined by a different decision maker.

[36] The Applicant sought costs but the Respondent did not. I will award costs in the lump sum amount of $250.00 payable forthwith by the Respondent to the Applicant.

JUDGMENT in T-1051-17

THIS COURT'S JUDGMENT is that:

1. The application is granted and sent back to be re-determined by a different decision maker;

2. Costs are awarded in the lump sum of $250.00 to be payable forthwith by the Respondent to the Applicant.

"Glennys L. McVeigh"
Judge

ANNEX A

Canada Pension Plan (R.S.C., 1985, c. C-8)

Reconsiderations and Appeals

Appeal to Minister

81 (1) Where

(a) a spouse, former spouse, common-law partner, former common-law partner or estate is dissatisfied with any decision made under section 55, 55.1, 55.2 or 55.3,

(b) an applicant is dissatisfied with any decision made under section 60,

(c) a beneficiary is dissatisfied with any determination as to the amount of a benefit payable to the beneficiary or as to the beneficiary's eligibility to receive a benefit,

(d) a beneficiary or the beneficiary's spouse or common-law partner is dissatisfied with any decision made under section 65.1, or

(e) a person who made a request under section 70.1, a child of that person or, in relation to that child, a person or agency referred to in section 75 is dissatisfied with any decision made under section 70.1,

the dissatisfied party or, subject to the regulations, any person on behalf thereof may, within ninety days after the day on which the dissatisfied party was notified in the prescribed manner of the decision or determination, **or within such longer period as the Minister may either before or after the expiration of those ninety days allow**, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

Emphasis added

Révisions et appels

Appel au ministre

81 (1) Dans les cas où :

a) un époux ou conjoint de fait, un ex-époux ou ancien conjoint de fait ou leurs ayants droit ne sont pas satisfaits d'une décision rendue en application de l'article 55, 55.1, 55.2 ou 55.3,

b) un requérant n'est pas satisfait d'une décision rendue en application de l'article 60,

c) un bénéficiaire n'est pas satisfait d'un arrêt concernant le montant d'une prestation qui lui est payable ou son admissibilité à recevoir une telle prestation,

d) un bénéficiaire ou son époux ou conjoint de fait n'est pas satisfait d'une décision rendue en application de l'article 65.1,

e) la personne qui a présenté une demande en application de l'article 70.1, l'enfant de celle-ci ou, relativement à cet enfant, la personne ou l'organisme visé à l'article 75 n'est pas satisfait de la décision rendue au titre de l'article 70.1,

ceux-ci peuvent, ou, sous réserve des règlements, quiconque de leur part, peut, dans les quatre-vingt-dix jours suivant le jour où ils sont, de la manière prescrite, avisés de la décision ou de l'arrêt, **ou dans tel délai plus long qu'autorise le ministre avant ou après l'expiration de ces quatre-vingt-dix jours**, demander par écrit à celui-ci, selon les modalités prescrites, de réviser la décision ou l'arrêt.

Mon-soulignement

Appeal to Social Security Tribunal

82 A party who is dissatisfied with a decision of the Minister made under section 81, including a decision in relation to further time to make a request, or, subject to the regulations, any person on their behalf, may appeal the decision to the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*.

Appel au Tribunal de sécurité sociale

82 La personne qui se croit lésée par une décision du ministre rendue en application de l'article 81, notamment une décision relative au délai supplémentaire, ou, sous réserve des règlements, quiconque de sa part, peut interjeter appel de la décision devant le Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*

Canada Pension Plan Regulations (C.R.C., c. 385)

Request for Reconsideration

74.1 (1) A request for a reconsideration under subsection 81(1) or (1.1) of the Act shall be made in writing to the Minister and shall set out

(a) the name, address and Social Insurance Number of the contributor;

(3) For the purposes of subsections 81(1) and (1.1) of the Act and subject to subsection (4), the Minister may allow a longer period to make a request for reconsideration of a decision or determination if the Minister is satisfied that there is a **reasonable explanation for requesting a longer period** and the person has **demonstrated a continuing intention to request a reconsideration.**

(4) 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 the Minister** or a party by allowing a longer period to make the request, if the request for reconsideration

(a**) is made after the 365-day period** after the day on which the person is notified in

Demande de révision

74.1 (1) La demande de révision faite en vertu des paragraphes 81(1) ou (1.1) de la Loi est faite au ministre par écrit et contient les renseignements suivants :

a) les nom, adresse et numéro d'assurance sociale du cotisant;

(3) Pour l'application des paragraphes 81(1) et (1.1) de la Loi et sous réserve du paragraphe (4), le ministre peut autoriser la prolongation du délai de présentation de la demande de révision d'une décision ou d'un arrêt s'il est convaincu, **d'une part, qu'il existe une explication raisonnable à l'appui de la demande de prolongation du délai** et, d'autre part, que l'intéressé a **manifesté l'intention constante de demander la révision.**

(4) Dans les cas ci-après, le ministre doit aussi être convaincu que la **demande de révision a des chances raisonnables de succès et que l'autorisation du délai supplémentaire ne lui porte pas préjudice** ni d'ailleurs à aucune autre partie :

a) **la demande de révision est présentée après 365 jours** suivant celui où il est avisé

writing of the decision or determination;

(b) is made by a person who has applied again for the same benefit; or

(c) is made by a person who has requested the Minister to rescind or amend a decision under subsection 81(3) of the Act.

Emphasis added

par écrit de la décision ou de l'arrêt;

b) elle est présentée par une personne qui demande pour la seconde fois la même prestation;

c) elle est présentée par une personne qui a demandé au ministre d'annuler ou de modifier une décision en vertu du paragraphe 81(3) de la Loi.

Mon-soulignement

Department of Employment and Social Development Act (S.C. 2005, c. 34)

Appeal Division

Appeal

55 Any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision and any other prescribed person.

Leave

56 (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.

Exception

(2) Despite subsection (1), no leave is necessary in the case of an appeal brought under subsection 53(3).

Grounds of appeal

58 (1) The only grounds of appeal are that

(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

Division d'appel

Appel

55 Toute décision de la division générale peut être portée en appel devant la division d'appel par toute personne qui fait l'objet de la décision et toute autre personne visée par règlement.

Autorisation du Tribunal

56 (1) Il ne peut être interjeté d'appel à la division d'appel sans permission.

Exception

(2) Toutefois, il n'est pas nécessaire d'obtenir une permission dans le cas d'un appel interjeté au titre du paragraphe 53(3).

Moyens d'appel

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

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

b) elle a rendu une décision entachée d'une

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.

Criteria

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

erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

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.

Critère

(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.

FEDERAL COURT

SOLICITORS OF RECORD

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