Federal Court Cour fédérale

Date: 20160727

Docket: 16-T-19

Citation: 2016 FC 878

Ottawa, Ontario, July 27, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GORDON J. MCCANN

Applicant (Moving Party)

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicant is seeking an extension of time to file an application for judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada [the Appeal Division], dated December 15, 2015. The decision denied the Applicant leave to appeal the decision of the General Division of the said Tribunal [the General Division], dated May 28, 2015, in which his application for a Disability Pension [DP Application] under the *Canada Pension Plan*, RSC, 1985 c C-8 [CPP] was refused.

[2] The Appeal Division concluded that the Applicant's appeal of the decision of the General Division had no reasonable chance of success. The General Division had previously found that the Applicant had failed to establish, on a balance of probabilities, that he had a severe and prolonged disability, within the meaning of the CPP, on or before December 31, 2011, which was his Minimum Qualifying Period for a Disability Pension. In particular, the General Division found that the Applicant had work capacity at that date and continued to work at substantially gainful employment until he retired in January 2014.

[3] The Applicant, who is representing himself, attempted, with the assistance of the Member of Parliament of his home constituency, to file his Notice of Application for Judicial Review of the Appeal Division decision on January 25, 2016. Pursuant to a Direction issued by the Court on February 1st, 2016, the said Notice of Application was not accepted for filing on the ground that it was received outside the 30-day period contemplated in section 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7. On May 31, 2016, the Applicant filed his notice of motion for extension of time. The Applicant blames the confusing wording of the covering letter of the Appeal Division's decision, the government's mailing procedure as well as the divergent information he received from staff of the Canada Pension Plan directorate for missing the prescribed deadline.

[4] As is well established, in order to succeed with his motion for an extension of time, the Applicant must establish that (i) he had a continuing intention to pursue the underlying judicial review proceeding; (ii) his position in this proceeding has some merit; (iii) no prejudice to the Respondent arises from the delay; and (iv) a reasonable explanation for the delay exists (*Canada (Attorney General) v Hennelly*, 167 FTR 158, 89 ACWS (3d) 376 [*Hennelly*]).

[5] The Respondent contends that even if the Court is satisfied that the Applicant has shown a continuous intention to pursue his judicial review application, that there is a reasonable explanation for the delay and that no prejudice would result to the Respondent if the extension of time is granted, granting an extension of time in this case would not serve the interests of justice since the Applicant's underlying judicial review application has no merit, and therefore, no chance of success.

[6] The Respondent claims in this regard that although it has been held that the underlying consideration for the four-pronged test for extension of time is that justice be done between the parties and that, as a result, an extension of time may be granted even if one of the four factors of the test set out in *Hennelly* is not met, there is jurisprudential support for refusing to allow an extension of time on the sole basis of a lack of an arguable case (see: *Maqsood v Canada (Attorney General)*, 2011 FCA 309, at paras 12-14 [*Maqsood*]). However, the Respondent recognizes that, ultimately, the weight to be assigned to each of the four factors of the test will vary in each case, in accordance with a flexible and contextual approach (*Canada* (*Attorney General) v Blondahl*, 2009 FC 118, at para 12, 362 FTR 1).

[7] The relevant facts of this case can be summarized as follows. The DP Application was submitted on November 10, 2011 when the Applicant reached the age of 60. In the DP Application materials, the Applicant indicated that he continued to work 8 hours per day, 5 days a week, at a salary of $29.00 per hour. In January 2012, he began receiving early CPP Retirement Benefits. On February 16, 2012, the DP Application was rejected by the CPP directorate on the basis that the Applicant was found not to have a disability that is both severe

and prolonged as defined under the CPP since he was still working in December 2011, which is the latest date he could be deemed disabled as he began receiving early retirement benefits as of January 2012. Upon reconsideration, this decision was confirmed on July 20, 2012.

[8] In November 2012, the Applicant appealed the rejection of his DP Application to the Office of the Commissioner of Review Tribunal. His appeal, which was heard by the newly created General Division, was dismissed on May 28, 2015. In response to a request for additional information from the General Division, the Applicant had previously indicated that his last working day was January 31, 2014. As indicated previously, the General Division found that the Applicant could not be considered to be disabled on the ground that he continued to work at a "substantially gainful occupation" in 2012 and 2013, which is two years after the latest date on which he could be found to have become disabled under CPP rules.

[9] On July 28, 2015, the Applicant sought leave to appeal the General Division decision to the Appeal Division. He claimed that the General Division failed to address the prolonged nature of his disability and had the General Division done so, it would have concluded that his disability was also severe. He contended that his medical history showed that his disability was prolonged and it could only be so if it was also severe. The Applicant also submitted new medical records showing that his condition is changing for the worst each and every day. Finally, the Applicant contended that by improperly adjudicating the severe and prolonged aspects of his disability and by not recognizing the seriousness of his medical issues, the General Division failed to observe the principles of natural justice.

[10] As indicated at the outset of these Reasons, the Appeal Division rejected the Applicant's Leave Application on the ground that it had no reasonable chance of success. In particular, the Appeal Division found that the General Division neither erred in law nor breached the principles of natural justice by not considering the prolonged nature of the disability since the test for disability is a two-part test**.** If an applicant does not meet one aspect of the test, which requires that the disability be both severe and prolonged, then he or she will not meet the disability conditions under the CPP. It also found that it was not an error on the part of the General Division not to recognize that the Applicant's disability is deteriorating over time as the General Division was required to determine whether the Applicant could be found disabled by the minimum qualifying period of December 31, 2011, making it therefore irrelevant to determine whether the Applicant's disability has since deteriorated.

[11] The issue to be determined in this case is whether the Applicant's judicial review application against the Appeal Division decision is bound to fail and whether, as a result, the requested extension of time should, for that sole reason, be dismissed even if the Court otherwise accepts, as the Respondent does, that the Applicant has shown a continuous intention to pursue his judicial review proceeding, that there is a reasonable explanation for the delay and that no prejudice would result to the Respondent if the extension of time is granted.

[12] According to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34, leave to appeal decisions from the General Division may only be granted where an appellant satisfies the Appeal Division that his or her appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in that provision, that is: (i) a breach of

natural justice; (ii) an error of law; or (iii) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it (see also: *Canada (Attorney General) v O'Keefe*, 2016 FC 503, at paras 36-37 [*O'Keefe*]; *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100, at paras 71-73).

[13] This provision of the *Department of Employment and Social Development Act*, as well as the provisions of the CPP to which I will refer later in these Reasons, are reproduced in the Annex to this Order.

[14] Decisions of the Appeal Division to grant or deny leave to appeal are in turn reviewable by this Court against the standard of reasonableness (*O'Keefe*, at para 17). This means that such decisions are owed substantial deference and the Court will only interfere with them if they fall outside the range of possible, acceptable outcomes in respect of the law and the facts (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190[*Dunsmuir*]).

[15] Therefore, in order to conclude that the Applicant's underlying judicial review proceeding raises an arguable case, I must be satisfied that there is some merit in claiming that the Appeal Division decision denying leave to appeal the General Division decision is unreasonable. Unfortunately for the Applicant, I am not satisfied, for the following reasons, that this is the case.

[16] First, apart from simply stating that he disagrees with the Respondent's submissions that his underlying judicial review application has no chance of succeeding and that he wishes to

continue and prove his case, the Applicant has not put forward any grounds that suggest that the said application is well-founded and warrants the intervention of this Court. A review of the Applicant's motion material shows that he applied himself at providing a reasonable explanation for the delay in filing his judicial review application and in establishing a continued intention of pursuing this proceeding. However, there is nothing in this material addressing what is wrong with the decision rendered by the Appeal Division. This, in and of itself, would be sufficient to conclude that the Applicant has failed to establish, as a condition for granting the extension of time he is seeking, that his case has some merit (*Laurendeau v Canada (Attorney General)*, 2003 FCA 445, at para 4; *Dompierre v Daubois – Company*, 2010 FCA 10, at para 3).

[17] Second, upon review of the entire record before me, I am in any event satisfied that the Applicant's underlying judicial review application has no chance of succeeding on the merits. Under subsection 42(2)(a) of the CPP, "Disability" is defined as a physical or mental disability that is "severe" (i.e. the person in respect of whom the determination is made "is incapable regularly of pursuing any substantially gainful occupation") and "prolonged" (i.e. the disability "is likely to be long continued and of indefinite duration or is likely to result in death"). Accordingly, in order to be admissible to a Disability Pension under the CPP, the Applicant had to establish that he suffered from a disability that was both "severe" and "prolonged" within the meaning of subsection 42(2)(a) on or prior to December 31, 2011.

[18] Why on or prior to that date? Because, according to subsections 44(1) and 66.1(1) of the CPP, a person in receipt of a Retirement Pension, as was the case of the Applicant as of January 2012, is not entitled to a Disability Pension and in order for that person to cancel a Retirement

Pension in favour of a Disability Pension, he or she must be deemed to be disabled before the month in which the Retirement Pension became payable. This time period is also referred to as the Minimum Qualifying Period. In the present case, that period was December 2011.

[19] The undisputed evidence before the General Division and before the Appeal Division is that on or prior to December 31, 2011, the Applicant was working 40 hours a week at a pay rate of $29 per hour and that he continued to work in 2012 and 2013 where he recorded the maximum Unadjusted Pensionable Earnings for these two years, being $50,100 and $51,100 respectively, before retiring in January 2014. Although the General Division recognized that the Applicant benefited from a number of occupational accommodations due to his physical limitations (according to the record, the Applicant suffers from knee replacements' related debilitating pain as well as arthritis in both ankles and hands and had to battle prostate cancer), it found, based on that evidence, that the Applicant's disability, as of December 31, 2011, was not "severe" within the meaning of paragraph 42(2)(a) of the CPP since the Applicant was engaged, then and for the next two years, in substantially gainful employment.

[20] The Appeal Division saw no reason to interfere with this finding and I see nothing arguably unreasonable with that decision as the arguments that formed the basis of the Leave Application submitted by the Applicant before the Appeal Division are unsustainable both in law and in fact.

[21] On one hand, a person is entitled to a Disability Pension under the CPP if that person's disability is deemed to be both "severe" and "prolonged." Although related, these are two

distinct features of the concept of "disability," as defined by the CPP. A disability may be "severe" but temporary, which will not trigger the right to a Disability Pension. Conversely, a disability may be "prolonged" but not "severe" if the person in respect of whom the determination is made is otherwise, despite his or her limitations, regularly capable of pursuing any substantial gainful occupation, which, again, will not trigger the right to a Disability Pension.

[22] As noted by the Appeal Division, the Federal Court of Appeal, in *Klabouch v Canada (Social Development)*, 2008 FCA 33 [*Klabouch*], held that these two features of the CPP's definition of "disability" are cumulative, "so that if an applicant does not meet one or the other [condition], his application for a disability pension under the [CPP] fails" (*Klabouch*, at para 10). As a result, the fact of concentrating on one feature of the test and of not making any findings regarding the other, as did the General Division in the present case, does not constitute an error (*Klabouch*, at para 10). Therefore, the Applicant's argument that the Appeal Division should have granted leave on the basis of the failure of the General Division to consider the "prolonged" part of the disability test, since evidence of a "prolonged" disability is necessarily evidence of a "severe" disability, is bound to fail. As a result, I am satisfied that the Appeal Division's finding that this argument had no reasonable chance of success raises no arguable issue on judicial review as it has no merit in respect of the law and the facts.

[23] On the other hand, there is no arguable error either in respect of the General Division's finding that the Applicant's disability is not "severe" given that the Applicant was engaged, at the Minimum Qualifying Period of December 2011 and in the subsequent two years, in substantially gainful employment. In *Atkinson v Canada (Attorney General)*, 2014 FCA 187

[*Atkinson*], the Federal Court of Appeal reminded that in order to constitute a severe disability within the meaning of paragraph 42(2)(a) of the CPP, an individual needs to regularly be incapable of pursuing a substantial gainful occupation, which requires the individual to be "incapable of pursuing with consistent frequency any truly remunerative occupation" (*Atkinson*, at para 37). In that case, earnings of $43,000 to $45,000 between 2009 and 2012 were considered "substantially gainful occupation", which prevented the appellant, Ms Atkinson, to be considered disabled under the CPP despite her "significant physical limitations" (*Atkinson*, at para 3-4). Here, I agree with the Respondent that the Applicant's earnings in 2011, 2012 and 2013 belie any argument that he became disabled on or prior to December 2011. In other words, it was reasonably open to the Appeal Division to choose not to interfere with this finding of the General Division. Therefore, I am satisfied that this aspect of the Appeal Division's decision raises no arguable issue on judicial review as, again, it has no merit in respect of the law and the facts.

[24] Finally, the Applicant insisted in his Leave Application before the Appeal Division that there is evidence that his condition has been deteriorating each and every day since he first applied for a Disability Pension. This may be so. However, and how unfortunate that is, I find that it was reasonably open to the Appeal Division to find that this evidence is not relevant to what the General Division was required to determine, which is whether the Applicant could be found disabled, within the meaning of the CPP, by his Minimum Qualifying Period of December 31, 2011. In fact, I find that this was the only conclusion the Appeal Division could draw in the present circumstances since the Applicant's physical and mental condition, on or before that date, were the only considerations the General Division was required to take into account for the

purposes of the DP Application. Again, the Appeal Division decision on that point does not raise, in my view, an arguable issue on judicial review.

[25] Although I am sympathetic to the Applicant's situation, I find, as did the Federal Court of Appeal in *Maqsood*, that despite being satisfied that there is a reasonable explanation for the delay in filing the judicial review application, that the Applicant has shown a continued intention to pursue it and that the Respondent would not suffer prejudice from that delay, this is a case where an extension of time is not warranted as there is no basis upon which the said application might succeed. For me, this is the overriding *Hennelly* factor in the circumstances of this case.

[26] I am fully aware that the Applicant is representing himself and that this may have affected the way his arguments were articulated throughout this process, including in the present proceedings. However, the law is the same for all and does not vary depending on whether a litigant chooses to be represented or to represent himself or herself (*Kalevar v Liberal Party of Canada*, 2001 FCT 1261, 110 ACWS (3d) 236, at para 24; *Cortirta v Missinnipi Airways*, 2012 FC 1262, at para 13, aff'd 2013 FCA 280). The Applicant had a test to meet and, unfortunately for him, he failed on the most important factor, that of the merit of his claim against the decision of the Appeal Decision. His motion for an extension of time will therefore be dismissed.

[27] Lastly, on a technical note, the Respondent claims that the style of cause shall be amended to substitute the Attorney General of Canada as Respondent. The Applicant, in materials he filed with the Court on July 18, 2016, in the form of a motion record, seeks the same

amendment as he recognizes that “Canada Disability Pension” is not a proper way to name the respondent in this case. The style of cause will be changed accordingly.

[28] The Respondent is not seeking costs. None will be awarded.

ORDER

THIS COURT ORDERS that:

1. The motion for extension of time to file a judicial review application is dismissed without costs;
2. The style of cause is amended to substitute the Attorney General of Canada as Respondent.

"René LeBlanc"
Judge

ANNEX

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

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 to have been filed on the day on which the application for leave to appeal was filed.	(5) Dans les cas où la permission est accordée, la demande de permission est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé à la date du dépôt de la demande de permission.

Canada Pension Plan, RSC, 1985, c C-8

42(2) For the purposes of this Act,	42(2) Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;
[…]	[…]

44 (1) Subject to this Part,	44 (1) Sous réserve des autres dispositions de la présente partie :
(a) a retirement pension shall be paid to a contributor who has reached sixty years of age;	a) une pension de retraite doit être payée à un cotisant qui a atteint l'âge de soixante ans;
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who	b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :
(i) has made contributions for not less than the minimum qualifying period,	(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iv) [Repealed, 1997, c. 40, s. 69]	(iv) [Abrogé, 1997, ch. 40, art. 69]

(c) a death benefit shall be paid to the estate of a deceased contributor who has made contributions for not less than the minimum qualifying period;

c) une prestation de décès doit être payée à la succession d'un cotisant qui a versé des contributions pendant au moins la période minimale d'admissibilité;

(d) subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, if the survivor

d) sous réserve du paragraphe (1.1), une pension de survivant doit être payée à la personne qui a la qualité de survivant d'un cotisant qui a versé des cotisations pendant au moins la période minimale d'admissibilité, si le survivant :

(i) has reached sixty-five years of age, or

(i) soit a atteint l'âge de soixante-cinq ans,

(ii) in the case of a survivor who has not reached sixty-five years of age,

(ii) soit, dans le cas d'un survivant qui n'a pas atteint l'âge de soixante-cinq ans :

(A) had at the time of the death of the contributor reached thirty-five years of age,

(A) ou bien avait au moment du décès du cotisant atteint l'âge de trente-cinq ans,

(B) was at the time of the death of the contributor a survivor with dependent children, or

(B) ou bien était au moment du décès du cotisant un survivant avec enfant à charge,

(C) is disabled;

(C) ou bien est invalide;

(e) a disabled contributor's child's benefit shall be paid to each child of a disabled contributor who

e) une prestation d'enfant de cotisant invalide doit être payée à chaque enfant d'un cotisant invalide qui :

(i) has made contributions for not less than the minimum qualifying period,

(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1, had not been made;

(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

(iv) [Repealed, 1997, c. 40, s. 69]

(iv) [Abrogé, 1997, ch. 40, art. 69]

(f) an orphan's benefit shall be paid to each orphan of a deceased contributor who has made contributions for not less than the minimum qualifying period; and

f) une prestation d'orphelin doit être payée à chaque orphelin d'un cotisant qui a versé des cotisations pendant au moins la période minimale d'admissibilité;

(g) a post-retirement benefit shall be paid to a beneficiary of a retirement pension under this Act or under a provincial pension plan.

g) une prestation après-retraite doit être payée au bénéficiaire d'une pension de retraite au titre de la présente loi ou d'un régime provincial de pensions.

[…]

[…]

66.1 (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced, request cancellation of that benefit.

66.1 (1) Un bénéficiaire peut demander la cessation d’une prestation s’il le fait de la manière prescrite et, après que le paiement de la prestation a commencé, durant la période de temps prescrite à cet égard.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	16-T-19
STYLE OF CAUSE:	GORDON J. MCCANN v CANADA DISABILITY PENSION

MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES

ORDER AND REASONS:	LEBLANC J.
DATED:	JULY 27, 2016

SOLICITORS OF RECORD:

Gordon J. McCann	FOR THE APPLICANT (Self-Represented)
William F. Pentney Deputy Attorney General of Canada Gatineau, Québec	FOR THE RESPONDENT