



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

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Citation: *B. G. v. Minister of Employment and Social Development*, 2017 SSTGDIS 50

Tribunal File Number: GP-17-141

BETWEEN:

B. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Susan Smith

DATE OF DECISION: May 5, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) survivor's pension was date stamped by the Respondent on March 31, 2016. The Respondent allowed the application initially. The Respondent received the Appellant's request for reconsideration of the retroactive period granted in the initial decision beyond the 90 day limit to request reconsideration. On November 22, 2016, the Respondent denied the Appellant's request for reconsideration on the basis the request was received late. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Appellant's spouse passed away on March 28, 2012. The Appellant did not submit an application for survivor benefits until March 2016, in part, because she was severely depressed and her ability to function was significantly diminished following the sudden death of her spouse. The Appellant also applied late partly because she was unaware that she qualified for the benefit. A letter from her family doctor indicates the Appellant's cognitive function was severely affected by her depression during the relevant time.

[3] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The member has decided that a further hearing is not required.
- b) The issues under appeal are not complex.
- c) There are no gaps in the information in the file or need for clarification.
- d) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[4] Section 81 of the CPP states that a person may within 90 days of receiving the Minister's decision to deny entitlement to a disability, request a reconsideration of that decision. The Minister may 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.

[5] Subsection 74.1(3) of the CPP Regulations states that Minister may allow a longer period to make a request for reconsideration if the Minister is satisfied that: 1) there is a reasonable explanation for requesting a longer period and 2) the person has demonstrated a continuing intention to request reconsideration.

[6] Section 82 of the CPP allows a party to appeal the Minister's decision to deny further time to make a request to the Tribunal.

ISSUE

[7] The Tribunal must determine if the Minister's discretion was exercised judicially in deciding not to allow a longer period of time for the Appellant to request reconsideration of the initial decision denying her a disability pension.

ANALYSIS

[8] The decision of the Minister to grant or refuse a late reconsideration request is considered a discretionary decision. The Minister's discretion must be exercised judicially or judiciously (*Canada (A.G.) v. Uppal* 2008 FCA 388).

[9] According to *Canada (A.G.) v. Purcell*, [1996] 1 FCR 644, a discretionary power is not exercised "judicially" if it can be established that the decision-maker:

- acted in bad faith,
- acted for an improper purpose or motive,

- took into account an irrelevant factor,
- ignored a relevant factor, or
- acted in a discriminatory manner.

[10] The role of the Tribunal is therefore not to determine if the Respondent made the correct determination but whether it exercised its discretion in a judicial manner. The Appellant has the burden of proof in establishing that the Respondent failed to do so.

[11] By letter dated March 21, 2017 (GD6), the Tribunal wrote to the Respondent and requested they provide a copy of the initial grant letter claimed to have been sent to the Appellant on May 27, 2016, but which was missing from the Section 26 documents provided by the Respondent. On March 31, 2017 (GD7), the Respondent submitted a Regional Observation Sheet indicating that a breakdown letter was not sent to the Appellant, but, a Notice of Entitlement “would have been sent”. The Respondent further submitted that the Notice of Entitlement “would have been sent in late May as the benefit was processed May 27, 2016”.

[12] When the Respondent received the Appellant’s request for reconsideration October 19, 2016, they reviewed the file history and made their determination on whether to allow an extension of time for the reconsideration request. In making a determination the Respondent must follow department protocols under the Reconsider Extension Guidelines and assess the evidence in relation to the following four questions:

- Is there a reasonable explanation for the delay?
- Has there been a continuing intention to request reconsideration?
- Is there a reasonable chance of success?
- Will an extension of time result in unfairness to the Minister or another party?

[13] The Respondent found that the Appellant did not provide a reasonable explanation, and she had not demonstrated a continuing intention to seek reconsideration. The Respondent did not consider the last two questions as it determined the Appellant had to have satisfied the first

two questions in order to succeed in her request for an extension of time. In reaching their conclusion the Respondent determined that the date by which the Appellant would have been deemed to receive the initial denial letter was June 6, 2016; this allowed ten days from the date of the initial letter to account for mailing.

[14] In its review of the file, the Tribunal found no evidence that the Respondent acted in bad faith or acted with an improper purpose or motive when it made its determination. The evidence confirms that the Appellant made her request for reconsideration outside the 90 day time frame.

[15] However, the Tribunal finds the Respondent failed to consider a relevant factor when it was discovered that the communication they relied upon to calculate the 90 day period, having regard for the protocol of 10 days delivery time, was not contained in her file. They then proceeded to rely on an assumption that in the normal course of events the Appellant “would have” been sent a *Notice of Entitlement* on May 27, 2016 because the benefit was processed on May 27, 2016. Of note is the fact that a letter dated May 27, 2016 was sent to the Appellant but it informed her only that her application was being considered.

[16] The Tribunal finds it is not reasonable in circumstances where the Respondent’s incomplete file requires an assumption that a specific document was mailed on a particular date and to rely on that assumption to deny an extension of time to request reconsideration.

[17] Furthermore, as the grant letter cannot be produced, it is not possible to assess whether an arguable case exists. The file does not contain evidence to confirm that the Appellant is already in receipt of the maximum amount of retroactive payment under the legislation, being not more than 12 months prior to the day the application was received. In circumstances where the file shows the Appellant is in receipt of the maximum retroactive survivor’s pension, in the Appellant’s case being March 2015, it would be reasonable for the Respondent to determine that no arguable case exists.

[18] The Tribunal finds that the Appellant has met the burden of proof in showing that the Respondent exercised its discretion in a manner that was not judicious.

CONCLUSION

[19] The appeal is allowed.

Susan Smith
Member, General Division - Income Security