

Citation: *J. M. v. Minister of Employment and Social Development*, 2015 SSTAD 1398

Appeal No. AD-15-1244

BETWEEN:

J. M.

Applicant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision**

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 7, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 26, 2015. The General Division refused to extend the time for filing an appeal to the General Division, after it found that the Applicant was late in filing her notice of appeal and in requesting an extension of time. Counsel for the Applicant filed an application requesting leave to appeal on November 20, 2015, essentially on the grounds that the General Division based its decision on erroneous findings of fact that it made without regard for the material before it. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

FACTUAL BACKGROUND

[3] The Applicant filed an application for a Canada Pension Plan disability pension on August 3, 2012. The Respondent denied the application initially and upon reconsideration, the latter by letter dated May 6, 2013. The Applicant retained counsel in or about this time. Counsel for the Applicant alleges that she filed a notice of appeal in June 2013 by regular post, appealing the reconsideration decision. The date as to when counsel might have filed the notice of appeal is the subject of some dispute. Counsel alleges that she also filed a Consent to Communicate Information to a Representative. The date which appears on the signed Consent is also the subject of some dispute.

[4] At paragraph 5 of its decision, the General Division wrote:

The Appellant claimed to have filed an appeal dated June 26, 2013. However, this appeal was never received by the Tribunal. The Appellant claimed to have sent a follow-up letter on March 4, 2014 but this letter was not received by the Tribunal either. The telephone conversation between the Tribunal and the Applicant's representative on April 7, 2014 made it clear to the Applicant's

representative that the previous correspondence had never been received.

[5] The Social Security Tribunal did not receive the Notice of Appeal which counsel alleges had been filed in June 2013. Counsel claims to have followed up by letter to the Social Security Tribunal on March 4, 2014; this too was also sent by regular post.

[6] I note that the General Division indicated at paragraph 7 of its decision that counsel's letters of June 26, 2013 and March 4, 2014 were incorrectly addressed to the Social Security Tribunal. Both letters were addressed to "P.O. Box 981" instead of "P.O. Box 9812". Counsel acknowledges the typing errors in her earlier correspondence, but submits that, despite them, the Social Security Tribunal had to have received her letter of March 4, 2014.

[7] Counsel submits that the Social Security Tribunal contacted counsel by telephone on April 2, 2014, in response to her letter of March 4, 2014. The Social Security Tribunal allegedly informed counsel that it had not received the Notice of Appeal filed in June 2013 on behalf of the Applicant.

[8] Counsel alleges that there were further telephone communications between the Social Security Tribunal and the Applicant's counsel on April 7, 2014. The Social Security Tribunal is reported to have confirmed that there was no evidence that it had received counsel's original letter of June 26, 2013.

[9] In response to the alleged telephone call of April 7, 2014 from the Social Security Tribunal, counsel filed an affidavit with the Social Security Tribunal, by cover of a letter dated May 13, 2014. She sent this third letter by regular post. The General Division wrote that subsequent letters from counsel to the Social Security Tribunal were correctly addressed, but the letter dated May 13, 2014 was also incorrectly addressed to "PO Box 981". The Social Security Tribunal nonetheless did receive counsel's letter dated May 13, 2014 on May 20, 2014.

[10] In her affidavit sworn May 13, 2014 (GD1A-12), counsel deposed that as she had not received any response from the Social Security Tribunal, nor a copy of the Applicant's

file, she sent a letter dated March 4, 2014 to follow up. However, there is no other evidence outside of the affidavit of any letter dated March 4, 2014.

[11] Although counsel points to telephone communications involving the Social Security Tribunal in April 2014 as proof that it had received her letter dated March 4, 2014, significantly, she does not mention these alleged telephone communications in her affidavit.

[12] The affidavit also indicates that it was sworn for the purpose of “requesting a time extension to appeal to the Workplace Safety and Insurance Appeals Tribunal”, but this likely was in error.

[13] On June 5, 2014, the Social Security Tribunal acknowledged receiving the Notice of Appeal. The Social Security Tribunal notified counsel that the appeal was incomplete and also wrote that the “Appeal is not properly filed until the Tribunal has received all of the required information”. The Social Security Tribunal advised that it required a copy of the reconsideration decision being appealed, the grounds for appeal, social insurance number and contact information for the Applicant “without delay”.

[14] The Social Security Tribunal also informed counsel that if the requested information was not filed “without delay”, she would need to request an extension of time to file the complete Notice of Appeal, and would also need to address all of the following:

- a) whether there was a continued intention to pursue the appeal;
- b) whether the matter discloses an arguable case;
- c) whether there was a reasonable explanation for the delay; and
- d) whether there would be prejudice to the other parties in extending the deadline.

[15] Counsel advises that she received the letter dated June 5, 2014 from the Social Security Tribunal on June 12, 2014, and that she sent a response, along with a list of additional documents, to the Social Security Tribunal on June 18, 2014 (GD1A-1). The Social Security Tribunal received counsel’s letter of June 18, 2014 on June 25, 2014.

Counsel provided the information listed in the letter dated June 5, 2014 from the Social Security Tribunal.

[16] In the Notice of Appeal filed on June 25, 2014 (GD1A-10) counsel set out her reasons for the late appeal. She wrote:

The representative's letter to SST dated June 26, 2013 was sent by Canada Post and never received at the Tribunal offices. We were not aware of this until follow up calls were made in March 2014. We provided an affidavit dated May 13, 2014 attesting to our submission of the appeal and the clear intent of [the Applicant] to appeal the reconsideration decision.

[17] On February 18, 2015, the Social Security Tribunal wrote to counsel and to the Applicant, advising that the Notice of Appeal appeared to have been filed more than 90 days after the date that the Applicant received the reconsideration decision. The Social Security Tribunal advised counsel and the Applicant that the "[General Division] has the authority to extend the appeal period under certain circumstances, but in no case can an extension be granted if more than one year has passed since [the Applicant] received the reconsideration decision".

[18] Counsel advises that she received a further letter from the Social Security Tribunal, dated June 24, 2015. The letter set out a number of questions raised by the General Division, directed to both parties. The questions were as follows:

Question(s) for Appellant:

1. The Notice of Appeal says that the Appellant received the May 6, 2013 reconsideration decision it [*sic*] on May 30, 2013. However, May 30, 2013 is also the date that the Appellant provided the reconsideration decision to the Appellant's representative. Please confirm the date that the Appellant (as opposed to the Appellant's Representative) received the reconsideration decision.
2. Please provide a copy of your letter to the Tribunal dated June 26, 2013, if available, plus enclosures.
3. Please provide a copy of your letter to the Tribunal dated March 4, 2014, if available, plus enclosures.
4. Please provide particulars of any other contact between Appellant's representative and the Social Security Tribunal (prior to June 18, 2014) that is not already contained in the Affidavit of the Appellant's representative.

Question(s) for Respondent

1. Please provide particulars of any contact with the Appellant (or her representative) subsequent to the sending of the reconsideration decision on May 6, 2013.

[19] The Social Security Tribunal advised that it required the additional information by August 14, 2015.

[20] On July 20, 2015, the Respondent filed particulars, as well as a request that the General Division not grant an extension and that the appeal be dismissed. The Respondent sought a dismissal on the grounds that the criteria for granting an extension in this case were not met, and that the appeal was out of time and therefore statute-barred. The Respondent further submitted that the General Division has no jurisdiction to waive the statutory limitation period set out in subsection 52(2) of the *Department of Employment and Social Development Act* (DESDA). The Respondent advised that it had searched its records and could find no record of any contact between the Respondent and either the Applicant or her counsel, subsequent to sending the reconsideration decision on May 6, 2013.

[21] On August 11, 2015, counsel for the Applicant provided copies of her letters of June 26, 2013 and March 4, 2014, under cover of her letter dated August 7, 2015 (GD4- 1). (In fact, the letter of “March 4, 2014” is dated March 3, 2014.) Counsel was unable to provide the precise date when the Applicant received the reconsideration decision, but her office’s notes suggest that it was likely between May 13, 2013 and May 16, 2013.

SUBMISSIONS

[22] Counsel for the Applicant submits that the General Division based its decision on an erroneous finding that it made without regard for the material before it. Counsel submits that the applicant has a disability that is both severe and prolonged, and that there is evidence to be submitted that was not before the adjudicators at Service Canada. Counsel submits that the Applicant was not represented until after she received the reconsideration decision. Counsel advises that she has not had an opportunity to submit evidence on behalf of the Applicant.

[23] Counsel disputes the finding by the General Division as to the date which appears on the Consent to Communicate Information to a Representative. The Consent was dated “2013 05 30” at the client signature line and “13 05 30” at the representative line. The General Division wrote:

Given that the Appellant’s representative dated the “Consent to Communicate Information to a Representative” document on May 13, 2013, the Tribunal finds that the reconsideration decision was received by the Appellant on May 13, 2013.

[24] Counsel submits that both dates on the completed form indicate “May 30, 2013 and not May 13, 2013”, as the General Division found. Nonetheless, counsel agrees that the time to appeal the reconsideration decision was August 12, 2013.

[25] Counsel submits that an appeal was sent by regular post by letter of June 26, 2013, and that there is supporting affidavit evidence of this fact. Counsel submits that the General Division should have regarded this as an express intent to appeal. Counsel submits that she sent a follow-up letter of March 4, 2014, again by regular post, and that this necessarily had to have been received by the Social Security Tribunal, given that it then allegedly contacted her, ostensibly in response to this letter.

[26] Counsel submits that she sent a third letter, dated May 13, 2014, to the Social Security Tribunal in which she provided a copy of the Notice of Appeal, and supporting affidavit material, to evidence that she had previously submitted a notice of appeal. Although the Social Security Tribunal wrote to her on June 5, 2014 and June 24, 2015 requesting additional information, counsel submits that by then, the “intent to appeal” letter (presumably her March 2014 letter) was received within the one year limit.

[27] Counsel submits that although the remaining documents completing the appeal were dated and mailed on June 18, 2014 (but not received and filed until June 25, 2014), the appeal “would be considered complete and properly filed within the one year time limit”. Counsel requests that there be a finding that the time limits were met given the intent to appeal and the subsequent communications with the Social Security Tribunal.

[28] The Respondent has not filed any written submissions.

ANALYSIS

[29] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). 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 (Attorney General)*, 2010 FCA 63.

[30] Subsection 58(1) of the DESDA sets out that 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 that it made in a perverse or capricious manner or without regard for the material before it.

[31] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

[32] For there to have been an erroneous finding of fact, it had to have been one upon which the General Division based its decision. Ordinarily, the filing of a Consent to Communicate Information to a Representative would not be evidence of when a reconsideration might have been received by an applicant, but in this particular case, the date that appears on the signed consent was accepted as evidence by the General Division as to when the Applicant might have received the reconsideration decision. While the General Division might have based its decision in part on the (mistaken) date of the signed Consent, ultimately nothing would have turned on it, as counsel accepts that the time limit to appeal the reconsideration decision was August 12, 2013. I am not satisfied that the appeal has a

reasonable chance of success on the ground that the General Division based its decision on this particular erroneous finding of fact.

[33] Counsel submits that the second error committed by the General Division was in basing its decision on an erroneous finding that the Social Security Tribunal did not receive counsel's letter of March 2014, when she alleges that there is evidence that the Social Security Tribunal had received it. This submission is particularly critical to this leave application. Counsel's letter dated March 3, 2014 indicates that it enclosed a copy of her original letter of June 26, 2013. If so, then this would suggest that counsel may have endeavoured to file an appeal within 90 days after the reconsideration decision had been communicated to the Applicant. There is no indication however that either the letter of June 26, 2013 or March 3, 2014 set out any grounds of appeal.

[34] If there is no supporting evidence that the letter of March 3, 2014 was indeed received by the Social Security Tribunal, then this would leave counsel's letter dated May 13, 2014 as the first written communications indicating that the Applicant was appealing the reconsideration decision. While this letter may have been dated May 13, 2014, it cannot be said to have been received within the one year time limit, as it was not received by the Social Security Tribunal until May 20, 2014 – more than one year after the day on which the decision was communicated to the Applicant. It is not enough to rely on the date of a document as establishing when it was brought or filed with the Social Security Tribunal.

[35] While counsel may have adopted a general practice to file materials by regular post, this may well be a practice that needs to be revisited. It is incredulous that counsel (1) relied on regular post to continue to file documents with the Social Security Tribunal, even after it should have become obvious to her that a limitation period had expired or was due to expire, particularly after learning that her first letter had yet to be received by the Social Security Tribunal and when there were other means available by which she could have filed documents and ensured that she preserved her client's right to an appeal, and (2) did not have a proper "bring forward" system within her office to ensure timely responses and follow-up.

[36] It is unclear whether counsel ever investigated why the Social Security Tribunal might not have received the Notice of Appeal which she purports to have mailed on or about June 26, 2013 or whether she checked her file to determine if the letter had ever been returned as undeliverable. It is unlikely counsel checked her letters until after she received a copy of the decision of the General Division, to ensure the address for the Social Security Tribunal was correct, otherwise it is unlikely that the error would have been replicated on at least two subsequent occasions.

[37] While counsel assumed that a Notice of Appeal had been filed in at least March 2014, counsel nonetheless had not received any acknowledgment from the Social Security Tribunal that it had been received. It was inadequate for counsel to have waited until more than eight months after she had purported to file the Notice of Appeal to determine whether the Social Security Tribunal had indeed received a notice of appeal from her in March 2014. After all, counsel had little more than one month within which to request an extension of time to file a notice of appeal until the limitation period expired, after which, no further time within which an application for leave to appeal could be made.

[38] Counsel alleges that the Social Security Tribunal contacted her in early April 2014, to advise that the original Notice of Appeal had never been received, and that it could not find an appeal in the system.

[39] Counsel also alleges that the Social Security Tribunal advised that it would be up to the "Tribunal office to determine if they can accept [the Applicant's] appeal or not". Given that the Social Security Tribunal may have advised counsel that it had not received an appeal, it would seem to presuppose that a notice of appeal would be forthcoming.

[40] By April 7, 2014, upon learning that the Social Security Tribunal had not received the original Notice of Appeal, counsel ought to have immediately faxed a copy of the original Notice of Appeal to the Social Security Tribunal, as she could have then received a confirmation of transmission. Alternatively, counsel could have electronically filed or submitted the Notice of Appeal by registered mail, courier or some other means of service by which she could have tracked delivery.

[41] Yet, despite learning on April 7, 2014 that the Social Security Tribunal had yet to receive the Notice of Appeal, counsel delayed in filing anything with the Social Security Tribunal – until five weeks later, on May 20, 2014. And, by this time, it placed her more than one year after which an extension of time could be sought to file a notice of appeal. It would have been moot at this late juncture whether any correspondence from the Social Security Tribunal failed to inform the Applicant or her counsel that the appeal had yet to be properly filed.

[42] Counsel's letter of May 13, 2014 enclosed an affidavit sworn by her on May 13, 2014. The affidavit makes reference to the Applicant's "intent to appeal" on June 26, 2013. I do not know if anything turns on that, or if there is any distinction in this particular case by counsel between an "intent to appeal" and a "notice of appeal". If so, there does not appear to be any consistency by counsel as to whether the June 26, 2013 and May 13, 2014 letters represent a Notice of Appeal or an "intent to appeal".

[43] Counsel relies on the reconsideration letter to suggest that an applicant is only required to provide written intent to appeal to the Social Security Tribunal. Counsel submits that there is no indication in the reconsideration letter that the appeal would be considered incomplete or that additional forms were required if certain information was missing. She submits that as her March 3, 2014 letter included her June 26, 2013 letter and that as her letter of March 3, 2014 was received by the Social Security Tribunal in March or April 2014, the appeal "would be considered complete and properly filed within the one year time limit".

[44] Subsection 52(1) of the DESDA stipulates that an appeal of a decision must be brought to the General Division in the "prescribed form and manner". Sections 23 and 24 of the *Social Security Tribunal Regulations* indicates how an appeal is brought and that it must contain certain information, including a copy of the decision that was made, and the grounds for the appeal.

[45] Counsel's letter dated March 3, 2014 indicates that a copy of the June 26, 2013 correspondence was enclosed. If, as counsel submits, the General Division based its decision in part on an erroneous finding of fact that the Applicant had not filed her letter

dated March 3, 2014, when she claims that there is definitive proof that it had to have received this letter, then by all accounts, she submits that the Social Security Tribunal should have been aware of the Applicant's appeal by then. Even if counsel had inadvertently omitted to enclose her June 26, 2013 letter with her March 3, 2014 letter, the March 3, 2014 letter alone indicates that the Applicant intended to appeal the decision of the General Division.

[46] However, there is no indication that the Social Security Tribunal ever received counsel's letter dated March 3, 2014. Certainly the Social Security Tribunal did not formally acknowledge counsel's letter of March 3, 2014, as it has with all other subsequent correspondence. The Social Security Tribunal did not send any letter to any of the parties, confirming that it might have received any correspondence from counsel in March 2014. There also is nothing in the hearing file material before the General Division of any notes documenting any telephone conferences with the Applicant's counsel in April 2014.

[47] Curiously, there is no reference by counsel in the Notice of Appeal filed on June 25, 2014 that she had sent a letter dated March 3, 2014 to the Social Security Tribunal, or that the Social Security Tribunal had contacted her on April 2 and/or on April 7, 2014. As I have noted above, I find that it is not without significance that counsel made no mention of any telephone communications in April 2014 with the Social Security Tribunal in her affidavit sworn on May 13, 2014.

[48] The General Division was required to make findings based on the evidence before it. The General Division found that the letter of March 4, 2014 (or March 3, 2014) had not been received by the Social Security Tribunal. This was reportedly communicated to counsel in early April 2014. Counsel still had an opportunity at that time to bring an appeal, in the prescribed form and manner, as set out in subsection 52(1) of the DESDA. She has not provided any explanation why she delayed in filing a notice of appeal until May 20, 2014, given the circumstances.

[49] I am not satisfied that the appeal has a reasonable chance of success that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it.

CONCLUSION

[50] Given the considerations above, the Application is dismissed.

Janet Lew

Member, Appeal Division