



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

**Citation: *N. D. v. Minister of Employment and Social Development*, 2016 SSTGDIS 10**

**Date: January 18, 2016**

**File number: GP-14-3776**

**GENERAL DIVISION - Income Security Section**

**Between:**

**N. D.**

**Appellant**

and

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

**Respondent**

**Decision by: Margot Ballagh, Member, General Division - Income Security Section**

## REASONS AND DECISION

### INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension on two occasions arising out of the same injuries which he sustained while at work in May 2010. On both occasions, the Respondent denied the application initially and, in decision letters dated October 12, 2011 and October 16, 2013, denied both applications upon reconsideration. The Appellant appealed both of those decisions to the Social Security Tribunal of Canada (Tribunal) on September 19, 2014, beyond the time limit set out in section 52 of the *Department of Employment and Social Development Act* (DESD Act).

### ISSUES

#### ***Issue 1 - Reconsideration Decision Dated October 12, 2011***

[2] The Tribunal must decide whether to allow an extension of time for the Appellant to appeal the reconsideration decision of October 12, 2011, which is prior to the coming into force of subsection 52(2) of the DESD Act.

#### ***Issue 2 - Reconsideration Decision Dated October 16, 2013***

[3] In the event that an extension of time to appeal the decision of October 12, 2011 is refused, the Tribunal must then decide whether to allow an extension of time to appeal the decision of October 16, 2013.

### ANALYSIS

#### ***Issue 1- Reconsideration Decision Dated October 12, 2011***

[4] When the Appellant was notified of the reconsideration decision dated October 12, 2011, subsection 82(1) of the CPP was applicable and provided that an appeal of a reconsideration decision may be filed within 90 days of the date the appellant received it or within such longer period that the Commissioner of Review Tribunals may allow. In April 2013, the *Jobs, Growth and Long-term Prosperity Act* introduced changes to the way appellants may appeal decisions of the Respondent under the CPP. In particular, subsection 52(2) of the

DESD Act now allows for an extension of time within which an appeal of a reconsideration decision may be brought before the Tribunal but in no case can the appeal be brought more than one year after the day on which the reconsideration decision is communicated to the appellant. The Tribunal finds that the one- year time-limit under subsection 52(2) of the DESD Act does not apply to those appellants who were notified of a reconsideration decision before April 1, 2013. In coming to this conclusion, the Tribunal has considered the rules of statutory interpretation, and in particular, the general rule that legislation is not to be interpreted as having retrospective application. Consequently, the Tribunal concludes that subsection 52(2) of the DESD Act should be interpreted to apply only to appellants who received a reconsideration decision on or after April 1, 2013, which is not the case for the Appellant with respect to the reconsideration decision dated October 12, 2011.

[5] The Tribunal finds that the appeal was filed well after the 90-day limit. The Respondent's reconsideration decision was dated October 12, 2011. The Appellant did not indicate when he received the reconsideration decision; however, even if the Tribunal was to allow a generous period of time for the reconsideration decision to have been communicated to the Appellant, it is clear that the Appellant did not appeal within the 90-day time limit. The Appellant did not appeal to the Tribunal for almost three years until September 19, 2014.

[6] In deciding whether to allow further time to appeal the decision of October 12, 2011, the Tribunal considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204; see also recent decision by the Appeal Division in AD-15-262).

### **Continuing Intention to Pursue the Appeal**

[7] An appellant must demonstrate that he or she formed an intention to pursue an appeal within the 90-day limit and continuously thereafter (*Grewal v. Canada (Minister of Employment and Immigration)* 1985 2 F.C. 263 (C.A.); *Doray v. Canada*, 2014 FCA 87).

[8] The Appellant submits that rather than appealing the reconsideration decision of October 12, 2011, he applied for Ontario Works.

[9] The Appellant took no steps to appeal the reconsideration decision of October 12, 2011 until September, 16, 2014, almost three years later.

[10] There is no evidence that the Appellant formed an intention to pursue his appeal within the 90-day limit and that he was reasonably diligent in pursuing his appeal.

[11] The Tribunal finds that the Appellant did not have a continuing intention to pursue the appeal of the reconsideration decision dated October 12, 2011.

### **Arguable Case**

[12] The Appellant claims that he could no longer work because of his medical conditions as of May 27, 2010. He describes his medical conditions as serious problems with his shoulders, knees, feet, hands and back as well as depression.

[13] On appeal, the Appellant would have to establish a severe and prolonged disability within the meaning of the CPP on or before December 31, 2012, the minimum qualifying period as stated in the file.

[14] The Tribunal is satisfied that there is medical evidence related to the Appellant's medical conditions at the time around the minimum qualifying period.

[15] The Tribunal finds, based on the Appellant's submissions and the medical evidence on file, that there is an arguable case on appeal.

### **Reasonable Explanation for the Delay**

[16] The Appellant submits that he did not understand his rights of appeal and rather than appealing the matter to the Office of the Commissioner of Review Tribunals, he applied for Ontario Works. He submits that his highest level of education attained is grade 6 and that this was done in his home country of Portugal. He submits he has limited understanding of the English language, and even more limited ability to comprehend written correspondence. When he applied for CPP benefits, the forms were completed by his union representative as he has limited ability to write in the English language.

[17] The steps that are required to launch an appeal are not particularly onerous. The reconsideration decision contained clear instructions on how to appeal and that a notice of appeal had to be filed within 90 days of the date he received the decision. The Appellant took no steps to appeal the reconsideration decision of October 12, 2011 until September 16, 2014. As such, the Appellant has not satisfied the Tribunal that there was a reasonable explanation for the delay.

[18] The Tribunal finds that the Appellant did not provide a reasonable explanation for the delay in filing the appeal of the reconsideration decision dated October 12, 2011.

### **Prejudice to the Other Party**

[19] The Respondent's interests do not appear to be prejudiced given the period of time that has lapsed since the reconsideration decision. The Minister's ability to respond, given its resources, would not be unduly affected by an extension of time to appeal.

### **Conclusion**

[20] The test set out in *Gattellaro* is meant to be a flexible one in which the decision maker assigns the appropriate weight to each factor depending on the circumstances (*Canada (Attorney General) v. Pentney*, 2008 FC 96).

[21] In this case, the Tribunal places greater weight on the fact that the Appellant did not have a continuing intention to pursue the appeal and did not provide a reasonable explanation for the lengthy delay of almost three years in pursuing his appeal. These factors weigh in favour of refusing the Appellant an extension to file his appeal in respect of the reconsideration decision of October 12, 2011.

[22] In consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal refuses an extension of time to appeal the reconsideration decision of October 12, 2011.

### ***Issue 2 - Reconsideration Decision Dated October 16, 2013***

[23] On the second issue, the Tribunal finds that the appeal was filed after the 90-day limit. The Respondent's reconsideration decision was dated October 16, 2013. The Tribunal assumes

that the reconsideration decision was sent to the Appellant by mail. The Tribunal takes judicial notice of the fact that mail in Canada is usually received within 10 days. It is therefore reasonable to find that the reconsideration decision was communicated to the Appellant by October 26, 2013.

[24] In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant had until January 24, 2014 to file an appeal.

[25] The Appellant filed an appeal on September 16, 2014, outside the 90-day limit, but within a year of communication of the reconsideration decision.

[26] In deciding whether to allow further time to appeal, the Tribunal considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204; see also recent decision by the Appeal Division in AD-15-262).

### **Continuing Intention to Pursue the Appeal**

[27] The Appellant submits that during the appeal period, he provided the reconsideration decision to his paralegal who was assisting him with an appeal before the Workplace Safety and Insurance Appeals Tribunal. He expected that his representative would have ensured that his rights were preserved. When he hired a new paralegal, he learned that there had been no action taken on his CPP disability appeal.

[28] The Tribunal accepts this explanation and finds that the Appellant had a continuing intention to pursue the appeal of the reconsideration decision dated October 16, 2013.

### **Arguable Case**

[29] The Appellant claims that he could no longer work because of his medical conditions as of May 30, 2010. He describes his medical conditions as shoulder pain and pain and numbness in his feet.

[30] On appeal, the Appellant would have to establish a severe and prolonged disability within the meaning of the CPP on or before December 31, 2012, the minimum qualifying period as stated in the file.

[31] The Tribunal is satisfied that there is medical evidence related to the Appellant's medical conditions at the time around the minimum qualifying period.

[32] The Tribunal finds, based on the Appellant's submissions and the medical evidence on file, that there is an arguable case on appeal.

### **Reasonable Explanation for the Delay**

[33] The Appellant submits that he did not understand his rights of appeal. He submits that the highest level of education he attained was grade 6 and that this was done in his home country of Portugal. He submits that he has limited understanding of the English language, and even more limited ability to comprehend written correspondence. He submits that during the appeal period, he was also involved in another appeal before the Workplace Safety and Insurance Appeals Tribunal and that he had a paralegal to assist him with that appeal. He submits that he provided his reconsideration decision to his paralegal and that he expected his representative would have ensured that his rights were preserved. It was only when he hired a new paralegal that he learned about the status of his CPP disability appeal and took steps to complete the appeal.

[34] The Tribunal finds that the Appellant provided a reasonable explanation for the delay in filing the appeal of the reconsideration decision dated October 16, 2013.

### **Prejudice to the Other Party**

[35] The Respondent's interests do not appear to be prejudiced given the short period of time that has lapsed since the reconsideration decision. The Minister's ability to respond, given its resources, would not be unduly affected by an extension of time to appeal.

## **Conclusion**

[36] The test set out in *Gattellaro* is meant to be a flexible one in which the decision maker assigns the appropriate weight to each factor depending on the circumstances (*Canada (Attorney General) v. Pentney*, 2008 FC 96).

[37] On this issue, the Tribunal finds that the Appellant had a continuing intention to pursue the appeal of the reconsideration decision dated October 16, 2013, a reasonable explanation for the delay, and an arguable case. In the absence of prejudice to the Respondent, and in consideration of the *Gattellaro* factors, the Tribunal finds that it would be in the interests of justice to allow an extension of time to appeal the reconsideration decision of October 16, 2013 pursuant to subsection 52(2) of the DESD Act.

## **OUTCOME**

### ***Issue 1 - Reconsideration Decision Dated October 12, 2011***

[38] The Tribunal does not allow an extension of time for the Appellant to appeal the reconsideration decision of October 12, 2011.

### ***Issue 2 - Reconsideration Decision Dated October 16, 2013***

[39] The Tribunal allows an extension of time for the Appellant to appeal the reconsideration decision of October 16, 2013.

Margot Ballagh  
Vice-Chairperson and Member, General Division - Income Security