



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. L. v. Minister of Employment and Social Development*, 2016 SSTGDIS 106

Tribunal File Number: GP-14-2426

BETWEEN:

G. L.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shannon Russell

DATE OF DECISION: January 28, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 30, 2008. The Respondent denied the application and advised the Appellant of its decision on February 24, 2009. The Appellant did not request a reconsideration within 90 days of receiving the February 24, 2009 decision. He did, however, request a reconsideration on June 17, 2013. The Appellant's request for a late reconsideration was denied by the Respondent on March 26, 2014. The Appellant appealed the Respondent's March 26, 2014 decision to the Social Security Tribunal (SST or Tribunal) on June 5, 2014.

[2] This appeal was decided On the Record for the following reasons:

- 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.
- 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

[3] Subsection 81(1) of the CPP states that a person who is dissatisfied with a decision that no benefit may be paid, may, within 90 days of being notified in writing of the decision, or within such longer period as the Minister may allow, either before or after the expiration of those 90 days, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision.

[4] Subsection 74.1(3) of the CPP Regulations states that for the purposes of subsection 81(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 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.

[5] Subsection 74.1(4) of the CPP Regulations states that if the request for reconsideration is made more than one year after the day on which the person was notified in writing of the initial decision or if the request for reconsideration is made by a person who has applied again for the same benefit, then 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.

[6] Subsection 82 of the CPP allows a person who is dissatisfied with a decision of the Minister in relation to further time to request a reconsideration to appeal that decision to the Tribunal.

ISSUE

[7] The 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.

EVIDENCE

[8] The Appellant applied for a CPP disability pension on December 30, 2008. By letter dated February 24, 2009, the Respondent informed the Appellant that his application was denied. The Respondent provided written reasons for its decision and these reasons indicate that the Respondent relied on a report from the Appellant's family doctor, a report of September 2008 from a neurologist, a report of December 2008 from a neurosurgeon, and the Appellant's questionnaire. The Respondent's decision letter informed the Appellant that if he disagreed with the decision he could ask to have the decision reconsidered. The decision letter explained to the Appellant that if he decided to ask for a reconsideration he needed to write to the Respondent

within 90 days from the date he received the February 24, 2009 letter. The Appellant was provided with a telephone number to contact if he had any questions regarding the denial of his application or his appeal rights.

[9] On June 17, 2013, the Respondent received a letter from the Appellant's representative requesting a reconsideration of the February 24, 2009 decision. In support of this request, the Appellant's representative indicated that the Respondent's denial of the Appellant's disability benefit application was based on medical information and opinions relayed by the Alberta Workers' Compensation Board (WCB) which suggested that the Appellant was capable of working. Since that time there had been a number of developments, resulting in new medical information. The Appellant's representative explained the developments in detail and in so doing indicated that the WCB had initially relied heavily on a December 2008 report of Dr. Louw and in that report Dr. Louw expressed his view that the Appellant could work sedentary to light duties for four hours per day. It later became apparent that there were a number of conflicting opinions on several issues and, as a result, the WCB convened a Medical Panel in October 2011 to resolve these issues. The Panel's report confirmed that Dr. Louw's report could no longer be treated as an accurate assessment of the Appellant's diagnosis or ability work. The Appellant's representative submitted that as the Respondent had based its initial decision on a report that had later been discredited, a reassessment of the Appellant's eligibility for the disability benefit was warranted.

[10] On December 27, 2013 the Respondent wrote to the Appellant's representative and acknowledged receipt of the request for a reconsideration of the decision of February 24, 2009. The Respondent explained that, although the request was made late (i.e. after the 90 day appeal period had expired), the Respondent was permitted to consider whether to accept a late request for a reconsideration. The Respondent indicated that it needed more information to make this decision and asked the Appellant to provide the Respondent with an explanation for the delay in sending the request and to indicate how he kept the department informed of his intent to request a reconsideration.

[11] On January 8, 2014, the Appellant's representative replied to the Respondent's letter of December 27, 2013. On the issue of delay, the Appellant's representative submitted that the Appellant's request was the result of a material change in medical information. Until this new medical information was available and assessed it would have been premature to make a request for review. The Appellant's representative explained that the WCB had erroneously advised CPP in 2009 that the Appellant was fit for work. This opinion was based on the WCB arbitrarily accepting one side of contradictory medical opinions (i.e. the opinion of Dr. Louw). The Appellant was advised that CPP had to defer to the WCB findings as they existed at the time. Later, a Medical Panel was convened by the WCB and that Panel reached a number of conclusions that discredited the opinion previously relied upon by the WCB. The Panel favoured the opinion of Dr. Wilson to that of Dr. Louw and Dr. Wilson's opinion was that the Appellant was unfit for work. The WCB eventually acknowledged that the Appellant was unable to work as a security guard as they had previously concluded. On the issue of a continued intention to pursue the appeal, the Appellant's representative submitted that the Appellant was informed by telephone in early 2009 that his application for benefits was being rejected and he was told by the agent that the reason for the rejection was WCB's conclusion that he was fit for work. The Appellant subsequently received the denial letter from the Respondent that advised him of the appeal process, but the substance of the decision was communicated to the Appellant by telephone. During that telephone call, the Appellant advised the agent that he disputed the WCB's findings, but was told that CPP had to defer to the WCB conclusion. The Appellant advised the agent that he would be taking steps to appeal the WCB findings and he was told by the agent that he should come back when the appeal was sorted out. The Appellant confirmed his intention to do so. As a result, it was made clear to CPP from the outset that the Appellant intended to have the matter reviewed once the medical issues were resolved in his favour. While the process of getting to this point took longer than anticipated, it was always the Appellant's intention to request a reconsideration.

[12] By decision dated March 26, 2014, the Respondent informed the Appellant's representative that it had considered the reasons he had provided in support of his request for a late reconsideration and had decided not to accept the late reconsideration request. The Respondent did not provide reasons for its decision in its letter of March 26, 2014. However, the Respondent indicated that its reasons for decision could be found in a "Decision Document" which was enclosed with the March 26, 2014 letter.

[13] The Respondent's Decision Document indicates that it considered each of the four criteria set out in section 74.1 of the CPP Regulations.

[14] With respect to a reasonable explanation for delay, the Respondent indicates that it considered the Appellant's representative's letters of June 12, 2013 and January 8, 2014, the Appellant's letter of December 16, 2013, the Respondent's initial decision letter of February 24, 2009 and the Respondent's telephone contact record from February 24, 2009. After reviewing this information, the Respondent concluded that the Appellant and his representative had not provided a reasonable explanation for the long delay in submitting the reconsideration request. The Respondent indicated that (1) there was no reference to exceptional circumstances regarding the Appellant's medical condition that would have prevented him from appealing within the appeal period or in the time since; (2) the Appellant was advised of the CPPD appeals process and the 90 day appeal period in early 2009 by telephone and by letter and his representative acknowledges both communications; (3) the Appellant's WCB case being under appeal should not have precluded the Appellant from appealing in a timely manner and, as such, it cannot be accepted as a reasonable explanation for delay.

[15] With respect to a continuing intention to request a reconsideration, the Respondent indicates that it considered the argument set out in the Appellant's representative's letter of January 8, 2014. The Respondent reviewed the telephone contact form for the February 24, 2009 decision and noted that it showed no notes of the conversation other than an indication that the Appellant was informed of his appeal rights and the appeal period. The Respondent noted that the Appellant's representative had acknowledged that the Appellant was made aware of the appeal process at the time of his initial denial. The Respondent also reviewed the Appellant's file and a system known as "Client View" and noted that there had been no contact from the

Appellant between the time he was notified of the denial of his application and the time his request for a late reconsideration was received, a period of more than four years. The Respondent concluded that the Appellant had not demonstrated the intent to appeal during his appeal period or at any time up to June 2013.

[16] In assessing the reasonable chance of success criterion, the Respondent indicated that, based on the specialist and WCB medical information that had recently been submitted, there may be a reasonable chance of success.

[17] Finally with respect to the potential for prejudice to the Minister, the Respondent concluded that an extension of time could result in unfairness to the Minister as there had been a delay of over four years since the Appellant's appeal period had expired.

[18] The Appellant's representative appealed the Respondent's March 26, 2014 decision to the SST on June 5, 2014. In his Notice of Appeal, he submitted as follows: (1) the medical adjudicator was in error when she concluded there was not a reasonable explanation for delay. Until the proper medical record could be put forward, an appeal would not have been warranted. Furthermore, the Appellant relied on representations from the Respondent's agent that he should come back after the WCB issues had been sorted out, as it was those issues that were impacting the Respondent's ability to make a proper assessment; (2) the medical adjudicator was in error when she concluded that the Appellant did not demonstrate a continuing intention to request a reconsideration. It was always the Appellant's intention to request a reconsideration upon clarification of the medical record, and this was communicated to the Respondent's agent during a telephone call in 2009; (3) the medical adjudicator was in error when she concluded that a late reconsideration would result in unfairness to the Minister. There is no evidence of irreparable prejudice or unfairness that would occur as a result of a late reconsideration; and (4) the medical adjudicator acknowledged that the Appellant's appeal has a reasonable chance of success on the merits. Refusing to reconsider the initial decision on technical grounds would represent a great injustice to the Appellant, especially when the required clarification of the medical record was not possible until 2014.

[19] On October 2, 2015, the Appellant's representative wrote to the Tribunal for the purpose of elaborating on his argument relating to the reasonable explanation for delay. He emphasized that the appeal is based on new medical information that was not available at the time of the Respondent's initial denial of the disability benefit application. He also submitted that the Appellant was specifically told by one of the Respondent's agents that CPP had to defer to the WCB findings and that he would need the new medical information to appeal. This left the Appellant with no choice but to resolve the WCB issues first before any appeal could be effectively pursued. Finally, the Appellant's representative submitted when the Appellant told the Respondent's agent that he was in the midst of an appeal with the WCB he was told "when you finish your appeal with WCB, come back to us". On hearing this, the Appellant advised the Respondent's agent that he would do so. The Appellant interpreted the agent's words to mean that an extension was granted.

[20] On October 7, 2015, the Appellant's representative advised the SST that he had never received a copy of the appeal file and he requested a one week extension of the filing deadline following receipt of the file. The SST mailed a copy of the file to him on October 8, 2015 and the Tribunal Member extended the filing deadline to October 26, 2015 and the response deadline to November 26, 2015.

[21] On October 20, 2015, the SST received submissions from the Respondent that were prepared in response to the Appellant's submissions of June 2014. The Respondent submitted as follows: (1) waiting for more medical information is not a reasonable explanation of extenuating or exceptional circumstances. Additional medical information is not a requirement for requesting a reconsideration. The decision letter and attachment sent to the Appellant on February 24, 2009 clearly explained the process and also indicated that requests for reconsideration should not wait for any additional information. There were no medical reports provided to indicate that the Appellant has a medical condition that would have significantly impaired his ability to request a reconsideration by June 4, 2009 and it is, therefore, reasonable to expect that the Appellant had the capacity to submit a request for a reconsideration in a timely manner; (2) the Respondent does not have a record of an agent telling the Appellant that he should come back when his WCB issues were sorted out; however, there is a record of a telephone contact on February 24, 2009 which indicates that the Appellant was informed of his

appeal rights and the appeal period. The record also indicates that the Appellant was informed that the appeal must be received within 90 days and should not be delayed if waiting for new information. The Appellant's desire to pursue his WCB matter through legal channels is not a reasonable explanation for the extensive delay in requesting a reconsideration. The WCB and the CPP are separate programs and have different criteria for qualifying and the programs do not rely on each other for decisions; (3) a review of the notes in the Service Canada Intranet Renewal Delivery System shows that neither the Appellant nor his representative contacted the department after the initial decision of February 24, 2009 and before May 28, 2013, when additional information was received. As such, there is no evidence of the Appellant having demonstrated a continuing intention to request a reconsideration from February 24, 2009 onwards; (4) while a reasonable chance of success may exist, this is only one of four criteria that must be met. In order for a late reconsideration request to be allowed all four criteria must be satisfied; and (5) there is unfairness to the Respondent due to the significant time lapse of 1564 days between the end of the decision and the late request for reconsideration.

SUBMISSIONS

[22] The Appellant's representative submitted that the Appellant's request for a late reconsideration should be approved as the Appellant satisfied all four of the criteria set out in section 74.1 of the CPP Regulations.

[23] The Respondent submitted that, although the reasonable chance of success criterion may be satisfied, the Appellant did not satisfy the remaining three criteria set out in section 74.1 of the CPP Regulations.

ANALYSIS

[24] The Respondent's decision to grant or refuse a late reconsideration request is considered a discretionary decision. The Respondent's discretion must be exercised judicially and judiciously (*Canada (Attorney General) v. Uppal*, 2008 FCA 388).

[25] A discretionary power should not be interfered with unless it can be shown that the discretion was exercised in a non-judicial manner or the decision maker acted in a perverse or capricious manner without regard to the material before it. 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

(Canada (Attorney General) v. Purcell, [1996] 1 FC 644)

[26] The role of the Tribunal in appeals such as this is not to determine whether the Respondent made the correct determination. Rather, the Tribunal must decide whether the Respondent exercised its discretion judicially and judiciously.

[27] In assessing the Respondent's exercise of discretion, the Tribunal did not consider the Respondent's supplementary reasons set out in its submissions of 2015, as the Respondent's exercise of its discretion was completed on March 26, 2014. The Tribunal did, however, review the Respondent's submissions of October 20, 2015, as it was necessary for the Tribunal to determine whether the Respondent was making argument on the issue of its judicial and judicious exercise of discretion.

[28] The Tribunal reviewed the appeal file in its entirety and finds no evidence that the Respondent acted in bad faith, acted for an improper purpose or motive, or acted in a discriminatory manner. The appeal file indicates that the Respondent reviewed the Appellant's request for a late reconsideration with diligence. Before rendering its decision of March 26, 2014, the Respondent wrote to the Appellant's representative on December 27, 2013 and requested further information relevant to two of the criteria set out in section 74.1 of the CPP Regulations. It is reasonable to infer from this that the Respondent felt it had insufficient information relevant to these two criteria to render a decision. The Respondent's request for further information is thus indicative of the Respondent not having pre-judged the matter and of the Respondent's intention to make a well-informed decision.

[29] The Respondent's Decision Document of March 2014 indicates that the Respondent based its decision on relevant factors in that the Respondent assessed each of the four criteria set out in section 74.1 of the CPP Regulations. There is no indication that the Respondent's discretion was influenced by irrelevant factors or considerations.

[30] The Tribunal reviewed the Respondent's Decision Document with a view to ascertaining whether the Respondent ignored a relevant factor in exercising its discretion. On the issue of a reasonable explanation for delay, the Decision Document indicates that the Respondent considered the Appellant's main arguments including the argument that the Appellant was waiting for his WCB appeal to be resolved before appealing, and that until new medical information was available it would have been premature to request a review. The Decision Document also indicates that the Respondent reviewed the telephone contact record from February 24, 2009, presumably with a view to ascertaining what was discussed during that call. This record indicated that the Appellant was informed of the appeal process and the 90 day appeal period.

[31] On the issue of a continuing intention to pursue the appeal, the Decision Document indicates again that the Respondent considered the Appellant's main arguments including the Appellant's argument that he reportedly told an agent on February 24, 2009 that he intended to pursue his appeal. In this regard, the Decision Document indicates that the adjudicator reviewed the telephone contact form for the February 24, 2009 decision and reviewed a system referred to as "Client View". The adjudicator was unable to find any evidence in any of the 2009 communications of the Appellant communicating his intention to appeal.

[32] The Tribunal notes that there is a discrepancy between the Respondent's Decision Document of March 2014 and the Respondent's submissions of 2015 in that the Decision Document indicates that there had been no contact from the Appellant from February 24, 2009 to June 2013 and the 2015 submissions indicate that neither the Appellant nor his representative contacted the Respondent between the time of his initial denial and May 28, 2013 when additional information was received. The Respondent did not indicate the nature of the information that was reportedly received on May 28, 2013; however, the appeal file includes a WCB report that is dated May 23, 2013 that was sent to the Appellant and his representative.

This report bears a received stamp of May 28, 2013 but unlike other stamps in the Appellant's appeal file, this stamp does not identify the Respondent as the recipient. Instead, it is a generic received stamp. It is possible then that the person who prepared the submissions of 2015 mistakenly assumed the document was received by the Respondent. Of course, it is also possible that the Respondent did receive additional information in May 2013 and that that information was not considered by the adjudicator in March 2014. In considering this discrepancy, the Tribunal notes that the Appellant's representative did not argue that he or the Appellant contacted the Respondent in May 2013 and for this reason the Tribunal considers it more likely than not that the submissions of 2015 are mistaken. This finding is consistent with notes that are in the appeal file from the Respondent's Intranet Delivery System which indicates no activity on the Appellant's file between March 10, 2009 and July 11, 2013 (GD3-19).

[33] On the issue of prejudice to the Minister, the Respondent's Decision Document indicates that an extension of time could result in unfairness to the Minister as there had been a delay of over four years since the Appellant's appeal period had expired. Unfortunately, the Respondent did not explain how the Minister would be prejudiced and 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. While the Respondent's reasons with respect to the prejudice factor are deficient, the Tribunal does not consider this deficiency as indicative of a discretion exercised in a non-judicial or non-judicious manner, particularly given the Respondent's findings that the reasonable delay criterion and the continued intention criterion were not met.

CONCLUSION

[34] Having reviewed all of the evidence in the file, the Tribunal finds that the Respondent's discretion was exercised judicially and judiciously.

[35] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security