



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. S. v. Minister of Employment and Social Development*, 2016 SSTGDIS 52

Tribunal File Number: GP-15-219

BETWEEN:

B. S.

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: Raymond Raphael

HEARD : By written questions and answers from April
19, 2016 to May 13, 2016

DATE OF DECISION: July 14, 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 September 6, 2011. The Respondent denied the Appellant's initial request for a disability pension at the initial stage. The Appellant did not apply for reconsideration within 90 days of receiving the initial denial. On October 22, 2014, the Respondent denied the Appellant's request for an extension of the 90 day time limit to apply for reconsideration.

[2] The Appellant filed a Notice of Appeal with the General Division of the Social Security Tribunal (Tribunal) on January 13, 2015.

[3] The hearing of this appeal was by Questions and Answers for the following reasons:

- 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] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) be under 65 years of age;
- b) not be in receipt of the CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[5] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[6] Paragraph 42(2)(a) of the CPP defines disability a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[7] 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.

[8] 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 there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request reconsideration.

[9] Subsection 74.1(4) of the CPP Regulations states that if the request is made after the 365-day period after the applicant was notified in writing of the decision or determination or if the request is made by a person who has applied again for the same benefit or has requested the Minister to rescind or amend the decision, 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 for making the request.

[10] Section 82 of the CPP allows a party who is dissatisfied with the Minister's decision to refuse to allow a longer period to make the request for reconsideration to appeal the decision to the Tribunal.

ISSUE

[11] The Tribunal must determine if the Minister exercised its discretion judicially when it refused to allow a longer period of time for the Appellant to request reconsideration of the initial decision letter denying her a disability pension.

BACKGROUND AND EVIDENCE

[12] A chronological overview of events and proceedings as revealed by the hearing file is set out below.

[13] The Appellant was injured in a motor vehicle accident on December 29, 2009.

[14] His application for CPP disability was date stamped by the Respondent on September 6, 2011.

[15] In his CPP disability questionnaire, signed on August 24, 2011, the Appellant indicated that he last worked as a forklift operator and that he stopped working on January 15, 2010 because of a motor vehicle accident. He claimed to be disabled as of December 25, 2009 and listed nightmares, a fear of driving, a left frozen shoulder as well as neck, back and knee pain as the illnesses or impairments that prevented him from working.

[16] Having regard to the Appellant's Record of Earnings (ROE) his MQP extends to December 31, 2010. Accordingly, the Appellant must establish that he had severe and prolonged disability in accordance with the CPP criteria on or before December 31, 2010 and continuously thereafter.

[17] The application was denied by the Respondent by letter dated January 31, 2012 on the basis that although the Appellant may not be able to work at the present time, he should be able to return to work in the foreseeable future.

[18] On July 9, 2012 the Appellant submitted an unsigned letter requesting reconsideration to the Respondent. The Respondent did not accept the request apparently because it was unsigned. The Respondent did not notify that Appellant at that time that his request for reconsideration was not being accepted.

[19] On March 25, 2014 the Appellant's lawyers wrote to the Respondent advising that the Appellant had written to the Respondent on July 9, 2012 requesting a reconsideration of the denial of his application for CPP disability and inquiring as to the status of his application.

[20] On May 26, 2014 the Appellant's lawyers wrote to the Respondent advising that they had not received a response to their March 25, 2014 inquiry. They enclosed a copy of the denial decision date January 31, 2012; a copy of the Appellant's letter requesting reconsideration dated July 9, 2012; and a copy of their letter dated March 25, 2015 requesting information regarding the appeal.

[21] On June 11, 2014 the Appellant's lawyers wrote to the Respondent advising that they had not received a response to their correspondence. They enclosed extensive medical documentation relating to the Appellant's disability application.

[22] On June 16, 2014 the Appellant submitted a subsequent application for CPP disability benefits along with additional medical information. This was not accepted as a valid application because it did not have the Appellant's "wet signature."

[23] On July 24, 2014 the Respondent advised that consent was needed to continue communication with the Appellant's lawyers.

[24] On July 24, 2014 the Respondent wrote directly to the Appellant requesting further information in order to allow it to make a decision whether to accept a late reconsideration request. The Respondent did not send this request to the Appellant's lawyers until September 5, 2014.

[25] On August 11, 2014 the Appellant's lawyers forwarded the Appellant's executed consent.

[26] On September 23, 2014 the Appellant's lawyers responded to the Respondent's request for further information indicating that they had already provided extensive medical documents; that they had already provided an explanation of the delay; and that they had kept the Respondent informed through ongoing written correspondence. They enclosed copies of the most recent correspondence as well as a copy of the original letter dated July 9, 2012 from the Appellant requesting reconsideration. They also noted that the Appellant was disputing the finding in the original decision that he should be able to return to work in the foreseeable future. The Appellant disagrees with this decision because he has not yet returned to work; his injuries are severe and prolonged; his injuries prevent him from doing any type of work; and his disability is likely to be long term or indefinite.

[27] On October 22, 2014 the Respondent issued a decision refusing to extend the 90-day time limit for requesting reconsideration. This refusal is the subject matter of this appeal.

[28] On January 13, 2015 the Appellant appealed to the Social Security Tribunal.

DECISION REFUSING TO EXTEND

[29] In its decision the Respondent made, inter alia, the following determinations:

- That the Appellant had not provided the department with requested information to evaluate whether the more than two year delay in requesting the reconsideration has a reasonable explanation and whether he had the ongoing intention to appeal the decision. It noted that the July 9, 2012 letter requesting reconsideration was unsigned. It also alleged that the Appellant had not responded to its request to explain the delay, to explain how he kept the department informed of his intent to request reconsideration, and to explain the reasons he disagrees with the decision. This request was sent directly to the Appellant on July 24, 2014 (even though correspondence had been submitted on his behalf by his lawyers) and was not sent to his lawyers until September 5, 2014. The Respondent makes no reference to the letter from the Appellant's lawyers dated September 23, 2014 (see paragraph 26, supra) which responded to the request.
- A review of the Appellant's file in the Respondent's records provides no evidence of the Respondent having received the Appellant's unsigned letter dated July 9, 2012 or any information concerning his intent to seek reconsideration with the 90-day time limit. As such, he has not demonstrated a continuing intention to seek reconsideration within the allowable time limit.
- There is no reasonable chance of success as there is no information on file that would support that the Appellant was unable to form or express the intent to request reconsideration within the 90-day time limit.
- The Respondent acknowledged that it would not suffer any prejudice if the extension of time is allowed since the file is still available for review.

THE QUESTIONS AND ANSWERS

[30] The questions from the Tribunal dated April 19, 2016 are as follows:

Question(s) for the Appellant

Please provide your written submissions (including your legal submissions) on the issue before the Tribunal which is whether the refusal by the Respondent to allow a late reconsideration (see GD2-26) should be set aside.

Question(s) for the Respondent

Please provide your written submissions (including your legal submissions) on the issue before the Tribunal which is whether the refusal by the Respondent to allow a late reconsideration (see GD2-26) should be set aside

[31] The Appellant's lawyers provided their submissions on May 13, 2016. The Respondent did not provide a response.

SUBMISSIONS

[32] The Appellant submits that he should have been allowed a longer period to request reconsideration because:

- a) He was denied procedural fairness because he should have been given an opportunity to have his July 9, 2012 letter returned so that he could sign it;
- b) If the Respondent has concerns about the authenticity of the July 9, 2012 letter a formal affidavit could have been provided by the Appellant attesting to his having sent the letter at that time. The Respondent did not give the Appellant the opportunity to submit this type of evidence;
- c) The Respondent incorrectly stated that the Appellant had not responded to its request for further information even though a response had been sent on September 23, 2014;
- d) There is extensive medical evidence to support that the Appellant's disability is severe and prolonged.

[33] The Respondent has not provided any submissions beyond the position taken in its decision refusing to extend the time for the reconsideration request.

ANALYSIS

[34] 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).

[35] 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.

[36] 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 to establish that the Respondent failed to do so.

Did the Respondent exercise its discretion in a judicial manner?

[37] For the reasons that follow, the Tribunal has determined that the Respondent failed to exercise its discretion in a judicial manner.

[38] The Respondent denied the Appellant procedural fairness by failing to provide him with the opportunity to have his July 19, 2012 letter returned and signed; it failed to provide him with the opportunity to provide sworn evidence that he had in fact sent the letter on that date; it incorrectly stated that the Appellant had not responded to its request for further information even though the Appellant's lawyers had responded on September 23, 2014.

[39] Further the Respondent made a clear error in law when it determined that the Appellant's request had no reasonable chance of success because there is no information on file that would support that he was unable to form or express the intent to request reconsideration with the 90-day time limit. The issue is whether the Appellant's disability application has a reasonable chance of success not whether an incapacity claim, which was never suggested, could succeed.

[40] The Tribunal has determined that the Minister's discretion was not exercised judicially and that the Tribunal should give the decision that the Minister should have given.

Should the time for filing the reconsideration request be extended?

[41] Having determined that the Minister's discretion was not exercised judicially, the Tribunal must now determine whether the time for filing the reconsideration request should be extended.

[42] The Tribunal is satisfied, on the balance of probabilities, that the Appellant sent a letter requesting reconsideration on July 9, 2012 and that it was not accepted because it was unsigned. The denial letter is dated January 31, 2012. The Tribunal assumes that the denial decision was sent to the Appellant by mail. The Tribunal takes judicial notice of the fact that mail is usually received within 10 days. The Tribunal finds it reasonable that the reconsideration decision was communicated to the Appellant by February 10, 2012.

[43] In accordance with s. 81 of the CPP the Appellant had until May 10, 2012 to request reconsideration. The Tribunal has found that the Appellant's request for reconsideration was not sent until July 9, 2012 (approximately 60 days beyond the time-limit).

[44] In determining whether to allow a longer period of time for the reconsideration request the Tribunal should consider the factors set out in subsection 74.1(3) of the CPP regulations. The Tribunal should be satisfied that there is a reasonable explanation for requesting a longer period and that the Appellant has demonstrated a continuing intention to request reconsideration.

[45] The Appellant is not fluent in English; he was unrepresented when he sent his reconsideration request; and the medical evidence establishes that he suffers from significant

physical, cognitive and emotional impairments. The Tribunal is satisfied that this provides a reasonable explanation for requesting a longer period.

[46] The Appellant subsequently hired a law firm to pursue his application and his law firm has followed up and been in communication with the Respondent. This demonstrates a continuing intention to request reconsideration.

CONCLUSION

[47] Having reviewed all of the evidence contained in the file, the Tribunal finds that the Respondent's discretion was not exercised judicially and that the time for submitting the reconsideration request should be extended.

[48] The time for submitting the reconsideration request is extended to July 9, 2012 which is the date the Tribunal finds the Appellant submitted his request for reconsideration.

[49] The appeal is allowed and this matter is sent back to the Minister to make the reconsideration decision.

Raymond Raphael
Member, General Division - Income Security