



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. S. v. Minister of Employment and Social Development*, 2016 SSTGDIS 62

Tribunal File Number: GP-16-2278

BETWEEN:

C. 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: Virginia Saunders

DATE OF DECISION: August 15, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension. The Respondent denied the application initially and, in a decision letter dated December 18, 2015, denied the application upon reconsideration. The Appellant appealed that decision to the Tribunal on July 5, 2016, beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[2] The Tribunal must decide whether to allow an extension of time for the Appellant to appeal pursuant to subsection 52(2) of the DESD Act.

EVIDENCE

[3] The Appellant's disability application was received by the Respondent on March 6, 2015. The Respondent informed the Appellant that the application was denied by letter dated July 21, 2015.

[4] In a letter to the Respondent dated October 20, 2015, the Appellant requested reconsideration of the initial decision to deny her application. She stated that she had requested reports from her specialist many times, but these had been delayed. She stated that "they have now given me a date for a MRI for my shoulder and will be forwarding all the reports to you as well." She asked the Respondent to wait to receive those reports before making its decision.

[5] The reconsideration decision indicated that it was made without waiting for the Appellant to have her MRI. The decision informed the Appellant of her appeal rights. It stated:

If you disagree with the decision

You have the right to appeal this decision to the General Division, Income Security Section of the Social Security Tribunal. If you decide to appeal, **you must submit a *Notice of Appeal* that contains all the required information within 90 days** of the date You receive your Reconsideration decision letter. **For a copy of the *Notice of Appeal***

Form, instructions on how to fill it out and details on how to appeal a decision, please visit their Web site at <http://canada.ca/en/sst/index.html>, or you may also call free of charge at 1-877-227-8577. For your Notice of Appeal to be accepted, you must provide all the required information and attach all required documents, including a copy of this letter, before mailing it to the following address:

Social Security Tribunal
Attention: General Division (IS)
PO Box 9812, STN T CSC
Ottawa ON K1O 6S3

[6] The Appellant stated that she did not appeal within the 90 day period because she needed an MRI from a specialist, “but my appointment was on March 11, 2016, which was after the 90 days time period.”

[7] A report by an orthopedic surgeon, Dr. P. Yao, to the Appellant’s family doctor, Dr. M. Jawanda, dated April 27, 2016, indicated that Dr. Yao saw the Appellant on that date. It referred to the MRI of March 11, 2016. Dr. Yao sent this report to the Respondent along with an invoice and progress notes from February 20 2014 to September 17, 2015. All of these documents were received by the Respondent on May 11, 2016.

[8] The Respondent’s notes in the appeal file indicated that the Respondent contacted the Appellant by telephone on May 19, 2016, and informed her that the Respondent was unable to consider this new information and that her appeal period to the Tribunal had expired. She was advised to contact the Tribunal to inquire about submitting a late appeal. This information was also contained in a letter to the Appellant dated May 19, 2016.

[9] The appeal file indicated that on June 13, 2016, the Appellant made a request under access to information legislation for a copy of the reconsideration decision. A copy was sent to her on June 16, 2016. She filed her appeal with the Tribunal on July 5, 2016.

ANALYSIS

[10] The Tribunal finds that the appeal was filed after the 90-day limit. The Respondent’s reconsideration decision was dated December 18, 2015. The Appellant stated that she received the reconsideration decision on December 27, 2015. The Tribunal notes that this date was on a Sunday, and it is unlikely the Appellant had mail delivery that day. The Tribunal assumes that

the reconsideration decision was delivered the previous week and was brought to the Appellant's attention on December 27, 2015. The Tribunal finds that the reconsideration decision was communicated to the Appellant by December 27, 2015.

[11] In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant had until March 29, 2016 to file an appeal. She filed an appeal on July 5, 2016.

[12] 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. These are:

- a) a continuing intention to pursue the appeal;
- b) the matter must disclose an arguable case;
- c) there is a reasonable explanation for the delay; and
- d) there is no prejudice to the other party in allowing the extension.

[13] This is meant to be a flexible test in which the decision-maker assigns the appropriate weight to each factor depending on the circumstances (*Canada (Attorney General) v. Pentney*, 2008 FC 96). The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

Continuing Intention to Pursue the Appeal

[14] The Tribunal file indicates that the Appellant took no steps to appeal during the period between December 27, 2015 and March 29, 2016. There is no record of any oral or written contact by her or on her behalf, to either the Respondent or the Tribunal. The Appellant knew she had an MRI scheduled and wanted that information to be considered, yet she made no inquiries to determine how or if it would affect the timing of her appeal rights.

[15] The Tribunal finds that the Appellant did not have a continuing intention to pursue the appeal.

Arguable Case

[16] The Appellant claims that she can no longer work because of ongoing arm and shoulder pain. On appeal, she would have to establish a severe and prolonged disability within the meaning of the CPP on or before December 31, 2017, the minimum qualifying period as stated in the file. The Tribunal is satisfied that there is medical evidence related to the Appellant's medical condition. There is, therefore, an arguable case on appeal.

Reasonable Explanation for the Delay

[17] The Appellant submits that her appeal was late because she needed the MRI report. Dr. Yao did not send medical information related to the MRI to the Tribunal until some six weeks after the appeal period expired.

[18] The reconsideration decision explained the Appellant's appeal rights. She knew there was a 90 day time limit. She knew that her MRI would not take place until the time limit was close to expiring. She has provided no reasonable explanation for why she did not at least file a Notice of Appeal within the time limit, or contact the Tribunal to explain her dilemma or to seek advice as to what she might do to maintain her appeal rights.

[19] Furthermore, there is no indication that the Appellant advised Dr. Yao of the time limit. While he would not have been able to send a report on his consultation with the Appellant by March 29, 2016, there is nothing to suggest that he would not have been able to send the MRI results. It is also apparent that the Appellant did not provide Dr. Yao with the Tribunal's address and with instructions to send any documents there rather than to the Respondent.

[20] The Appellant was informed by telephone on May 19, 2016, that Dr. Yao's reports had been sent to the Respondent in error. She was informed that her appeal time limit had expired, and she was advised to contact the Tribunal. There is no record of her having done so until seven weeks later when she filed her Notice of Appeal. In the meantime, it took her more than three weeks after she spoke with the Respondent before she attempted to get a copy of her reconsideration decision.

[21] While the Appellant has provided an explanation for the delay, it is not a reasonable one. She was given clear instructions in the reconsideration letter and again when she spoke with the Respondent in May 2016. There is no evidence that she did not understand them; rather, the evidence suggests that she paid little attention to them and had no concern for the time limits until she decided to submit her Notice of Appeal in early July 2016. She has not provided a reasonable explanation for why she failed to follow the instructions, or why she did not act in a timely way even after they were clarified for her.

[22] The Tribunal finds that the Appellant did not provide a reasonable explanation for the delay in filing the appeal.

Prejudice to the Other Party

[23] 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

[24] Although the Appellant has an arguable case and there would be no prejudice to the other party, the Tribunal places more weight on the finding that the Appellant did not have a continuing intention to appeal, or a reasonable explanation for the delay in appealing. The DESD Act sets out a fairly short limitation period; however, the appeal requirements are minimal and they are explained clearly in the reconsideration decision and on the Tribunal's web-site. The Tribunal finds no compelling reason for allowing the Appellant to disregard those time limits in her particular circumstances.

[25] In consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal refuses an extension of time to appeal pursuant to subsection 52(2) of the DESD Act.

Virginia Saunders
Member, General Division - Income Security