



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 176

Tribunal File Number: AD-16-712

BETWEEN:

K. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 25, 2017

REASONS AND DECISION

OVERVIEW

[1] At its core, this case is about the appropriateness of granting an extension of time to file an appeal with the General Division, when the time permitted for doing so under the *Department of Employment and Social Development Act* (DESDA) has passed.

[2] The Respondent rendered its reconsideration decision on October 14, 2010. On September 12, 2014, the Applicant filed an appeal of the Respondent's reconsideration decision. The General Division determined that the Applicant was late in bringing her appeal and, notwithstanding the fact that she had an arguable case and the other party would not suffer any prejudice if an extension were granted, refused an extension of time. The Applicant seeks leave to appeal the General Division's decision. For the Applicant to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

BACKGROUND HISTORY

[4] The Respondent issued its initial decision on February 5, 2010 (GD2-11 to GD2-13). The letter indicates that if the Applicant disagreed with the decision, she had a right to seek a reconsideration, and that she was to write within 90 days from the date that she received the letter. The Applicant filed a request for reconsideration on May 6, 2010 (GD2-124).

[5] On May 11, 2010, the Respondent acknowledged receiving the Applicant's letter and advised that it would contact her if it required additional information (GD2-123). Otherwise, she would be advised as soon as it made a decision. The Respondent issued its reconsideration decision on October 14, 2010 (GD2-119 to GD2-122), which the Applicant does not recall ever receiving.

[6] In November 2010, the Applicant provided the Respondent with a copy of a power of attorney, executed in August 2008, although it was unclear why it was provided (GD2-112 to GD2-115).

[7] On February 7, 2011, the Applicant's counsel wrote to the Respondent, requesting a copy of the Applicant's file (GD2-109).

[8] On July 19, 2013, the Applicant's counsel wrote to the Respondent, requesting a reconsideration of its February 5, 2010 decision, despite the fact that in May 2010, the Applicant had already requested a reconsideration. The Applicant's counsel enclosed eight medical reports (GD2-9 to GD2-10). The reports are dated between October 20, 2010 and June 14, 2012, and can be found from pages GD2-15 to GD2-101 of the hearing file before the General Division. On July 25, 2013, the Respondent wrote to the Applicant, requesting that she complete and sign an attached Request for Reconsideration of a Canada Pension Plan decision (GD2-102).

[9] On October 7, 2013, the Applicant's counsel provided the Respondent with a completed request for reconsideration signed by the Applicant (GD2-107). The Applicant indicated that she was seeking a reconsideration of the decision of February 5, 2010 (GD2-108).

[10] The Applicant's counsel wrote to the Respondent on June 2, 2014. He noted that he had received correspondence from the Social Security Tribunal of Canada (Tribunal), advising that it could not process an appeal before receiving a reconsideration decision and that it was therefore closing the Applicant's file. Consequently, the Applicant's counsel enquired of the Respondent as to the status of the request for reconsideration (GD2-104 to GD2-105).

[11] The Respondent wrote to the Applicant's counsel on June 11, 2014, advising that it had rendered a reconsideration decision on October 14, 2010 (GD2-103).

[12] The Applicant's counsel wrote to the Respondent on June 24, 2014 (GD2-5 and GD23-6), acknowledging that he had received its letter of June 11, 2014, with the attached reconsideration decision dated October 14, 2010. The Applicant's counsel confirmed that

on July 25 [*sic*], 2013, he had sent medical reports to the Respondent and that he had requested a reconsideration of the initial decision of February 5, 2010. He confirmed that “we now know that there is an October 14, 2010 decision” and enquired as to the steps that needed to be taken for the Applicant to appeal the October 14, 2010 decision.

[13] The Respondent wrote to the Applicant’s counsel on July 3, 2014 (GD2-7). The Applicant filed an appeal with the Tribunal on September 8, 2014 (GD1). The Notice of Appeal reads:

The Appellant received the February 5, 2010 decision and then sent in a handwritten letter to request a reconsideration. At the time she was represented in respect of a May 29, 2007 motorcycle accident by [a] lawyer. During this time period the Appellant was disabled to the point that many days she could not get out of bed. She never notified [her lawyer] about the October 14, 2010 CPP Disability decision. [The lawyer] only learned of it through recent correspondence with HRSDC.

...

In sum, the appeal is late because the Appellant’s severe disability prevented her from notifying [the lawyer] of the October 14, 2010 decision and instructing him to take steps to appeal it in a timely manner (assuming the Appellant even received the October 14 decision, which she does not recall).

[14] The Tribunal wrote to the Applicant on September 15, 2014, indicating that her Notice of Appeal was incomplete and that she had to provide a copy of the reconsideration decision being appealed, “without delay.” The Tribunal also indicated that a completed notice of appeal had to be received within 90 days of the date that the Respondent’s reconsideration decision had been communicated to the Applicant. The Tribunal advised the Applicant that if she wished to proceed and did not provide the requested information within the specified timeframe, she would be required to request an extension of time to file a completed notice of appeal, by addressing whether there had been a continuing intention to pursue the appeal and whether there was a reasonable explanation for the delay, amongst other things.

[15] On October 24, 2014, the Applicant filed a copy of the reconsideration decision with the Tribunal. She did not address the questions of whether there had been a continuing intention to pursue the appeal and whether there was a reasonable explanation for the delay.

ANALYSIS

[16] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to 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.

[17] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[18] The Applicant submits that the General Division erred when it conducted its *Gattellaro*¹ and *Larkman*² assessments. However, there is the issue of whether it was even necessary for the General Division to conduct such an assessment and to determine whether it was in the interests of justice to extend the time for bringing an appeal, given that the Applicant was ostensibly late in bringing her appeal. After all, if the Applicant is found to have brought her appeal more than one year after the day on which the reconsideration decision was communicated to her, then the General Division has no

¹ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

² *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

discretion or jurisdiction under subsection 52(2) of the DESDA to allow further time within which an appeal may be brought.

[19] The General Division determined that the Applicant had received the reconsideration decision on October 24, 2010 and that she had until January 22, 2011 to file an appeal. The Applicant did not challenge this finding, other than to suggest that she does not recall ever having received a copy of the reconsideration decision in or about October 2010. I note, however, that the Applicant does not recall requesting a reconsideration in May 2010, yet she clearly requested a reconsideration at that time, so I am not prepared to find that she could not have received the reconsideration decision until June 2014, simply because she does not recall having received it before then. In any event, the General Division was aware of the Applicant's argument that, because she did not recall receiving the reconsideration decision on or about October 24, 2010, she might not have received it at that time. It is not appropriate, in the circumstances before me, to reassess the evidence on this issue and disturb the General Division's determination on when the Applicant received the reconsideration decision.

[20] The General Division found that the reconsideration decision had been communicated to the Applicant in or about October 2010. Hence, by the time she filed her appeal on October 20, 2014, it was filed more than three and a half years after the time permitted. (Even if the limitation of one year were to commence on April 1, 2013— when appeals generally were transferred from the Office of the Commissioner of Review Tribunals to the General Division of the Tribunal— the Applicant would have still fallen outside this timeframe by the time she filed her Notice of Appeal.)

[21] Subsection 52(2) of the DESDA stipulates that “in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.”

[22] Given its finding that the reconsideration decision had been communicated to the Applicant on October 24, 2010, the General Division had no jurisdiction or discretionary authority to extend the time for filing the appeal. It was unnecessary for the General Division to consider the four *Gattellaro* factors or the interests of justice.

[23] Indeed, in *Fazal (aka Mahmood) v. Canada (Attorney General)*, 2016 FC 487, the Federal Court held that the DESDA does not permit any discretion to be applied when an application for leave to appeal is filed more than one year after the date that a reconsideration decision is communicated to an appellant.

CONCLUSION

[24] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division