Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *K. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 238

Tribunal File Number: AD-16-558

BETWEEN:

K. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 25, 2017

REASONS AND DECISION

OVERVIEW

[1] This is an appeal of the General Division decision rendered on March 9, 2016, in which it refused to exercise its discretion to grant the Appellant an extension of time to file a notice of appeal, having found that he did not have a reasonable explanation for the delay in filing his appeal or a continuing intention to pursue an appeal, and that the Respondent would be prejudiced by an extension of time. The Appellant denied receiving a copy of the Respondent's reconsideration decision of May 8, 2007 that he was appealing, until June 2015. Having found that there was a reasonable chance of success on appeal, I granted leave to appeal on the basis that the General Division may have erred in taking judicial notice of mail service and imposing a duty on an applicant to make timely enquiries on the status of any applications or reconsideration requests.

[2] The parties made additional submissions on this ground. As neither party requested a hearing, and as I determined that no further hearing is required, this appeal is proceeding under paragraph 43(*a*) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The following issues are before me:

a. Is it appropriate for the Appeal Division to assess the Appellant's medical records?

b. Did the General Division err in finding that the Appellant had received a copy of the reconsideration decision and, if so, did it err under subsection 56(2) of the *Department of Employment and Social Development Act* (DESDA)?

MEDICAL RECORDS

[4] The Appellant provided several medical records that had been before the General Division (AD2 and GD3). However, there is no basis for me to consider them at this juncture, particularly as they do not form any grounds of appeal under subsection 58(1) of the DESDA. The subsection sets out the following narrow grounds of appeal:

> 58. (1) The only grounds of appeal are that
>
> (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.

[5] I granted leave on the basis that the General Division may have erred in law.

MAIL DELIVERY

[6] Although the Appellant has steadfastly maintained that he did not receive the Respondent's reconsideration decision until 2015, the General Division nevertheless took judicial notice "of the fact that mail in Canada is usually received within ten days" and found on that basis that the Appellant therefore had to have received the Respondent's reconsideration decision by May 18, 2007. The General Division addressed the Appellant's claim that he had never received the Respondent's reconsideration decision to the extent of finding that he was under a duty to follow up with the Respondent to ensure a timely response to his reconsideration request. It is somewhat unclear from this whether the General Division accepted or rejected the Appellant's claim that he had not received the reconsideration decision until 2015.

[7] There are limits to the reach of judicial notice. The Supreme Court of Canada set out these parameters in *R. v. Find* (2001), SCC 32 (CanLII), 154 CCC (3d) 97 (SCC) and *R.*

v. Spence (2005), SCC 71 (CanLII), 202 CCC (3d) 1 (SCC). As McLachlin C.J. held in *Find*, at paragraph 48:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they test by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy . . . .

[8] While it is not unreasonable to presume mail is delivered generally within 10 days, that does not meet the threshold set by the Supreme Court of Canada, such that one should take judicial notice of mail service, particularly when disputes often times arise as to whether mail service is not only timely, but whether it is even effected, i.e. delivered.

[9] The General Division treated the general presumption as an absolute, irrebuttable presumption that delivery had been effected on the Appellant, and then deemed him to have received the reconsideration decision. However, it did not specifically address the Appellant's assertions that he had not received the reconsideration decision until 2015. The General Division was entitled to accept or reject the Appellant's assertions, but it is not readily apparent that it did either. If the General Division had rejected the Appellant's assertions, it would have then been entitled to find that the Appellant had received the reconsideration decision when it did (without having to rely on taking judicial notice) and that his appeal had therefore been filed late—well beyond the time permitted under section 52 of the DESDA.

[10] Setting these considerations aside, it is unclear why the General Division even considered whether to allow an extension of time for the Appellant to bring his appeal. Although subsection 52(2) permits the General Division to allow further time within which an appeal may be brought, as I have indicated, "in no case may an appeal be brought more than one year after the day on which the decision is communicated." Having been deemed to have received the reconsideration decision on May 18, 2007, the Appellant was well out of time to file an appeal by the time he filed on July 10, 2015. The interests of justice under

Canada (Attorney General) v. Larkman, 2012 FCA 204 and the "*Gattellaro*[1] factors" were altogether irrelevant considerations, as the General Division lacked any discretionary authority to extend the time for filing an appeal, given that the appeal was filed more than a year after the date on which the decision had been deemed communicated to him, irrespective of whether the time started running on May 18, 2007, or on April 1, 2013. (As of April 1, 2013, appeals of reconsideration decisions are no longer filed with the Office of the Commissioner of Review Tribunals and have since been filed with the Social Security Tribunal – General Division).

[11] In his most recent submissions, the Appellant acknowledges that he received the Respondent's initial denial letter dated February 19, 2007, but claims that there was no attachment to the letter providing more information on how to request a reconsideration. He claims that had there been an attachment, he would have forthwith requested a reconsideration. The Appellant also states that he enquired about disability benefits in March 2010, at the time thinking that he might re-apply for a disability pension. He claims that no one informed him about the appeal process, but once he became aware of his right to appeal, he brought an appeal with the General Division.

[12] The Respondent's initial denial letter indicated that the Appellant had the right to seek a reconsideration and that if he chose to pursue this, he had to write within 90 days from the date that he received the letter. An attachment to the letter provided additional information. The attachment indicated that it usually took "about **3 months** to reconsider a decision," and that this represented the average time it took to evaluate all the information—longer if additional information was required (GD2-12).

[13] The Respondent sent the Appellant a letter dated March 15, 2007, acknowledging receipt of his request for a reconsideration (GD2-16). Neither the General Division nor the Appellant addressed this fact, or whether the Appellant received a copy of this letter.

[14] Clearly, the Appellant is mistaken that he did not request a reconsideration, as someone wrote a letter dated February 28, 2007 to the Respondent, on his behalf, seeking a

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

reconsideration of its initial denial (GD2-17). Surely this was done with the Appellant's full knowledge and under his instructions.

[15] It seems more likely than not that the letter that the Appellant denies having received is the Respondent's reconsideration decision of May 8, 2007, and the attachment to that letter, rather than the initial denial letter. From this, I find that the Appellant had to have received the Respondent's initial denial letter of February 19, 2007 and the attachment to that letter.

[16] The attachment to the February 19, 2007 letter indicated that the Appellant could expect to receive a reconsideration decision in approximately three months.

[17] In part because he was notified that he could expect a response within three months or thereabouts, I find that it was unreasonable for the Appellant to have purportedly waited until close to eight years had passed, until June 2015, before making any enquiries about the status of his request for a reconsideration decision, particularly as there had been other communications with the Respondent within that timeframe. I find that, absent compelling reasons otherwise, appellants have a duty to take appropriate steps to move their claims forward in a timely manner.

[18] Essentially, the Appellant's justification for his late appeal is his lack of knowledge about the appeal process. As the Federal Court of Canada held in *Reinhardt v. Canada (Attorney General)*, 2016 FC 909, "A self-represented litigant's inability to understand the Court process and inability to obtain legal advice cannot justify an applicant's failure to move his litigation forward."

[19] Finally, I acknowledge the Appellant's allegations that he has a limited education and is largely illiterate, but, if that is the case, I fail to see how he can definitively assert that he did not receive the reconsideration decision in 2007. In this regard, I find that the Appellant likely received a copy of the reconsideration decision in or about May 2007.

[20] Given the provisions of subsection 52(2) of the DESDA, there was no basis whereby the Appellant's appeal of the General Division's decision could succeed, irrespective of whether the time to file an appeal started running on May 18, 2007, or on

April 1, 2013. The subsection permits the General Division to allow further time within which an appeal may be brought, "but in no case may an appeal be brought more than one year after the day on which the decision is communicated" (my emphasis). As I have found that the Appellant likely received the reconsideration decision sometime in or about May 2007, he was well out of time to file an appeal by the time he filed it on July 10, 2015.

[21] In *Mahmood v. Canada (Attorney General)*, 2016 FC 487, the Federal Court held that, as the application for leave in that case was filed more than one year after the date that the decision was communicated to Mr. Mahmood Fazal, there was no discretion under the DESDA to be applied. Although the decision was in the context of an application for leave to appeal to the Appeal Division under subsection 57(2) of the DESDA, the wording is the same as that under subsection 52(2) of the DESDA and therefore applicable to these proceedings. I find that the General Division lacked any discretion to extend the time for filing an appeal in the Appellant's case.

CONCLUSION

[22] The appeal is dismissed.

Janet Lew
Member, Appeal Division