



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 114

Tribunal File Number: GP-17-8

BETWEEN:

C. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: John Eberhard

DATE OF DECISION: August 18, ~~2018~~

August 18, 2017

CORRIGENDUM DATE

September 21, 2017

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 August 31, 2016, denied the application upon reconsideration. The Appellant appealed that decision to the Tribunal on December 23, 2016, beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESD Act). Subsection 52(2) of the DESDA states the General Division may 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 to the Appellant.

[2] Section 25 of the Social Security Tribunal Regulations states:

"A person who does not file an appeal within the time limits set out in subsection 52(1) of the Act, may request an extension of time by filing their appeal with a statement that sets out the reasons why the General Division should allow further time for bringing of the appeal."

[3] This is such an appeal.

ISSUE

[4] 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.

ANALYSIS

[5] The Tribunal finds that the appeal was filed after the 90-day limit. The Respondent's reconsideration decision was dated August 31, 2016. The Appellant states that she received the reconsideration decision on August 31, 2016 but then indicated that she did not remember when she received it. The Tribunal assumes that the reconsideration decision was sent to the Appellant by mail. The Tribunal takes judicial notice of the fact that mail in Canada is usually received within 10 days. The 10th day was a Saturday. The Tribunal therefore finds that the reconsideration decision was communicated to the Appellant by Monday September 12, 2016.

[6] In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant had until Monday December 12th to file an appeal.

[7] The Appellant filed an appeal on December 23, 2016, outside the 90-day limit. The General Division of the Tribunal received the appeal of the Respondent's decision on January 3, 2017, 115 days following receipt of the reconsideration decision. This date is beyond the legislative 90 days but within one year provided in the DESDA.

[8] 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. The Federal Court states that the criteria to be followed are:

- a) the appellant has demonstrated a continuing intention to pursue the appeal.
- b) that the matter discloses an arguable case.
- c) there is a reasonable explanation for the delay, and
- d) there is no prejudice to the Minister in allowing the extension.

[9] 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

[10] The Appellant states that she did nothing to advance the appeal until it was too late. She received some assistance from her brother who is a retired para-legal. A continuing intention to seek appeal exists if the information indicates the applicant had the intent to request an appeal during the 90 day time period. There is no indication she contacted Service Canada or the SST in regard to her disability application at any time during her 90 day appeal period. Therefore, she did not demonstrate any activity that would support a continuing intention to pursue her appeal within the 90 day time period.

[11] The Appellant states in her application for benefits that she suffers from Osteoarthritis (OA), Fibromyalgia, anxiety and depression but does not explain how any of these conditions might have prevented her from pursuing the appeal process within the required time lines.

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

Arguable Case

[13] The Appellant claims that she could no longer work because of her medical conditions as of October 28, 2010. She qualifies for consideration of a disability pension under the “late applicant rules”. Her record of earnings suggest modest (below gainful) earnings in 2008 and 2009 and the most recent earnings before that were in 1985. She would have to be found disabled in December 1997 and continuously to the present.

[14] When the Respondent considered all the information and completed an internal medical adjudication it determined that she did not have a disability that was severe and prolonged as defined under the CPP legislation in December 1997 and that has been continuous to the present. Therefore did not meet these rules and does not qualify for CPP Disability benefits. The Appellant describes her medical conditions as OA, Fibromyalgia, anxiety and depression. Her family doctor (Dr. Schacter) notes in a 2015 report a diagnosis of fibromyalgia, generalized anxiety disorder and major depression (chronic). She has OA bilateral knees, carpal tunnel syndrome with a history of chronic pain intermittent since 2007. She was diagnosed with fibromyalgia in 2013. The Appellant has submitted additional reports dated in 2016; however, they are all dated well past her minimum qualifying period (MQP).

[15] On appeal, the Appellant would have to establish a severe and prolonged disability within the meaning of the CPP on or before December 1997, the MQP as determined by reference to the file.

[16] The Tribunal is not satisfied that there is medical evidence related to the Appellant’s medical conditions at the time around the MQP. The Tribunal finds, based on the Appellant’s submissions and the medical evidence on file, that there is not an arguable case on appeal.

Reasonable Explanation for the Delay

[17] The Appellant did not provide a compelling explanation for the delay. It is the Minister's position that a reasonable explanation for the delay exists if the Appellant's medical condition prevented her from acting with reasonable diligence or situational factors that are unusual, unexpected or unavoidable and beyond her control that prevented her from submitting a timely request. The Tribunal agrees. In the Appellant's Notice of Appeal signed and dated on December 12, 2016, she explained that she did not understand the "thresholds" or realize her appeal was late. She relayed receiving assistance from her brother in representing her for the purposes of an appeal. Service Canada received a call from C. S.'s representative, Christopher Weedmark on January 31, 2017 and he was directed by a Service Canada employee to call the Social Security Tribunal (SST) presumably to find out what to do when the time for appeal had expired. There was no other explanation.

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

Prejudice to the Other Party

[19] The Respondent's interests do not appear to be prejudiced given the short period of time that has lapsed in this case 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. The Tribunal does recognise however that prejudice to the Minister can exist when there are lengthy delays in requesting an appeal. That is not the case here. Procedural fairness and natural justice are not jeopardised to either party on the findings set out above. The finding that one of the factors in *Gattellaro* is met does not mean that all the criteria have been satisfied.

CONCLUSION

[20] 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. As stated in this decision, the Tribunal found that the Appellant does not have an arguable case based on the information currently on file, and therefore, there appears to be no reasonable chance of success. Pursuant to section 22 of the *Social Security Tribunal Regulations* the Appellant shall be

given a reasonable period of time to make submissions before the Tribunal summarily dismisses the appeal.

John Eberhard
Member, General Division - Income Security