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

Citation: *A. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 153

Tribunal File Number: GP-16-2615

BETWEEN:

A. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: October 12, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's most recent application for a *Canada Pension Plan* ("CPP") disability pension on October 26, 2009. The Appellant claimed that she was disabled because of severe bipolar depression, narcolepsy, cataplexy, migraines, sleep apnea, fibromyalgia, anxiety, and post-traumatic stress disorder. The Respondent denied the application initially on June 28, 2010, and declined to provide an extension of time for the Appellant's reconsideration request. The Appellant appealed the reconsideration refusal to the Social Security Tribunal ("Tribunal").

[2] The Appellant has unsuccessfully applied for CPP disability benefits on two prior occasions. The first application was ultimately appealed to a Review Tribunal. The Review Tribunal denied her appeal on November 12, 2001 but was adjudicating on the basis that her minimum qualifying period ("MQP") ended on April 30, 1991. The second application was denied initially by the Respondent on February 5, 2004. This denial appears to have been based on both *res judicata* and the merits of the case, as the Appellant's MQP date was still considered to be April 30, 1991. The Appellant did not request a reconsideration of that denial.

[3] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the MQP. The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 1999. This is not the same MQP as in the Appellant's two previous applications.

[4] The Tribunal is not ruling on the merits of the Appellant's case at this time. It is charged with assessing whether the Respondent exercised its discretion judicially when it refused to allow a longer period of time for the Appellant to request reconsideration of the Respondent's June 28, 2010 decision. If the Respondent did not exercise its discretion judicially, then the Tribunal must also determine how the Respondent ought to have handled the Appellant's request for an extension of time to request that reconsideration.

[5] This appeal was heard by written Questions and Answers for the following reasons:

a) The issues under appeal are not complex.

b) There are gaps in the information in the file and/or a need for clarification.

c) Credibility is not a prevailing issue.

d) 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.

e) The issue currently before the Tribunal is whether the Respondent exercised its discretion judicially when it refused to allow a longer period of time for the Appellant to request reconsideration of the Respondent's June 28, 2010 decision.

[6] The Tribunal has decided that the Respondent did not exercise its discretion judicially when it refused to allow a longer period of time for the Appellant to request reconsideration of the Respondent's June 28, 2010 decision. Given that finding, the Tribunal then considered the Appellant's reconsideration request and decided that an extension of time could not be granted for requesting that reconsideration.

EVIDENCE

[7] As the role of the Tribunal in this matter is restricted to assessing the Respondent's exercise of its discretion in denying the reconsideration request, and then possibly assessing whether an extension ought to have been granted, only the evidence relevant to those particular issues is specifically referenced in this evidentiary summary.

Relevant Historic Evidence

[8] On November 3, 1997, Dr. P. Burra (Psychiatry) prepared a consultation note regarding the Appellant. The note refers to a quite severe degree of anxiety and depression. Dr. Burra found her to be "very considerably handicapped". She tended to see frightening images (or "bugs") out of the corner of her eye. On February 24, 2000, Dr. Burra wrote a letter in support

of the Appellant's application for CPP disability benefits. He said she suffered from a recalcitrant mixture of anxiety and depression that he had been trying to treat over the past two years. She suffered from Obsessive Compulsive Disorder, had high levels of anxiety that rendered her "completely dysfunctional a large part of the time", and was depressed to a severe degree. Extensive treatment efforts produced minimal benefit and did not return her "to anything of a functional state".

[9] On August 4, 2000, Dr. R. Smith (Psychiatry) stated that the Appellant had suffered from major depressive disorder and generalized anxiety disorder since at least 1994. Dr. Smith observed that she was essentially housebound due to intolerable anxiety about leaving the home, could not be alone, could not use public transportation or a taxi, and could not go shopping. She had missed numerous appointments with a previous psychiatrist solely because of anxiety about leaving the house. Dr. Smith also referenced uncontrolled migraines and opined that she was unable to achieve gainful employment. On January 31, 2001, Dr. Smith noted that she remained confined to her apartment and was quite cognitively impaired.

[10] In a Medical Report dated June 28, 2009, Dr. Lynn Stewart (Family Physician) provided diagnoses of narcolepsy, cataplexy, severe refractory depression, fibromyalgia and migraines. Dr. Stewart wrote that the Appellant tried hard to improve her life but was forever pulled back down by depression, pain, poverty, and an inability to function well cognitively. Dr. Stewart said she was unable to maintain her housekeeping and personal care, let alone work for a living. Dr. Stewart described her as "chronically exhausted, chronically in pain, and chronically miserable" and said her medications affected her cognitive functions as well as her illnesses.

[11] In the October 15, 2009 Questionnaire, the Appellant's functional limitations included seeing bugs, hearing voices, avoidance of any confrontation, a terrible memory, and an inability to concentrate. In addition to the diagnoses previously provided by Dr. Stewart, she listed sleep apnea, anxiety, and post-traumatic stress disorder. She had a very hard time leaving her home for anything: her anxiety caused her to stay awake for days, followed by sleeping for up to a week at a time. She said she had no memory and fell asleep after starting to read. She added that her father and a brother killed themselves because of some of the same illnesses she suffered.

Decisions in the Most Recent Application

[12] On June 28, 2010, the Respondent made an initial denial (the "2010 Decision") on the Appellant's latest application. The Respondent admitted that the Appellant's limitations left her unable to work. However, the application was denied on the basis that her condition had not continuously prevented her from working since the expiry of her MQP. While the Respondent appears to have denied the application on its merits, it also raised the issue of *res judicata*. However, her previous applications were adjudicated on the basis of an April 30, 1991 MQP, rather than the December 31, 1999 MQP that now applied. The Appellant was advised of her right to request a reconsideration decision within 90 days of receiving the 2010 Decision.

[13] No precise date has been given for the Appellant's receipt of the 2010 Decision, but there was no further communication until the June 18, 2015 letter from Queen's Legal Aid ("QLA") to the Respondent. QLA indicated that they had been retained to assist the Appellant with her application for disability benefits and enclosed a consent form to that end. QLA said that they had previously been retained by the Appellant in connection with a credit splitting application that was approved by the Respondent in June 2005. QLA also suggested that the Appellant was told at that time that she qualified for disability benefits and would be contacted about her entitlement amount in 4-6 months. However, when the Appellant contacted the Respondent, she was apparently told that there was no record of any of her applications or correspondence. As a result, she was apparently told to commence a new application.

[14] There does not appear to be any other documentary evidence of the events described in the June 18, 2015 QLA letter, which concluded with a request for copies of any documentation concerning the Respondent. An acknowledgment of the letter was also requested, but it is unclear that any action was taken by the Respondent at that time.

[15] On February 8, 2016, QLA requested a reconsideration of the 2010 Decision. It appears that this request was first received by the Respondent on February 24, 2016 but was missing an original signature. A signed copy appears to have been received on February 29, 2016.

[16] In its February 8, 2016 letter, QLA stated that additional medical evidence and information was pending and would be provided promptly to the Respondent. QLA stated that the Appellant had not submitted a reconsideration request since June 2010 because she had severe medical problems and family hardships. She had suffered from major depressive disorder and generalized anxiety disorder since 1994. Since 2010, she had complications from her medications and had extreme family hardships that worsened her anxiety symptoms. QLA wrote that they were contacted by the Appellant in May 2015, when she felt well enough to seek legal advice. She initially sought help with respect to her missing CPP disability benefits application from 2005 and was advised that the Respondent did not have any records regarding that application. As a result, she wished to appeal the 2010 Decision through a reconsideration request. That letter also enclosed additional medical information.

[17] On April 1, 2016, the Respondent contacted the Appellant by telephone in order to get an explanation for her delay in appealing. However, the phone number was not in service. The Respondent then attempted to contact the assigned QLA representative but she was not in the office. No message was left at the QLA offices.

[18] On April 6, 2016, the Respondent wrote to QLA in response to QLA's request for a copy of the Appellant's CPP disability file. The request was apparently received on February 29, 2016. However, the Respondent stated that it had no record of the Appellant ever applying for CPP disability benefits.

[19] On April 7, 2016, the Respondent wrote to the Appellant, but not QLA, acknowledging receipt of QLA's request for a late reconsideration of the 2010 Decision. This letter will be referred to as the "Request for Further Information". The Respondent indicated that it needed the following additional information to make the decision: an explanation for the delay in sending the reconsideration request, how she kept the Respondent informed of her intent to request a reconsideration, and the reasons she disagreed with the 2010 Decision (including any new information she might have). The Respondent indicated that it would make a decision using the information in the file if no response were received within 30 days.

[20] On May 10, 2016, in a letter sent to both the Appellant and QLA (the "Extension Refusal Decision"), the Respondent denied the reconsideration request. The Respondent noted that the Appellant did not respond to the Request for Further Information and the reconsideration request was denied based on the information in her file. The Respondent also enclosed an internal "Decision Document" dated May 10, 2016 that explained the reasons for the decision.

The Decision Document

[21] Pursuant to s. 74.1 of the *Canada Pension Plan Regulations* (the "*CPP Regulations*"), the Decision Document purported to address each of the following four criteria for the late reconsideration request: (1) Is there a reasonable explanation for the delay; (2) Has there been a continuing intention to request a reconsideration; (3) Is there a reasonable chance of success; and (4) Will an extension result in unfairness to the Respondent or another party?

[22] With respect to a reasonable explanation for the delay, the Respondent repeated the submissions made by QLA in its February 8, 2016 letter. It added that no response had been received to the Request for Further Information. The Respondent concluded that no reasonable explanation for the delay had been received, as there was no evidence of any exceptional medical conditions that prevented her from requesting a timely reconsideration and no extenuating situational circumstances had been provided.

[23] With respect to the continuing intention to request a reconsideration, the Respondent noted correspondence received from QLA on June 22, 2015 and February 24, 2016. The Respondent concluded that no continuing intention to pursue a reconsideration of the 2010 Decision had been demonstrated, as the first contact with the Respondent was not until June 22, 2015.

[24] With respect to a reasonable chance of success, the Respondent described medical documentation from 2000 to 2002 that was received well past the 90-day reconsideration time limit. However, the Respondent did not make a conclusion as to whether the Appellant had a reasonable chance of success. It also appears that some or all of that "late" medical documentation had been previously filed.

[25] With respect to the unfairness of an extension, the Respondent stated that there was no indication of any prejudice to the Respondent, although a very long period of time had expired since the reconsideration decision was issued.

[26] The Respondent then concluded that, based on its assessment of the four criteria in s. 74.1 of the *Canada Pension Plan Regulations*, it would not extend the time limit for making a reconsideration request.

Subsequent Documentation

[27] On May 18, 2016, QLA advised the Respondent that neither QLA nor the Appellant ever received a copy of the Request for Further Information. QLA requested a copy of that letter, as it had been referenced in the Respondent's May 10, 2016 decision on the late reconsideration request. The Respondent provided QLA with a copy of the Request for Further Information on June 3, 2016.

[28] On August 22, 2017, the Tribunal sent the parties a Notice of Hearing that set out its intention to proceed by way of written Questions and Answers. Both questions were addressed to the Respondent, as the Appellant had already filed comprehensive submissions. A response deadline of September 29, 2017 was imposed.

[29] The Respondent's reply to the Tribunal's questions was received on September 21, 2017. Firstly, the Respondent was asked whether the Request for Further Information was actually sent to the Appellant. The Respondent replied that the letter was sent to the address it had on file at the time. It added that there was no indication the letter was not delivered, as no undeliverable mail had been returned by Canada Post. Secondly, the Respondent was asked why the Request for Further Information was not sent to QLA. The Respondent simply replied that "[t]here is no indication on file that a copy of this letter was sent to the Appellant's representative". No actual explanation was given.

SUBMISSIONS

[30] The Appellant has made extensive submissions in this matter, but only the most relevant submissions are set out here. She submits that she ought to be granted an extension for filing her reconsideration request because:

a) She had severe medical problems and family hardships when she ought to have made her reconsideration request;

b) The Decision Document did not consider whether she had a reasonable chance of success, but this is a factor to which a high degree of weight ought to be accorded;

c) Her failure to demonstrate a continuing intention to request a reconsideration ought to be given little weight, given its connection to her various medical conditions;

d) She sought legal assistance in May 2015, once she felt well enough to pursue the matter; and

e) She never received the Request for Further Information and it was never sent to her representative.

[31] The Respondent does not appear to have made specific submissions on the issue before the Tribunal. However, the reasoning behind its Extension Refusal Decision was set out in the Decision Document that has already been described above.

ANALYSIS

Applicable Provisions

[32] Subsection 81(1) of the *Canada Pension Plan* states that a person who is dissatisfied with a benefit payment decision may, within 90 days of being notified in writing of the decision, or within such longer period as the Minister may allow, either before or after the expiration of those 90 days, make a request to the Minister for a reconsideration of that decision.

[33] Subsection 74.1(3) of the *CPP Regulations* states that, for the purposes of subsection 81(1) of the *Canada Pension Plan* and subject to subsection 74.1(4) of the *CPP Regulations*, the Minister may allow a longer period to make a request for reconsideration of a decision 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 a reconsideration.

[34] Subsection 74.1(4) of the *CPP Regulations* states that if the request for reconsideration is made more than one year after the day on which the person was notified in writing of the initial decision, then 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 to make the request.

[35] Section 82 of the *Canada Pension Plan* allows a party to appeal the Minister's decision to deny further time to make a request to the Tribunal.

Exercise of Discretion

[36] 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 (Attorney General) v. Uppal*, 2008 FCA 388).

[37] According to *Canada (Attorney General) 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.

[38] The role of the Tribunal at this stage of its analysis is not to determine whether the Respondent made the correct determination. Instead, the Tribunal's role is to determine whether the Respondent exercised its discretion in a judicial manner. The Appellant has the burden of proof in establishing that the Respondent failed to do so.

[39] The Appellant raised considerable concern about the Respondent's emphasis on the lack of response to the Request for Further Information. The Respondent's Extension Refusal Decision did mention that the Appellant failed to respond to the Request for Further Information. However, the Extension Refusal Decision also stated it relied on the information in the file when arriving at its decision. Accordingly, on its face, the Respondent's Extension Refusal Decision does not appear to have run afoul of the criteria set forth in *Purcell*.

[40] However, the Extension Refusal Decision does not explain why the information in the file was insufficient to grant an extension. The rationale for the Extension Refusal Decision is actually contained in the separate Decision Document. As set out in the Decision Document, the Respondent needed to examine the four criteria from s. 74.1 of the *CPP Regulations* in arriving at its Extension Refusal Decision. The Respondent's assessment of each of these criteria will be reviewed separately.

Reasonable Explanation for the Delay

[41] The Respondent acknowledged the submissions made by QLA in its February 8, 2016 letter, but added that no response had been received to the Request for Further Information and appears to have placed some weight on this lack of response. It concluded that no reasonable explanation for the delay had been received, as there was no evidence of any exceptional medical conditions that prevented her from requesting a timely reconsideration and no extenuating situational circumstances had been provided. While QLA's February 8, 2016 letter referred to "severe medical problems" and medication complications during the delay period, no specific details or any contemporaneous objective evidence of such problems was provided. QLA also referred to "extreme family hardships" during that delay period, although no specifics were provided at that time. Without corroborating evidence or at least some specifics, it is doubtful that the Respondent failed to act judicially when assessing these explanations.

[42] However, the Tribunal is somewhat concerned by the Respondent's apparent reliance on the lack of a response to the Request for Further Information. Given the Appellant's circumstances and her engagement of a representative, the Respondent's failure to send QLA the Request for Further Information takes on more importance. This failure is made more worrisome by the Respondent's previous exchanges with QLA as well as the fact that the

Extension Refusal Decision was sent to QLA. Finally, QLA has indicated that the Appellant never received the Request for Further Information. Dr. Stewart's June 28, 2009 Medical Report and the Appellant's October 15, 2009 Questionnaire raise questions about her ability to respond to the Request for Further Information even if she had received it. As such, it is not immediately clear that the Respondent complied with the *Purcell* criteria, in connection with this factor. However, the Tribunal's analysis of the other factors also renders it unnecessary to make a finding on this issue.

Continuing Intention to Request a Reconsideration

[43] The Respondent concluded that no continuing intention to pursue a reconsideration had been demonstrated, as the first contact with the Respondent was not until June 22, 2015. The Tribunal has no issue with the manner in which the Respondent arrived at this conclusion, as it is reasonably based on the evidence before it. The Respondent did not fail to act judicially with respect to this factor.

Reasonable Chance of Success

[44] The Respondent did not make a conclusion on whether the Appellant had a reasonable chance of success. The Respondent only stated that medical documentation from 2000 to 2002 was received well past the 90-day reconsideration time limit. The fact that evidence was submitted late is, in itself, of little relevance in assessing whether there is a reasonable chance of success. However, the content of that evidence may well be relevant. The Respondent does not appear to have considered that content, even though some or all of that evidence may have been previously filed. The lack of a conclusion on this factor, as well the essentially irrelevant comment made about it, suggests that the Respondent failed to properly consider whether the Appellant had a reasonable chance of success. This, in turn, suggests that the Respondent failed to consider a relevant factor, which is one of the *Purcell* criteria.

Prejudice if Extension Granted

[45] The Respondent admitted that there would be no prejudice to it if an extension were granted. The Tribunal has no issue with the manner in which the Respondent arrived at this conclusion and the *Purcell* criteria are not applicable to this factor.

Findings on Discretion

[46] The Respondent was tasked with assessing four factors in determining whether to grant or refuse the Appellant's late reconsideration request. However, as set out above, the Respondent only appears to have come to a fully reasoned and supportable conclusion on two factors: the continued intention to request a reconsideration (against the Appellant), and the existence of prejudice if an extension is granted (in favour of the Appellant). While the Respondent found against the Appellant on the "reasonable explanation" factor, it appeared to place significant weight on the Appellant's lack of a response to a letter that was curiously never sent to the Appellant's representative and, in retrospect, may not have been received by the Appellant at all. Finally, and most significantly, the Respondent did not come to a conclusion at all on the "reasonable chance of success" factor and in fact appeared to misinterpret that factor when discussing the Appellant's recently filed medical evidence.

[47] The Respondent's failure to properly consider the reasonable chance of success factor constitutes a failure to take a relevant factor into account. In accordance with *Purcell*, the Tribunal finds that this constitutes a failure to exercise discretion judicially. Given that finding, it is not necessary to determine whether the Respondent's failure to send the Request for Further Information to QLA (and apparent subsequent reliance on the lack of a response) also constitutes a similar failure.

[48] It must be stressed that the Tribunal, in the above analysis, was not attempting to substitute its interpretation of the s. 74.1 factors for that of the Respondent. The above analysis was merely intended to determine whether the Respondent exercised its discretion judicially.

[49] Having found that the Respondent did not exercise its discretion judicially, however, the Tribunal is now charged with making the decision that the Respondent should have given. Accordingly, the Tribunal must now itself assess the s. 74.1 factors.

Tribunal's Assessment of the Late Request for Reconsideration

Reasonable Explanation for the Delay

[50] The Tribunal finds that there was a reasonable explanation for the delay between May 2015 and February 2016. The Appellant sought assistance from QLA in May 2015. QLA then requested a copy of the Appellant's file on June 18, 2015 and it is unclear if and when an accurate response was received. However, the Respondent's letter of April 6, 2016 stated that there was no record of the Appellant ever applying for CPP disability benefits: this was clearly incorrect, as the Appellant had made three such applications by that date, including one that was appealed to the Review Tribunal. In any case, QLA requested a reconsideration of the 2010 Decision on February 8, 2016. It therefore does appear that the Appellant and her representative were attempting to move forward with the matter beginning in May 2015.

[51] The 2010 Decision is presumed to have been communicated to the Appellant by early July of 2010. This leaves the nearly five-year period until the first signs of activity in May 2015. There is no objective documentation from this period: this would normally be inconsistent with a reasonable explanation for a delay. However, the facts and submissions in this case are unique and merit a closer review.

[52] It was submitted that the Appellant's various medical conditions and her personal circumstances prevented her from moving forward with a request for reconsideration. The Appellant's submissions made reference to "severe medical problems", medication complications, and "extreme family hardships" (including multiple family suicides during the five-year period from 2010 to 2015). Few details and no objective evidence were provided regarding any of these explanations; the reference to multiple suicides was not contained in the Appellant's original submissions to the Respondent.

[53] Nonetheless, there is relatively recent evidence suggesting that the Appellant did in fact have quite profound limitations and medical conditions. Dr. Stewart's June 28, 2009 Medical Report provided diagnoses of narcolepsy, cataplexy, severe refractory depression, fibromyalgia and migraines. Dr. Stewart said the Appellant tried hard to improve her life but was forever pulled back down by depression, pain, poverty, and inability to function well cognitively. She

was unable to maintain her housekeeping and personal care activities, let alone work for a living.

[54] Similarly, on October 15, 2009, the Appellant described functional limitations of seeing bugs, hearing voices, avoiding any confrontation, a terrible memory, and an inability to concentrate. In addition to Dr. Stewart's diagnoses, she listed sleep apnea, anxiety, and post-traumatic stress disorder. She had a very hard time leaving her home for anything: her anxiety caused her to stay awake for days, followed by sleep periods for up to a week at a time. She said that she had no memory and fell asleep quickly after starting to read.

[55] The Appellant's statements appear to be supported by the earlier evidence of Dr. Smith, who noted on August 4, 2000, that she was essentially housebound due to intolerable anxiety about leaving the home. She could not be alone, could not use public transportation or a taxi, could not go shopping, and had missed numerous appointments with a previous psychiatrist solely because of anxiety about leaving the house. On January 31, 2001, Dr. Smith noted that she remained confined to her apartment and was quite cognitively impaired.

[56] The Appellant thus appears to have difficulty with relatively basic activities, for reasons including pain, mental health issues, and cognitive limitations. This raises significant questions about her ability to request a reconsideration within the allotted 90-day period. When compounded by an apparent series of multiple suicides within her family, and her expressed avoidance of confrontation, the lack of objective evidence from July 2010 to May 2015 is more understandable. As noted above, she also had a history of missing appointments because of the profound nature of her anxiety.

[57] The Appellant's cognitive limitations are also noted. She appears to have been under the impression that she had been granted disability benefits in 2005, although there is no objective evidence to support this. The fact that she requested assistance with this from QLA in May 2015, despite having made another application for CPP disability benefits in the interim, also suggests that cognitive issues may be playing a role.

[58] The Tribunal concludes that the Appellant's medical conditions and personal circumstances constitute a reasonable explanation for the delay between July 2010 and May

2015. Combined with the reasonable explanation about the delay between May 2015 and February 2016, the Tribunal consequently finds that there is a reasonable explanation for the entire delay between the 2010 Decision and the Appellant's eventual reconsideration request.

[59] The Tribunal stresses that the Appellant's unique circumstances are responsible for this finding. It is difficult to conceive of another situation where a reasonable explanation could be provided for a period of nearly five years without any objective documentation. Nonetheless, in this particular case, the current submissions and the historical evidence are consistent with the conclusion reached.

Continuing Intention to Request a Reconsideration

[60] The Appellant has not disputed that there was no communication with the Respondent between June 28, 2010 and the QLA letter of June 18, 2015. While she has provided an explanation for the delay, there is also little or no evidence of a continuing intention to request a reconsideration. She has essentially conceded this point but suggests that this needs to be considered in light of her serious personal and medical issues that prevented her from displaying a continuing intention. She has also suggested that this factor be assigned little weight.

[61] While the Tribunal understands the Appellant's submission, it must nonetheless reach a conclusion on each individual factor. Accordingly, given the specific absence of information about her intent to request a reconsideration, the Tribunal finds that the Appellant has failed to establish a continuing intention to request a reconsideration of the Respondent's June 28, 2010 decision. The Appellant's position on the relative weighing of factors will be discussed in more detail below.

Reasonable Chance of Success

[62] The Appellant has submitted medical evidence that spoke directly to her condition at the expiry of the MQP. This includes, but is not limited to, Dr. Burra's February 24, 2000 letter that spoke of a severe condition and dysfunctionality lasting for the previous two years. In the Tribunal's view, this in itself is sufficient to establish at least an arguable case.

Prejudice if Extension Granted

[63] In the Decision Document, the Respondent admitted that there would be no prejudice to it if an extension were granted. Her previous applications were still available for review. In the circumstances, the Tribunal finds that an extension in time would not result in unfairness to the Respondent or another party.

Appellant's Submissions on Weighing and Assessing Factors

[64] Despite essentially conceding that there had been little or no evidence of a continuing intention to request a reconsideration, the Appellant made extensive submissions suggesting that the Tribunal had the ability to assign little weight to that factor. The Appellant also submitted that it was not necessary for her to meet each individual factor contained in s. 74.1 of the *CPP Regulations*.

[65] In support of her position, the Appellant observed that criteria essentially identical to those contained in s.74.1 of the *CPP Regulations* were at issue in the Federal Court of Appeal's decision in *Canada (Minister of Human Resources Development)* v. *Hogervorst*, 2007 FCA 41. The *Hogervorst* case also concerned a request for an extension of time in the CPP context. The Court of Appeal recognized that the four-pronged test is a means of ensuring that justice is done between the parties. The Court of Appeal also found that the test could permit an extension of time even if one of the criteria is not satisfied.

[66] The Appellant also submitted that, in *Canada (Attorney General) v. Pentney*, 2008 FC 96, the Federal Court upheld and expanded upon the decision in *Hogervorst.* In *Pentney*, the Court held that the test is a flexible one. This means an appropriate weight must be assigned to each factor depending on the circumstances. The Court emphasized that the test was not an exclusive list of factors: an implied fifth factor may be the facts of the particular case.

[67] The Appellant's submissions do have some initial appeal. The submissions suggest that *Hogervorst* and *Pentney* would permit the Tribunal to disregard the Appellant's failure to demonstrate a continuing intention to request a reconsideration and/or assign so little weight to it that the failure would not be determinative. However, closer analysis of *Hogervorst* and *Pentney* reveals that they were not concerned with an assessment under s. 74.1 of the *CPP*

Regulations. Those cases flowed from an assessment of a late appeal to a review tribunal, as opposed to a late reconsideration request to the Respondent. While the assessment criteria cited in those two cases is essentially identical to the criteria in s. 74.1, the assessment criteria were derived through common law. There is no legislative support for the specific assessment criteria cited in *Hogervorst* and *Pentney*.

[68] This makes the context of *Hogervorst* and *Pentney* entirely different. The criteria in the present case are taken directly from s. 74.1 of the *CPP Regulations*. It was open to the drafters of the legislation to state that variable weights could be assigned to each of the criteria. Similarly, they could have stated that it was not strictly necessary for each individual criterion to be met. However, the drafters of the legislation chose not to do either of those things.

[69] The Tribunal is a creation of statute and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the *Canada Pension Plan* and its regulations. It cannot vary the legal requirements set out in the legislation. More particularly, it cannot apply principles (as set out in *Hogervorst* and *Pentney*) derived through common law for one situation to a different situation that is specifically addressed by the governing legislation. Accordingly, despite the attractiveness of the Appellant's argument, the Tribunal cannot grant an extension pursuant to s. 74.1 of the *CPP Regulations* if one of the criteria in that section is not met. Similarly, the Tribunal cannot assign different weights to the criteria set out in s. 74.1 of the *CPP Regulations*. The Appellant must be found to have met all of the criteria, in order for an extension to be granted.

Conclusion for Tribunal's Assessment

[70] As the Tribunal found that the Appellant failed to demonstrate a continuing intention to request a reconsideration, the Appellant has failed to meet all of the criteria set out in s. 74.1 of the *CPP Regulations*. For the reasons given above, the principles outlined in *Hogervorst* and *Pentney* do not apply in this case. It follows that an extension cannot be granted for the Appellant's reconsideration request.

OVERALL CONCLUSIONS

[71] The Tribunal finds that the Respondent did not exercise its discretion judicially in response to the Appellant's request for an extension of time to request a reconsideration of the 2010 Decision. As a result of that finding, the Tribunal itself had to make a finding on the request for an extension of time. Based on the evidence and submissions before it, however, the Tribunal finds that the Appellant did not meet all of the criteria set out in s. 74.1 of the *CPP Regulations* and therefore could not be granted an extension of time for requesting a reconsideration decision.

[72] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security