



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. C. v. Minister of Employment and Social Development*, 2017 SSTGDIS 201

Tribunal File Number: GP-17-203

BETWEEN:

A. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shannon Russell

DATE OF DECISION: December 18, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension in September 2015. The Respondent denied the application at both the initial and reconsideration levels of adjudication. The Respondent's reconsideration decision was dated April 14, 2016. The Appellant appealed that decision to the Social Security Tribunal on May 24, 2017, beyond the 90-day appeal period 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.

THE LAW

[3] Subsection 52(2) of the DESD Act states that the Tribunal 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.

[4] Subsection 5(1) of the *Social Security Tribunal Regulations* (SST Regulations) states that any document required to be filed by the Regulations must be filed with the Tribunal at the address, facsimile number or email address – or in accordance with the electronic filing procedure – provided by the Tribunal on its website.

[5] Section 23 of the SST Regulations states that an appeal of a decision to the General Division is brought by filing the appeal at the address, facsimile number or email address – or in accordance with the electronic filing procedure – provided by the Tribunal on its website.

[6] Section 24 of the SST Regulations requires that the appeal be in the form set out by the Tribunal on its website, and this provision sets out a list of information that must be provided with the appeal.

ANALYSIS

[7] The Tribunal finds that the appeal was filed after the 90-day appeal period expired. The Respondent's reconsideration decision was dated April 14, 2016. The Appellant states that she received the reconsideration decision on or about April 21, 2016. In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant had until July 19, 2016 to file an appeal.

[8] The Appellant's representative filed a letter with the SST on January 13, 2017 and, although that letter raises questions in the mind of the Tribunal as to whether it should have been treated as an intention to appeal to the SST, the letter nonetheless appears to have been treated as such by staff at the SST Office. The Tribunal's concerns with the January 2017 letter stem from the fact that the letter (while addressed to the SST) is written as though it is directed at the Respondent. For example, the letter states in part:

On April 14, 2016 you sent my client, A. C. a CPP Disability decision in which you have taken the position that she does not meet the CPP disability rules.

A copy of the decision was not sent to my office.

On August 8, 2016 our office sent a letter appealing your decision. We did not hear from you and followed up on October 4, 2016. On October 14, 2016 we received a letter for [sic] the Tribunal informing us that there is no appeal on file.

I fail to understand why that is.

[9] The SST Office treated this letter as an incomplete appeal and over the course of the next few months there were several letters exchanged between the SST Office and the Appellant's representative concerning the information that was needed to complete the appeal. These letters are summarized as follows:

- January 19, 2017: The SST Office wrote to the Appellant's representative and explained that she needed to provide the Tribunal with the date the reconsideration decision was communicated to the Appellant; the grounds for the appeal; the Appellant's social insurance number; the Appellant's telephone number and, if any, her facsimile number

and email address; and a declaration signed by the Appellant indicating that the information she provided is true to the best of her knowledge.

- February 9, 2017: The Appellant's representative wrote to the SST Office and stated she takes issue with the position that the appeal is incomplete. She stated the appeal was "certainly complete and there appears to have been issues in processing her appeal and communicating with our firm regarding said appeal and decisions". She nonetheless provided the Appellant's contact information, a social insurance number, the grounds for appeal, and the Appellant's signed declaration (GD1A-1 to GD1A-4).
- February 16, 2017: The SST Office wrote to the Appellant's representative and explained that information is still needed to complete the Notice of Appeal, namely the date the reconsideration decision was communicated to the Appellant and the Appellant's valid social insurance number.
- February 27, 2017: The Appellant's representative wrote to the SST Office and corrected the Appellant's social insurance number. She also provided the date of the reconsideration decision. This information was received by the SST Office on March 3, 2017 (GD1B-1).
- March 7, 2017: The SST Office wrote to the Appellant's representative and explained that the appeal is still missing the date that the reconsideration decision was communicated to the Appellant.
- March 17, 2017: The Appellant's representative wrote to the SST Office and stated that the requests are getting unreasonable and that she had previously advised that the reconsideration was dated April 14, 2016 (GD1C-1).
- March 24, 2017: An employee with the SST Office called the Appellant's representative and explained that what is needed is the date the reconsideration decision was received or alternatively something in writing indicating that the Appellant cannot recall when she received the reconsideration decision.

- May 24, 2017: The Appellant's representative wrote to the SST and stated that to the best of the Appellant's recollection, the Appellant received the decision on or about April 21, 2016. She added that it seems unreasonable and trivial that such a minor detail would occasion further delay in a matter that has been outstanding since August 2016 (GD1D-2).

[10] It is clear from the evidence that the Appellant's representative did not file an appeal in the manner prescribed by the SST Regulations within one year of April 21, 2016 (which is when the Appellant said she received the reconsideration decision). As the appeal with the SST was not completed until May 24, 2017, the Tribunal invited the Appellant's representative to address, in her submissions, subsection 52(2) of the DESD Act. The Appellant's representative's entire submissions on this issue comprise one sentence, namely: "A. C.'s Appeal was brought a few weeks late, on August 8, 2016".

[11] The Appellant's representative's submissions do not adequately address subsection 52(2). First, the Appellant's representative appears to be under the mistaken belief that a simple letter constitutes an appeal. She has not addressed the fact that she did not satisfy the requirements of section 24 of the SST Regulations until May 24, 2017. Second, although the Appellant's representative's assistant sent a letter to the SST Office on August 8, 2016, it is clear from the content of that letter that it was not intended to be an appeal to the Tribunal. (This is discussed later in this decision).

[12] Paragraph 3(1)(b) of the SST Regulations allows the Tribunal, in special circumstances, to vary a provision of the SST Regulations or dispense a party from compliance with a provision. Given that the Appellant was relying on her representative to navigate the appeals process on her behalf and given that her representative did not pursue the appeal in accordance with the relevant legislation, the Tribunal finds that there are special circumstances which warrant relieving the Appellant from strict compliance with section 24 of the SST Regulations. By "strict compliance" the Tribunal means that it relieves the Appellant from having to have filed all of the information set out in section 24 before her appeal could be considered complete. By March 3, 2017, the Appellant's representative had filed all of the information required by section 24 except the date that the reconsideration decision was communicated to the Appellant. Given the Appellant's

representative's misunderstanding about what was being requested and given that she eventually provided the information, the Tribunal considers it appropriate to deem the appeal to have been completed on March 3, 2017. The Tribunal, therefore, finds that the Appellant has not contravened subsection 52(2) of the DESD Act because her appeal was brought within one year of the Appellant receiving the Respondent's reconsideration decision.

[13] Turning now to the delay between April 21, 2016 (when the Appellant says she received the reconsideration decision) and March 3, 2017, the Tribunal considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. 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 Appellant's representative submits that she did not learn that the Respondent had issued a reconsideration decision until August 3, 2016 when she spoke with the Appellant. She submits that the Appellant's continuing intention to pursue the appeal is evidenced by the Appellant's timely response to the Respondent's initial decision letter of December 31, 2015 and by the fact that the Appellant's representative submitted a Notice of Appeal on August 8, 2016. The Appellant's representative acknowledges that her letter of August 8, 2016 was addressed to the wrong office (i.e. the Respondent) but she submits that a further letter was also sent to the SST.

[15] In support of her argument, the Appellant's representative provided the Tribunal with an affidavit of S. S. (the Appellant's representative's assistant) and in this affidavit S. S. states that on August 8, 2016 she sent Service Canada a Notice of Intention to Appeal the department's decision. That same day she spoke with a colleague and learned that she had inadvertently sent the correspondence to the wrong address. She tried to retrieve her letter from the outgoing mail box but she was unsuccessful and so she sent a letter to the SST regarding the Appellant's Notice of Intention to Appeal.

[16] It appears that S. S. did, in fact, send correspondence to the SST as she claims because the record includes a letter from the SST Office dated October 14, 2016 and that letter explains that the SST Office was returning documents to the Appellant's representative because the documents did not appear to be an appeal of a reconsideration decision (GD5-30).

[17] Despite the fact that S. S. sent the August 2016 letter to the SST, it is clear from the content of that letter that it was not intended to be an appeal to the SST. Rather, it was a request (albeit a misguided request) to the Respondent to again reconsider its decision. This may explain why S. S. initially sent the letter to the Respondent rather than to the SST. In other words, it would have been reasonable for S. S. to send the letter to the Respondent as the content of the letter was clearly directed at the Respondent and not to the SST. The August 8, 2016 letter states, in part:

...On March 30, 2016, you were provided with a copy of Dr. Breton-Fortin's report and original signed authorization in support of A. C. appeal. We have not heard from you since that time.

On August 3, 2016, during a client status update, A. C. advised us that she had received a denial letter dated April 14, 2016.

She presumed our office was in receipt of this said letter. We were not. It is the first we hear of this denial.

You are well aware that A. C. has retained our services with respect to her appeal. A copy of the CPP disability decision dated April 14, 2016 should have been forwarded to our attention. It was not.

...I fail to see how you could have reconsidered your decision so quickly after having been provided additional information from our office less than ten business days prior to the denial dated April 14, 2016...

A. C. should not be prejudiced by your failure to review all relevant information, nor should she be prejudiced in her right to appeal, due to your failure to notify our firm of your CPP disability decision dated April 14, 2016.

Please confirm that you will review the information provided to you on March 30, 2016 and reconsider your decision.

[18] While the Appellant's representative should have known that the Respondent does not have the statutory authority to reconsider a decision more than once and that the appropriate recourse, if dissatisfied with the Respondent's reconsideration decision, was to appeal to the SST, the fact remains that the letter of August 8, 2016 evidences an intention on the part of the Appellant to pursue *an* appeal in order to obtain the disability benefit. The fact that her representative did not pursue the appeal correctly does not detract from the Appellant's intention to appeal.

[19] While there is evidence of an intention to pursue the appeal as early as August 8, 2016, the Tribunal was not presented with evidence showing the Appellant had a continuing intention to pursue the appeal during her 90 day appeal period (i.e. April 21, 2016 to July 19, 2016). That said, the Appellant was represented throughout that time and may have believed her representative was handling the appeal. Moreover, there was a short amount of time that passed between August 3, 2016 (when the Appellant learned her representative had not received the reconsideration decision) and August 8, 2016 (the appeal letter), which is supportive of the Appellant having maintained an intention to appeal, particularly since the conversation of August 3, 2016 was in relatively close proximity to the end of the Appellant's appeal period.

[20] The Appellant's continuing intention to pursue the appeal in and after August 2016 is evidenced by (1) a letter her representative sent to the SST on October 4, 2016 in which she asked for a response to her letter of August 8, 2016 and in which she indicated she was providing additional medical information; (2) a letter her representative sent to the SST on January 10, 2017 in which she acknowledged having received the SST's letter of October 14, 2016 and in which she said she failed to understand why there is no appeal on file; and (3) the letters the Appellant's representative sent to the SST in February, March and May 2017 which respond to the SST's letters informing the representative that the appeal was incomplete.

[21] The Tribunal finds that the Appellant had a continuing intention to pursue the appeal.

Arguable Case

[22] The Appellant claims that she has been disabled since June 2015 and that the conditions that prevent her from working include fatigue and chronic pain.

[23] On appeal, the Appellant would have to establish a severe and prolonged disability within the meaning of the CPP on or before December 31, 2018, her minimum qualifying period.

[24] The Tribunal is satisfied that there is medical evidence related to the Appellant's medical conditions and that this evidence is relevant to the Appellant's condition in recent years. Based on the Appellant's submissions and the medical evidence on file, there is an arguable case on appeal.

Reasonable Explanation for the Delay

[25] The Appellant's representative initially suggested that the appeal was late because the Respondent did not send her a copy of the reconsideration decision. When she was invited to comment on the fact that the record includes a copy of a letter that the Respondent addressed to her on April 14, 2016 which states that the Respondent was enclosing a copy of the reconsideration decision, the Appellant's representative submitted that she did not receive that letter. She explained that she had conducted a thorough review of all correspondence received and exchanged with Service Canada and the letter is not in the file. She also explained that she reviewed the Appellant's LTD file to ensure the letter was not mis-filed, but she did not see the letter in that file either. She further submitted that she did not learn of the reconsideration decision until August 3, 2016, when she spoke with the Appellant.

[26] It is not clear from the record what prompted the discussion that took place between the Appellant and her representative on August 3, 2016. The Tribunal does not know, for example, whether the Appellant contacted her representative to inquire as to the status of her appeal or whether the representative contacted the Appellant. What is clear though is that, despite having received the reconsideration decision on or about April 21, 2016, the Appellant appears not to have contacted her representative at any time in her appeal period (i.e. before July 19, 2016).

[27] The Appellant's representative submits that it was reasonable for the Appellant to expect that her representative would respond to the reconsideration decision in a timely manner. While it may seem strange that the Appellant would not question why her representative did not contact her to discuss the reconsideration decision and to obtain instructions during her appeal period,

the Tribunal is inclined to accept the argument that the Appellant was simply relying on her representative, and finds that it reasonably explains the delay up to August 8, 2016.

[28] The delay between August 8, 2016 (when the Appellant's representative asked the Respondent to again reconsider its decision) and March 3, 2017 (when the Appellant's representative corrected the Appellant's social insurance number and reiterated the date of the reconsideration decision) is explained by the fact that the Appellant's representative did not pursue the appeal in accordance with the relevant legislation. First, rather than appealing to the SST she first attempted to have the Respondent reconsider its reconsideration decision. Second, it took time for the Appellant's representative to provide the SST Office with all of the information that must accompany a Notice of Appeal. Third, the Appellant's representative appears not to have understood what the SST Office was asking for when it asked for the date the reconsideration decision was communicated to the Appellant. The Tribunal acknowledges that the wording used by the SST Office could have been more clear in that it could simply have asked for the date that the Appellant received the reconsideration decision. In fairness to the SST Office though, the words "the date the decision was communicated to the appellant" are taken directly from subsection 24(1) of the SST Regulations (which is the provision that sets out the information that must be provided with a Notice of Appeal). Had the Appellant's representative looked at section 24 of the SST Regulations she might have realized that the SST Office was clearly asking for more than the date of the reconsideration decision because section 24 also requires that a copy of the reconsideration decision be filed with the Notice of Appeal. The reason why the date the decision was communicated is important is because this information is necessary in order to calculate the date that the 90 day appeal period expires in that the appeal period starts, not with the date of the reconsideration decision, but with the date the Appellant is informed in writing of the reconsideration decision.

[29] The Tribunal finds that the delay between August 8, 2016 and March 3, 2017 has been reasonably explained. The Tribunal acknowledges that the Appellant's representative did not address, in her submissions, the almost two month delay between her letters of March 17, 2017 and May 24, 2017; however, it is apparent from the tone of the representative's correspondence that she believed the outstanding information was trivial and thus she likely did not appreciate

that she was adding to the delay in this matter. In these circumstances, it would be unfair for the Appellant to be prejudiced by the actions (or inactions) of her representative.

Prejudice to the Other Party

[30] The Respondent acknowledged in submissions of July 5, 2017 that the Minister would be able to respond to an appeal and would not be prejudiced if an extension is allowed. The Tribunal, therefore, finds that an extension would not result in any prejudice to the Minister.

CONCLUSION

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

Shannon Russell
Member, General Division - Income Security