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

Citation: *L. S. v. Minister of Employment and Social Development*, 2018 SST 211

Tribunal File Number: AD-16-828

BETWEEN:

L. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jennifer Cleversey-Moffitt

DATE OF DECISION: March 5, 2018

Canada

DECISION AND REASONS

OVERVIEW

[1] The Appellant applied for a Canada Pension Plan disability pension. The Respondent refused the application initially and, in a decision letter dated March 17, 2014, again upon reconsideration. The appeal of the reconsideration decision to the General Division of the Social Security Tribunal was received on December 2, 2015.

[2] The General Division relied on subsection 52(2) of the *Department of Employment and Social Development Act* (DESDA), which states 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." The General Division determined that the Appellant had received the reconsideration decision on March 27, 2014, assuming the decision had been sent by mail and taking judicial notice that mail in Canada is usually received within 10 days. The General Division dismissed the appeal, as it had been brought outside of the one-year limit.

[3] Leave to appeal was granted on June 12, 2017. Upon receipt of submissions from the Respondent, the Respondent agreed that the General Division based its decision on an erroneous finding of fact when it determined that the reconsideration decision was communicated to the Appellant on March 27, 2014.

[4] This appeal proceeded on the record for the following reasons:

a) Pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations*, the Member has determined that no further hearing is required.

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

c) The Respondent agrees that the appeal should be allowed.

ISSUE

[5] According to subsection 58(1) of the DESDA, the only grounds of appeal to the Appeal Division are 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.

[6] Did the General Division base 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, when it determined that the reconsideration decision had been communicated to the Appellant on March 27, 2014, and consequently found that the appeal of the reconsideration decision had been received after the one-year time limit set out in subsection 52(2) of the DESDA?

ANALYSIS

[7] The Appellant's legal representative made the initial request for reconsideration in accordance with subsection 74.1(1) of the *Canada Pension Plan Regulations* (CPP Regulations). He identified himself as the Appellant's legal representative on numerous occasions (letters dated March 27, 2013; June 4, 2013; June 10, 2013; August 9, 2013; November 4, 2013; December 9, 2013; July 21, 2015; August 26, 2015; and October 27, 2015). With respect to subsection 74.1(1) of the CPP Regulations, a representative can make a request for reconsideration. Accordingly, subsection 81(2) of the CPP Regulations indicates that the Respondent must communicate the decision to the party who made the request. In this case, the reconsideration decision was sent directly to the Appellant, not to the representative who made the request for reconsideration.

[8] In submissions dated October 6, 2017, the Respondent agreed that this appeal should be allowed and that the error correctly falls under paragraph 58(1)(*c*) of the DESDA. In support of its position, the Respondent explains:

> The Respondent understands that there is no discretion provided under paragraph 52(2) of the DESDA for application filed one year after the date on which the reconsideration decision was communicated; but submits that in the present appeal the one-year limitation period may be based on an erroneous start date.
>
> The Respondent does not take position at the current time with regards to its obligation to send a copy of the reconsideration decision to the party who made the request; as the grounds giving rise to this appeal are very facts specific and should be limited to the current situation.
>
> In the appeal before us, since a written confirmation that the reconsideration decision would be sent to both the Appellant and his representative was provided; it was reasonable for the Appellant's representative to expect that a copy of the said decision would be sent to him. It should additionally be noted that a copy of the CPP Disability Decision, dated December 3, 2013, was provided to the Appellant's representative (GD2-14). The General Division (GD) failed to consider this information. Furthermore, the GD at paragraph 7 concluded that the reconsideration decision was communicated to the Appellant by March 27, 2014; however there is no evidence of this as confirmed by the GD in paragraph 6.
>
> By denying the extension of time, the GD 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, as there is no clear evidence as to when the reconsideration decision was communicated, affecting the start date of the one-year limitation period.

[9] The Respondent concedes that the reconsideration decision in this case was not properly communicated. The representative identified himself numerous times and the Respondent confirmed it would send him and the Appellant the reconsideration decision, and then failed to send the promised documents to the representative until sometime after October 27, 2015. In particular, in a letter dated December 17, 2013, the Respondent agreed to communicate its decision to both the representative and the Appellant. In its submissions dated October 6, 2017, the Respondent concedes that despite this promise, it did not send the reconsideration decision to the representative for many months. There is a lack of case law addressing the meaning of "communicated" as found in section 52 of the DESDA. However, case law does exist with

respect to subsection 18.1(2) of the *Federal Courts Act* which sets out the time limit to apply for judicial review. Subsection 18.1(2) of the *Federal Courts Act* and section 52 of the DESDA are similarly constructed and in the case of *Bartlett v. Canada (Attorney General)*, 2012 FCA 230, the Federal Court of Appeal has noted that the burden of proving that a decision has been communicated rests with the decision-maker:

> [39] […] In my view, if the February 2, 2009 letter was to be held as the starting point for the appellant to initiate judicial review proceedings, it was then incumbent on the respondent to show that the letter was indeed received by the appellant, i.e. that the Minister's agent effectively communicated the decision to the appellant […] It was not the burden of the appellant to disprove receipt of the alleged decision; the burden was rather on the respondent to establish that it was effectively communicated to the appellant.

[10] The language in the DESDA suggests that the interpretation of "communicated" would require the same treatment as in *Bartlett.* This would mean that the Respondent bears the burden of proving when the reconsideration decision was communicated. In this case, it has not met that burden. The Respondent agreed to send the decision to the representative and did not. In the Respondent's submissions of October 6, 2017, it was agreed that the date the decision was "communicated" was not March 27, 2014, because the Respondent failed to send the reconsideration decision to the representative.

[11] In denying the extension of time, 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. The General Division member failed to consider that the representative made the request for reconsideration and that the Respondent did not send the copy to the representative despite several requests that all communication regarding the Appellant be sent directly to him. The representative sent his last request for a copy of the reconsideration decision in a letter dated October 27, 2015, and the Notice of Appeal of the reconsideration decision was filed on December 2, 2015. Even if the Respondent sent the reconsideration decision on October 27, 2015 (which would be the earliest date possible, given the dates of the letters from the representative), the appeal of the decision was brought to the General Division within 90 days. The General Division failed to consider these two pieces of evidence, which read together support a finding that the reconsideration decision was only communicated sometime between

October 27, 2015, and December 2, 2015. The Respondent has failed to prove that the decision was communicated earlier than October 27, 2015.

[12] The Respondent consents to the appeal being allowed.

CONCLUSION

[13] Having reviewed the parties' submissions and the file, I allow the appeal. In accordance with subsection 59(1) of the DESDA, I find that the appeal of the reconsideration decision was filed with the General Division within the prescribed period of time. It is now for the General Division to render a decision on the merits of the appeal.

Jennifer Cleversey-Moffitt
Member, Appeal Division