



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. O. v Minister of Employment and Social Development*, 2018 SST 1205

Tribunal File Number: GP-17-2057

BETWEEN:

L. O.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Teleconference hearing on: September 27, 2018

Date of decision: October 2, 2018

DECISION

[1] The Appellant does not meet the requirements to have her application for *Canada Pension Plan* (CPP) disability benefits reconsidered.

OVERVIEW

[2] The Appellant is a 61 year old woman who applied for CPP disability benefits in August 2015. The Respondent denied the application in January 2016. The Appellant asked the Respondent to reconsider its decision, but the Respondent refused because the Respondent determined that the Appellant's request was late and the Appellant had not shown that there was a reasonable explanation for the delay and that she had a continuing intention to request a reconsideration. The Appellant appealed the Respondent's decision (to refuse her request for a reconsideration) to the Social Security Tribunal.

ISSUE(S)

[3] I must determine whether the Respondent exercised its discretion judicially when it denied the Appellant's request for a late reconsideration of the decision to deny her application for disability benefits.

ANALYSIS

The Relevant Statutory Provisions

[4] Subsection 81(1) of the CPP states that a person who is dissatisfied with a decision to deny disability benefits 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 in the prescribed form and manner for a reconsideration of that decision.

[5] Subsection 74.1(3) of the CPP Regulations states that for the purposes of subsection 81(1) of the Act and subject to subsection (4), 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.

[6] 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 or if the request for reconsideration is made by a person who has applied again for the same benefit, then the Minister must 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.

[7] Section 82 of the CPP allows a person who is dissatisfied with a decision of the Minister (in relation to further time to request a reconsideration) to appeal that decision to the Tribunal.

The Relevant Jurisprudence

[8] The Respondent's decision to grant or refuse a late reconsideration request is considered a discretionary decision. The Respondent's discretion must be exercised judicially (*Canada (Attorney General) v. Uppal*, 2008 FCA 388). A discretionary power should not be interfered with unless it can be shown that the discretion was exercised in a non-judicial manner or the decision maker acted in a perverse or capricious manner without regard to the material before it. 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

(*Canada (Attorney General) v. Purcell*, [1996] 1 FC 644).

The Relevant Dates

[9] The Respondent's initial decision to deny disability benefits is dated January 22, 2016¹. The Appellant's written request for a reconsideration of that decision is dated April 27, 2017 and her letter was stamped as received by the Respondent on May 1, 2017². The Respondent calculated that the Appellant's request for reconsideration was made 451 days after the date the Appellant received the initial denial letter. In making this calculation, the Respondent determined that the Appellant had received the initial decision by February 1, 2016³.

The Respondent Did Not Exercise Its Discretion Judicially

[10] My role in appeals such as this is not to determine whether the Respondent made the correct determination. Rather, I must decide whether the Respondent exercised its discretion in a judicial manner.

[11] It is apparent to me that, in rendering its decision to refuse the Appellant's late reconsideration request, the Respondent ignored relevant factors and, as a result, I find that the Respondent did not exercise its discretion judicially.

[12] The problem, as I see it, stems from the Respondent's letter of May 25, 2017. In that letter, the Respondent informed the Appellant that her request for reconsideration was late in that her appeal period expired on May 2, 2016. The Respondent also explained that it could consider whether to accept the Appellant's late request for reconsideration but it first needed the Appellant to⁴:

- Provide an explanation for the delay in sending the request;
- Explain how she kept the department informed of her intent to request a reconsideration;
- Explain why she disagrees with the Respondent's decision.

¹ Page GD2-17

² Page GD2-16

³ Page GD2-11

⁴ Pages GD2-14 to GD2-15

[13] While I agree with the Respondent's *general* approach (i.e. to provide the Appellant with the opportunity to give further particulars relevant to the factors set out in subsections 74.1(3) and (4) of the CPP Regulations), I see two problems with the content of the Respondent's letter.

[14] First, the letter does not explain why the Respondent was seeking the information requested. The Respondent did not explain, for example, that the information it was requesting was related to the criteria set out in section 74.1 of the CPP Regulations. The Respondent also did not explain that it could only accept a late reconsideration request if each of four criteria is met. Without this explanation, a recipient of this letter might think that he or she need only address one of the factors. Indeed, in this case, the Appellant only addressed the first factor (i.e. the explanation for the delay).

[15] Second, the Respondent did not accurately explain the continued intention factor. Subsection 74.1(3) of the CPP Regulations requires that the Minister be satisfied that the person demonstrated a continuing intention to request a reconsideration. The legislation does not specifically require the person to have kept the department informed of her intent to request a reconsideration.

[16] It is apparent to me that when the Respondent issued its decision of June 22, 2017⁵ (to refuse the late reconsideration request) it did not consider the two problems with the letter of May 25, 2017 and thus the Respondent ignored relevant factors when it made its decision.

[17] I would add that in its decision letter of June 22, 2017 the Respondent provided the Appellant with confusing and inaccurate information. For example, the Respondent said that the Appellant's request for reconsideration was received 451 days after the initial denial (which is accurate). However, the Respondent then went on to say that the request was received "within the 365 day period" (which is not accurate). As another example, the Respondent said that, because the Appellant's request was received "within the 365 day period", two of the four criteria set out in section 74.1 of the CPP Regulations had to be met. The reason this is not accurate is because the Appellant's request was in fact made more than one year after she received the initial denial letter and, therefore, she was required to show that all four of the

⁵ Pages GD2-9 to GD2-12

criteria set out in section 74.1 of the CPP Regulations was met. As a final example, the Respondent said that it assessed the four criteria (not just two) and “will extend” the reconsideration time limit. Clearly, the Respondent omitted the word “not”⁶.

The Appellant Does Not Meet the Requirements for a Late Reconsideration

[18] Having found that the Respondent did not exercise its discretion judicially, I must now decide whether the Appellant has satisfied each of the four factors set out in subsections 74.1(3) and (4) of the CPP Regulations.

[19] Dealing first with the explanation for delay, the Appellant explained in her request for reconsideration that she had been very ill in the past 6-8 weeks⁷. In her subsequent letter of May 30, 2017 she explained that she was diagnosed with non-hodgkin’s lymphoma two weeks ago and that she has been very sick. During the hearing, I asked the Appellant to elaborate on her response and she said that in October 2016 she came down with a severe case of shingles and that it was almost a year before she was even able to get out of the house (aside from going to see her doctor). She also confirmed that she was still dealing with the shingles at the time she wrote her letter of May 30, 2017. When I asked if there was anything else that contributed to the delay in requesting the reconsideration, the Appellant said that she sprained her ankle two weeks before the shingles started and that she also had ongoing pain in her hip, knee, wrist and back.

[20] I acknowledge that in the spring of 2017 the Appellant was diagnosed with non-hodgkin’s lymphoma. As for the shingles, the evidence is conflicting. On the one hand, the Appellant testified that she came down with shingles in October 2016 and that she was still dealing with shingles when she wrote her letter of May 30, 2017. On the other hand, the Appellant attached a letter with her Notice of Appeal and in that letter she indicated that she came down with shingles in October 2014⁸. Whether the shingles started in October 2014 or October 2016 is not critical to this appeal because even if the shingles started in October 2016, there is still a significant portion of the delay that has not been reasonably explained. More specifically, the period from May 1, 2016 (when the Appellant’s 90 day appeal period expired)

⁶ Page GD2-12

⁷ Page GD2-16

⁸ Page GD1-6

to the fall of 2016 is a period of about 5 months and this delay has not been reasonably explained. I accept that the Appellant would have been dealing with the medical conditions that prompted her to apply for the disability benefits, but there is nothing in the evidence to suggest that these conditions would have prevented her from requesting a timely reconsideration. For these reasons, I find that the Appellant has not provided a reasonable explanation for requesting a longer period to appeal.

[21] I next considered whether the Appellant demonstrated a continuing intention to request a reconsideration. The Appellant did not address this factor in her appeal correspondence. However, I asked her about it during the hearing and, specifically, I asked her if she remembers doing anything during the period up to April 2017 (when she requested a late reconsideration) that would demonstrate a continuing intention to appeal, and she said she could not recall anything. I have read the appeal file in its entirety and I am unable to identify anything obvious from the record that would demonstrate the Appellant's continued intention to pursue the appeal. I, therefore, find that the Appellant did not demonstrate a continuing intention to request a reconsideration.

[22] The third factor is whether the request for reconsideration has a reasonable chance of success. I accept that the Appellant's appeal gave rise to a reasonable chance of success. Her Minimum Qualifying Period (MQP) is December 2012 and there is medical evidence on file that is relevant to her disability in and around that date.

[23] The fourth factor is whether prejudice would be caused to the Respondent if the late reconsideration request were allowed. The Respondent has not raised any arguments indicating that it would be prejudiced and, as such, I find that granting the late reconsideration request would not result in prejudice to the Respondent.

[24] Although the Appellant has satisfied two of the criteria that are necessary for a late reconsideration request to be accepted, the legislation is clear that, to be successful, she needed to have satisfied each of the four criteria set out in subsections 74.1(3) and (4) of the CPP Regulations. She has not done so. The Appellant is, therefore, not eligible to have her application reconsidered.

CONCLUSION

[25] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security