



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. A. v Minister of Employment and Social Development*, 2018 SST 1348

Tribunal File Number: GP-17-2568

BETWEEN:

S. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Adam Picotte

Claimant represented by: Heather Brownhill

Date of decision: December 11, 2018

DECISION

[1] I allow the Claimant a longer period to request reconsideration so the Minister is to reconsider the decision of January 19, 2017.

OVERVIEW

[2] The Claimant has a long history of cognitive impairments and chronic pain. In August 2014 she stopped working for the federal government. She then applied for and was accepted onto long term disability benefits through a private insurance company. On September 29, 2016, the Claimant submitted an application for a CPP disability pension.

[3] On January 19, 2017 the Minister denied the application for a disability pension. The Claimant had 90 days to request reconsideration but she was late doing so. The Claimant's request for a reconsideration decision was date stamped as received by the Minister on May 23, 2017.

[4] The Minister denied the Claimant's request for a longer period of time to request a reconsideration decision. The Minister determined that the Claimant did not have a reasonable explanation for requesting a longer period for reconsideration and that the Claimant did not demonstrate a continuing intention to request reconsideration. The Claimant now appeals the Minister's decision to the Social Security Tribunal.

ISSUE(S)

[5] Was the Minister's discretion exercised judicially in finding that the Claimant did not have a reasonable explanation for requesting a longer period for reconsideration?

[6] If so, was the Minister's discretion exercised judicially in finding that the Claimant did not demonstrate a continuing intention to request reconsideration?

[7] If the Minister's discretion was not exercised judicially, did the Claimant have a reasonable explanation and continuing intention to allow me to grant a longer period for reconsideration?

ANALYSIS

[8] When the Claimant received the Minister's decision to deny her application, she had 90 days to request reconsideration.¹ Since she made her request outside of the 90 days, the Minister had the discretion to allow a longer period for her to request reconsideration. To allow a longer period, the Minister must be satisfied that there is a reasonable explanation for the delay in requesting reconsideration and the Claimant demonstrated a continuing intention to request reconsideration.²

[9] The Minister's decision to grant or refuse a late reconsideration request is discretionary and must be exercised judicially.³ A discretionary power is not exercised "judicially" if the decision-maker

- a) Acted in bad faith;
- b) Acted for an improper purpose or motive;
- c) Took into account an irrelevant factor;
- d) Ignored a relevant factor; or,
- e) Acted in a discriminatory manner.⁴

[10] My role is not to determine whether the Minister made the correct determination but rather whether the discretion was exercised in a judicial manner.

Was the Minister's discretion exercised judicially in deciding whether the Claimant had a reasonable explanation for requesting a longer period of time?

[11] I have determined that the Minister did not exercise her discretion judicially in deciding that the Claimant did not have a reasonable explanation for requesting a longer period of time.

¹ Section 81 *Canada Pension Plan*

² Section 74.1(3) *Canada Pension Plan Regulations*

³ *Canada (A.G.) v. Uppal* 2008 FCA 388

⁴ *Canada (A.G.) v. Purcell*, 1995 CanLii 3558 (FCA), [1996] 1 FCR 644

[12] The Claimant wrote in her request for a reconsideration decision that she had attempted to find assistance from a representative and that she had cognitive impairments including difficulty concentrating.⁵ She stated that because of these factors she was not able to request a reconsideration decision within 90 days of receiving the initial decision.

[13] In rejecting her request, the Minister relied on medical evidence to find the Claimant had not demonstrated a reasonable explanation for the delay. The Minister wrote that two neuropsychological assessments done in 2013 and 2014 cited a few cognitive issues but also noted considerable strengths that would benefit from occupational therapy. The Minister also noted that the Claimant continued to work after the reports and was able to apply for disability benefits in September 2016. The Minister further noted that the medical reports from the family physician did not indicate a severe cognitive condition that would also support an exceptional or extenuating memory issue that would prevent the Claimant from requesting a reconsideration decision in time.⁶

[14] However, the evidence in the file shows that the Claimant had stopped working in her own occupation before the second neuropsychological assessment was completed in 2014. She had attempted some sporadic self-employment after 2014 and had been in an accommodated position through her employer.⁷ However, the extent of accommodations and the impact of her cognitive ability in functioning in these positions were not taken into consideration by the Minister.

[15] In addition, the Minister set out that the medical report from the family physician did not indicate a severe cognitive condition. While it is true that the medical report did not indicate a severe cognitive issue, several chart notes attached with the medical report indicate cognitive issues. A chart note from January 19, 2016 details that the Claimant had cognitive impairments following excessive use of narcotics post operatively and that these impairments had resulted in the Claimant being disabled from working at the X.⁸ An assessment note from June 17, 2016 also notes that the Claimant had a cognitive impairment flowing from a not yet diagnosed medical

⁵ GD2-6

⁶ GD2-51

⁷ GD2-86

⁸ GD2-64

condition.⁹ The Minister relied upon the medical report from the family physician but did not consider the chart notes. I am satisfied that, by not considering the chart notes and relying solely on the medical report the Minister ignored relevant factors.

[16] The Minister found the reasons provided by the Claimant did not support an exceptional or extenuating circumstance that would have prevented her from requesting reconsideration in time. The relevant test is whether there is a reasonable explanation for requesting a long period.¹⁰ The terms exceptional and extenuating are not synonymous with reasonable. The former two terms invite a higher or more demanding inquiry than that of reasonableness. As such the Minister has mischaracterized the legislative requirement and has therefore considered an irrelevant factor in the analysis.

[17] For these reasons I find that the Minister's discretion was not exercised judicially in respect of whether the Claimant had a reasonable explanation for requesting a longer period of time to request a reconsideration decision.

Was the Minister's discretion exercised judicially in deciding whether the Claimant had a continuing intention to request her reconsideration decision?

[18] I have determined that the Minister did not exercise her discretion judicially in deciding that the Claimant did not have a continuing intention to request her reconsideration decision.

[19] The Minister found that, according to the communication tracking system within the CPP disability department, the Claimant did not attempt to contact the department at any time prior to April 28, 2017. She did not inquire or report intent to appeal the January 19, 2017 decision.

[20] The Claimant stated in her request for reconsideration that she had attempted to obtain assistance in filling out her request for reconsideration but was unable to find anyone who would be able to assist her.¹¹ This assertion is suggestive of a continuing intention to pursue the appeal but the Minister did not deal with this in the analysis. I am satisfied that in not doing so the Minister ignored a relevant factor.

⁹ GD2-60

¹⁰ Section 74.1(3) *Canada Pension Plan Regulations*

¹¹ Gd2-6

[21] As I have already detailed, there is a significant amount of information on file addressing the Claimant's cognitive impairments. The Claimant asserted throughout her request for a late reconsideration that her cognitive impairments affected her ability to request a reconsideration decision. These cognitive impairments have a direct bearing on the Claimant's ability to demonstrate a continuing intention to pursue the reconsideration. However, this factor was not considered by the Minister. I am satisfied that in not considering this information the Minister ignored a relevant factor.

[22] For these reasons I find that the Minister's discretion was not exercised judicially in respect of whether the Claimant had a continuing intention to pursue the reconsideration.

Did the Claimant have a reasonable explanation and continuing intention to allow me to grant a longer period for reconsideration?

[23] I find that the Claimant had a reasonable explanation and a continuing intention and is therefore granted a longer period for reconsideration.

[24] The Claimant explained that she had cognitive impairments including a lack of memory and as such she sought assistance in filing out the request for reconsideration. She was unable to find assistance and because of her poor memory and difficulty with concentration she ended up waiting longer than 90 days to submit her request.¹² I find that these reasons are supported by the medical information on file. Moreover, the reasons demonstrate both a reasonable explanation and a continuing intention to pursue the request for reconsideration.

CONCLUSION

[25] I have determined that the Minister's discretion was not exercised judicially. I have also determined that the Claimant had both a reasonable explanation for requesting a longer period and a continuing intention. Having made this determination I allow the appeal and allow a longer period of time for the Claimant to request reconsideration. The Minister will reconsider the decision.

¹² GD2-6

[26] The appeal is allowed.

Adam Picotte
Member, General Division - Income Security