



Citation: *G. L. v Minister of Employment and Social Development*, 2019 SST 411

Tribunal File Number: GP-18-1722

BETWEEN:

**G. L.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Raymond Raphael

Claimant represented by: Daniel Jukes

Minister represented by: Heather Carr

Teleconference hearing on: December 3, 2018 and February 3, 2019

Date of decision: March 21, 2019

## DECISION

[1] The time for the Claimant to ask for reconsideration of the Minister's decision denying him a disability pension cannot be extended.

## OVERVIEW

[2] The Claimant is appealing the Minister's refusal to extend the time for him to ask for reconsideration of the Minister's decision denying his application for a *Canada Pension Plan* (CPP) disability pension.

[3] A chronology of the most significant events is set out below:

- August 2005: The Claimant was injured in a workplace accident. He suffered a serious neck injury that led to permanent loss of the use of his left hand and limited use of his right hand.
- December 23, 2008: The Minister received the Claimant's application for a CPP disability pension. The Claimant stated that he was unable to work because of his injuries from the workplace accident.<sup>1</sup>
- February 24, 2009: Telephone call between medical adjudicator and Claimant.<sup>2</sup> The Claimant states that the medical adjudicator told him at that time that the CPP had to defer to the Worker's Compensation Board (WCB), that he should come back with the results of his WCB appeal, and that his application would be put on hold pending his WCB appeal. The Minister denies these statements were made.
- February 24, 2009: Minister's letter denying the Claimant's application.<sup>3</sup> The Claimant denies receiving this letter and states that he received only instruction sheets titled "How to Ask Canada Pension Plan (CPP) to Reconsider Its Decision".<sup>4</sup> The Minister takes the position that both the letter and instruction sheet were mailed to the Claimant.
- June 17, 2013: Minister received letter from Claimant's lawyer requesting reconsideration of decision denying the Claimant a CPP disability pension.<sup>5</sup>

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<sup>1</sup> GD3-69

<sup>2</sup> GD3-60 and GD3-114

<sup>3</sup> GD3-61 to 63

<sup>4</sup> IS9-5 to 10

<sup>5</sup> GD3-24 to 27

- December 17, 2013: Letter from Service Canada to Claimant's lawyer asking for explanation for the Claimant's delay in requesting reconsideration and evidence he had a continuing intention to make such a request.<sup>6</sup>
- January 8, 2014: Letter from Claimant's lawyer to Service Canada setting out reasons for delay in requesting reconsideration.<sup>7</sup>
- March 26, 2014: Minister refuses to accept the Claimant's late request for reconsideration.<sup>8</sup>
- June 5, 2014: The Claimant appeals to the Social Security Tribunal.
- June 28, 2016: The General Division dismisses the appeal.
- June 16, 2017: The Appeal Division refuses the Claimant's application for leave to appeal.
- May 3, 2018: The Federal Court allows the Claimant's application for judicial review and refers this matter back to the Appeal Division for redetermination.
- June 18, 2018: The Appeal Division allows the Claimant's application for leave to appeal.
- July 25, 2018: The Appeal Division allows the Claimant's appeal and refers this matter back to the General Division for a new hearing.

## **ISSUES**

1. Did the Minister mail the February 24, 2009 letter denying the Claimant's disability application?
2. If the Minister mailed the letter, did it exercise its discretion judicially when it refused to extend the time for the Claimant to request reconsideration?
3. If not, can I extend the time for the Claimant to do so?

## **ANALYSIS**

***Did the Minister mail the February 24, 2009 letter to the Claimant?***

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<sup>6</sup> GD3-12 to 13

<sup>7</sup> GD3-9 to 11

<sup>8</sup> GD3-7

[4] I must initially determine whether the Minister mailed the February 24, 2009 denial letter to the Claimant.

[5] The Claimant had 90 days to request consideration after he was notified of the decision in the prescribed manner.<sup>9</sup> Notification in the prescribed manner must be in writing and sent by the Minister.<sup>10</sup>

[6] If the Minister did not mail the letter, the Claimant's request for reconsideration was not late since the ninety day period for requesting reconsideration had not started. The Minister would be obligated to consider his request for reconsideration on the merits.

[7] The issue as to whether the Claimant received the denial letter was first raised as a legal issue at the hearing on December 3, 2018. I directed the Claimant to file a copy of the instruction sheet he received. I also directed both parties to file submissions on this issue. After the parties filed these submissions, the Claimant requested a further oral hearing. The continued hearing took place on February 13, 2019.

[8] The Claimant stated that after his February 24, 2009 telephone conversation with the medical adjudicator he received the instruction sheet in the mail on how to ask for a reconsideration<sup>11</sup>, but he did not receive a letter. Since the instruction sheet was "in line" with what he had been told in the telephone conversation he "just" put it in his file.

[9] Mr. Jukes stated that both he and the Claimant did not realize the potential legal implications of the Claimant not having received the denial letter, until the Claimant produced the information sheet at the December 3, 2018 hearing. This had, however, been previously raised as a factual issue. Mr. Jukes' January 2014 letter to Service Canada stated that after being informed by telephone his application was being denied, the Claimant received a letter "advising of the appeal process, but the substance of the decision was received via telephone"<sup>12</sup>. The Claimant's request for leave to appeal to the Appeal Division stated that the Claimant received a

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<sup>9</sup> Section 81(1) of the CPP.

<sup>10</sup> Section 74.2 of the CPP Regulations

<sup>11</sup> IS9-4 to 9

<sup>12</sup> GD3-10

“letter setting out the appeal process, but the correspondence received did not contain written reasons.<sup>13</sup>

[10] Ms. Carr submitted that the Claimant could not have received only the instruction sheet since it does not contain a mailing address. Under standard departmental practice, CPP denial letters are sent on official government letterhead and the letter systematically generates data for the individual’s name, address and social security number. The instruction sheet presented by the Claimant shows his social security number in the bottom left corner, which means that the letter and instruction letter were printed at the same time. The Claimant could not have received only the instruction sheet since it did not contain an address. The mailroom could not have known to whom to mail it. Canada Post could not have delivered it because the Claimant’s name and mailing address could not have been on the envelope.

[11] The Minister must establish on the balance or probabilities (more likely than not) that the denial letter was mailed to the Claimant.

[12] I am satisfied that the Claimant genuinely believes at this point that he did not receive the letter, but we are now more than 10 years since the denial letter. He may have found only the instruction sheet in his file when the January 2014 letter was sent to Service Canada, but this does not mean that the letter itself was not inadvertently misplaced. I recognize that it is possible that there was a mistake in the mailing room and somehow the letter and instruction sheet were separated. But this does not explain how the mailing room would have been able to prepare an envelope with the Claimant’s name and address. A possibility is not a probability.

[13] I find that it is more likely than not that both the letter and instruction sheet were mailed to the Claimant, and that he misplaced the letter.

***Did the Minister exercise its discretion judicially?***

[14] Since I have determined that the decision letter was mailed to the Claimant, I must determine if the Minister exercised its discretion judicially when it refused to extend the time for the Claimant to request reconsideration.

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<sup>13</sup> AD1-11

[15] The decision by the Minister to grant or refuse a late reconsideration request is a discretionary decision. The Minister's discretion must be exercised judicially.<sup>14</sup>

[16] 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.<sup>15</sup>

[17] It is not my role to determine if the Minister made the correct determination. My role is to determine whether it exercised its discretion in a judicial manner. The Claimant has the burden of proof to establish that the Minister failed to do so.

[18] The decision letter was mailed the Claimant on February 24, 2009. Mail in Canada is usually received within 10 days. I therefore find that the decision was communicated to the Claimant by March 6, 2009. He had until June 4, 2009 to request reconsideration. The Minister did not receive the reconsideration request until June 17, 2013.

[19] Because the Claimant did not request reconsideration until June 17, 2013 the Minister may only allow a longer period to request the reconsideration if satisfied that 1) there is a reasonable explanation for requesting a longer period, 2) the Claimant has demonstrated a continuing intention to request reconsideration, 3) the request for reconsideration has a reasonable chance of success, and 4) no prejudice would be caused to the Minister or a party by allowing a longer period for making the request.<sup>16</sup>

[20] All four factors must be met.<sup>17</sup>

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<sup>14</sup> *Canada (A.G.) v Uppal* 2008 FCA 388

<sup>15</sup> *Canada (A.G.) v. Purcell*, [1996] 1 FCR 644

<sup>16</sup> Subsections 74.1(3) and 74.1(4) of the CPP Regulations

<sup>17</sup> *Lazure v Attorney General of Canada* 2018 FC 467, paragraph 25

[21] The Claimant states that he relied on the statements made by the medical adjudicator in their February 24, 2009 telephone conversation: the medical adjudicator told him that the CPP had to defer to the WCB, that he should come back with the results of his WCB appeal, and that his application would be put on hold pending his WCB appeal. Because of these statements, he did not request reconsideration until after a WCB Medical Panel discredited the medical opinion that the WCB previously relied on. After the Medical Panel decision, the WCB acknowledged that he could not work as a security guard and was unable to find a vocation suitable to his limitations.

[22] The Minister found that the Claimant had a reasonable chance of success. However, it determined that there was no reasonable explanation for the delay, that there was no continuing intention to appeal, and that an extension would result in prejudice to the Minister since there had been a delay of over four years.<sup>18</sup>

[23] The Minister failed to act in a judicial manner when it determined that an extension would result in prejudice to the Minister. It did not ask for submissions on this in its December 17, 2013 letter to the Claimant's lawyer and there is no explanation for this finding in its decision. It stated that there had been a four-year delay, but did not address whether the Minister had been prejudiced by the delay. There is no evidence that the file had been lost or destroyed, or that the Minister has been prejudiced in some other manner.

[24] The Minister also failed to act in a judicial manner when it determined that there was no reasonable explanation for delay and there had not been a continuing intention to request a reconsideration. The Minister reviewed in detail the relevant correspondence, the telephone contact records, and the Client View file (which records all contacts with the Claimant). However, it did not properly consider the Claimant's position that the delay in requesting reconsideration was because of verbal statements made to him by the medical adjudicator. It merely stated that there is no record of such a conversation in their records. Since the Minister did not assess the credibility and potential significance of the Claimant's position, it failed to consider a relevant factor.

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<sup>18</sup> GD1-12 to 14

[25] I find that the Minister's discretion was not exercised judicially.

***Can I extend the time for filing the reconsideration request?***

[26] Since I have found that the Minister failed to exercise its discretion in a judicial manner, I must determine whether I can extend the time for filing the reconsideration request.

[27] There is no issue as to the Claimant's request for reconsideration having a reasonable chance of success. In addition, there is no evidence of any prejudice to the Minister if I extend the time for filing the reconsideration request.

[28] The issues as to whether there was a reasonable explanation for delay and a continuing intention to appeal are in this case intertwined. The Claimant's position is that there is a reasonable explanation for delay because of verbal statements made to him in the February 24, 2009 telephone conversation: the CPP defers to the WCB, his CPP disability application would be put on hold pending the results of his WCB appeal, and he should come back after his WCB issues were resolved. If the Claimant delayed requesting a reconsideration because of verbal statements by the medical adjudicator that he should come back after the WCB issues were resolved, he would have had a continuing intention to appeal once his WCB issues had been resolved.

[29] In considering these factors, I have to make a credibility determination as to whether the medical adjudicator actually made the verbal statements alleged by the Claimant. I am satisfied from his demeanour that the Claimant was an honest witness and that he now genuinely believes that these statements were made.

[30] But demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency, and consistency with contemporaneous and undisputed documents. I have determined that the Claimant's position the medical adjudicator made the statements is not credible for the following reasons:

- First, it lacks the ring of truth. I accept Ms. Carr's position that the CPP does not defer to the WCB and it is not CPP practice to defer requests for an indefinite



period pending the resolution of a Claimant's WCB issues. I find it difficult to envision that a medical adjudicator would on her own initiative make statements that clearly conflict with established CPP law and procedures. She would have had no reason to do so.

- Second, the contemporaneous records make no mention of these statements. There is no mention of them in the telephone record of the conversation or in the letter that was sent out that day. If the medical adjudicator made the alleged statements, she would likely have made some notation of them in both the telephone record and decision letter. She had no reason not to do so.
- Third, the instruction sheet that the Claimant acknowledges having received stated that a request for reconsideration must be made within 90 days of receipt of the decision. It also stated the Claimant should not wait to send in his request, even if he was waiting for more information.<sup>19</sup> Even though this conflicts with the statements allegedly made by the medical adjudicator, the Claimant made no inquiries to clear up the conflict.
- Fourth, even though the Claimant retained a lawyer in the spring of 2009, he apparently had no discussions with his lawyer about the alleged statements until after requesting the reconsideration in June 2013. When asked at the hearing whether he told his lawyer about the statements he stated, "I believe I told my lawyer that I have to go through with my WCB claim because all my other claims depend on the WCB claim...I can't say I mentioned the CPP claim to my lawyer."<sup>20</sup> His lawyer did not contact Service Canada to confirm the statements and there is no reference to the statements in the detailed June 2013 letter requesting reconsideration.

[31] Since I have found the Claimant's position that the medical adjudicator made the alleged statements is not credible, there is no reasonable explanation for the delay. Since there is no evidence of any contact between the Claimant and the Minister between the February 24, 2009 decision letter and the June 2013 request for reconsideration, there is no credible evidence of a continuing intent to appeal.

[32] I find that the Claimant has failed to establish, on the balance of probabilities, a reasonable explanation for the delay and a continuing intention to appeal. Since he must establish all four factors, I cannot extend the time for filing the reconsideration request.

## CONCLUSION

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<sup>19</sup> IS9-5

<sup>20</sup> The Claimant testified that he also had outstanding Long Term Disability and Human Rights claims.

[33] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security