



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. H. v Minister of Employment and Social Development*, 2020 SST 102

Tribunal File Number: AD-19-809

BETWEEN:

T. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time Kate Sellar
by:

Date of Decision: February 11, 2020

DECISION AND REASONS

DECISION

[1] An extension of time for permission to appeal is refused. There is no arguable case that the General Division made an error so the appeal does not have a reasonable chance of success. I will not extend the time for the Claimant to appeal.

OVERVIEW

[2] T. H. (Claimant) applied for a disability pension on May 5, 2017. He stated that he was unable to work because he had a grand mal seizure. The Minister denied the application on July 12, 2017. The Claimant requested reconsideration of that decision on March 2, 2018. That request was late: it was after the 90-day time limit for making that kind of request.¹

[3] The Claimant appealed to this Tribunal. The General Division decided that the Minister made its choice (exercised its discretion) judicially when it refused to extend the time for the Claimant to request reconsideration. The General Division dismissed the Claimant's appeal on May 9, 2019.

[4] The Claimant asked for permission (leave) to appeal the General Division's decision to the Appeal Division on November 19, 2019.² I must decide whether the application for permission to appeal the General Division's decision is also late. If it is late, I must decide whether I can consider granting an extension of time to appeal the General Division decision. If I can consider granting that extension of time, I must decide whether the Claimant meets the test for receiving the extension.

[5] I find that the application for permission to appeal the General Division's decision is late. However, it is not more than a year late, so I can consider whether to grant an extension of time for the appeal.

¹ *Canada Pension Plan*, s 81(1).

² AD1.

[6] The Claimant does not meet the test for receiving an extension of time to appeal the General Division's decision. It is not in the interests of justice to allow this case, which has no reasonable chance of success, to continue. There is no arguable case that the General Division made an error when it decided that the Minister acted judicially when it refused an extension of time for the Claimant to request reconsideration. I will not extend the time for appealing the General Division decision.

PRELIMINARY MATTERS

[7] The Claimant provided the Appeal Division with new evidence.

[8] Generally speaking, the Appeal Division does not consider new evidence on a leave to appeal application.³ There are some exceptions to that rule. None of those exceptions apply in this case. I will not consider the new evidence.

ISSUES

[9] The issues are:

1. Is the Claimant's application for leave to appeal late? If it is late, can I consider granting an extension of time for the appeal of the General Division's decision?
2. Does the Claimant meet the legal test for receiving an extension of time on the appeal of the General Division's decision?

ANALYSIS

Late Requests to the Minister for Reconsideration

[10] Claimants have 90 days from when the Minister communicates the initial decision to ask the Minister to reconsider.⁴ When a request for reconsideration is late, the Minister must decide whether to grant the Claimant an extension. The law says that the Minister "may" extend the

³ The Federal Court explains this in a case called *Parchment v Canada*, 2017 FC 354.

⁴ *Canada Pension Plan*, s 81(1).

time. That means that the decision to extend time is a choice (a matter of discretion) that the Minister makes.⁵

[11] To receive an extension of time to file the reconsideration request, the Claimant has to show: (a) that there is a reasonable explanation for requesting a longer period, and (b) a continuing intention to request reconsideration.⁶ The Claimant must meet both of these factors.⁷

[12] The Minister must exercise the choice to extend the time judicially. The Minister is not acting judicially if it acts in bad faith, acts for an improper purpose or motive, takes into account an irrelevant factor, or acts in a discriminatory way.⁸

Late Appeals to the Appeal Division

[13] Claimants have 90 days from when the Tribunal communicates the General Division decision to ask for permission to appeal to the Appeal Division.⁹

[14] The Appeal Division may allow further time to make an application for leave to appeal. However, an applicant may not, in any case, make an application more than a year after the day on which the Tribunal communicates the decision to the applicant.¹⁰

[15] A decision from the General Division is presumed (deemed) to have been received 10 calendar days after it is mailed to the parties.¹¹ Claimants can overcome that presumption with evidence about when they actually received the decision.

Is the Claimant's application for permission to appeal the General Division decision late?

[16] The application for permission to appeal the General Division decision is late. The Appeal Division does have the ability to consider granting an extension of time because the

⁵ *CPP Regulations*, s 74.1(3).

⁶ *CPP Regulations*, s 74.1(3).

⁷ The case that confirms that the Claimant needs to meet both parts of the test is *Lazure v Canada (Attorney General)*, 2018 FC 467. There are two more factors that apply if the application is more than a year late, but the General Division did not consider them here, presumably because the Claimant did not meet the first two parts of the test.

⁸ The Federal Court explained this in a case called *Canada (Attorney General) v Purcell*, 1996 1 FC 644.

⁹ *DESDA*, s 57(1)(b).

¹⁰ *DESDA*, s 57(2).

¹¹ *Social Security Tribunal Regulations*, s 19(1)(a).

Claimant filed the appeal within a year of when I deem the Tribunal communicated the decision to him.

[17] The decision from the General Division is dated May 9, 2019. Ten days after May 9, 2019 was Sunday May 19, 2019. The next day, May 20, 2019, was a statutory holiday. I deem the Claimant to have received the decision on Tuesday May 21, 2019. The Claimant appealed to the Appeal Division on November 19, 2019.¹² The Claimant is past the 90-day deadline and is late.

Can I consider giving an extension to the Claimant to appeal?

[18] Although the Claimant was more than 90 days late, I find that the Claimant filed his application for leave to appeal within the one-year limit. This means that I can consider extending the time for making the application for leave to appeal.

Does the Claimant meet the legal test for an extension of time?

[19] The Claimant does not meet the legal test for receiving an extension of time.

[20] There are four questions the Appeal Division must ask in order to decide whether to grant an extension of time to appeal a General Division decision. They are:

- a) Was there was a continuing intention to pursue the application?
- b) Does the matter disclose an arguable case?
- c) Is there a reasonable explanation for the delay?
- d) Is there a prejudice to the other party in allowing the extension?¹³

[21] The weight the Appeal Division needs to give to the answers to each of these questions may be different depending on the case. In some cases, different factors will be relevant. The overriding consideration is that the Appeal Division serve the interests of justice.¹⁴

¹² AD1.

¹³ The Federal Court outlined this test in a case called *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 833.

¹⁴ The Federal Court of Appeal outlined this test in a case called *Canada (Attorney General) v Larkman*, 2012 FCA 204.

[22] The Tribunal wrote to the Claimant asking him for information that would help the Appeal Division to answer these four questions. The Claimant provided a brief explanation for why he was late at the Appeal Division level.

Was there a continuing intention to pursue the application?

[23] The Claimant has not shown a continuing intention to pursue the application by the 90-day mark and continuously thereafter.

[24] A claimant is to pursue the appeal as diligently as can reasonably be expected.¹⁵ I do not have any arguments from the Claimant or records in the file that would lead me to conclude that the Claimant showed the Tribunal that he had an intention to bring the application by the 90-day mark and continuously thereafter.

Does the Claimant have an arguable case?

[25] The Claimant does not have an arguable case for an error by the General Division.

[26] According to the *Department of Employment and Social Development Act* (DESDA), there are three types of errors that the Appeal Division can address on appeal. If the General Division fails to provide a fair process, that is one possible reason for appeal. The Appeal Division can also fix errors of fact or errors of law by the General Division.¹⁶

[27] In cases where the Claimant asks for an extension of time at the Appeal Division, an arguable case means that there needs to be some reasonable chance of success.¹⁷ This is a low test to meet.

[28] The General Division decided that the Minister acted judicially when it refused to grant an extension of time for the Claimant to request reconsideration. The Claimant has not raised an arguable case for an error in the General Division decision.

¹⁵ The Federal Court explained this in a case called *Caisse Populaire Desjardins Maniwaki v Canada (Attorney General)*, 2003 FC 1165.

¹⁶ DESDA, s 58(1)(a) through (c).

¹⁷ The Federal Court of Appeal explained this in a case called *McKinney v Canada*, 2008 FCA 409.

[29] The Claimant's appeal to the Appeal Division seems to focus on why he should receive benefits.¹⁸ The Appeal Division's job is to decide whether there is an arguable case that the General Division made an error. The General Division decided that the Minister acted judicially when it decided not to extend the time for the Claimant's appeal to the General Division (which was over a year late). The General Division considered the legal test and applied it to the facts. The General Division considered the Claimant's evidence that he did not think he would be off work for a long period, that he visited a Service Canada location to find out about how to appeal and that he eventually did so. The General Division concluded that the Minister acted judicially when it decided that extenuating circumstances did not cause the delay. The General Division noted that there were no documents on file that showed a continuing intention to appeal from the time the Claimant got the denial letter to when he requested reconsideration.¹⁹

[30] In my view, the Claimant does not have an arguable case on appeal. The Claimant has not raised (and I do not see) any arguable case for an error of law or an error of fact in the General Division decision. The Claimant has not raised any concern about fair process at the General Division level either.

[31] There is no arguable case that the General Division made any error under the DESDA when it decided that the Minister acted judicially by refusing to extend the time for requesting reconsideration.

Is there a reasonable explanation for the delay?

[32] The Claimant explained the delay at the Appeal Division. He says that he had been hoping to get back to work and that the last three years have been very difficult on him and on his wife.

[33] There is no doubt that the Claimant has not been well. I understand that the Claimant has had legitimate challenges in completing paperwork, including his appeal to the Appeal Division. However, he has been able to participate to some extent in the Tribunal's processes, and has had some help from his wife. While there is nothing wrong with the Claimant having held out hope

¹⁸ AD1-2.

¹⁹ General Division decision, paras 15-18.

that he would return to work, he has not provided an explanation for the delay that is reasonable in the circumstances.

Is there prejudice to the Minister in allowing the extension?

[34] There is no prejudice to the Minister in allowing the Claimant an extension of time. If I gave the Claimant the extension of time, the Minister would have the ability to argue the case, even though many months have passed since the General Division hearing.

Extension of time is refused

[35] Having considered all four of the relevant questions, I refuse to give an extension of time for the Claimant to appeal the General Division decision.

[36] The Claimant was not able to show a continuing intention to appeal. The Claimant explained the delay, but it was not reasonable in the circumstances. The Claimant does not have an arguable case for an error. The lack of an arguable case is the most important factor here. Even though there is no prejudice to the Minister in allowing the application to proceed, it does not serve the interests of justice for the Claimant's case to proceed where there is no arguable case for an error by the General Division.

[37] I have reviewed the record from the General Division.²⁰ I am satisfied that the General Division did not ignore or misunderstand the evidence in its decision.

[38] A final note. Based on the information I have, the Claimant's minimum qualifying period (MQP) for the disability pension ends on December 31, 2020. This means that if the Claimant chooses to do so, he can reapply for the disability pension under the CPP if he wants to show that he had a severe and prolonged disability on or before the end of his MQP, which is still in the future.

²⁰ Consistent with the Federal Court's decision in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

CONCLUSION

[39] An extension of time to apply for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	T. H., self-represented
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