



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. R. v Minister of Employment and Social Development*, 2020 SST 432

Tribunal File Number: AD-20-612

BETWEEN:

J. R.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time
and Leave to Appeal by: Neil Nawaz

Date of Decision: May 21, 2020

DECISION AND REASONS

DECISION

[1] I am refusing the Claimant an extension of time to apply for leave to appeal.

OVERVIEW

[2] The Claimant is attempting to reopen a decision to deny him a Canada Pension Plan (CPP) disability pension.

[3] The Claimant is a former boilermaker who has a lengthy history of CPP earnings and contributions. In August 2015, a few months after he turned 60, he applied for and began receiving an early CPP retirement pension. He had been experiencing increasing arthritic pain in his right hip and knee but carried working on working until October 2015, when he could no longer handle the physical demands of his job. In May 2016, he applied for the CPP disability pension, claiming to be disabled from all employment.

[4] The Minister refused the Claimant's application because the law does not permit an individual to receive CPP retirement and disability pensions at the same time.¹ The Minister also found that the Claimant's medical condition did not prevent him from working as of July 31, 2015, when his CPP disability coverage ended.

[5] In March 2017, the Claimant appealed the Minister's refusal to the Social Security Tribunal. In a decision dated March 27, 2019, the Tribunal's General Division dismissed the appeal, finding insufficient medical evidence that the Claimant was severely disabled as of July 31, 2015. The General Division placed considerable weight on what it found was the Claimant's own admission that he remained capable of work until October 2015.

[6] After the Tribunal's Appeal Division refused leave to appeal, the Claimant filed an application to rescind or amend the General Division's decision,² alleging that a Service Canada agent had negligently failed to advise him that he would be limiting his eligibility for the CPP

¹ Minister's initial refusal letter dated August 24, 2016 (GD2-14) and reconsideration letter dated November 3, 2016 (GD2-36).

² Claimant's application to rescind or amend dated July 11, 2019, RA1.

disability pension once he started receiving an early retirement pension. Another member of the General Division considered whether to rescind or amend the March 27, 2019, decision but decided that the circumstances surrounding the Claimant's early CPP retirement application did not amount to a "new material fact" under section 66 of the *Department of Employment and Social Development Act (DESDA)*.³

[7] The Claimant has now applied for leave to appeal⁴ from the Tribunal's Appeal Division, alleging that the General Division failed to observe a principle of natural justice when it refused to rescind or amend its decision. In his application, the Claimant repeated his claim that, when he applied for his CPP retirement pension in 2015, no one told him that doing so might also disqualify him from the CPP disability pension. He asked that his prior application for the retirement benefit be regarded as a "material new fact."

ISSUES

[8] I have to decide the following related questions:

Issue 1: Is the Claimant's request for leave to appeal late? If so, should the Claimant receive an extension of time?

Issue 2: Is there an arguable case that the General Division committed an error when it declined to amend or rescind its decision dated March 27, 2019?

ANALYSIS

Issue 1: Is the Claimant's request for leave to appeal late? If so, should the Claimant receive an extension of time?

[9] According to section 57(1)(b) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. The Appeal Division may allow further time within which an

³ See General Division's decision dated September 30, 2019.

⁴ Application requesting leave to appeal dated April 10, 2020, ADN1.

application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[10] The record indicates that the General Division issued its rescind or amend decision on September 30, 2019. Two days later, it was sent by regular mail to the Claimant at his last known residential address.

[11] The Appeal Division did not receive the Claimant's application for leave to appeal until April 10, 2020—well after the 90-day filing deadline. Even allowing for the 10-day delivery period deemed under the *Social Security Tribunal Regulations*, the Claimant's application for leave to appeal was submitted more than three months late.

[12] In *Canada v Gattellaro*,⁵ the Federal Court set out four factors to consider when deciding whether to allow further time to appeal:

- (i) whether there is a reasonable explanation for the delay;
- (ii) whether the claimant demonstrates a continuing intention to pursue the appeal;
- (iii) whether allowing the extension would cause prejudice to other parties; and
- (iv) whether the matter discloses an arguable case.

The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.⁶

(i) Reasonable explanation for the delay

[13] There is a letter on file⁷ suggesting that, in early January 2020, the Claimant had inquired about the status of the General Division's rescind and amend decision. At that time, the Tribunal informed the Claimant that the General Division had issued a decision on that matter in October and had closed his file. The Claimant later claimed that he did not receive the General Division's decision until the Minister sent him another copy in January.

⁵ *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

⁶ *Canada (Attorney General) v Larkman*, 2012 FCA 204.

⁷ Tribunal's letter to the Claimant dated January 20, 2020, ADN1B.

[14] I recognize and that mail sometimes goes missing. For that reason, I am willing to accept the Claimant was late in submitting his request for leave to appeal because the first mailing of the General Division's rescind and amend decision had been misdirected.

(ii) Continuing intention to pursue the appeal

[15] As noted, the Claimant inquired about the General Division's progress in January 2019. In doing so, he displayed an active interest in pursuing his claim. From that, one can infer that he also had a desire to preserve his appeal rights. I am willing to assume that the Claimant had a continuing intention to pursue his appeal in the months leading up to his application for leave to appeal.

(iii) Prejudice to the other party

[16] I find it unlikely that permitting the Claimant to proceed with his appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

(iv) Arguable case

[17] Claimants seeking an extension of time must show that they have at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.⁸

[18] For the reasons that follow, I find that the Claimant has failed to put forward reasons for appealing that would have a reasonable chance of success.

Issue 2: Is there an arguable case that the General Division committed an error when it declined to amend or rescind its decision dated March 27, 2019?

⁸ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[19] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.⁹

[20] An appeal can proceed only if the Appeal Division first grants leave to appeal.¹⁰ At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.¹¹ This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.¹²

[21] The Claimant wanted the General Division to reopen his case, but the only way to do so was to point to new material facts that could not have been discovered at the time of the March 2019 hearing with the exercise of reasonable diligence.¹³ The General Division decided that the Claimant's allegation that he was the victim of bad advice at the time of his early retirement application did not amount to a new material fact, because it was clearly accessible at the time of its first hearing.

[22] I do not see an arguable case that the General Division breached a principle of natural justice or committed an error of fact or law when it decided not to rescind or amend its prior decision. The General Division assessed the record and came to the defensible conclusion that the Claimant's supposedly new information did not meet the applicable legal standard. I see no reason to interfere with its reasoning.

[23] In his application for leave to appeal, the Claimant is essentially telling the Appeal Division what he told the General Division—that he was given poor guidance by Service Canada staff when he applied for an early CPP retirement pension. While I sympathize with the Claimant, who did not understand the full implications of taking a retirement pension sooner rather than later, Service Canada's conduct is not at issue here. This appeal is about whether the

⁹ The formal wording for these grounds of appeal is found in section 58(1) of the DESDA.

¹⁰ DESDA, sections 56(1) and 58(3).

¹¹ DESDA, section 58(2).

¹² *Fancy v Canada (Attorney General)*, 2010 FCA 63.

¹³ DESDA, section 66(1)(b).

General Division did its job properly when it determined that the Claimant’s retirement pension, and the circumstances surrounding it, were reasonably discoverable in March 2019.

[24] An Appeal Division hearing is meant to be a “redo” of the General Division hearing. My authority as an Appeal Division member permits me to determine only whether any of a claimant’s reasons for appealing fall within the specified grounds of appeal and whether any of them have a reasonable chance of success. In this case, the decision under appeal concerned a relatively narrow question—whether the evidence filed in support of the application to rescind or amend established a new material fact within the meaning of the DESDA.

CONCLUSION

[25] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I found that the Claimant had a reasonable explanation for the delay and a continuing intention to pursue his appeal. I also thought it unlikely that the Minister’s interests would be prejudiced by extending time. However, I could not find an arguable case for any of the grounds of appeal advanced by the Claimant. It was this last factor that was decisive; I see no point in advancing an appeal that is destined to fail.

[26] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.



Member, Appeal Division

REPRESENTATIVE:	J. R., self-represented
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