



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PP v Minister of Employment and Social Development*, 2021 SST 166

Tribunal File Number: AD-21-11

BETWEEN:

P. P.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 28, 2021

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

[2] The General Division made an error when it approved the Minister's refusal to extend a deadline. I am ordering the Minister to grant the Claimant more time to request reconsideration.

BACKGROUND

[3] The Claimant is a 36-year-old former financial manager and analyst with a history of depression. In May 2015, he sustained a head injury in a motor vehicle collision.

[4] In September 2018, the Claimant applied for a Canada Pension Plan (CPP) disability pension. He said that he could no longer work because of cognitive deficits and other symptoms caused by a concussion. In a letter dated February 19, 2019,¹ the Minister refused the application because, in its view, the Claimant did not have a severe and prolonged disability.

[5] A year went by. The Claimant hired a lawyer who, in a letter dated April 7, 2020, asked the Minister to reconsider its decision not to grant his client a disability pension.² The Minister refused to consider the request since it came after the *Canada Pension Plan's* 365-day deadline.³

[6] The Claimant's lawyer appealed the Minister's refusal to the Social Security Tribunal's General Division. The lawyer acknowledged that the request for reconsideration was late, but blamed it on the Claimant's cognitive and mental health impairments and his lack of awareness of the appeal process.

[7] In a decision dated October 16, 2020, the General Division dismissed the appeal. It found that the Minister had exercised its discretion judicially when it refused the Claimant's request for an extension of time.

¹ GD2-20.

² GD2-16.

³ GD2-8.

[8] The Claimant is now arguing that his interests would be prejudiced if the Minister continues to refuse his request for an extension. He says that it was “counter-intuitive” for the Minister to acknowledge his brain injury, yet still find that he had no good reason for submitting his reconsideration request late.⁴ He has also enclosed several hundred pages of medical records⁵ that were not available to the Minister when it assessed the Claimant’s disability claim or, later, when it adjudicated his late request for reconsideration.⁶

ISSUES

[9] There are only three grounds of appeal to the Appeal Division. An applicant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.⁷

[10] In this appeal, I had to consider the following questions:

Issue 1: Can the Appeal Division consider new evidence?

Issue 2: Did the General Division make an error when it found that the Minister refused the Claimant’s request for an extension judicially?

ANALYSIS

Issue 1: Can the Appeal Division consider new evidence?

[11] As noted, the Claimant has submitted a large volume of medical records to the Tribunal that were not available to the Minister when it rejected the Claimant’s disability claim and, later, when it refused his request for an extension of time. It appears that the Claimant’s motivation for submitting these records was to support his arguments that (i) he could no longer work and (ii) he had a good reason for submitting his reconsideration request late.

⁴ Claimant’s leave to appeal application dated January 8, 2021, AD1.

⁵ See AD01A, parts 1-18.

⁶ The Claimant had already submitted these medical records to the General Division, which apparently did not consider them; there was no mention of them in its decision.

⁷ The formal wording for these grounds of appeal is found in s 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[12] For reasons that I explained at the hearing, I did not consider these medical records. This appeal is not about whether the Claimant is disabled. Rather, it is about whether the Minister did its job properly—based on the information that was in front of it at the time—when it refused to give the Claimant more time to make his reconsideration request. The Minister can't be blamed for a failure to rely on information that it didn't know about. As a result, that information was irrelevant to the General Division's assessment of the Minister's conduct. It is similarly irrelevant to my assessment of the General Division's conduct.

[13] The Claimant wanted me to use these new medical records to find that he had a reasonable explanation for missing the deadline. I couldn't do that. The law does not allow me to consider new evidence that was not available to the General Division.

Issue 2: Did the General Division make an error when it found that the Minister refused the Claimant's request for an extension judicially?

[14] This is an issue that the Claimant did not explicitly raise in his notice of appeal. However, it is consistent with his larger argument that the Minister and the General Division ignored his circumstances in the year leading up to his request for reconsideration. For reasons that I will explain, I find that the General Division made two legal errors when it analyzed the Minister's refusal to grant an extension of time:

- (i) It applied the wrong test when considering the Claimant's explanation for the delay in submitting his reconsideration request; and
- (ii) It ignored the seriousness of his psychiatric condition.

The Minister must follow judicial and legislative guidelines when it exercises discretion

[15] The Minister has two types of power: mandatory and discretionary. The first are things the Minister must do under the law; the second are optional—things the Minister can do if it wants to but doesn't necessarily have to.

[16] Even for discretionary powers, the Minister cannot simply do whatever it feels like doing. The law requires the Minister to exercise such powers in a judicial manner. This means that when someone asks the government for something, the Minister owes it to them to take their

request seriously, to listen to what they are saying, and to weigh relevant information in an attempt to come to a fair decision.

[17] The courts have defined what it means to exercise discretionary power judicially.⁸ The Federal Court has held that a discretionary power is not exercised judicially if the decision-maker

- (i) acted in bad faith;
- (ii) acted for an improper purpose or motive;
- (iii) took into account an irrelevant factor;
- (iv) ignored a relevant factor; or
- (v) acted in a discriminatory manner.⁹

[18] Among the Minister's many discretionary powers is the power to grant an extension when a Claimant has missed a filing deadline.

[19] According to the *Canada Pension Plan*, a person who disagrees with the Minister's initial refusal of their disability application has 90 days to ask the Minister to reconsider that refusal.¹⁰

[20] Under section 74.1 of the *Canada Pension Plan Regulations* (CPPR), the Minister may allow a longer period to request reconsideration if it is satisfied that

- (i) there is a reasonable explanation for requesting a longer period and
- (ii) the claimant has demonstrated a continuing intention to request a reconsideration.¹¹

[21] If the request for reconsideration is made more than 365 days after the initial refusal, the Minister must also be satisfied that

- (iii) the request has a reasonable chance of success and

⁸ *Canada (Attorney General) v Uppal*, 2008 FCA 388.

⁹ *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.

¹⁰ CPP, s 81(1).

¹¹ CPPR, s 74.1(3).

- (iv) no prejudice would be caused to any party by allowing a longer period to make the request.¹²

[22] In this case, no one disputes that the Claimant's request for reconsideration came more than 365 days after the Minister turned down his disability application. The issue for the General Division was whether the Minister considered the Claimant's request in accordance with the law.

The Minister considered all four conditions

[23] The inclusion of the word "and" between the two pairs of conditions suggests that all four must be met if the request for reconsideration comes more than a year after the initial decision.¹³

[24] I have no doubt that the Minister considered all four of the conditions required by the *Canada Pension Plan* and its regulations. In response to the Claimant's late reconsideration request, one of the Minister's medical adjudicators prepared a worksheet,¹⁴ in which she attempted to systematically address the Claimant's circumstances through the lens of the four conditions. The adjudicator ultimately concluded that the Claimant had met only two of the four conditions. She found that the Claimant's case had a reasonable chance of success and that extending the deadline would not prejudice the Minister's interests. However, she found that the Claimant had not shown a continuing intention to request reconsideration or provided a reasonable explanation for failing to do so sooner.

The Minister misapplied the first condition by demanding more than just a "reasonable" explanation for the delay

[25] It is not enough for the Minister to consider the conditions. The Minister must also satisfy itself that they have, or haven't, been met. In doing so, the Minister must carefully follow the wording of sections 74.1(3) and 74.1(4).

[26] I see indications that the Minister's adjudicator held the Claimant to an inappropriately high standard when she looked into why he filed his reconsideration request late. I note that the

¹² CPPR, s 74.1(4).

¹³ The Federal Court examined s 74.1 of the CPPR and confirmed that the Minister must consider all four conditions and be satisfied that all of them have been met. See *Lazure v Canada (Attorney General)*, 2018 FC 467.

¹⁴ GD2-10.

adjudicator's worksheet came with a guideline that defined "reasonable explanation for delay" as follows:

A reasonable explanation for the delay in requesting a reconsideration exists if there are exceptional or extenuating circumstances. Exceptional circumstances include information that relates to a person's medical condition prevented them from acting in a timely manner. Extenuating circumstances are related to situational factors that are unusual, unexpected or beyond the person's control that prevented them from submitting a timely request.¹⁵

It is not clear that this guideline reflects the law, nor is it obvious that a "reasonable explanation" can be equated with "exceptional circumstances." There are any number of potential explanations for missing a filing deadline that could be reasonable yet not involve exceptional circumstances. Such explanations might have nothing to do with a medical condition but might instead be related to more commonplace factors, such as lost mail, bad advice, or, yes, ignorance of the law. Depending on the particular facts of the case, explanations relying on such factors might well be "reasonable."

[27] In her analysis, the Minister's adjudicator acknowledged the Claimant's head trauma and his ongoing cognitive and mental health problems, but she went on to say:

A neuropsychological assessment (2017-11-16) notes diagnoses of MDD (severe), adjustment disorder with anxiety, pain disorder, possible concussion, musculoskeletal strains and situational stressors. He drove to his own appointment and participated alone in the assessment. **There was no evidence to support that he did not understand the information presented to him in the assessment** [Emphasis added].¹⁶

Again, it appears that the Minister's adjudicator was looking for evidence that the Claimant lacked capacity, when all that the law required of him was a reasonable explanation for missing the deadline. The General Division endorsed the Minister's approach:

The Minister recognized that the medical reports supported that the Claimant suffered from several mental health conditions including major depressive disorder, adjustment disorder with anxiety, and pain disorder associated with psychological factors. It also recognized that he suffered from problems with memory and concentration. **However, it concluded that the reports did not**

¹⁵ Minister's late consideration request worksheet, completed by S. Bulbeck on June 24, 2019, GD2-10.

¹⁶ Minister's late consideration request worksheet, GD2-10.

establish that he was unable to understand the appeal process. The Minister also considered that the Claimant had been able to retain his own lawyer, drive a car, and was independent in his activities of daily living [Emphasis added].¹⁷

The Claimant had pleaded that he had cognitive difficulties and was not aware of his rights until he hired a lawyer. He never claimed to be completely mentally incapacitated from making decisions but, as we will see, he did put forward evidence indicating that he was in the midst of a serious psychiatric crisis that may have impaired his judgment, memory, and executive functioning.

[28] I am satisfied that the General Division made an error of law by failing to recognize that the Minister applied the wrong standard in assessing the Claimant's explanation for the delay.

The Minister ignored relevant factors

[29] Even if the Minister had applied the correct standard, I would still have found that it failed to exercise its discretion judicially. Why? Because the Minister didn't appreciate what the Claimant was going through around the time he received the initial refusal letter. It didn't take into account the fact that the Claimant had just been discharged from a psychiatric facility, and it didn't notice that he was heavily medicated. The General Division then perpetuated these errors by failing to see that the Minister ignored relevant factors when it decided not to grant the Claimant an extension of time.

[30] The Minister had access to information suggesting that there were extenuating circumstances behind the Claimant's late request for reconsideration. As the Minister's guidelines put it, extenuating circumstances are related to situational factors that are "unusual, unexpected or beyond the person's control." One would think that the Claimant's admission to a comprehensive in-patient psychiatric care program would qualify as "unusual" and relevant to the Claimant's ability to manage his life post discharge.

¹⁷ General Division decision, para 15.

[31] We now know that, when he applied for disability benefits, the Claimant submitted only a fraction of his medical file. But there was still enough information available to the Minister to suggest that the Claimant's life had gone off the rails:

- The Claimant has a history of depression and has been diagnosed with severe major depressive disorder.¹⁸ He was admitted to hospital after attempting to hang himself in 2014.¹⁹
- Since then, he has received intensive counselling and been prescribed with a number of powerful psychotropic medications, all to limited effect. When he applied for CPP disability benefits in December 2018, he was on Abilify (an antipsychotic), Zoloft (an antidepressant), and what appears to be an extraordinarily high dose of Lyrica (an anticonvulsant used to treat neuropathic pain and generalized anxiety).²⁰
- In December 2018, after spending several months on a waiting list, the Claimant entered an in-patient psychiatric care program at the X in X, Ontario.²¹

[32] The Minister's adjudicator made no mention of the Claimant's drug regime. While the adjudicator did mention his recent admission to X, she did so only in passing, and she apparently made no attempt to consider the potential impact of a lengthy in-patient stay on the Claimant's ability to manage his disability claim. The Minister now makes much of fact that the Claimant was discharged from X in mid-February 2019, two or three weeks before the initial refusal letter arrived. However, the Minister's adjudicator had no way of knowing that at the time, and it is reasonable to assume that a person coming off a two-month psychiatric admission would have had other things on his mind than administrative tasks.

¹⁸ Neuropsychological Assessment report dated January 16, 2017 by Clarissa McKay and Diane Velikonja, both clinical neuropsychologists.

¹⁹ Assessment report dated July 7, 2014 by Yvonne Taylor, social worker with the Credit Valley Hospital psychiatric services unit, GD2-67.

²⁰ See CPP medical report dated December 4, 2018 by Dr. Joe Tran, General practitioner, (GD2-59) and report dated May 3, 2018 by Dr. Shawn Vasdev, psychiatrist (GD2-63). Both Dr. Tran and Dr. Vasdev indicated that the Claimant was taking seven tablets of Lyrica daily at 75 mg each.

²¹ Dr. Tran's CPP medical report, GD2-59.

[33] The Minister ignored relevant factors when it refused the Claimant an extension of time. The General Division in turn erred in law by failing to recognize that the Minister disregarded relevant factors when it found the Claimant had no reasonable explanation for being late.

REMEDY

There are two ways to fix the General Division's errors

[34] During the hearing, I talked about what to do if I were to find an error in the General Division's decision. I told the parties that there were essentially two options:

- I could return the matter back to the General Division for another hearing on whether the Minister considered the Claimant's late request judicially or
- I could give the decision that the General Division should have given and make my own assessment of the Minister's conduct.²²

[35] I indicated to the parties that, in my view, the record was complete enough to do the latter. I have now concluded that, if the General Division had properly applied the law and considered the evidence, it would have arrived at a different result.

[36] The Claimant understandably wants his case to be brought to a swift resolution. His lawyer asked me to substitute my decision for, not just the General Division's, but also the Minister's. He argued that I have the power, not just to waive the reconsideration request deadline, but to perform the reconsideration myself and ultimately find the Claimant disabled. For its part, the Minister denied that either it or the General Division had erred at all, but in case I found otherwise, it urged me to refer the matter back to the Minister with instructions to reconsider the Claimant's request for an extension of time in compliance with sections 74.1(3) and (4) of the CPPR.

There are limits to the Appeal Division's remedial powers

²² DESDA, ss 59(1) and 64.

[37] As much as I want to help the Claimant, I can't give him everything he wants. I don't share his lawyer's opinion that my powers extend as far as he says they do. The General Division is empowered to give the decision that the Minister should have given.²³ That, in turn, limits what I can do when I give the decision that the General Division should have given.

[38] The Claimant argues that my remedial powers could go as far as finding that he is disabled. I have to disagree. So far, the only issues that the Claimant has raised at the Tribunal have been procedural. At this point, the Minister has not yet issued a valid reconsideration decision about the Claimant's disability under section 81 of the *Canada Pension Plan*. According to section 82, such a reconsideration decision is the only basis for an appeal to the General Division. Since the General Division has not yet ruled on the Claimant's disability, I can't do so either.

The Claimant meets all four of the conditions in sections 74.1(3) and (4)

[39] While I can't determine whether the Claimant is disabled, I can decide whether he deserves an extension of time to request reconsideration. For the following reasons, I am satisfied that the Claimant met all four of the conditions listed in sections 74.1(3) and (4) of the CPPR.

The Claimant had a reasonable explanation for requesting a longer period

[40] The available evidence suggests that the Claimant did not respond to the Minister's refusal letter dated February 18, 2019 because he had just been released from a psychiatric facility. As discussed above, there was considerable evidence that the Claimant's life was in disarray at the time, and it is reasonable to assume that his mind was not focused on administrative tasks.

The Claimant had a continuing intention to request reconsideration

[41] I note that the Claimant displayed a desire to preserve his appeal rights before a year had elapsed. The record shows that he hired a lawyer in early 2020 to request a time extension. In a

²³ DESDA, s 54(1).

letter dated February 12, 2020,²⁴ the Claimant's lawyer asked the Minister for a copy of his new client's complete disability file so that he might be brought up to date on the claim. In light of this, I am willing to find that the Claimant intended to pursue his claim in the months leading up to his application for leave to appeal.

The Minister would not be prejudiced by granting a longer period to request reconsideration

[42] I find it unlikely that permitting the Claimant to proceed with his disability claim 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 request reconsideration.

The Claimant's request for reconsideration has a reasonable chance of success

[43] A reasonable chance of success is akin to an arguable case. On the face of it, the Claimant has an arguable case that he is disabled. He has been off work for several years. He has been diagnosed with severe depression. He has attempted suicide. He is on a heavy medication regime. He has received what appears to be intensive psychiatric treatment with limited effect. In my view, the interests of justice won't be served if the Claimant is prevented from pursuing his disability claim because of a missed deadline.

CONCLUSION

[44] Since the General Division committed legal errors, the appeal is allowed. If the General Division had applied the law correctly, it would have found that the Minister failed to fulfill its obligations under section 74.1 of the CPPR. I am satisfied that the Minister erred by holding the Claimant's explanation for being late to an overly strict standard and by ignoring relevant information about the severity of his psychiatric condition around the time he received his reconsideration refusal letter.

²⁴ GD2-19.

[45] I am giving the decision that the General Division should have given and directing Minister to grant the Claimant an extension of time to request reconsideration.



Member, Appeal Division

HEARING DATE:	April 7, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. P., Appellant Daniel Michaelson, representative for the Appellant Viola Herbert, representative for the Respondent