Citation: *WM v Minister of Employment and Social Development*, 2022 SST 29

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	W. M.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated November 25, 2021 (GP-21-2165)

Tribunal member:	Kate Sellar
Decision date:	January 25, 2022
File number:	AD-22-18

Decision

[1] I am denying leave (permission) to appeal. The appeal will not go ahead. These reasons explain why.

Overview

[2] W. M. (Claimant) has a history of epilepsy and seizures and lower back pain because of degenerative disc disease. He had a total right hip replacement in July, 2017. He worked in the coast guard and did not return to work after the hip surgery.

[3] The Claimant applied for a disability pension under the Canada Pension Plan in March 2018. The Minister of Employment and Social Development (Minister) refused his application in April 27, 2018. In August, 2018, the Claimant asked the Minister to reconsider. The Minister wrote a letter that same month requesting further information about why the Claimant asked for reconsideration past the 90-day deadline for requesting reconsideration.

[4] The Claimant responded on September 11, 2018. He explained that his request for the Minister to reconsider the decision was past the 90-day deadline. The reason was that on July 24, 2018, his long-term disability insurer wrote to him, advising him to request reconsideration.

[5] On January 9, 2019, the Minister wrote a letter to the Claimant titled "Reconsideration Decision." The letter actually states that the Minister would not accept the Claimant's late request for a reconsideration and would not review the file the way that they would if they were actually reconsidering the substance of the decision.

[6] On October 12, 2021, the Claimant appealed the January 9, 2019 reconsideration letter to this Tribunal.

[7] The General Division decided that the Claimant did not bring his appeal of the reconsideration letter to this Tribunal in time. The appeal could not proceed because appeals that are more than one year late are not eligible for an extension of time.

[8] I must decide whether the General Division might have made an error that would justify granting the Claimant leave to appeal.

[9] The Claimant has not raised an argument that the General Division made any error that would justify granting leave to appeal. The appeal will not go ahead.

Issue

[10] The issue in this appeal is as follows:

- Can it be argued that the General Division made an error that would justify granting leave to appeal?

Analysis

[11] First, I will describe my role at the Appeal Division in terms of reviewing General Division decisions. Second, I will explain how I have reached the conclusion that the Claimant has not raised an arguable case for an error by the General Division that would justify granting leave to appeal. I will also make a final note about the General Division's use of judicial notice.

Reviewing General Division Decisions

[12] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the Claimant's arguments and the General Division's decision to decide whether the General Division may have made any errors.

[13] That review is based on the wording of the *Department of Employment and Social Development Act* (Act), which sets out the "grounds of appeal." The grounds of appeal are the reasons for the appeal. To grant leave to appeal, I must find that it is arguable that the General Division made at least one of the following errors:

- It acted unfairly.
- It failed to decide an issue that it should have, or decided an issue that it should not have.

- It based its decision on an important error regarding the facts in the file.
- It misinterpreted or misapplied the law.[1]

[14] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.[2] To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.[3]

Claimant has not raised an arguable case for an error

[15] The Claimant has not raised an arguable case for an error. He has given the reason why his appeal is late. However, the General Division did not have the power to accept his application because it was more than one year late. The reason for the lateness does not provide the Claimant with a path to receiving an extension of time to appeal.

[16] Claimants must bring their appeals to the General Division within 90 days after the Minister communicated the decision. The General Division can grant an extension of time to appeal, but not beyond "one year after the day on which the decision is communicated" to the claimant.[4] I'll refer to this as the "one-year rule."

[17] To decide whether claimants are past the one-year rule, the General Division decides when claimants received the reconsideration letter, and when they appealed.

[18] When claimants appeal to the General Division, the appeal form asks them to attach the reconsideration decision they received from the Minister that they disagree with. That form also asks claimants to:

- give the date they received the reconsideration decision; or
- check the box to state that they don't remember when the received it.

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[1] See section 58(1) of the *Department of Employment and Social Development Act* (Act).
[2] See section 58(2) of the Act.
[3] The Federal Court explained this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[4] See section 52(2) of the Act.

[19] The Claimant explained in that form why he was late, but he left the question about when he received the reconsideration decision blank.[5]

[20] The Tribunal wrote to the Claimant stating that he was late, and warning him about the one-year rule. It did not ask him to state when he received the reconsideration letter given that he had left it blank in his appeal form.

[21] The General Division acknowledged that the Claimant did not state when he received the reconsideration letter.[6] The General Division found that the Minister communicated the reconsideration decision to the Claimant on January 19, 2019 after taking "judicial notice of the mail and allowing 10 days for delivery."[7]

[22] The Claimant filed his appeal to the General Division more than two and a half years after the date on the reconsideration letter. The General Division decided that the Claimant received the letter within ten days of its date, applied the one-year rule, and concluded the Claimant could not have an extension of time to appeal.

[23] The Claimant has not raised an arguable case that the General Division made an error. He states only that the General Division did not act fairly because when his insurance company told him, in 2021, that he could appeal the reconsideration letter from January 2019, he did so.[8]

[24] There is no path to a successful appeal here for the Claimant. He does not dispute receiving the reconsideration letter in a timely way. He does not dispute when he filed the appeal. He is more than a year late, and the General Division had no choice but to apply the one-year rule. The General Division could not give the Claimant an extension of time to appeal. It may feel unfair, but the General Division did not act unfairly in applying the law as it did. The Claimant has not raised an arguable case for an error by the General Division.

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[5] See GD1-2.
[6] See paragraph 5 of the General Division decision.
[7] See paragraph 6 of the General Division decision.
[8] See AD1-3.

A final note about judicial notice

[25] The General Division reached its decision about when the Claimant received his reconsideration letter by taking "judicial notice of the mail and allowing 10 days for delivery."

[26] In my view, the General Division should not take judicial notice of this kind of fact. It does not affect the outcome for the Claimant, so my findings about judicial notice do not change anything for the Claimant in this case.

[27] Judicial notice is like assuming something is true because it is a fact that is so generally accepted that:

- It's not the subject of debate among reasonable people; or
- It's capable of an immediate check using a readily accessible and indisputably accurate source.[9]

[28] When tribunals take notice of certain facts, it's "official notice" rather than "judicial notice." Judicial refers to courts, and courts are not the same as tribunals.[10]

[29] When a tribunal takes official notice of a fact, there is no longer a need for either party to prove that fact. Tribunals have "extra latitude" to take notice of facts when those facts relate to the specialized knowledge or expertise of the tribunal.[11]

[30] In my view, the Tribunal should not be taking judicial notice of the fact that a piece of mail arrived or did not arrive to any particular claimant. Reasonable people could well have a debate about how long the mail takes to arrive generally. Any factual question about when a particular claimant received a particular piece of mail should be resolved based on the available evidence about those circumstances specifically. When any piece of mail arrives is not the kind of generally accepted or well-known information

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[9] The Supreme Court states that judicial notice is for notorious facts that are capable of immediate demonstration, see *R. v Spence*, 2005 SCC 71.
[10] See paragraphs 131 to 136 in *Minister of Employment and Social Development v SH and Justice for Children and Youth*, 2021 SST 412 (SH).
[11] See SH again at paragraphs 131 to 136.

a decision maker can rely on judicial notice to resolve. Certainly, it is not an issue that can be checked using a readily accessible and accurate source.

[31] Similarly, official notice is also note the right tool for resolving a factual question about when a claimant received a document. Mail delivery is not an area of special expertise for this Tribunal.

[32] Anyway, in my view, it isn't necessary to take official notice of how the mail works to infer that a claimant received a reconsideration letter. The appeal form asked the claimant to state when it was received (or to check the box if he did not recall receiving it at all).

[33] In this case, the Claimant did not complete that part of the form. The Tribunal letter warned the Claimant about the one-year rule. The Claimant did not provide any more information about when he received the reconsideration letter. The reconsideration letter had a date on it. The Claimant appealed long after the one-year timeline expired. The General Division can either:

- Communicate further with the Claimant to ask that he provide the information about when he received the reconsideration letter and explain why that is important; or

- rely on the information already in the file to infer that the Claimant received the reconsideration letter shortly after the date on the letter, without relying on judicial or official notice.

[34] I am satisfied that in this case, the Claimant has no reasonable prospect of success on appeal. The General Division did not ignore or misunderstand the available evidence. The Claimant does not take issue with when he received the reconsideration letter, and he is subject to the one-year rule. There are no exceptions to the one-year rule. As such, the circumstances that explain why the Claimant is late (that his insurer advised him to appeal late) do not help him to access an extension of time.

Conclusion

[35] I am denying permission to appeal. This means that the appeal will not proceed.

Kate Sellar
Member, Appeal Division