



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DS v Minister of Employment and Social Development*, 2022 SST 1359

Tribunal File Number: GP-22-1068

BETWEEN:

D. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: George Tsakalis

DATE OF DECISION: October 19, 2022

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* (CPP) disability pension. He was awarded a CPP disability pension with payments starting in February 2020. He asked the Respondent to reconsider its decision because he disputed the start date for his pension. The Respondent, in a decision letter dated November 8, 2021, denied the application upon reconsideration. The Respondent maintained its decision to start paying the Appellant his disability pension starting in February 2020. The Appellant appealed that decision to the Tribunal on May 31, 2022, beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[2] The Tribunal must decide whether to allow an extension of time for the Appellant to appeal pursuant to subsection 52(2) of the DESD Act.

ANALYSIS

[3] The Tribunal finds that the appeal was filed after the 90-day limit. The Respondent's reconsideration decision was dated November 8, 2021. The Tribunal assumes that the reconsideration decision was sent to the Appellant by mail. The Tribunal takes judicial notice of the fact that mail in Canada is usually received within 10 days. The Tribunal therefore finds that the reconsideration decision was communicated to the Appellant by November 18, 2021.

[4] In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant had until February 16, 2022 to file an appeal.

[5] The Appellant filed an appeal on May 31, 2022 outside the 90-day limit.

[6] In deciding whether to allow further time to appeal, the Tribunal considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

Continuing Intention to Pursue the Appeal

[7] The Tribunal finds that the Appellant had a continuing intention to pursue the appeal within 90 days of receiving the reconsideration decision. He wrote to the Respondent on January 12, 2022, requesting an appeal to the Tribunal.¹

Arguable Case

[8] The Tribunal finds that there is not an arguable case on appeal.

[9] The CPP says the Appellant cannot be considered disabled more than 15 months before the Respondent receives the disability pension application.² After that, there is a four-month waiting period before payments start.³ This means that payments cannot start more than 11 months before the application date.

[10] The Respondent received the Appellant's application in January 2021. That means he cannot be considered disabled under the CPP before October 2019. The earliest his pension payments can start would be in February 2020.

[11] The Tribunal member notes that the Respondent began paying the Appellant his CPP disability pension in February 2020.⁴ February 2020 is the earliest possible date that the Minister can begin paying the Appellant a disability pension.

[12] The Appellant suggested in his Notice of Appeal that he did not file an appeal earlier because of his medical condition.⁵ The CPP allows for an earlier deemed application date if an Appellant can establish incapacity under the CPP.⁶ To satisfy the CPP's incapacity test, the Appellant must establish on a balance of probabilities that he lacked the capacity to form or express an intention to apply for a benefit. The capacity to form or express an intention to apply

¹ See GD2-5

² Paragraph 42(2)(b) of the *Canada Pension Plan* sets out this rule.

³ See section 69 of the *Canada Pension Plan*

⁴ See GD2-22

⁵ See GD1-3-4

⁶ See subsection 60(8) of the *Canada Pension Plan*

for benefits is similar in kind to the capacity to form or express an intention with respect to other choices in life.⁷

[13] The medical evidence in the file does not show incapacity under the CPP. The Appellant consented to medical treatment. The Appellant told me at a case conference that he does not have a power of attorney. He did not apply for a CPP disability pension sooner because he was not aware of the program. He had collected short-term disability benefits after he went off work, sick benefits from Employment Insurance, and had applied for long-term disability benefits. This evidence does not show incapacity under the CPP.

Reasonable Explanation for the Delay

[14] The Tribunal finds that the Appellant provided a reasonable explanation for the delay in filing the appeal. The Appellant was in the hospital having spinal surgery.⁸

Prejudice to the Other Party

[15] The Respondent's interests do not appear to be prejudiced given the short period of time that has lapsed since the reconsideration decision. The Respondent's ability to respond, given its resources, would not be unduly affected by an extension of time to appeal.

CONCLUSION

[16] In consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal refuses an extension of time to appeal pursuant to subsection 52(2) of the DESD Act. This is because the Appellant does not have an arguable case. The Respondent has already paid the Appellant CPP disability benefits as far back as it possibly can under the law.

George Tsakalis
Member, General Division - Income Security

⁷ See *Sedrak v. Canada (Social Development)*, 2008 FCA 86

⁸ See GD3