



Citation: *KB v Minister of Employment and Social Development*, 2023 SST 713

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** K. B.  
**Representative:** O. E.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Ian McRobbie

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**Decision under appeal:** General Division decision dated February 10, 2023  
(GP-22-2000)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Videoconference  
**Hearing date:** May 3, 2023  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** June 5, 2023  
**File number:** AD-23-216

## Decision

[1] The appeal is dismissed. The Appellant is statute-barred from appealing Service Canada's decision to deny her a CPP disability pension.

## Overview

[2] The Appellant, K. B., is a former housekeeper who last worked in December 2010. She says that she can no longer work because of back and knee pain, as well as anxiety and depression. She is now 50 years old.

[3] The Appellant applied for a CPP disability pension in November 2019. Service Canada refused the application because, in its view, the Appellant had not proved that she had a severe and prolonged disability during her coverage period, which ended on December 31, 2012.<sup>1</sup>

[4] The Appellant asked reconsideration. In a letter dated September 30, 2020, Service Canada maintained its decision to deny the Claimant disability benefits.<sup>2</sup> The letter also contained instructions on how to appeal the denial to the Social Security Tribunal.

[5] More than two years went by. On December 12, 2022, the Tribunal received a notice of appeal to the General Division, which the Appellant's lawyer sent by email.

[6] The Appellant's lawyer claimed that that he had originally filed the appeal by regular mail in January 2021. He said that, after noticing that he hadn't received a hearing date, he filed another appeal by email in September 2022. He said that, after discovering that appeal had gone missing too, he filed a third appeal in December 2022.

[7] The General Division considered the documents on file and dismissed the appeal. It found that that the Appellant did not receive Service Canada's reconsideration decision until January 24, 2021. It found no evidence that the Appellant had filed an

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<sup>1</sup> CPP disability coverage is established by working and contributing to the CPP. A contributor who applies for the CPP disability pension must show that they became disabled during the coverage period and have remained so since.

<sup>2</sup> See Service Canada' reconsideration denial letter dated September 30, 2020, GD2-9.

appeal with the General Division before December 12, 2022. It decided that it could not consider the Appellant's appeal because it was more than a year late.

[8] Earlier this year, one of my colleagues on the Appeal Division granted the Appellant permission to proceed because she saw an arguable case that the General Division failed to provide adequate reasons for its decision. Last month, I held a hearing to discuss whether to give the Appellant an extension of time in which to make her appeal.

## **Preliminary Matters**

[9] On December 5, 2022, the rules governing appeals to the Social Security Tribunal changed. Under the new rules, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division. As I explained at the outset of the hearing, that meant I would be considering all available evidence about whether the Appellant's appeal was late and, if so, whether I could waive the applicable filing deadlines. I also made it clear that I would not be bound by any of the General Division's findings.

[10] Much of the Appellant's case depended on what her former lawyer did or didn't do on her behalf. For that reason, V. M. appeared as a witness at the hearing, providing evidence in the form of an affidavit and sworn testimony.

[11] The parties agreed to potentially hold the hearing in two parts. They understood that, if I were to decide that the Appellant's appeal was not late or, alternatively, worthy of an extension, then I would schedule a second videoconference to discuss the merits of the Appellant's disability claim.

## **Issues**

[12] In this appeal, I had to decide the following questions:

- Was the Appellant's appeal to this Tribunal filed late? If so, by how much did it miss the statutory deadline?

- If the appeal was late, does the law permit me to extend the deadline?

## Analysis

[13] Now that I have considered the parties' evidence and arguments, I have concluded that the Appellant cannot succeed. Because her appeal was more than a year late, I am barred by law from granting her an extension.

### The law sets out two appeal deadlines

[14] Under this Tribunal's governing statute, an appeal must be submitted to the General Division within 90 days after Service Canada's reconsideration decision was communicated to the appellant.<sup>3</sup> The General Division may allow further time to make the appeal, but in no case can it be made more than one year after the day on which the decision was communicated to the appellant.<sup>4</sup>

[15] These provisions mean that a prospective appellant faces both a "soft" and "hard" deadline. An appeal that is more than 90 days late can still be heard if the appellant has a reasonable explanation for the delay. But if more than a year has passed, then the General Division is prohibited from granting an extension.

### An appeal is filed only when the Tribunal receives it

[16] This Tribunal must **receive** a notice appeal for it be deemed filed with the Tribunal. According to the rules that were in effect when the Appellant was attempting to submit her appeal, the date of filing of an appeal sent by regular mail is deemed to be the date indicated by the date stamp placed on the document by the Tribunal.<sup>5</sup> A similar provision is contained in new rules that came into force on December 5, 2022.<sup>6</sup>

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<sup>3</sup> See DESDA, section 52(1)(b).

<sup>4</sup> See DESDA, section 52(2).

<sup>5</sup> See *Social Security Tribunal Regulations*, section 7.

<sup>6</sup> See *Social Security Tribunal Rules of Procedure*, section 19(2).

## **The Appellant's appeal was more than a year late**

[17] The key questions in this case are (i) when Service Canada's reconsideration decision was communicated to the Appellant and (ii) when the Appellant's former lawyer succeeded in bringing the appeal to the General Division.

### **– The reconsideration decision was communicated to the Appellant on January 24, 2021**

[18] Service Canada's reconsideration letter was dated September 30, 2020, but the Appellant says that she didn't receive it until much later. I don't know what happened to the letter in the interim, but what's clear is that, in January 2021, the Appellant hired a lawyer, who asked Service Canada to reconsider its denial of benefits. In a letter dated January 21, 2021, Service Canada replied that it had already issued a reconsideration letter, a copy of which it enclosed.<sup>7</sup> It also provided a mailing address for this Tribunal's General Division.

[19] In her notice of appeal, the Appellant said that she received the reconsideration letter on January 24, 2021. That means the "hard" deadline for the Appellant to have filed her appeal to the General Division was **January 25, 2022**.<sup>8</sup>

### **– The Appellant did not make her appeal to the General Division until December 12, 2022**

[20] V. M., the Appellant's former lawyer, claims that he submitted valid notices of appeal to the General Division on three occasions. He argues that the first notice, which he allegedly mailed on January 31, 2021, constitutes a valid appeal. He maintains that the Tribunal must have misplaced that notice along with a second, which he says that he sent by email on September 2, 2022. He insists that the Tribunal is wrong to acknowledge only the third notice, which it received by mail on December 12, 2022, as a valid appeal.

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<sup>7</sup> See Service Canada's letter dated January 21, 2021, GD2-8.

<sup>8</sup> Section 19 of the *Social Security Tribunal Regulations* deemed documents sent by regular mail to have been communicated within 10 days after mailing. However, this provision applied only to documents that the **Tribunal** sent to a party, not the other way around.

[21] For the following reasons, I am not satisfied that V. M. succeeded in making an appeal on behalf of the Appellant before December 12, 2022.

– **There is insufficient evidence that the Appellant’s first appeal was ever received**

[22] V. M.’s first attempt, in January 2021, to file a notice of appeal is the only one that matters in this case. That’s because the other two, including the one that the Tribunal acknowledges having received in December 2022, fall far outside the one-year deadline.

[23] The centrepiece of the Appellant’s evidence is an affidavit sworn by V. M. detailing his efforts to bring an appeal on behalf of his former client. V. M. wrote that, after learning that a reconsideration letter had already been issued, he prepared the Appellant’s notice of appeal and took steps to mail it to the address that Service Canada had provided in its reply letter:

That same day (i.e., January 31), I placed the First Application in a large envelope, printed the Address on the envelope and stamped the envelope (using a stamp machine that my office has). The practice at my firm at that time was to place all outgoing mail in a mail trolley. At the end of the business day, our receptionist would bring all mail left in that trolley to a Canada Post mailbox near our office and place the parcels in the mailbox to be sent out. I left the envelope containing the First Application in that trolley on January 31, 2021. There is no reason for me to believe that the receptionist did not place the envelope in the mailbox. Further, there were no other instances at this time of mail items not arriving at their intended destination. I verily believe that our receptionist placed the First Application in the mailbox.<sup>9</sup>

[24] This is the only passage that describes events that were within V. M.’s personal knowledge during the critical one-year window after the reconsideration letter was communicated to the Appellant. Reduced to its essence, it shows only that V. M. placed an envelope on an office trolley in the expectation that it would be delivered to its

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<sup>9</sup> See affidavit by V. M. sworn April 6, 2023, paragraph 9, AD5-257.

destination. It does not contain any concrete information about what happened to the envelope after it was last seen on the trolley, nor does the rest of V. M.'s affidavit.

[25] What the affidavit does contain is speculation — and lots of it. V. M. claims, rather implausibly, that he had never known another piece of office mail to go missing until this one. He says that he assumed his receptionist would mail the envelope and that it would be delivered to the Tribunal. He maintains that he had no reason to believe the notice wouldn't reach its destination, even though 19 months went by without any communication from the Tribunal. He assumed that the Tribunal was “simply dealing with delays and backlogs caused by the COVID-19 pandemic (issues with which many other aspects of society were similarly dealing).”<sup>10</sup>

[26] The Appellant's factum continues in the same vein, blaming “organizational chaos that existed in the throes of the pandemic” for the Tribunal's loss of the January 2022 notice of appeal.<sup>11</sup> However, neither the affidavit nor the factum provides evidence that the Tribunal, in particular, was affected by pandemic-related “chaos” and, if it was, whether such chaos affected it any more than other organizations, such as for instance Canada Post or V. M.'s own law firm.

[27] V. M.'s account is also undercut by the fact that, despite having received no confirmation of any kind that the January 2021 appeal had been properly filed, it took him 19 months to follow up with the General Division. By then, it was too late. V. M. again blames what he presumed was “organizational chaos” for the Tribunal's silence and for his consequent decision not to make inquiries, but it is just as likely that he or someone in his office simply forgot about the Appellant's file. V. M. insists that he continued to gather evidence relating to the appeal during the following 19 months but, oddly enough, he did not file any of it with the Tribunal for the entire period.<sup>12</sup> Had he done so, he might have discovered the problem sooner.

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<sup>10</sup> See V. M.'s affidavit, paragraph 11, AD5-258.

<sup>11</sup> See Appellant's factum dated April 11, 2023, paragraph 34, AD5-27.

<sup>12</sup> See V. M.'s affidavit, paragraph 13, AD5-258.

[28] The Appeal Division has previously held that claimants cannot assume their documents will be received if sent by regular mail.<sup>13</sup> When you send documents to Service Canada or to the Tribunal by mail, you run the risk that they won't reach their destination. The Appellant cites a General Division case called *G.C.*, which found that it was more likely than not that a claimant's CPP application was actually received by Service Canada right after he mailed it, rather than three months later, when it was processed and date stamped.<sup>14</sup> However, that case was not about **whether** a document was filed but **when** it was filed. Moreover, the Appeal Division later overturned *G.C.* because the General Division lacked the authority to make a finding about Service Canada's potential mishandling of the application.<sup>15</sup>

[29] V. M. says there is no reason to believe that the Tribunal didn't receive the notice of appeal, but that, strictly speaking, is not true. A liaison officer later told him that the Tribunal had no record of the January 2021 notice of appeal having ever been received.<sup>16</sup> In the end, I had to decide what happened to the notice by choosing between two accounts from equally credible sources. The burden was on the Appellant to prove that the notice had been delivered; in my view, she failed to meet that burden.

**– The Appellant's second appeal is statute barred**

[30] V. M. says that he made a second attempt to file a notice of appeal by email on September 2, 2022. He has submitted a copy of the email from his end but, again, there is no evidence that it was received by the Tribunal.<sup>17</sup> In any event, whether the Tribunal received the email or not, it is relevant because it came well after the one-year hard deadline.

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<sup>13</sup> See *Minister of Employment and Social Development v N.A.*, 2021 SST 72 at paragraph 28. This case involved an application for benefits that was supposedly sent to Service Canada, whereas the Appellant's case involves a notice appeal that was supposedly sent to the Social Security Tribunal. However, these factual differences are immaterial and the underlying law in both cases is essentially the same.

<sup>14</sup> See *G.C. v Minister of Employment and Social Development*, 2020 SST 1241.

<sup>15</sup> See *Minister of Employment and Social Development v G.C.*, 2021 SST 301.

<sup>16</sup> See V. M.'s affidavit, paragraph 13, AD5-258.

<sup>17</sup> See V. M. affidavit, paragraph 14, AD5-259 and an email from V. M. to the Tribunal dated September 2, 2022, AD5-303.



– **The Appellant’s third appeal is also statute barred**

[31] The Tribunal recognized V. M.’s third attempt to file a notice of appeal, this one by email on December 12, 2022. However, it too was filed outside the one-year hard deadline. This appeal cannot proceed because both the General Division and Appeal Division are barred from considering it.

## **Conclusion**

[32] It must be said that the Appellant and her legal team have experienced unusually bad luck in sending and receiving material important to her disability claim. On three separate occasions, they have had key documents inexplicably go missing in transit: (i) Service Canada’s reconsideration letter of September 30, 2020; (ii) V. M.’s notice of appeal of January 30, 2022; and (iii) V. M.’s notice of appeal of September 2, 2022.

[33] V. M. suggested that Service Canada or the Tribunal were to blame for each one of these mishaps. He specifically insisted that a notice of appeal was mailed from his office on January 30, 2022, but he offered little evidence to support this assertion other than a dated copy of the notice and his own assurance that outgoing mail had not been mislaid on his end.

[34] That was not enough for me. V. M. claimed, without evidence, that pandemic-induced “chaos” within the Tribunal might have caused it to lose the notice. But it apparently never occurred to him that the pandemic could just as easily have caused a similar level of chaos within his own office — or, for that matter, at Canada Post. In the end, I found V. M.’s evidence to be speculative and unconvincing.

[35] For that reason, I am dismissing this appeal. For appeals submitted more than one year after reconsideration, the law is strict and unambiguous. The governing legislation states that in no case may an appeal be brought more than one year after the reconsideration decision was communicated to a claimant. While extenuating circumstances may be considered for appeals that come after 90 days but within a year, the wording of the legislation eliminates any scope for a decision-maker to exercise discretion once the year has elapsed. The Appellant’s explanations for filing her appeal

late are therefore rendered irrelevant, as are other factors, such as the merits of her disability claim.

[36] It is unfortunate that missing a filing deadline cost the Appellant an opportunity to make her appeal. However, I am bound to follow the letter of the law. The Appellant may regard this outcome as unfair, but I can only exercise the powers granted to me by the Tribunal's enabling legislation.<sup>18</sup>

[37] The appeal is dismissed.



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Member, Appeal Division

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<sup>18</sup> See *Pincombe v Canada (Attorney General)*, [1995] F.C.J. No. 1320 and *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.