



Citation: *MH v Minister of Employment and Social Development*, 2023 SST 1457

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** M. H.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Andrew Kirk

---

**Decision under appeal:** General Division decision dated March 30, 2023  
(GP-22-2059)

---

**Tribunal member:** Neil Nawaz

**Type of hearing:** Videoconference

**Hearing date:** October 10, 2023

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** November 6, 2023

**Corrigendum date:** November 27, 2023

**File number:** AD-23-604

## Decision

[1] The appeal is allowed. I am ordering the Minister to grant the Appellant more time to request reconsideration of her Canada Pension Plan (CPP) disability claim.

## Overview

[2] The Appellant is a former financial planning associate at a bank. She has a long history of mental health problems. She went on sick leave in August 2017 and hasn't worked since.

[3] The Appellant applied for a CPP disability pension in February 2019. She claimed that she could no longer work because of ~~pelvic inflammatory disease~~ a primary immune disorder and anxiety and depression. In a letter dated July 5, 2019, Service Canada refused her application after determining that she didn't have a "severe and prolonged" disability.<sup>1</sup>

[4] More than two years went by. On January 13, 2022, the Appellant asked Service Canada to reconsider its decision not to grant her the disability pension. Service Canada refused the request, since it came long after the statutory 90-day deadline.<sup>2</sup>

[5] The Appellant appealed Service Canada's refusal to this Tribunal's General Division. She acknowledged that her reconsideration request was late but said she had good reasons for it being late. She said that, on the advice of her lawyer, she had delayed making the request pending the outcome of her workplace long-term disability (LTD) claim.

[6] The General Division decided that an oral hearing was unnecessary and held a paper hearing — that is, one based only on the existing documents. In March, the General Division dismissed the appeal. It found that whether to extend the deadline was a discretionary, or voluntary, decision of the Minister. It found that the Minister had not

---

<sup>1</sup> Service Canada is the agency that the Minister uses to deliver services to the public. CPP disability claimants must show that they have a severe and prolonged disability in accordance with the definitions set out in section 42(2)(a) of the *Canada Pension Plan*.

<sup>2</sup> See Service Canada's reconsideration refusal letter dated February 1, 2022, GD2-9.

handled the Appellant's request for an extension of time in a judicial manner. But it then looked at the evidence itself and decided that the Appellant didn't have a reasonable explanation for requesting reconsideration more than two years after the deadline.

[7] The Appellant then applied for permission to appeal to the Appeal Division. Earlier this year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Last month, I held a hearing to discuss her claim in full.

[8] Now that I have considered submissions from both parties, I have concluded that Service Canada failed to judicially consider the Appellant's request to waive the reconsideration deadline. I have also decided that the Appellant should have been allowed more time to ask for reconsideration.

## Preliminary Matter

[9] In December 2022, the law governing the appeals to the Social Security Tribunal changed.<sup>3</sup> Under the new law, 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.<sup>4</sup> As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about the way in which the Minister addressed the Appellant's request for reconsideration.

## Issues

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

- Was the Appellant's request for reconsideration was late?

---

<sup>3</sup> See section 58.3 of the *Department of Employment and Social Development Act* (DESDA). This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on June 12, 2023, after the new law came into force.

<sup>4</sup> The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.

- If the request was late, did the Minister act judicially when it refused to give the Appellant more time to ask for reconsideration?
- If the Minister didn't act judicially, should the Appellant have more time to ask for reconsideration?

## Analysis

[11] I have applied the law to the available evidence and concluded that the Minister did not deal with the Appellant's late reconsideration request in the appropriate manner. I am satisfied that the Minister has an obligation to take another look at the Appellant's request for an extension of time.

### **The Appellant's request for reconsideration was late**

[12] 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. If a person waits more than 90 days after they were notified of the refusal in writing, then their request is late.<sup>5</sup>

[13] In this case, the Appellant's request for reconsideration was late. The Appellant was notified of the Minister's decision to refuse her CPP disability application by way of a letter dated July 5, 2019.<sup>6</sup> More than two years later, when the Appellant requested reconsideration, she acknowledged that she had received the Minister's initial refusal letter on the same day that it was sent.<sup>7</sup>

[14] I am satisfied that the Appellant didn't make her reconsideration request until January 13, 2022 — long after the 90-day deadline.

---

<sup>5</sup> See section 81(1) of the *Canada Pension Plan* and section 74.1 of the *Canada Pension Plan Regulations*.

<sup>6</sup> See Minister's initial refusal letter dated July 5, 2019, GD2-18.

<sup>7</sup> See Appellant's request for reconsideration dated January 13, 2022, GD2-11.

## **The Minister didn't consider the Appellant extension request judicially**

### **– 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 describes things the Minister must do under the law; the second describes things that are optional — powers the Minister can use if he wants to but doesn't necessarily have to.

[16] Even for discretionary powers, the Minister cannot simply do whatever he 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.<sup>8</sup> 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.<sup>9</sup>

[18] Among the Minister's many discretionary powers is the power to grant an extension when a claimant misses a filing deadline. As noted, 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.<sup>10</sup>

---

<sup>8</sup> *Canada (Attorney General) v Uppal*, 2008 FCA 388.

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

<sup>10</sup> CPP, section 81(1).

[19] Under section 74.1 of the *Canada Pension Plan Regulations* (CPPR), the Minister may allow a longer period to request reconsideration if he is satisfied that the following criteria are met:

- (i) There is a reasonable explanation for requesting a longer period and
- (ii) The claimant has demonstrated a continuing intention to request a reconsideration.<sup>11</sup>

[20] If the request for reconsideration is made more than 365 days after the initial refusal, the Minister must also be satisfied that two more criteria are met:

- (iii) The request has a reasonable chance of success and
- (iv) No prejudice would be caused to any party by allowing a longer period to make the request.<sup>12</sup>

[21] In this case, the Appellant's request for reconsideration came more than 365 days after the Minister turned down her disability application. In considering that request, the Minister was required to exercise his discretionary power judicially while applying all four of the criteria listed above.

**– The Minister misapplied the first condition by demanding more than just a “reasonable” explanation for the delay**

[22] I see an indication that the Minister held the Appellant to an inappropriately high standard when he considered her reasons for filing her reconsideration request late. In the Appellant's case, an adjudicator used a worksheet that set out the four criteria listed in section 74.1 of the CPPR. The worksheet came with guidelines 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

---

<sup>11</sup> See CPPR, section 74.1(3).

<sup>12</sup> See CPPR, section 74.1(4).

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.<sup>13</sup>

[23] 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.”

[24] In her analysis, the Minister's adjudicator considered the Appellant's explanation for the delay in submitting her reconsideration request:

It is acknowledged the client indicated having a medical condition of mental health struggles. In addition to PID (Pelvic Inflammatory Disease) and hypogammaglobulinemia. The client indications that she was delayed in resubmitting due to awaiting legal mediation with her LTD (Long Term Disability). However, this would not support either extenuating circumstances preventing the client from requesting a reconsideration within the 90-day appeal period.<sup>14</sup>

[25] Again, it appears that the Minister's adjudicator was looking for “exceptional or extenuating circumstances,” when all that the law required was a reasonable explanation for missing the deadline.

[26] I am satisfied that the Minister applied the wrong standard in assessing the Appellant's explanation for the delay.

---

<sup>13</sup> See Service Canada's late consideration request worksheet completed by A. Robia on February 1, 2022, GD2-53

<sup>14</sup> See late consideration request worksheet, GD2-53. The Appellant later informed the Minister and this Tribunal that “PID” stood for “Primary Immune Disease.”

## **The Appellant should have more time to ask for reconsideration**

[27] Because the Minister misapplied one of the criteria in section 74.1 of the CPPR, I now have to decide whether the Appellant should have more time to ask for reconsideration. When I do this, I must consider the same criteria that the Minister had to consider. For the following reasons, I am satisfied that the Appellant met all four of those criteria.

### **– The Appellant had a reasonable explanation for requesting a longer period**

[28] The Appellant says that she did not respond to the Minister's initial refusal letter dated July 5, 2019 for the following reasons:

- She was waiting for legal mediation with her workplace insurer regarding LTD benefits;
- the COVID-19 pandemic made it hard to see healthcare providers;
- She felt ashamed asking for a CPP disability pension; and
- She found the process of applying for a CPP disability pension exhausting and traumatic due to her medical conditions.<sup>15</sup>

[29] On the whole, I find this multifaceted explanation reasonable. **In substance**, there was no reason for the Appellant to delay her CPP disability application pending the outcome of her private LTD claim. However, that's not what the Appellant **believed**. Instead, she thought that she was better off waiting for the outcome of her private LTD claim. I am satisfied that her belief was genuine, the result of faulty legal advice.

[30] Ignorance of the law is usually not an excuse. But in this particular instance, the relevant legislation specifically asks for an excuse — a reasonable explanation — for the delay. The Appellant has no expertise in the world of public and private disability

---

<sup>15</sup> See Appellant's request for reconsideration dated January 13, 2022, GD2-13 and 16.



benefits. It is easy to imagine that she might have been led to believe that it made sense to wait until one disability claim was complete before going forward with another.

[31] The Appellant's delay is further explained by arrival of the COVID-19 crisis. It is plausible that her already fragile mental health was further harmed by feelings of isolation and uncertainty engendered by the pandemic. It is likely that the Appellant, who has long reported problems with her memory and concentration, would experience a worsening of these symptoms.

– **The Appellant had a continuing intention to request reconsideration**

[32] The Appellant's explanation for delaying her request for reconsideration suggests that she also had a continuing intention to pursue CPP disability benefits. If she believed that her claim for CPP disability benefits would be strengthened by waiting, then it follows that she never gave up on it during the more than two years before she finally made her request.

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

[33] I find it unlikely that permitting the Appellant to proceed with her disability claim at this late date would prejudice the Minister's interests, given the time that has elapsed since the expiry of the statutory deadline. I don't believe that the Minister's ability to respond, given his department's resources, would be unduly affected by allowing the extension of time to request reconsideration.

– **The Appellant's request for reconsideration has a reasonable chance of success**

[34] A reasonable chance of success is akin to an arguable case. On the face of it, the Appellant has an arguable case that she is disabled. She is a university-educated former financial services administrator who has been off work since 2018. She has been diagnosed with major depression and anxiety disorders. She is on a heavy medication regime and has been under psychiatric treatment for six years with limited effect. In my view, the interests of justice won't be served if the Appellant is prevented from pursuing her disability claim because of a missed deadline.

– **There are limits to the Appeal Division’s remedial powers**

[35] Although I think the Appellant’s disability claim should go forward, I can’t give her everything he wants. That’s because my powers extend only so far. The General Division is empowered to give the decision that the Minister should have given.<sup>16</sup> That, in turn, limits what I can do when I give the decision that the General Division should have given.<sup>17</sup>

[36] The Appellant argues that I should simply go ahead and find her disabled. I have to disagree. So far, the only issues that the Appellant has raised at the Tribunal have been procedural. At this point, the Minister has not yet issued a valid reconsideration decision about the Appellant’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 Appellant’s disability, I can’t do so either.

## **Conclusion**

[37] The Appeal is allowed. The Minister failed to fulfill his obligations under section 74.1 of the CPPR. He applied an overly strict standard in assessing the Appellant’s explanation for her delay in requesting reconsideration. When I reviewed the record myself, I found that the Appellant had fulfilled all four of the criteria for allowing an extension of time to request reconsideration after more than a year has passed. In particular, I found that the Appellant’s explanation for her late request was reasonable.

[38] For the above reasons, I am directing the Minister to reconsider the Appellant’s disability claim.



---

Member, Appeal Division

---

<sup>16</sup> See DESDA, section 54(1).

<sup>17</sup> See DESDA, section 59(1).