Citation: *RS v Minister of Employment and Social Development*, 2024 SST 253

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	R. S.
Representative:	Frank Van Dyke
Respondent:	Minister of Employment and Social Development
Representative:	Rebekah Ferriss
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated June 5, 2023 (issued by Service Canada)
Tribunal member:	Wayne van der Meide
Type of hearing:	Videoconference
Hearing date:	March 4, 2024
Hearing participants:	Appellant Appellant's representative Appellant's witness Respondent's representative
Decision date:	March 12, 2024
File number:	GP-23-1305

Decision

[1] The appeal is allowed.

[2] The Appellant, R. S., is entitled to have the February 8, 2014, decision about his Canada Pension Plan Disability (CPPD) pension reconsidered.

Overview

[3] The Appellant applied for a CPPD pension on July 4, 2013.[1] The Minister denied his application in a letter dated February 8, 2014.[2] I will call this the "denial decision".

[4] On December 7, 2022 (more than eight years later), the Minister got a request from the Appellant to reconsider the denial decision.[3] On June 5, 2023, the Minister said that it would not reconsider its denial decision because the Appellant asked it too late.[4] The Appellant appealed that decision to the Tribunal.

What I must decide

[5] I must decide whether the Appellant's reconsideration request was late.

[6] If it was, then I must decide whether the Minister exercised its discretion judicially (made its decision properly) when it refused to give the Appellant more time.[5]

[7] If the Minister didn't exercise its discretion judicially, I will make the decision it should have made. To do this, I will be considering four issues that I will describe more later.

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[1] The date received stamp is at GD2-216.
[2] See GD2-29 to GD2-32.
[3] See GD2-14 to GD2-20.
[4] See GD1-9 to GD1-13 for the decision letter and records explaining why the decision was made.
[5] When the Minister of Employment and Social Development (Minister) gives more time (or "a longer period" as the law words it) in this situation, that means it agrees to consider the late request.

I accepted late evidence

[8] The Appellant submitted late evidence (see GD7). I accepted it in a previous decision.[6]

[9] The Appellant then submitted more late evidence (see GD14 and GD16) after the hearing started and after it concluded, respectively. The Social Security Tribunal Rules of Procedure say that I cannot consider late evidence unless I give a party permission to use that evidence.[7]

[10] I am accepting GD14 and GD16 because:

- the Minister didn't object
- it is relevant
- I gave the Minister a chance to reply to the evidence and considered their reply[8]

[11] I am swayed to accept this evidence by two things in particular: the Minister's flexibility and the importance of the evidence. In the future, I hope that the Appellant's representative will make sure, **before the hearing**, that the evidence upon which he intends to rely has been received, coded, and shared with the parties.

Reasons for my decision

The Appellant's reconsideration request was late

[12] The Appellant's request was late. He asked the Minister to reconsider the denial decision more than 90 days after he received notice of the decision.

[13] An appellant has 90 days to ask the Minister to reconsider a denial decision.[9] If the appellant waits more than 90 days, then their request is late.

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[6] See GD13.
[7] See section 42 of the Rules.
[8] See GD17
[9] See section 81(1) of the *Canada Pension Plan*.

[14] The Appellant hasn't been consistent about whether he received the Minister's denial decision. Sometimes he said he wasn't sure he got the letter.[10] However, at the hearing he said he got the denial decision in February 2014.

[15] I find that the Appellant received the denial decision at some point in February 2014. He has never said he didn't get the letter, only that he wasn't sure if he did or not. Also, what he did at the time (which I will talk about more later) shows that he knew the Minister denied his application.

[16] The Appellant asked the Minister to reconsider the denial decision on December 7, 2022. This is more than 90 days after the Minister told the Appellant about its denial decision. In fact, the Appellant was about eight years late.

What to consider when a reconsideration request is late

[17] The Minister can reconsider a decision even if the reconsideration request is late.

[18] For this to happen, the law says that an appellant has to convince the Minister of two things. The appellant has to show that:[11]

- they have a reasonable explanation for why they are late
- they had a "continuing intention" to ask the Minister to reconsider

[19] If the appellant asked the Minister to reconsider its decision more than 365 days after the Minister told them about it in writing **or** made a second application for the same benefit, then the law says that the appellant has to convince the Minister of two other things too. The appellant has to show that:[12]

- their reconsideration request has a reasonable chance of success
- giving them more time would not be unfair to another party

[10] See GD2-14 to GD2-21 and GD2-183 to GD2-203.
[11] See section 74.1(3) of the Canada Pension Plan Regulations.
[12] See section 74.1(4) of the Canada Pension Plan Regulations.

[20] If the Appellant doesn't meet one of these four factors, then he isn't entitled to have the Minister's decision reconsidered.

The Minister must exercise its discretion judicially

[21] The Minister's decision whether to consider a late reconsideration request is discretionary. Discretion is the power to decide whether to do something. The Minister has to exercise its discretion judicially.[13]

[22] If the Minister has done one of the following, then it didn't exercise its discretion judicially:[14]

- acted in bad faith
- acted for an improper purpose or motive
- considered an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory way (unfairly)

The Minister didn't exercise its discretion judicially

[23] When I consider this issue, I look at the evidence of how the decision was made by the person or people who made it when they made it.

[24] The Minister said it refused the Appellant's reconsideration request because he didn't meet any of the four factors.

[25] There is no evidence that the Minister acted in bad faith, for an improper purpose or motive, or in a discriminatory way. But the Minister considered irrelevant factors and ignored relevant factors. This means the Minister didn't exercise its discretion judicially.

– The Minister considered irrelevant factors

[26] The Appellant has to show he has a reasonable chance of success. In an "Analysis" document, under the heading "Is there a reasonable chance of success?",

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[13] See Canada (Attorney General) v Uppal, 2008 FCA 388.
[14] See Canada (Attorney General) v Purcell, [1996] 1 FC 644.

the Minister said this: “Given the length of the delay, it is arguable that the Minister would not be able adequately to reconsider the applicant’s application….”[15] The Minister focussed on how likely it was that the Appellant would succeed, not was there a reasonable possibility he would succeed. This standard was too high. The issue is whether there is some basis upon which the Appellant could succeed. Because the Minister didn’t consider the right issue, the Minister didn’t exercise its discretion judicially.

What happens when the Minister doesn’t exercise its discretion judicially

[27] I have found that the Minister didn’t exercise its discretion judicially. So, I now have to assess for myself whether the Appellant should get more time.

[28] If I find that the Appellant should get more time, then I must send the matter back to the Minister and tell it to reconsider the decision. If I don’t find that the Appellant should get more time, then I must dismiss his appeal.

The Appellant should have more time

– What happened

[29] The delay in this case is more than eight years. This is a **very long** delay and I have considered it in relation to **all** of the four factors. On the other hand, there is no fixed period of delay after which the Minister can refuse to consider a request for reconsideration without considering the circumstances.

[30] I think it will be a very rare set of facts in which a delay of eight years can be excused. Therefore, I will start my analysis with a high-level summary of what happened.

[31] In October 2012 the Appellant had a medical procedure that went very badly. He got a brain injury. His right leg was also damaged. After rehabilitation he applied for CPPD pension in July 2013. He got his denial decision in February 2014. On April 1,

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[15] See GD1-11.

2014, he met with his family doctor. The family doctor said this: “R. S. wonders about CPP application – I think he should appeal and I will write a letter of [support] for him.”[16]

[32] The family doctor’s notes then include a letter in support of the Appellant.[17] In it she says, among other things: “I hope you can reconsider his application….” The Minister says that letter was never received.[18] There is no evidence that the family doctor’s letter was sent by her or received by the Minister. I find that the Minister never got this letter.

[33] In 2018 (about four years later) the Appellant met someone who became his friend. She became involved with this matter. In late 2022 (a further four years later) she helped him ask the Minister to reconsider its denial decision.

– **The Appellant has a reasonable explanation for why he was late**

[34] A reasonable explanation for one person may not be reasonable for another. The facts of each case and each person are important.

[35] I should also say something about the Appellant’s credibility and the reliability of his evidence. The Appellant’s brain injury resulted in cognitive deficits including problems with memory and concentration.[19] At the hearing he relied on notes and sometimes had difficulty remembering details. He often prefaced his answers with statements like “I think….” Several times he also said he couldn’t remember. I find that he is credible, but his evidence wasn’t always reliable. That is why I have also considered whether his memory matches other evidence and is objectively reasonable.

[36] The Appellant says that he thought his application was denied because it was missing or lacking in medical evidence showing a severe disability. I believe him in part

[16] See GD16-3
[17] See GD16-3 and GD16-4.
[18] See GD15.
[19] I won’t provide detailed citations to all the medical evidence, even if I have considered it. See for example GD2-164 to GD2-170, GD2-38 to GD2-41, and GD2-51 to GD2-56.

because I agree with him: that is why the Minister denied the application. He says that this is why he asked his family doctor to help him.[20] This too makes sense to me.

[37] At the hearing the Appellant said that his family doctor told him she would send a letter asking the Minister to reconsider. The note actually says that she would "support" him.[21]

[38] The Appellant said that when he met with her after April 1, 2014, he would ask her whether she heard anything back from the Minister. I believe him, and these conversations tell me that the Appellant really did think his doctor was handling the request for reconsideration, not simply supporting his request. He said that when she told him she hadn't heard back, he thought that the process was slow.

[39] The Minister says that the Appellant's explanation isn't reasonable for several reasons[22]:

- he knew or should have known from reading the denial decision that **he** was responsible (not his doctor) to ask for reconsideration
- after a certain point of his family doctor telling him she hadn't heard back about the reconsideration request, he should have done something himself
- during this period, he was involved in medical malpractice litigation and purchased a house
- the medical evidence (of his cognitive, physical and mental health limitations) show that he had the "capacity" to follow-up on the denial decision, if not continuously, at least at certain points during the eight-year delay[23]

[40] The Appellant says that I need to consider what was reasonable **for** him, not someone else. I agree. The Appellant's explanation may be reasonable for him, but not others.

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[20] See GD2-142 to GD2-148.
[21] See GD16.
[22] See GD4, GD6 and GD17.
[23] See GD2-119 to GD2-121, GD2-293, GD3-45, GD3-24, GD3-11

[41] If a reasonable delay of this length could only be explained by someone being "incapable" of asking for reconsideration earlier, I would deny this appeal. The Appellant clearly had the "capacity" to write a letter asking the Minister to reconsider.. At the very least, he could have asked someone to help him **and** follow up. But that is not the test.

[42] When I look at all the evidence, including what the Appellant said at the hearing, this is what I see. Since the medical mishap, the Appellant has had issues with his memory and concentration. His capacity to multi-task is compromised. He has also had periods of depression, sever fatigue, physical limitations, and cognitive deficits related to taking strong pain medications.

[43] The Appellant thought, albeit incorrectly, that his doctor started the process. He thought it took a long time, like the medical malpractice litigation process. Because of his memory problems, he didn't appreciate how much time was passing. Because of his difficulties multi-tasking and concentrating, he would lose focus on this issue. He could only do/think about so many things at once.

[44] The Minister says he should have known it was taking too long based on the time it took between his initial application and denial. I don't agree with the Minister. That may be true for the vast majority of people. It wasn't true for the Appellant.

[45] The Appellant then met someone who supported him in this and other aspects of his life. By getting a power of attorney and essentially representing him, she figured out what had happened and helped him to ask for reconsideration.

[46] If after eight years **the Appellant** had asked for reconsideration without assistance, this would be a very different case. But this isn't what happened. His friend took charge.[24] What happened with this reconsideration request is similar to what happened in other parts of his life. He formed an intention (e.g., to initiate a malpractice suit and buy a house) and then he relied on other people (e.g., lawyers, real estate agents, doctors) to action it.

[24] This is what the Appellant's friend described at the hearing. See also GD2-18 to GD2-21 and GD2-182.

[47] The last thing I will say about this issue is that a reasonable explanation is not the same thing as a convincing or compelling explanation. A "reasonable explanation" means an explanation that isn't unreasonable. It just has to make sense. The Appellant's explanation makes sense to me, even considering the extreme length of the delay.

– **The Appellant demonstrated a continuing intention to ask for reconsideration**

[48] The Appellant demonstrated an intention to request reconsideration when he spoke with his family doctor on April 1, 2014. The issue then becomes whether he demonstrated a "continuing intention" after that.

[49] Demonstrate means to show. And "continuing" means without interruption. So, I think of the test in this way: did the Appellant do things that showed he always (i.e., without interruption) meant to ask for reconsideration?

[50] The Federal Court of Appeal said that a person can demonstrate a continuing intention while pursuing a thing very slowly as long as the person doesn't seem to have abandoned it.[25] The evidence shows that the Appellant never abandoned his intention to request reconsideration. He may have not actively and continuously pursued the request, for multiple reasons, but he never abandoned it.

[51] At first, he "showed" his intention by asking his doctor for updates. Then, he showed his intention by asking his friend to look into what had happened. Nothing he has ever said or done suggests that he abandoned his intention to ask the Minister to reconsider the denial decision.

– **The Appellant has a reasonable chance of success**

[52] The Appellant has a reasonable chance of success. I say this simply because there is and has been evidence since his initial application that could support a finding

[25] See Canada (Attorney General) v. Larkman, 2012 FCA 204 at paragraphs 70 and 71.

that he had a severe and prolonged disability no later than he had to based on his contributions to the CPP.[26]

– **The delay doesn't cause prejudice to another party**

[53] The law says that I can only grant an extension if the delay is more than one year when there is "no prejudice" to another party. I will say a couple things about this. First, I think it is important that the law says "no prejudice" as opposed to "undue" prejudice. In other words, it is not a very difficult thing to show. **But** the prejudice must be real (not hypothetical). For example, it is not enough for the Minister to raise the spectre of many people asking for reconsideration years after they received the denial decision and the havoc it might cause.

[54] I appreciate that delay, in and of itself can lead to prejudice.[27] On the other hand, as I mentioned before, the law doesn't set a "hard deadline" after which a person cannot ask for reconsideration, regardless of the facts.

[55] When I look at this case this is what I see. The Appellant has to prove he had a disability that was severe and prolonged. The Minister doesn't have to disprove anything. If anyone is prejudiced, it is the Appellant, not the Minister.[28] There are no other parties in this case.

[56] The medical evidence is what it is. The Minister doesn't need to go out and seek other evidence or "challenge" the existing evidence. The Minister can make a decision based on the medical evidence **it has**. If it isn't convinced by the evidence (for whatever reason), then its decision would be to deny a CPPD pension to the Appellant.

[57] Although it may be more difficult to make a decision in this case as compared to most others, the Minister isn't prejudiced.

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[26] I won't analyze or even cite this evidence in detail. It wouldn't be appropriate for me to do so. But for a summary of the evidence, see the Minister's "Initial Adjudication Summary" at GD2-51 to GD2-56.
[27] See *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[28] I note that, based on a literal interpretation, even the Appellant's prejudice could be a bar to granting an extension because they are a party. But based on the context and purpose of the legislation and this part of the legislation, interpreting the legislation in this way would be unreasonable.

Conclusion

[58] The Minister's decision wasn't properly made, and the Appellant meets the four factors for a late reconsideration. He is entitled to have the Minister's denial decision reconsidered.

[59] I am sending this matter back to the Minister. The Minister must reconsider its denial decision.

[60] This means the appeal is allowed.

Wayne van der Meide
Member, General Division – Income Security Section