



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. E. v Canada Employment Insurance Commission*, 2019 SST 127

Tribunal File Number: AD-19-46

BETWEEN:

S. E.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: February 13, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division.

OVERVIEW

[2] The Applicant, S. E. (Claimant), established a claim for Employment Insurance (EI) regular benefits effective May 10, 2015. The Claimant then received EI benefits before the Respondent, the Canada Employment Insurance Commission (Commission), became aware of issues regarding his availability for suitable employment. The Commission gave the Claimant written notice of a decision, dated June 20, 2016, that showed that he was retroactively disentitled from receiving EI regular benefits effective August 14, 2015. This resulted in an overpayment.

[3] On June 12, 2018, the Claimant submitted a request for reconsideration of the decision regarding his availability for employment. This was beyond the 30-day limit for making such requests. The Commission advised the Claimant that the deadline for applying for a reconsideration of the decision had passed. The Claimant appealed the decision to the Tribunal's General Division.

[4] The General Division concluded that the Commission did not meet its burden of showing that it exercised its discretionary power judicially because the Claimant submitted post-hearing medical evidence that was not available during the Commission's review. Still, the General Division concluded that the Claimant's late request for reconsideration should not be accepted because the Claimant does not have a reasonable explanation for asking for an extension to make the reconsideration request, the Claimant has not demonstrated a continuing intention to appeal, and the appeal does not have a reasonable chance of success.

[5] The Claimant now seeks leave to appeal the General Division's decision. He submits that the General Division did not conduct a proper investigation to determine facts about his health condition for the period of 2015 to 2017. He has filed more medical evidence to support his position.

[6] The Tribunal must decide whether there is arguably some reviewable error of the General Division on which the appeal might succeed.

[7] The Tribunal refuses leave to appeal because the Claimant's appeal has no reasonable chance of success.

ISSUE

[8] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

ANALYSIS

[9] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[10] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case; instead, he must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, the Claimant must show that there is arguably some reviewable error on which the appeal might succeed.

[11] Therefore, before the Tribunal can grant leave, it must be satisfied that the reasons for appeal fall within any of the grounds of appeal mentioned above and that at least one of the reasons has a reasonable chance of success.

[12] This means that the Tribunal must be in a position to determine, in accordance with section 58(1) of the DESD Act, whether there is an issue of natural justice, jurisdiction, law, or fact that may lead to the setting aside of the General Division decision under review.

Issue: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[13] In his application for leave to appeal, the Claimant submits that the General Division did not conduct a proper investigation to determine facts about his health condition for the period of 2015 to 2017. He has filed more medical evidence to support his position.

[14] It is well-established case law that the Appeal Division can consider only the evidence that was filed by the Claimant before the General Division when deciding whether to grant a claimant's application for leave to appeal.

[15] The General Division had to decide whether the Commission exercised its discretion in a judicial manner under section 112 of the *Employment Insurance Act* (EI Act) when it denied the Claimant's request to extend the 30-day reconsideration period.

[16] The Commission made the decision regarding the Claimant's availability for suitable employment that resulted in the overpayment on June 20, 2016. On that date, the Commission wrote to the Claimant stating he was not entitled to benefits starting August 14, 2015, because he had quit his job due to medical reasons, he had not been seeking work and, he was not able to work in suitable and full-time employment.

[17] The Commission considered that the Claimant confirmed receipt of its decision dated June 20, 2016, and that he did not request a reconsideration of the decision, under section 112 of the EI Act and section 1 of the *Reconsideration Request Regulations* (Reconsideration Regulations), until June 12, 2018. This was a delay of 692 days. The Commission's decision of June 20, 2016, specifically mentioned the deadline for requesting a reconsideration if the Claimant was not satisfied with the outcome.

[18] The Commission considered that, when asked about the reason for his delay, the Claimant initially stated that he delayed in filing a request for reconsideration until June 12, 2018, because he was not in the right frame of mind and because he thought he had already requested a reconsideration of the decision regarding his availability for employment.

[19] The Commission considered that, around the same period, it had made another decision involving the Claimant on another issue and that he had requested a reconsideration of that decision.

[20] The Commission also considered that the Claimant did not have a reasonable chance of success on the availability issue and that granting an extension to the 692-day delay would therefore cause it prejudice. Information on file showed that the Claimant secured employment during his benefit period and that he left this employment because of medical concerns. Therefore, the Claimant was unable to accept or seek other employment for the same reasons and, more specifically, because of issues with his eyesight.

[21] In considering the above facts on file, the Commission concluded that the Claimant had not shown extenuating circumstances, had not provided a reasonable explanation for the delay, and had not demonstrated a continuing intention to request a reconsideration of the decision on the issue of availability.

[22] After reviewing the Claimant's evidence, the General Division determined that the Commission did not meet its burden of showing that it had exercised its discretionary power judicially because the Claimant submitted post-hearing medical evidence that was not available for the Commission to review.

[23] Nonetheless, the General Division concluded that the Claimant's late request for reconsideration should not be accepted because the Claimant does not have a reasonable explanation for asking for an extension to make the reconsideration request, the Claimant has not demonstrated a continuing intention to appeal, and the appeal does not have a reasonable chance of success.

[24] The General Division found that, even though the 30 days after June 20, 2016, may have been difficult for the Claimant because of his health situation, there was no reason he could not have requested a reconsideration of the decision regarding his availability since he had made such a request on another issue around the same period. The General Division found that the Claimant's argument that he thought he only needed to file one request for reconsideration for two separate issues to be untenable.

[25] Furthermore, the General Division found that the medical evidence states the Claimant was cleared from his cataract disability on November 25, 2016, yet his request for reconsideration was not made until June 12, 2018. This is a delay of more than a year from the date the Claimant was cleared from the medical issue.

[26] The General Division found that the medical evidence submitted post-hearing did not provide a reasonable explanation for asking for an extension to make a reconsideration request and failed to demonstrate a continuing intention to appeal the Commission's decision regarding his availability for employment.

[27] The General Division also found that the Claimant's case did not have a reasonable chance of success because he had made no submissions arguing that he was available for work in the relevant period and had focused on the fact that he was ill. It concluded that these reasons would not meet the threshold to reverse the decision regarding his availability for suitable employment.

[28] Based on these findings, the General Division concluded that the Claimant did not meet the test for an acceptable late reconsideration request under the Reconsideration Regulations.

[29] Unfortunately for the Claimant, an appeal to the Appeal Division is not a new hearing where claimants can submit evidence again and hope for a favourable outcome.

[30] In his application for leave to appeal, the Claimant has not identified any reviewable errors, such as a jurisdictional error, or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law and has not identified any erroneous findings of fact that the General Division may have made in a perverse or capricious manner or without regard for the material before it when it decided that it could not accept the Claimant's late reconsideration request.

[31] For the reasons mentioned above and after reviewing the appeal file and the General Division's decision and considering the Claimant's arguments in support of his request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

[32] The Tribunal refuses leave to appeal to the Appeal Division.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	S. E., self-represented
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