Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *A. K. v Canada Employment Insurance Commission*, 2019 SST 685

Tribunal File Number: AD-18-585

BETWEEN:

A. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: July 30, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Appellant, A. K. (Claimant), obtained Employment Insurance benefits using a fraudulently obtained Record of Employment. As a result, the Commission required the Claimant to return the benefits that had been paid, and it imposed a penalty. The Commission maintained this decision on reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division found that she had filed her appeal more than one year from the day on which the reconsideration decision had been communicated. The appeal was dismissed for having been filed out of time. The Claimant now appeals to the Appeal Division.

[4] The Claimant's appeal is dismissed. The medical evidence with which the Claimant was concerned would not support an inference that the appeal was filed within one year of the date the decision was communicated The General Division had no legal authority to allow the appeal to proceed once a year had passed since the date that the reconsideration decision was communicated.

ISSUE

[5] Did the General Division base its decision on an erroneous finding of fact without regard for the July 9, 2018, medical note?

ANALYSIS

[6] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] The only grounds of appeal are as follows:

> The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> The General Division erred in law in making its decision, whether or not the error appears on the face of the record, or;
>
> The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Issue 1:Did the General Division base its decision on an erroneous finding of fact without regard for the July 8, 2018, medical note?

[8] In her written submission, the Claimant requests that I consider her continuing intention to appeal, the existence of an arguable case, her reasonable explanation for the delay, and the prejudice to the other party.[1] The General Division is normally required to take these factors into consideration before granting or refusing an extension of time.[2] The Claimant appears to be arguing that the Claimant's condition as described in the medical letter would have been important to the General Division's assessment of these factors.

[9] However, the Federal Court of Appeal has directed that the General Division take these factors into consideration for the purpose of guiding the General Division's *exercise of discretion.* The extension of time decision is only discretionary if the appeal is filed within a year of the dated that the decision was communicated. After more than a year has passed, section 52(2) of the DESD Act states that "**in no case** may an appeal be brought". At that point, the General Division has no discretion and is prohibited from granting an extension.

[10] Therefore, the only possible relevance of the medical letter would be as evidence of the Claimant's incapacity over the period from the decision of January 11, 2017, through to July 18, 2017, which is one year prior to the date the appeal was filed. If the medical letter supported a finding that the Claimant did not have the mental capacity to understand that she had received the reconsideration decision from the Commission throughout that period, then it would have

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[1] AD4
[2] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883

been relevant to determining the date the decision had been communicated. The General Division would not have been prevented by section 52(2) of the DESD Act from allowing the Claimant's late appeal to go forward, if it could find that the appeal was filed within one year of the date that the decision was effectively communicated.

[11] However, on a balance of probabilities, I find that the medical letter does not support an inference that the appeal was filed within one year of the date the decision was communicated. In other words, the medical letter is not evidence that the Claimant did not know or could not have known of the Commission's reconsideration decision until sometime that was within a year of the date she eventually filed her appeal.

[12] The letter of July 9, 2018, describes the Claimant's general level of functioning but not her mental capacity. The medical letter diagnoses and describes the Claimant's mental health issues, including their effect on her social functioning, motivation and her concentration in the period between 2015 and the date of the letter. However, nothing in the letter suggests that the Claimant would not have had the ability to receive the Commission's decision, understand that it was a decision, or understand her need to respond.

[13] At the Appeal Division, the Claimant did not actually take the position that she had not had the capacity to understand that the Commission had given her a decision. The Claimant herself stated that she received the decision in January 2017 and that she knew she had to appeal. The Claimant clearly acknowledged that she had known she knew she had 30 days to appeal and that she was "not ignoring" the appeal. The Claimant's representative took a somewhat different position, confirming that the Claimant knew she had to appeal but stating that the Claimant had not been aware of the timeline.

[14] However, both the Claimant and her representative emphasized that the Claimant had left the appeal in the hands of a different representative and that person had not filed the appeal as he was supposed to do. The Claimant also argued that she was suffering for years from her mental illness and was in bad condition at the time. She was also overwhelmed with appeals including a decision or decisions associated with the Ontario Disability Support Program.

[15] I do not doubt that the Claimant's mental illness affected her ability to manage her affairs and that this included her own ability to file the appeal or to follow up to ensure her representative was acting on her behalf. If the Claimant's appeal had been late—but still within the year—than the medical letter supporting her mental illness and her ability to function would have been relevant to determining whether she had a reasonable excuse and a continuing intention to appeal.

[16] However, the medical letter is not relevant to this extension of time appeal because the appeal was filed more than a year after the decision was communicated. The letter does not confirm that the Claimant could not have known she received a reconsideration decision or appreciated its meaning.

[17] Therefore, the General Division did not make an error by omitting to mention or analyze the medical letter. The Federal Court of Appeal stated in *Simpson v. Canada (Attorney General)*[3] that the General Division is not required to refer to each and every piece of evidence but is presumed to have considered all the evidence. In this case, it is likely that General Division did not refer to the medical letter because it was not relevant to its decision under section 52(2) of the DESD Act.

[18] The Claimant has not established that the General Division erred under section 58(1)(c) of the DESD Act by basing its decision on an erroneous finding of fact that it made without regard for the evidence.

CONCLUSION

[19] The appeal is dismissed in accordance with my authority under section 59(1) of the DESD Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	July 16, 2019
METHOD OF PROCEEDING:	Teleconference

[3] Simpson v. Canada (Attorney General) 2012 FCA 82

APPEARANCES:	A. K., Appellant Dina Arkhipov, Representative for the Appellant