



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. J. v. Minister of Employment and Social Development*, 2016 SSTGDIS 13

Tribunal File Number: GP-13-3078

BETWEEN:

L. J.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shane Parker

DATE OF DECISION: January 26, 2016

REASONS AND DECISION

FACTS

[1] This matter pertains to the Respondent's recalculation of the Appellant's Guaranteed Income Supplement (GIS) from December 2004 to October 2012 due to his previously undeclared foreign pension from India.

Date Appellant received the initial decision

[2] The Respondent's initial decision in this regard was dated November 21, 2012 (the initial decision). The Respondent considered the initial decision delivered to the Appellant on December 1, 2012. The Appellant suggested he received it on November 23, 2012 (GD2-7). He also stated he did not receive it until May 10, 2013 (per May 19, 2013 letter at GD2-35). The Tribunal finds that the Appellant received the initial decision on May 10, 2013 after his return to Canada (he was absent from November 23, 2012 to April 30, 2013). November 23rd was an unlikely receipt date given this was also his departure date, and (even according to the Respondent) because of the presumed mail delivery time of 10 days following the initial decision date.

[3] The Appellant requested a reconsideration of the initial decision. The reconsideration request was received on October 4, 2013 (the reconsideration request at GD2-7 to 8), beyond the 90-day deadline set out in subsection 27.1(1) of the Old Age Security (OAS) Act which provides:

Request for reconsideration by Minister

27.1 (1) A person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to the person, or respecting the amount of a benefit that may be paid to the person, may, within ninety days after the day on which the person is notified in writing of the decision or determination, or within any longer period that the Minister may, either before or after the expiration of those ninety days, allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

[4] In his reconsideration request, the Appellant said he received the initial decision the day he left the country for India where he was visiting his wife who was medically ill. His absence was from November 23, 2012 to April 30, 2013. His son did not promptly forward his mail (including the initial decision). The Appellant also referenced his May 19, 2013 letter, advising that as soon as he received the initial decision he set out to collect documentation and assistance with his file. He is legally blind, and cannot operate a computer, and otherwise required help with translation.

[5] On October 28, 2013 the Respondent denied the Appellant's reconsideration request, and maintained its initial decision (the Decision at GD1A-3 to 6)). The Appellant appealed the Decision to the Tribunal on November 25, 2013.

TRIBUNAL'S JURISDICTION

[6] This appeal is before the Tribunal pursuant to subsection 28(1) of the OAS Act, which reads:

28. (1) A person who is dissatisfied with a decision of the Minister made under section 27.1, including a decision in relation to further time to make a request, or, subject to the regulations, any person on their behalf, may appeal the decision to the Social Security Tribunal established under section 44 of the Department of Employment and Social Development Act.

[7] The Tribunal Member decided to render a decision on the basis of the documents and submissions filed for the following reasons:

- A further hearing is not required;
- There are no gaps in the information in the file or need for clarification;
- This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[8] The issue the Tribunal must now decide is whether the Respondent acted judicially in denying the late reconsideration request.

ANALYSIS

[9] The analysis of this issue begins with subsection 29.1(1) of the OAS Regulations. This provision sets out the test in determining whether a late reconsideration request may be allowed:

29.1 (1) For the purposes of subsection 27.1(1) and (1.1) of the Act and subject to subsection (2), the Minister may allow a longer period to make a request for reconsideration of a decision or determination if the Minister is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration.

[10] The decision of the Respondent to grant or refuse a late reconsideration request pursuant to subsection 29.1(1) is a discretionary one.

[11] Case law indicates that the Respondent's discretion must be exercised judicially or judiciously (*Canada (A.G.) v. Uppal* 2008 FCA 388).

[12] A discretionary power is not exercised "judicially" if it can be established that the decision-maker (in this case the Respondent):

- acted in bad faith,
- acted for an improper purpose or motive,
- took into account an irrelevant factor,
- ignored a relevant factor, or
- acted in a discriminatory manner.

Canada (A.G.) v. Purcell, [1996] 1 FC 644.

[13] The following statement of Viscount Simon L.C. regarding the ignorance of relevant factors in the exercise of discretion was adopted by the Federal Court of Appeal and the Supreme Court of Canada:

The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due

only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. **But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.**

[emphasis added here]

(Charles Osenton & Co. v. Johnston, [1942] A.C. 130, at p. 138; Polylok Corp. v. Montreal Fast Print (1975) Ltd., [1984] 1 F.C. 713 (C.A.); Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3)

[14] The Decision at issue in the present appeal is curt and leaves one to infer that the Respondent ignored the explanation provided by the Appellant in his late reconsideration request, despite the Decision's statement to the contrary. The Decision merely acknowledges receipt of the reconsideration request dated October 3, 2013 and (without meaningful elaboration) includes the general statement that it considered the Appellant's reasons for requesting reconsideration beyond the 90-day deadline. The Decision references an enclosed Decision Document for further explanation (GD1A-3).

[15] The Decision Document simply states "Reasonable explanation (sic) not provided per OAS legislation" and "No intention to request a reconsideration within initial 90-day period." Neither the Decision nor the Decision Document address or cite any specifics provided in the Appellant's reconsideration request.

[16] Moreover, the Decision conflicts with its own express guideline as to what constitutes a reasonable explanation for delay. The guideline states:

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 that prevented them 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. (GD1A-5)

[17] In the present matter, the Appellant did in fact encounter delay due to exceptional circumstances. The Appellant's medical condition that caused delay was his blindness. The extenuating circumstances (situational factors beyond his control) were the illness of his wife and his dependence upon a third party for assistance with his file. It was also noted that he relied upon his son to forward his correspondence while he was out of the country, adding that the failure to promptly forward him the initial decision also caused delay. In other words, the Respondent was aware of relevant factors such as exceptional and extenuating circumstances; however it failed to address the existence of these in its Decision. Worse, the Respondent denied these existed.

[18] Not only was there a reasonable explanation for the delayed reconsideration request, the Appellant established a continuing intention to request a reconsideration. In his letters of May 2013 and October 2013 it was clearly expressed that he took immediate action to retrieve documents and seek assistance with this file once he received the initial decision. The Respondent failed to mention this in its Decision, again ignoring relevant information.

CONCLUSION

[19] For the above reasons, the Tribunal finds that the Respondent's discretion was not exercised judicially and allows the Appellant's reconsideration request to proceed. As such, the matter is referred back to the Respondent for reconsideration.

[20] The appeal is allowed.

Shane Parker
Member, General Division - Income Security