



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. H. v. Minister of Employment and Social Development*, 2016 SSTGDIS 78

Tribunal File Number: GP-16-420

BETWEEN:

M. H.

Appellant

and

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

Respondent

and

J. D.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Susan Smith

DATE OF DECISION: October 4, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant was in receipt of an Old Age Security (OAS) pension and Guaranteed Income Supplement (GIS). The Respondent reviewed the Appellant's entitlement for GIS and in a decision letter dated March 1, 2013, communicated the decision reached that the Appellant had been paid benefits to which she was not entitled based on her status of common-law spouse. The Appellant was assessed an overpayment of \$7118.84. The Respondent maintained their decision upon reconsideration and communicated the reconsideration to the Appellant by letter dated December 17, 2014. The Appellant appealed that decision to the Social Security Tribunal (Tribunal) on January 29, 2016, beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

[2] Subsection 52(1)(b) of the Department of Employment and Social Development (DESD) Act requires that an appeal of a decision must be brought before the Social Security Tribunal (SST) in the prescribed form and manner within 90 days after the day on which the decision is communicated to the appellant.

[3] Subsection 52(2) of the DESD Act allows the General Division of the SST to allow an extension of time within which to bring an appeal but in no case can the time be extended more than one year after the day on which the decision was communicated to the appellant.

[4] In accordance with paragraph 3(1)(b) of the *Social Security Tribunal Regulations* (Regulations), the Tribunal may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision.

ISSUE

[5] The Tribunal must decide whether to allow an extension of time for the Appellant to appeal pursuant to subsection 52(2) of the DESD Act.

ANALYSIS

[6] The Respondent's reconsideration decision was dated December 17, 2014. The Tribunal assumes that the reconsideration decision was sent to the Appellant by mail. The Tribunal takes judicial notice of the fact that mail in Canada is usually received within 10 days; however, as this was mailed so close to Christmas, it is reasonable to allow 21 days for delivery by mail. The Tribunal therefore finds that the reconsideration decision was communicated to the Appellant by January 7, 2015.

[7] In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant had until April 7, 2015 to file an appeal.

[8] On September 23, 2015, the Appellant wrote a letter to Service Canada in which she indicated she wished to request reconsideration of the Respondent's decision. She reiterated statements she had previously submitted in writing regarding her marital status and she attached a copy of the Respondent's December 17, 2014 reconsideration decision.

[9] On November 24, 2015 Service Canada wrote to the Appellant and returned her letter of September 25, 2015 "requesting an appeal from the Social Security Tribunal" and instructing her where to send her appeal, as well as instructing her that she must use the proper format and telling her where to access the proper forms.

[10] The Appellant's properly filed appeal was deemed received by the Tribunal, pursuant to section 7 of the Regulations, on January 29, 2016. The date deemed received is outside the 90-day limit communicated to the Appellant in the reconsideration letter and further, outside the one year time period within which the General Division may extend the time to appeal.

Special Circumstances

[11] The first issue the Tribunal must consider is whether special circumstances exist to justify invoking section 3(1)(b) of the Regulations to dispense the Appellant from compliance with the requirement of section 23 of the Regulations that sets out the method for filing an appeal and section 7 of the Regulations that deems the filing date of the appeal.

[12] The Appellant was first notified of the reassessment and overpayment of her GIS March 1, 2013. She wrote to the Respondent March 22, 2013, requesting reconsideration. She did not

receive a response to her request and she wrote to the Respondent again on June 14, 2013 and again on September 5, 2013.

[13] On December 17, 2013, the Respondent wrote and acknowledged the Appellant's March 22, 2013 request for reconsideration and informed her they would review her file and let her know if they needed more information.

[14] On October 20, 2014, the Appellant wrote to the Respondent again indicating that the reduction in her pension amount to effect repayment of the overpayment was a financial hardship and again urging they reconsider the decision.

[15] On December 17, 2014, one year to the day after acknowledging the Appellant's request for reconsideration and 20 months after the request for reconsideration had been received the Respondent wrote to the Appellant and maintained their initial decision.

[16] On September 23, 2015, the Appellant wrote to Service Canada, Old Age Security, Reconsideration, setting out her reasons for appeal and attaching a copy of the December 17, 2014 reconsideration letter.

[17] The Appellant made many attempts to follow proper protocols in having the initial reassessment decision reversed. The Appellant contacted the Respondent in pursuit of having them reverse the initial decision and to have a reconsideration decision on many occasions. There was no response from the Respondent to multiple communications from the Appellant. The communications between the parties, including many long delays in response from the Respondent, can reasonably be considered to have led to the Appellant being misled or confused regarding time frames. The evidence shows that the Respondent delayed more than 365 days in responding to the Appellant's request for reconsideration and this unexplained lapse of time may have misled the Appellant as to the importance of time lapsed.

[18] In making a determination as to whether special circumstances can be found to exist the Tribunal must keep in mind the overriding consideration that the interests of justice must be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204). Furthermore, it is appropriate for the Tribunal to observe a broad and generous interpretation of the governing legislation in

reaching a decision. In observing the above guiding principles and in ensuring that the interests of justice are served, the Tribunal finds that special circumstances exist.

[19] The Tribunal further finds that in view of the special circumstances it is appropriate to rely on section 3(1)(b) of the Regulations to vary sections 23 and 7 of the Regulations and determine the appeal was filed September 25, 2015, when Service Canada received the Appellant's letter of September 23, 2015. As such, the Tribunal finds that the appeal was filed within the one year time limit for the Tribunal to be able to consider an extension of time.

Extension of Time

[20] The next issue the Tribunal must determine is whether the granting of an extension of time and determining the appeal was filed on time is justified.

[21] In deciding whether to allow further time to appeal, the Tribunal considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. Again, the overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

Continuing Intention to Pursue the Appeal

[22] The Appellant did not take any steps to pursue an appeal within 90 days of communication of the reconsideration decision.

[23] The Appellant did take steps to pursue the appeal within 365 days of the reconsideration decision but not in the proper method and not by sending a notice of appeal to the SST as clearly instructed in the reconsideration letter. Rather, she sent a letter to Service Canada.

[24] The Tribunal finds that the Appellant did not demonstrate a continuing intention to pursue the appeal within the ninety days set out in the reconsideration letter.

Arguable Case

[25] The Appellant claims that she was not in a conjugal relationship with the added party to this appeal.

[26] On appeal, the Appellant would have to establish that she and the added party were not in a conjugal relationship from March 2008 until March 2013, the time frame for which her entitlement to GIS was reassessed and an overpayment determined.

[27] The Tribunal is satisfied that there is evidence related to the Appellant's marital status during the period under review.

[28] The Tribunal finds, based on the Appellant's submissions and the evidence on file, that there is an arguable case on appeal.

Reasonable Explanation for the Delay

[29] The Appellant did not submit any explanation addressing why the appeal was filed outside the ninety day appeal period permitted. The Appellant did, however, submit that the reason she filed the appeal late is because she mistakenly sent her notice of appeal to Service Canada and that there was a delay in getting it back from Service Canada. The Letter sent to Service Canada in error was sent 171 days after the 90 day time limit had expired. It was not sent to the correct address as required by Section 23 of the Regulations.

[30] The letter from Service Canada returning her letter of September 23, 2015 was dated November 24, 2015, 60 days after receipt thereof.

[31] The Tribunal finds that the Appellant provided an explanation to explain a delay in filing the completed appeal but did not provide a reasonable explanation for the appeal not being filed within the 90 day allowable appeal period.

Prejudice to the Other Party

[32] The Respondent's interests do not appear to be prejudiced given the short period of time that has lapsed since the reconsideration decision. The Minister's ability to respond, given its resources, would not be unduly affected by an extension of time to appeal. The interests of the added party would, similarly, not be prejudiced by an extension of time.

CONCLUSION

[33] The Appellant in this case is an elderly lady now 86 years old and it is reasonable that an unrepresented elderly appellant might be confused by the process of appeal. Furthermore, there is evidence of an arguable case. The overriding consideration in determining whether to allow an extension of time is that the interests of justice must be served.

[34] In consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal allows an extension of time to appeal pursuant to subsection 52(2) of the DESD Act.

Susan Smith
Member, General Division - Income Security