



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. M. v. Minister of Employment and Social Development*, 2018 SST 484

Tribunal File Number: GP-17-3067

BETWEEN:

A. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Virginia Saunders

DATE OF DECISION: April 19, 2018

DECISION

[1] The appeal is allowed. The Appellant is granted a longer period to request reconsideration of the decisions to deny his Guaranteed Income Supplement (GIS) for all or part of the payment periods 2009-2010, 2010-2011, and 2011-2012. The matter is referred back to the Respondent to reconsider each decision.

OVERVIEW

[2] The Appellant applied for a pension under the *Old Age Security Act* (OAS Act) in November 2008. In the application he stated that he wanted to apply for the GIS. The OAS pension was approved, with payment starting in September 2009, the month after the Appellant turned 65¹. In February 2013 the Respondent approved payment of the GIS to the Appellant as of January 2012. The Appellant claimed that he should also be paid GIS for the months between his 65th birthday and January 2012. He requested reconsideration of the decisions to deny his GIS applications covering that period. In October 2014 the Respondent determined that the request for reconsideration was late and decided not to review the Appellant's file². The Appellant appealed this decision to the Social Security Tribunal (Tribunal).

ISSUE

[3] In the Notice of Appeal the Appellant submitted that his GIS payments should be approved back to August 2009. At this stage I do not have jurisdiction to decide that issue. The Tribunal can only hear an appeal of a reconsideration decision made under section 27.1 of the OAS Act³. The Respondent has not made a reconsideration decision on any of the Appellant's GIS applications for the periods in question, because it refused to do so in its letter of October 14, 2014. That refusal is what is before me on this appeal.

[4] I must decide if the Respondent exercised its discretion judicially when it refused to allow the Appellant a longer period of time to request reconsideration of the decisions to deny his GIS applications.

¹ GD2-15-18

² GD2-5

³ *Canada (Attorney-General) v. Bannerman*, 2003 FCT 208

ANALYSIS

[5] A person who is dissatisfied with a decision that GIS is not payable to him may request reconsideration within 90 days of receiving the decision⁴. The Respondent may allow a longer period of time in which the request for reconsideration can be made if it is satisfied that there is a reasonable explanation for requesting a longer period, and the person demonstrated a continuing intention to request reconsideration⁵. If the request is made more than 365 days after the person received the decision, or is made by a person who applied again for the same benefit, the Respondent must also be satisfied that the request has a reasonable chance of success and that no prejudice would be caused to the Respondent or to another party⁶.

[6] The Respondent's decision to extend the time to request reconsideration beyond the 90 day time limit is a discretionary one and so must be exercised in a judicial manner⁷. A discretionary power is not exercised judicially if the decision-maker⁸:

- 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.

[7] After reviewing the documents and submissions in the file, including the parties' written answers to the questions I asked them in January 2018, I am satisfied that the Respondent did not act judicially when it refused to allow the Appellant more time to request reconsideration of the decisions regarding his GIS entitlement.

The Appellant's GIS applications and the Respondent's decisions

[8] The Appellant sent a Statement of Estimated Income (SEI) to the Respondent in November 2009⁹. In January 2010 the Respondent told the Appellant that he would also have to

⁴ OAS Act subsection 27.1(1)

⁵ OAS Act subsection 27.1(1); OAS *Regulations* subsection 29.1(1)

⁶ OAS *Regulations* subsection 29.1(2)

⁷ *Panopoulos v. Canada (Attorney General)*, 2010 FC 877; *Canada (A.G.) v. Uppal*, 2008 FCA 388

⁸ *Canada (A.G.) v. Purcell*, [1996] 1 FCR 644

complete a GIS application for the payment period July 2009-June 2010¹⁰. A reminder letter was sent the following month¹¹.

[9] Nothing was received from the Appellant until December 31, 2010, when he submitted a GIS application for 2009-2010¹². In January 2011 the Respondent requested further information, and it sent reminder letters in March and April 2011¹³. When the Appellant did not provide the requested information by May 4, 2011, the Respondent denied the application and sent the Appellant a letter informing him of the decision¹⁴.

[10] The Appellant submitted a GIS application for 2009-2010 on July 20, 2011¹⁵. It was denied because it was received too late for that payment period, and the Appellant was notified of the decision by a letter dated December 2, 2011¹⁶.

[11] On March 7, 2012, the Appellant submitted a GIS application for the payment period July 2010-June 2011¹⁷. Later that month the Respondent requested more information¹⁸. A reminder letter was sent to him on May 8, 2012¹⁹, and after he failed to provide the information a denial letter was sent on July 19, 2012²⁰.

[12] On May 22, 2012, the Appellant submitted a GIS application for 2010-2011²¹, as well as one for the payment period July 2011-June 2012²². The Respondent did not acknowledge or process these applications, and nothing about them was ever communicated to the Appellant.

⁹ GD2-86-87

¹⁰ GD2-89

¹¹ GD2-88

¹² GD2-90

¹³ GD2-92-94

¹⁴ GD2-91

¹⁵ GD2-80

¹⁶ GD2-83-84; paragraph 11(7)(a) of the OAS Act states that a GIS may not be paid for any month that is more than 11 months before the application was received. This application was received in July 2011, and the payment period ended more than 11 months earlier in June 2010.

¹⁷ GD2-63

¹⁸ GD2-71

¹⁹ GD2-72

²⁰ GD2-73

²¹ GD2-64

²² GD2-35-36

[13] On October 15, 2012, the Respondent acknowledged receiving a GIS application from the Appellant²³. The Respondent requested more information, and then sent a reminder letter in November 2012²⁴.

[14] On December 4, 2012, the Appellant submitted GIS applications for 2011-2012²⁵ and 2012-2013²⁶. After he provided more documents these applications were processed and payment of the GIS was approved back to January 2012. That start date has never been explained to the Appellant, but appears to have been based on applying 11 months of retroactivity to the December 2012 application, which is the maximum allowed for GIS payments²⁷. The Appellant was notified of the decision to approve the GIS by letter of February 12, 2013²⁸.

The Appellant's requests for reconsideration

[15] On March 2, 2012, the Appellant wrote to the Respondent and stated "I would like you to reconsider my guaranteed income supplement"²⁹. The Respondent never replied to this request. In a letter of March 20, 2013, the Appellant asked "Please reconsider accepting my application from retirement (Years 2009/2010, 2010/2011, 2011/2012)"³⁰. The Respondent's October 2014 decision to refuse reconsideration was stated to be in response to the Appellant's March 2013 letter.

The Respondent took into account an irrelevant factor

[16] The Respondent's October 2014 letter refers to a decision of March 19, 2010. The Decision Document (which shows how the Respondent analyzed the Appellant's reconsideration request) does not. It refers to a decision made on May 3, 2010³¹. The Respondent stated that this was a typographical error and should read March 19, 2010³². The Respondent stated that a

²³ GD2-76. The file does not contain a copy of this application.

²⁴ GD2-76-77

²⁵ GD2-38

²⁶ GD2-19-20

²⁷ OAS Act paragraph 11(7)(a)

²⁸ GD2-32

²⁹ GD2-66

³⁰ GD2-13

³¹ GD2-6-8

³² IS2-2

denial letter was sent to the Appellant on March 19, 2010, but it could not find a copy³³. The Appellant denied ever receiving one³⁴. The file does not have a decision letter for March 19, May 3, or any other date in 2010; nor does the Respondent's computer record show that a denial letter was sent to the Appellant at that time³⁵, unlike entries on other dates for different denials³⁶. In these circumstances I find that the Appellant was not notified in writing of any decision that was made on or around March 19, 2010, as required by the OAS Act³⁷.

[17] In deciding not to accept the Appellant's request for reconsideration the Respondent's starting points were March 2010 and May 2010³⁸. But the Appellant should not have to explain his failure to act at those times or for the following year, because he had no way of knowing that a decision had been made. The 90-day time limit had not begun. The Appellant was not notified of any decision about his GIS until May 2011, when a denial letter was sent to him after he submitted another GIS application³⁹. The period before May 2011 was irrelevant and yet the Respondent took it into account, holding the Appellant answerable for his failure to act for a much longer period than ought to have been considered.

[18] The Respondent also took into account irrelevant factors in deciding whether an extension of time would cause prejudice to it. The reasons given were that the Appellant had not provided any new information or a reasonable explanation for the late request⁴⁰. There was no evidence or analysis to show how these disadvantaged the Respondent, and so they were not relevant to the question of prejudice.

The Respondent ignored relevant factors

[19] The Respondent decided that the Appellant had not given a reasonable explanation for his delay in requesting reconsideration because while he claimed not have received decision letters or letters asking him to send more information, he had received other mail that the Respondent

³³ IS2-1

³⁴ IS3-2

³⁵ IS2-12-14

³⁶ IS2-11, 12

³⁷ OAS Act subsection 27.1(1)

³⁸ GD2-6-8

³⁹ GD2-90-94; IS2-12

⁴⁰ GD2-8

sent to him⁴¹. No other reason was given. The Respondent did not consider the Appellant's statements that he had received open mail or empty envelopes in the past⁴², or that he had previously reported not receiving cheques or documents that had been sent to him⁴³. These were relevant because they suggested that the Appellant had a persistent problem with mail delivery and so may not have received some items even if they were properly addressed. While it was open to the Respondent to decide that it did not believe the Appellant, the Decision Document does not contain any assessment of the Appellant's credibility or explain why his statements were not accepted.

[20] The Respondent did not consider the Appellant's statement that he had spoken to Service Canada many times on the phone regarding his applications⁴⁴, and that in particular he had been told that he did not have to supply income tax returns until later⁴⁵. The Decision Document does not discuss whether the Appellant's statement was credible or whether any inquiry was made into what telephone conversations took place and what was said in them. Any conversations with Service Canada were potentially relevant to the issues of continuing intent to request reconsideration and reasonable explanation for the delay, and should have been considered by the Respondent.

[21] The Respondent did not consider the Appellant's letter of March 2, 2012, which stated "I would like you to reconsider my guaranteed income supplement"⁴⁶. By that time the Appellant had been sent two denial letters for his 2009-2010 GIS applications: one dated May 4, 2011, for the application of December 31, 2010; and one dated December 2, 2011, for the application of July 20, 2011. The Appellant's letter is in the file, clearly stamped received by the Respondent on March 7, 2012, but it is not mentioned in the Respondent's computer notes or in the Decision Document. It is relevant for several reasons:

- First, the Appellant stated in this letter that he had been in very poor health, that he was "unable to function or do anything for myself", and that he needed a few more months to

⁴¹ GD2-6-7

⁴² GD2-66; IS2-15

⁴³ IS2-13, 15

⁴⁴ GD2-13-14

⁴⁵ GD2-13

⁴⁶ GD2-66

complete the forms for 2011-2012. This raised the question of whether his failure to properly complete his applications by supplying the requested information was the result of incapacity under section 28.1 of the OAS Act. After the October 2014 decision the Appellant provided medical evidence to support a claim of incapacity, and the Respondent then pursued this issue and determined that the Appellant did not meet the definition⁴⁷. However, the Respondent did not address the question of whether the Appellant's health was a reasonable explanation for the delay in requesting reconsideration of the denial of May 2011, which was also a relevant factor that it ought to have considered.

- Second, assuming that mail is received 10 days after it is sent⁴⁸, this request for reconsideration was made within the 90 day limitation period for the decision of December 2, 2011. It was not late, which was clearly a relevant factor.

[22] The Respondent did not consider that the Appellant submitted applications for 2010-2011 and 2011-2012 in May 2012⁴⁹. As with the letter of March 2, 2012, these were obviously received by the Respondent but they were never acknowledged nor were they discussed in the Decision Document. They were relevant because they were part of the Appellant's pattern of failing to respond to requests for information while continuing to submit GIS applications. Obviously the Appellant was interested in receiving GIS from 2009, and just as obviously he did not understand what he had to do to achieve that. The Respondent should have considered this when deciding if the Appellant had a continuing intention to request reconsideration or had a reasonable explanation for the delay in doing so.

[23] The Respondent did not consider that the Appellant's March 2013 request for reconsideration included the decision that was made in February 2013 regarding the payment period 2011-2012. The Respondent had decided that the Appellant could only be paid GIS back to January 2012 rather than to the beginning of the payment period in July 2011⁵⁰. The

⁴⁷ GD5; GD6; GD7-4-9

⁴⁸ which the Respondent assumes as well, see GD2-10-12

⁴⁹ GD2-64; GD2-35-36

⁵⁰ GD2-32

Appellant's request for reconsideration of that decision was made within five weeks and so was clearly within the allowable 90 day period.

The Respondent did not act judicially

[24] The Appellant requested reconsideration of all the decisions made on his GIS applications for the payment periods June 2009 through July 2012. The Respondent's decision of October 14, 2014, dealt with the Appellant's request as if it concerned only one decision that was made in March 2010. That decision was never communicated to the Appellant. The October 14, 2014, decision took into account irrelevant factors and ignored relevant ones, including that the Appellant requested reconsideration of two of the decisions within the 90 day limitation period. I therefore find that the Respondent did not exercise its discretion judicially when it made its decision of October 14, 2014.

The decision the Respondent should have given

[25] Section 54(1) of the *Department of Employment and Social Development Act* states that I may confirm, rescind or vary a decision of the Respondent, or give the decision that the Respondent should have given.

[26] After submitting the November 2009 SEI (which the Respondent viewed as an incomplete application) the Appellant applied eight more times for the GIS benefit. As a result, before allowing a longer period of time to request reconsideration I must be satisfied that all four factors set out in section 29.1 of the *OAS Regulations* have been met. These only apply to the decisions where a longer period is required; that is, the decisions of May 4, 2011; and July 19, 2012. As indicated above, the Appellant requested reconsideration of the decisions made in December 2011, and February 2013, within the applicable time frames. He was not notified of a decision of March 2010 and so the time limit for requesting reconsideration of that decision has not yet begun.

i. There is a reasonable explanation for requesting a longer period

[27] The Appellant did not request reconsideration of the decision of May 4, 2011, until March 2012. He did not request reconsideration of the July 19, 2012, decision until March 2013.

However, I am satisfied that these delays were caused by the Appellant's poor health and because he was confused about what he was supposed to do except to submit more applications, which he did in July 2011, March 2012, May 2012, October 2012, and December 2012. I note that the Appellant is originally from Uganda, that English is apparently not his first language, and that he relied on his wife to assist him. For these reasons I find that there is a reasonable explanation for the Appellant's delay.

ii. The Appellant demonstrated a continuing intention to request a reconsideration

[28] The Appellant submitted another application for 2009-2010 in July 2011, less than 90 days after the May 4, 2011, decision. While he did not specifically request reconsideration of the decision, this action is an obvious demonstration of a continuing wish to have his entitlement for that payment period reconsidered. It was reasonable of the Appellant not to take any further steps while he waited for a decision on the application, which did not come until December 2011. After that, he specifically requested reconsideration in March 2012, less than 90 days after he would have received the decision.

[29] In September 2012, less than 90 days after the July 2012 decision, the Appellant telephoned the Respondent⁵¹. By October 15, 2012, still within the 90-day limitation period, he had submitted another application⁵². He pursued this issue further by submitting two more applications in December 2012. As above, I find that these showed a continuing intention by the Appellant to have his GIS applications reconsidered.

iii. The request for reconsideration has a reasonable chance of success

[30] As an OAS pensioner the Appellant was entitled to receive GIS if he met the income requirements and resided in Canada. The amount of GIS depended on his marital status. Once he had provided all of the necessary information his 2011-2012 and 2012-2013 applications were approved at least in part. If he provides similar information for the previous payment periods and for the months before January 2012, it is reasonable to expect that these will be approved as well.

⁵¹ GD2-74

⁵² GD2-76

[31] I am aware of the potential difficulty caused by the rule limiting retroactive payments to 11 months from the date of application. This might affect the Appellant's entitlement in some months depending on which application date is used and whether the requirement for an application is waived⁵³. However, he has at least an arguable case that his 2009-2010 application should be considered to have been made in November 2009 when he sent the SEI, and that entitlement should be based on that date. He certainly has an arguable case that he is entitled to some payments before January 2012.

iv. The Respondent will not be prejudiced

[32] The Respondent does not appear to have been prejudiced by the delay thus far. Given its resources, its ability to make a reconsideration decision would not be unduly affected by allowing the Appellant a longer period to make the request.

CONCLUSION

[33] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security

⁵³ OAS Act subsection 11(4)