



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. B. v Minister of Employment and Social Development*, 2020 SST 822

Tribunal File Number: GP-19-1554

BETWEEN:

S. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Kelly Temkin

Teleconference hearing on: April 6, 2020

Date of decision: August 24, 2020

DECISION

[1] S. B. is the Claimant. I have decided that the Claimant is entitled to receive the survivor's pension. This is because the Minister lacks the authority to change its initial decision granting the Claimant a survivor's pension. The appeal is allowed. Here are my reasons why.

OVERVIEW

[2] In December 2014, the Claimant applied for a *Canada Pension Plan* (CPP) survivor's pension as the common-law partner of the late W. P., who died on October 15, 2014. The Minister approved the Claimant's application on May 11, 2015 with an effective payment date of November 2014.

[3] The Claimant reported different information on her marital status to the CPP and to Old Age Security (OAS). In 2016-2019, there were two separate investigations of her marital status by the Ministry.¹ Following the investigations, the Minister concluded that the Claimant was not the common-law partner of W. P. at the time of his death.

[4] As a result, the Minister decided that the Claimant was never entitled to the survivor's pension. An overpayment was declared between November 2014 and March 2019. The Minister required her to repay the monies she received between November 2014 and December 2016.²

[5] The Claimant appealed this decision. On reconsideration, the Minister maintained the decision to cancel the survivor's pension. The Claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

ISSUES

1. *Should I consider an issue not raised by the parties?*
2. *If so, does the Minister have authority to change its initial decision to grant a survivor's pension?*

1 Program Integrity Department and Business Expertise (GD4-4)

2 The Claimant is not responsible for the funds received between January 2017 and March 2019 (GD4-5)

3. *If the Minister has the authority to change its initial decision, should it have done so?
That is, was the Claimant the common-law partner of W.P at the time of his death?*

ANALYSIS

I may consider issues not raised by the parties

[6] I conducted the hearing on April 6, 2020. The Minister did not attend. Following the hearing, I learned of two decisions called *Kinney*³ and *B. R.*⁴ I requested written submissions from the parties on whether the Minister had the authority to change its initial decision. Neither party had raised this issue.⁵ The Minister requested a copy of the hearing recording and the Tribunal provided a copy to both parties. The Minister made written submissions.⁶ The Claimant confirmed she had no further submissions.⁷

[7] The Minister submits that the General Division of the Tribunal (GD) is not obliged to question the validity of the Minister’s powers, particularly when no party has raised any issues with those powers. While the GD may not be obliged to raise this question, it does not mean I should not raise it. The question of the Minister’s powers in the CPP-survivor context is important, and the issue of the Minister’s jurisdiction to reopen previous decisions has already arisen in CPP disability and OAS matters. The Tribunal has discretion to raise such issues⁸ “when failing to do so would risk an injustice.”⁹

[8] In the present case, it would be an injustice not to raise this as a new issue, particularly if *Kinney* applies. It is my duty to give the parties a full opportunity to address a principle of law that could affect the outcome of the appeal. I should also be sensitive to the fact that many claimants are unrepresented or under-represented.

3 *Kinney v. Canada (Attorney General)*, 2009 FCA 158. In *Kinney*, the Federal Court of Appeal decided the Minister cannot vary an earlier decision (“the last standing decision”) about eligibility for CPP benefits.

4 *B.R. v MESD*, 2018 SST 844. The Appeal Division of the Tribunal decided an appeal under the *Old Age Security Act* (OAS Act). In *B.R.*, the Appeal Division decided the Minister did not have the legal authority to change its initial decision about a claimant’s eligibility for an OAS pension.

5 GD5

6 GD9

7 GD10

8 *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 89

9 *Adamson* citing *R.v. Mian* 2014 SCC, 54 [2014] 2 SCR 689 at para 41

[9] The Tribunal should not build a party's case, but if there is a fundamental question such as jurisdiction, the parties should have the opportunity to address the question. I have followed the directions of the Federal Court in giving notice to the parties as well as an opportunity to respond.¹⁰

The Minister does not have authority to change its initial decision granting the Claimant a survivor's pension

[10] A well-established principle of law prevents a decision-maker like the Minister from revisiting a decision after it is made.¹¹ This applies to the Minister's decision to grant a benefit unless the legislation specifically makes an exception. For example, subsection 81(3) of the CPP gives the Minister specific authority to rescind or amend an earlier decision based on new facts. I did not consider this section because the Minister did not state that it was relying on subsection 81(3).

[11] The Minister submits that the CPP gives the Minister the authority to examine and change its decisions on eligibility for a benefit. The Minister relies on Section 90.2 and section 66 to support its argument.¹² The Minister further submits that any other view would be contrary to the wording of the statute and would defeat the purpose of the legislative scheme.

[12] The CPP does not give the Minister jurisdiction to reopen its initial decision granting the Claimant's eligibility for a pension. Benefits-conferring legislation such as the CPP ought to be interpreted in a broad and generous manner. Any doubt arising from the language of such legislation should be resolved in favour of the claimant.¹³ While the administration and enforcement provision¹⁴ gives the Minister authority to examine any document, I do not see wording in the section that gives the Minister authority to change its initial decision. If the Minister could change a decision under the administration and enforcement section,¹⁵ then

10 *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 89

11 This is called *functus officio*.

12 GD9-13

13 *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27; *Villani. v. Canada (Attorney General)*, 2001 FCA 248

14 Section 90.2 "The Minister may at any reasonable time, for any purpose relating to the administration or enforcement of this Act, examine any document that relates or may relate to the entitlement of a person to a benefit or the amount of a benefit."

15 Section 90.2

subsection 81(3), which allows the Minister to rescind or amend a decision because there are new facts, would be redundant. The Minister has not drawn my attention to any other provision that would allow it to revisit its initial decision to grant a survivor's pension.

[13] The Minister submits that s. 66 of the CPP¹⁶, would have no purpose or meaning if the Minister did not have authority to reassess entitlement.¹⁷ I agree. However, reassessing a benefit based on changing circumstances, for example when a person is no longer disabled or where a child over age 18 is no longer attending school, is different from reopening and changing an initial decision about a CPP survivor's pension.

Considering Kinney and B.R

[14] The Federal Court held in *Kinney*¹⁸ that the Minister could vary a decision regarding eligibility for a CPP disability pension. However, the Minister could terminate a disability pension only as far back as the last standing decision¹⁹ confirming eligibility.

[15] The Minister submits that *Kinney* is not applicable because it involves a CPP disability pension. A disability pension is payable so long as a person remains disabled. Disability status can change. In the case of a survivor's pension, a claimant's entitlement requires being in a common-law relationship with the deceased at the time of death, which is a fact that will not change at a later date.²⁰

[16] There is no reason why this distinction should impact the principle in *Kinney* that the Minister cannot go behind the last standing decision. In this case, the initial decision is the last standing decision. The Minister decided the Claimant was entitled to a survivor's pension. The CPP does not give the Minister the power to change its mind later.

[17] The Minister further submits that the reasoning in *B.R* is flawed, as the Tribunal discussed in the *R.S* decision.²¹ There are, however, other Appeal Division and General Division

16 This section of the CPP is called 'Return of benefit where recipient not entitled. It requires a person who receives a CPP benefit payment to which they are not entitled to return the incorrect payment known as an overpayment

17 GD9-13

18 *Kinney v. Canada (Attorney General)*, 2009 FCA 158

19 The last standing decision is the most recent decision, typically in a chain of decisions

20 GD9-9

21 *R.S. v MESD*, 2018 SST 1350

decisions that have followed *B. R.* Since this matter involves the CPP, I am bound by *Kinney*. An analysis of the *B.R* and *R.S* decisions, which involved the OAS, is not necessary to decide this matter.

It is not necessary to consider whether the Claimant and the contributor were in a common-law relationship

[18] Since I have determined that the Minister does not have the authority to change its initial decision, it is not necessary for me to determine whether the Claimant was W. P.'s common-law partner at the time of his death.

CONCLUSION

[19] There is no legislative authority for the Minister to change the decision granting a survivor's pension to the Claimant. This means that the original decision dated May 11, 2015, with an effective payment date of November 2014, remains unchanged.

[20] The Claimant is entitled to the survivor's pension.

[21] The appeal is allowed.

Kelly Temkin
Member, General Division - Income Security