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

Citation: *PS v Minister of Employment and Social Development*, 2021 SST 62

Tribunal File Number: AD-20-793

BETWEEN:

P. S.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 15, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Clamant is the widow of M. S. (the deceased contributor), who was born in 1927 and who died in 2018. M. S. immigrated to Canada in 1979 and contributed to the Canada Pension Plan (CPP) for several years before his retirement in 1993.

[3] In June 2018, the Claimant applied for a CPP death benefit. The Minister denied the application on the basis that her late husband's CPP contributions fell short of the minimum amounts required to establish eligibility under the law.

[4] The Claimant appealed the Minister's decision to the of the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and, in a decision dated August 7, 2020, dismissed the appeal. The General Division found that, for the Claimant to be entitled to the death benefit, her late husband would have had to have made contributions in at least 10 years, whereas the evidence showed that he had done so in only five.

THE CLAIMANT'S REASONS FOR APPEALING

[5] The Claimant then applied to the Appeal Division for leave to appeal, alleging that the General Division made the following errors:[1]

- It said that the Minister had apologized for initially finding that the deceased contributor needed eight (rather than 10) years of contributions for a death benefit to be payable;

[1] See Claimant's email to the Appeal Division requesting leave to appeal dated September 30, 2020, AD1. The Claimant made supplementary submissions elaborating on her reasons for appealing on October 5, 2020 (AD1B) and October 24, 2020 (AD3).

- It refused to hold the Minister to account for taking more than six months to reconsider the Claimant's application;
- It determined that the deceased contributor's contributory period began in 1966, when the CPP began, rather than in 1979, when he immigrated to Canada;
- It failed to consider the Minister's own admission that the deceased contributor needed only three years of contributions for the Clamant to be eligible for the death benefit;
- It relied on a case that neither party had argued, thereby depriving the Claimant of an opportunity to respond; and
- It displayed bias against the Claimant by repeatedly dismissing her arguments in favour of the Minister's.

[6] Late last year, I granted the Claimant leave to appeal because I thought she had raised an arguable case. I called a hearing by teleconference to discuss the Claimant's allegations. Now, having reviewed the record and heard the parties' oral arguments, I have concluded that none of the Claimant's reasons for appealing justify overturning the General Division's decision.

ISSUES

[7] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division (i) did not follow procedural fairness or made an error of jurisdiction; (ii) made an error of law; or (iii) made an important error of fact.[2]

[8] In this appeal, I had to answer the following questions:

Issue 1: Did the General Division err when it found that the Minister apologized for finding that the Claimant's late husband needed eight years of contributions?

Issue 2: Did the General Division err by not sanctioning the Minister for taking more than six months to reconsider its initial decision?

[2] *Department of Employment and Social Development Act* (DESDA), s. 58(1).

Issue 3: Did the General Division commit an error when it determined that the deceased contributor's contributory period began in 1966 rather than 1979?

Issue 4: Did the General Division ignore the Minister's admission that the deceased contributor required only three years of contributions?

Issue 5: Did the General Division act unfairly by relying on case law that neither party had argued?

Issue 6: Did the General Division display bias against the Claimant by repeatedly dismissing her arguments?

ANALYSIS

Issue 1: Did the General Division err when it found that the Minister apologized for finding that the Claimant's late husband needed eight years of contributions?

[9] The Claimant took issue[3] with the following passage in the General Division's decision:

> Further, I considered the Minister's submissions regarding the error regarding 8 vs 10 years of valid contributions required. The Minister acknowledged that the letter dated July 13, 2018 (the initial decision) incorrectly stated that the Contributor would have needed to work and make valid contributions for 8 years. This was incorrect. The Minister apologized for the error and clarified that 10 years of valid contributions would be needed. Although the Minister made an error initially, it was corrected.[4]

I don't see an error in the above passage. The Minister did, in fact, admit to making an error when it initially rejected the Claimant's application:

> The Minister acknowledges that the letter dated July 13, 2018 incorrectly stated that M. S. [*sic*] would have needed to work and make valid contributions to the Canada Pension Plan during 8 years. This is incorrect. The Minister apologizes for this error any stress or confusion it may have caused. The correct number of years in which M. S. needed

[3] At the hearing, the Claimant's representative conceded this issue and chose not to make an argument on it.
[4] General Division decision, para. 11.

> to have valid contributions to the Canada Pension Plan is 10 years not 8 years.[5]

In its decision, the General Division was addressing the Claimant's argument that the Minister's error invalidated its refusal to grant her a death benefit. Having reviewed the relevant legislation, the General Division concluded that the Minister's error was immaterial and did not change the key fact that, under the law, M. S.'s contributory period began in 1966 and not, as claimed, 1979. Even if the Minister had not conceded its error, the Claimant's five years of valid contributions would still have fallen well short of the statutory requirement.

[10] The Claimant also seems to be alleging that the General Division's refusal to criticize the Minister more forcefully on this issue is itself an indication of bias. I will address this point more fully later in this decision.

Issue 2: Did the General Division err by failing to sanction the Minister for taking more than six months to reconsider its initial decision?

[11] The Claimant is unhappy that the Minister took more than six months to reconsider its initial decision to deny her benefits. She says that one of the Minister's officials assured her that it would take no more than 120 days to review the initial decision not to award her disability benefits. She criticizes the General Division for failing to hold the Minister to account for not issuing its reconsideration decision sooner.

[12] Having reviewed the record and the relevant law, I see no reason to overturn the General Division's decision based on the length of time it took for the Minister issue a reconsideration.

[13] Under section 81(1) of the *Canada Pension Plan*, a party who is dissatisfied with the Minister's decision to refuse them disability benefits has 90 days in which to ask the Minister to reconsider that decision.[6]

[14] Under section 81(2), the Minister, if requested, is required to reconsider its decision "without delay."[7] At the General Division hearing, the Claimant pointed to *S.B.*, a case in which

---

[5] Minister's submission dated August 29, 2019, GD3-5.
[6] *Canada Pension Plan*, s. 81(1).
[7] *Canada Pension Plan*, s. 81(2).

the Appeal Division overturned the General Division's refusal to consider a 15-year gap between the Minister's initial approval of a CPP credit split and its eventual reconsideration of that decision. The General Division correctly noted that it was not bound by Appeal Division decisions, but it also implied that *S.B.* had limited relevance to the facts of this case. I agree.

[15] *S.B.* involved a reconsideration decision that took significantly longer than six months. In that case, the Minister admitted to mismanaging the application but argued that the General Division had no jurisdiction to consider the length of time it took to reconsider it.[8] The Appeal Division ultimately found that the General Division did have jurisdiction to address the Minister's "shoddy handling" of the application, but it made no finding on what constituted an unacceptable delay. Instead, it referred the matter back to the General Division for redetermination.

[16] In this case, jurisdiction is not at issue. Both parties accept that the General Division had the authority to address ministerial delay. The issue here is whether a 6½-month wait between initial and reconsideration decisions is unacceptable, either in law or fact.

[17] The General Division found that the delay, while "unfortunate," was acceptable. I don't see any error in this assessment. As the General Division noted, the phrase, "without delay," is not defined or quantified in the *Canada Pension Plan* and is therefore open to interpretation. However, such interpretation cannot be purely discretionary. It must be subject to reasonable limits, keeping in mind the context and circumstances in which the delay occurred. To a large degree, delay lies in the eyes of the beholder: a wait that is barely noticeable to one person might be intolerable to another.

[18] Parliament must have used the phrase, "without delay," for a reason. It presumably wanted the Minister to be held to some kind of service standard, although it left that standard vague. The Claimant argues that the General Division should have looked at the Black's Law Dictionary definition of the phrase: "Within a reasonable time, allowed by statute, custom, or

[8] The Minister specifically argued that the General Division had no jurisdiction to consider ministerial delay under the powers given to it by under s. 64 of the DESDA and s. 82 of the *Canada Pension Plan*.

usage." However, I am afraid that definition does not advance his argument very far. The key word there is again "reasonable."

[19] In this case, the Claimant applied for the death benefit on June 7, 2018, and the Minister issued its reconsideration decision letter on April 24, 2019. From beginning to end, the entire application process spanned a little more than eight months in total, even taking into account the 196 days that it took for the Minister to reconsider its initial decision. It is not clear to me that this was an unusually lengthy processing time, given the numerous CPP applications the Minister handles every year, and the Claimant has not offered any evidence to show that it was. The Claimant also insists that a department official told her that the reconsideration process would take 120 days. It is unclear whether this statement was an estimate or a promise. Even if it was the latter, the Claimant has never explained how her interests were materially damaged by having to wait an additional 76 days.

[20] In its role as finder of fact, the General Division should be given some leeway in how it weighs the evidence. In this case, I see no reason to interfere with the General Division's finding that a 6½-month reconsideration was unfortunate but acceptable.

Issue 3: Did the General Division commit an error when it determined that the late M. S.'s contributory period began in 1966 rather than 1979?

[21] The Claimant argues that the General Division committed an error of law when it found that M. S.'s contributory period began in 1979, the year he immigrated to Canada, rather than 1966, the year the CPP began.

[22] I don't see any merit in this submission.

[23] The *Canada Pension Plan* is clear. A death benefit is payable to the estate of a deceased contributor who has made contribution to the CPP for not less than the contributory period.[9] For the CPP death benefit to be payable, a deceased contributor must have made contributions (a) for

[9] *Canada Pension Plan*, s. 44(1)(c).

at least one-third of the total number of years included either wholly or partly within his or her contributory period but in no case for less than three years; or (b) for at least 10 years.[10]

[24] The contributory period commences January 1, 1966 or when a contributor reached 18 years of age, whichever is later. It ends when the contributor dies or begins taking the CPP retirement pension, whichever is sooner.[11]

[25] The parties agreed that the deceased contributor had no more than five years of valid contributions. That means that subsection (b) does not apply. It is therefore necessary to calculate the deceased contributor's contributory period under subsection (a): M. S. was born in 1927. He turned 18 in 1945, and his contributory period began on January 1, 1966 and ended when he began collecting his retirement pension in June 1993. That makes 28 years "in whole or in part." One-third of 28 is 9.33, which comes to 10 when rounded up.

[26] There is nothing in the above provisions that make an exception for immigrants who may have come to Canada after January 1, 1966. The provisions speak only of "contributors" to the CPP and make no distinction between residents and non-residents, citizens and non-citizens. I see no error in how the General Division calculated the late M. S.'s contributory period. The General Division was correct to find that his five years of contributions were not enough to qualify his estate for the death benefit.

[27] Just as she did at the General Division, the Claimant argues that a recent Appeal Division case called *R.S.*[12] has some applicability to her claim. I'm afraid I must disagree. It is true that both cases involve the CPP death benefit, but that is where their similarity ends. *R.S.* is about a claimant whose application was delayed by the length of time it took for him to be appointed executor of the deceased contributor's estate. Unlike *R.S.*, this case is all about the deceased contributor's contributory period and, in particular, when it began. The existence of the deceased contributor's estate is not at issue, nor is the Claimant's standing to make an application when she did. The Claimant is arguing that her late husband's estate was created in 1979, but I don't see how this can be so if he died in 2018. "Estate" in this sense is defined as the legal entity that

[10] *Canada Pension Plan*, s. 44(3).
[11] *Canada Pension Plan*, s. 49.
[12] *R.S. v Minister of Employment and Social Development*, 2019 SST 1043.

manages the interests and property of a deceased person. When the deceased contributor's estate came into being is ultimately irrelevant to the question of when his contributory period began.

Issue 4: Did the General Division ignore the Minister's admission that the deceased contributor required only three years of contributions?

[28] The Claimant argues that the Minister misunderstands the law. She says that the Minister inadvertently conceded her entitlement to the death benefit in its correspondence. She points to the Minister's reconsideration letter, which said:

> The Canada Pension Plan Death benefit are payable [*sic*] when the deceased contributor has made sufficient valid contributions to the Plan, during at least one third of the number of calendar years in their contributory period. **If the contributory period was nine years or less, then at least three years of valid contributions are needed** [*emphasis added*].[13]

[29] According to the Claimant, the highlighted sentence amounts to an admission that her late husband needed only three years of contributions: "Since M. S.'s contribution period totals 14 years, he clearly qualifies based on the ministry's own documents. [The General Division member] has intentionally left this vital piece of factual evidence out of her flawed decision."[14]

[30] I don't see the Minister's statement in the same way as the Claimant, and I disagree with her that the General Division erred in failing to address it in its decision.

[31] The Minister's statement does nothing more than accurately reflect the eligibility requirements set out in section 44(3) of the *Canada Pension Plan*. Under subsection (a), a deceased contributor's estate qualifies for the death benefit only if he or she has made contributions for a minimum of three years (that is, one-third of a contributory period of not less than nine years). As we have seen, the M. S.'s contributory period was significantly more than nine years, so this minimum eligibility threshold would not have applied to him. More to the point, the provision says that you need at show at least three years of contributions to get the

[13] Minister's reconsideration letter dated April 24, 2019, GD2-20.
[14] Claimant's submission dated October 24, 2020, AD3-3.

death benefit; it does **not** say that the **only** thing you have to show is at least three years of contributions.

Issue 5: Did the General Division act unfairly by relying on case law that neither party had argued?

[32] The General Division found that the Claimant was not entitled to the death benefit because her late husband had made insufficient contributions to the CPP during his contributory period. As we have seen, the General Division agreed with the Minister that M. S.'s contributory period began in 1966 with the launch of the CPP, rather than in in 1979, when the deceased contributor immigrated to Canada.

[33] However, to reinforce that point, the General Division relied on a Federal Court of Appeal case called *Lezau*[15] for the proposition that "the CPP contributory rules apply to all Canadians, immigrants and non-immigrants."[16] The Claimant notes that the Minister never argued or, for that matter, mentioned, *Lezau* in its written submissions. It appears that the General Division did its own research after the hearing, but the Claimant is now saying that she never had a chance to address *Lezau*. She is also alleging that the Minister felt no need appear at the hearing because it knew that the General Division would do its work for it.

[34] Having given careful consideration to the parties' arguments, I don't agree that the General Division treated the Claimant unfairly. Parties to a proceeding should know the case against them, but that right is subject to qualifications. The Claimant may not have known about *Lezau* until the moment she received the General Division's decision, but she or her legal representative should have familiarized themselves with the relevant law before the hearing.

[35] It matters who bears the burden of proof. In this case, the Claimant is an applicant for CPP benefits and, under the law, the onus is on her to show that she is entitled to them. It was up to her to come the hearing prepared to make her case. It was up to her to look into the jurisprudence surrounding the issues that she had raised. It was up to her to, not just make her

[15] *Lezau v Canada (Minister of Social Development)*, 2008 FCA 99.
[16] General Division decision, para 7.

own arguments, but to anticipate the Minister's counter-arguments. It was up to her to demonstrate that an immigrant's contributory period begins when they arrive in Canada.

[36] I am not suggesting that a claimant's obligation to research the law gives a decision-maker an unrestrained right do its own research and rely on any case that it sees fit. Parties are presumed to know the law, but the reality is that they sometimes do not.

[37] In some cases, it is only fair that the decision-maker bring a legal decision to the attention of the parties so that they can respond to it before a decision is reached. This would be necessary where the decision is (i) binding; (ii) relevant; and (iii) determinative of the issue at hand. In saying this, I am guided by an Ontario case called *Knoll*,[17] which found that the Ontario Human Rights Tribunal did not breach a party's right to be heard by relying on one of its own prior decisions without giving that party an opportunity to address the decision. The Court noted that the prior decision merely synthesized accepted understandings about anti-Black racism. A similar message is found in a case called *Diavik.* It says that a decision-maker does not have to disclose a case in advance, unless its decision turns on that case:

> I have no hesitation in saying that it is certainly preferable for any decision-maker, in any case, to alert the parties to guiding case law if they are going to rely on it and the parties have not referred to it. That holds true for judges as well as administrative decision-makers. But it is not a hard and fast rule. It is a question of the materiality of the authority relied on by the decision-maker. In this regard I draw a distinction between, for example, a case that is determinative of a particular factual or legal situation and a case that merely states some overarching principle or methodology for analysis.[18]

[38] *Lezau* was binding and it was relevant, but it was not determinative. *Lezau* was binding on the General Division because it was a decision of the Federal Court of Appeal. *Lezau* was relevant to the General Division's inquiry because it involved an applicant for CPP benefits, like the Claimant, who argued that an immigrant's contributory period did not begin until the date they landed in Canada. However, *Lezau* did not determine the General Division's decision.

---

[17] *Knoll North America Corp. v Adams et al.* 2010 ONSC 3005.
[18] *Diavik v Boullard* 2007 NWTSC 83, para 54.

[39] *Lezau* says that the CPP's contribution rules made no distinction between immigrants and non-immigrants. But the General Division didn't need to cite *Lezau* to make this point; as discussed earlier, *Lezau* did nothing more than confirm what a plain reading of section 81(2) already tells us.

[40] The General Division's reference to *Lezau* in its decision had no bearing on the outcome. As such, the General Division did not deprive the Claimant of her right to respond to the case against her.

Issue 6: Did the General Division display bias against the Claimant by repeatedly dismissing her arguments?

[41] The Claimant alleges that the General Division displayed bias against her by systematically rejecting her submissions. Among other things, she accuses the General Division of wilfully misreading the relevant legislation, of giving the Minister unmerited credit for an apology it never made, and of failing to sanction the Minister for what she calls an "unconscionable" delay in processing her application.

[42] I see no indication that the General Division gave preferential treatment to the Minister.

[43] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues. The Supreme Court of Canada has stated that test for bias is, "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[19] A real likelihood of bias must be demonstrated, with a mere suspicion not being enough.

[44] As discussed above, I found no error in how the General Division analyzed the evidence and applied the law. I reviewed the General Division's written reasons and saw nothing to suggest it was doing anything other than following the facts and the law as they led to their inevitable conclusion. The presiding member's decision was logical, reasoned, and measured. I am satisfied that she decided the Claimant's appeal impartially.

---

[19] *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

CONCLUSION

[45] For the reasons discussed above, the Claimant has not demonstrated to me that the General Division committed an error that falls within the permitted grounds of appeal.

[46] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	January 19, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Aresh, *in sui juris*, Virani, representative for the Claimant Viola Herbert, representative for the Minister