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

Citation: *Minister of Employment and Social Development v NA*, 2021 SST 72

Tribunal File Number: AD-20-824

BETWEEN:

Minister of Employment and Social Development

Appellant

and

N. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 24, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division exceeded its jurisdiction when it granted the Respondent additional retroactive Canada Pension Plan (CPP) survivor's pension payments. I have substituted my decision for the General Division's and confirmed the Minister's decision to start the Respondent's pension as of April 2018.

OVERVIEW

[2] The Minister of Employment and Social Development is seeking to overturn a decision of the Social Security Tribunal's General Division to award additional benefits to the Respondent, N. A.

[3] N. A.'s husband passed away in March 2017. In March 2019, she submitted an application for a CPP survivor's pension at her local Service Canada office. The Minister approved the application and paid N. A. a pension retroactive to April 2018, which it determined was the earliest date permitted under the law.[1]

[4] N. A. asked the Minister to reconsider the start date of her survivor's pension. She claimed to have submitted two earlier pension applications—one in April 2017 and another in January 2018—and argued that she was entitled to receive additional retroactive pension payments tied to one or the other of those applications. In a letter dated January 29, 2020, the Minister refused to change the start date.[2]

[5] N. A. appealed that refusal to the Social Security Tribunal. The Tribunal's General Division held a hearing by teleconference and, in a decision dated August 7, 2020, allowed the appeal. The General Division noted evidence that N. A. had sent in two prior applications and took judicial notice of the fact that mail in Canada is usually delivered with seven days. It found

[1] Under s 72 of the *Canada Pension Plan*, a survivor's pension begins the month after a contributor dies or 11 months before the date of application, whichever is later.
[2] See Minister's reconsideration decision dated January 29, 2020, GD2-14.

that the Minister had received the two applications, and it ordered N. A.'s pension start date to be moved back to April 2017, the month after her husband's death.

[6] The Minister is now requesting leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed the following errors in arriving at its decision:

- It exceeded its jurisdiction[3] by considering, not just the March 2019 application that was the subject of N. A.'s appeal, but also her April 2017 and January 2018 applications;
- It erred in law in law by presuming that unreturned registered mail is, in fact, received by the addressee; and
- It based its decision on erroneous findings that the Minister received N. A.'s earlier applications and that those applications were complete.

[7] Late last year, I granted the Minister leave to appeal because I thought it had raised an arguable case. Now, having reviewed the record and heard the parties' oral arguments, I have concluded that the General Division's decision cannot stand.

ISSUES

[8] There are four grounds of appeal to the Appeal Division. A party seeking leave to appeal must show that the General Division (i) acted unfairly; (ii) refused to exercise or exceeded its jurisdiction; (iii) interpreted the law incorrectly; or (iv) based its decision on an important factual error.[4]

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

- Did the General Division exceed its authority by considering N. A.'s first two applications?
- Did the General Division commit an error by presuming that unreturned mail is actually received by the addressee?

[3] Jurisdiction refers to the General Division's powers to make decisions and give orders.
[4] These grounds of appeal are described in more detail in s 58(1) of the *Department of Employment and Social Development Act* (DESDA).

- Did the General Division commit an error by finding that N. A.'s earlier applications were complete?

ANALYSIS

The General Division exceeded its authority by considering N. A.'s first two applications

[10] N. A. has always insisted that she submitted two prior applications in April 2017 and January 2018 that were either lost in transit or mishandled by the Minister's office. The General Division found that the Minister had in fact received the applications but, for whatever reason, did not process them.

[11] The Minister argues that the General Division had no jurisdiction to make any findings based on N. A.'s first two applications. It notes that neither application ever generated a reconsideration decision under section 81 of the *Canada Pension Plan*. It maintains that, under section 82, a reconsideration decision is the only basis on which an appeal to the Social Security Tribunal can be made.

[12] I agree with the Minister. Whether the Minister received the April 2017 and January 2018 applications is beside the point. That is because the General Division lacked jurisdiction to consider either of them.

The Minister's decisions were based only on the March 2019 application

[13] The Minister's initial decision to grant N. A. a survivor's pension was based on her March 2019 application. As much as N. A. may wish it were otherwise, that is the reality. It means that she was not entitled to retroactive pension payments any earlier than April 2018.[5]

[14] N. A. asked the Minister to reconsider its initial decision under section 81 of the *Canada Pension Plan*. On reconsideration, the Minister had the authority to decide only whether its initial decision on the March 2019 application was correct.[6] The Minister did not have the

[5] *Canada Pension Plan*, s 72.
[6] *Canada Pension Plan*, s 81.

authority to consider any other applications that N. A. may or may not have made. As a result, the Minister could not modify the retroactive start date of N. A.'s pension.

The General Division's jurisdiction was limited to the March 2019 application

[15] The General Division's jurisdiction is limited to appeals of reconsideration decisions. This comes from section 82 of the *Canada Pension Plan*, which says that a party who is dissatisfied with a Ministerial decision under section 81 may appeal the decision to the Social Security Tribunal. The General Division has the power to deal with appeals from reconsideration decisions.[7]

The General Division exceeded its jurisdiction by granting retroactivity that the Minister could not grant

[16] The General Division exceeded its jurisdiction when it granted N. A. a survivor's pension retroactive to April 2017. Although the General Division only had jurisdiction to address the March 2019 application, it considered two other applications that were not the subject of the Minister's reconsideration decision.

[17] On appeal, the General Division cannot make decisions based on any application other than the one that was the subject of the Minister's initial and reconsideration decisions.

The General Division misinterpreted Vinet-Proulx

[18] This principle was confirmed by the Federal Court in a case called *Vinet-Proulx*,[8] which dealt with a situation similar to this one. In *Vinet-Proulx*, the claimant applied for an Old Age Security (OAS) pension in April 2004, and the Minister approved it retroactive to May 2003.[9] The claimant the requested a reconsideration of the Minister's decision, claiming that she had previously sent in an application in March 2003. As here, the Minister was unable to find any

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[7] DESDA, ss 52-54.
[8] *Canada (Attorney General) v Vinet-Proulx*, 2007 FC 99.
[9] The *Old Age Security Act*, like the *Canada Pension Plan*, gives applicants for benefits the right to request reconsideration of the Minister's initial decision. As well, both statues limit retroactive payments to 11 months.

record of an earlier application and, on reconsideration, upheld its original decision. The claimant appealed the reconsideration decision to the General Division's predecessor, the CPP Review Tribunal, which decided that the Minister had, in fact, received the claimant's March 2003 application. The Review Tribunal granted the claimant benefits retroactive to July 2002, which was the month after the claimant turned 65 and thus the earliest possible date of payment. The Minister applied for judicial review at the Federal Court.

[19] The Federal Court found that the Review Tribunal exceeded its jurisdiction by granting additional retroactive OAS benefits based on the earlier application that the claimant insisted she had sent. The Minister, said the Court, could only make a reconsideration decision based on the one application that was before it. That, in turn limited the scope of the Review Tribunal's inquiry. The Minister could not grant retroactivity earlier than May 2003, and the Review Tribunal could not go beyond what the Minister had ordered on reconsideration.

[20] In this case, the General Division cited *Vinet-Proulx* but, in doing so, it seemingly disregarded the main principle for which that case stands. In its decision, the General Division wrote:

> In *Vinet-Proulx*, the Court noted that the issue of determining on what date an application for benefits was sent by an applicant and of determining on what date the application in question was received by [the Minister] are questions of fact within the jurisdiction of the review tribunal. It may decide based on the testimonies heard and the documents filed, or even based on presumptions, on a balance of probabilities. The Court considered the relevant statutory provisions and concluded that the Minister was bound to apply the provisions of the statute to the application **that it had received** [emphasis in original].[10]

This passage dwells on a passing comment in *Vinet-Proulx* that ultimately had no bearing on the larger point that the Federal Court was trying to make. It is true that the Court affirmed the Review Tribunal's right to make a finding of fact about whether or when an application was received, but it then suggested that none of that mattered if there was only one reconsideration decision on the table:

[10] General Division decision, para 13.

> However, the crux of the dispute is the Minister's initial decision and revised decision, which were rendered on the basis of **the** application for benefits received by the Minister on April 14, 2004, and [not][11] on the basis of **another** application for benefits completed by the applicant and which was not found, assuming it exists, by the Minister [emphasis in original].[12]

The Court found nothing to contradict the Minister's position that it had never received Ms. Vinet-Proulx's first application. But the larger issue for the Court was that the first application, even assuming it existed and was received by the Minister, had never generated a reconsideration decision. That meant that the Review Tribunal had nothing on which to base an order for additional retroactive payments.

[21] I am confident that, if the General Division had properly adopted the Federal Court's reasoning in *Vinet-Proulx,* it would come to a different conclusion than the one it did. It would have concluded that, in the absence of reconsideration decisions tied to the "lost" applications of April 2017 and January 2018, it had no jurisdiction to consider anything to do with them.

The Tribunal lacks jurisdiction to force the Minister to correct administrative errors

[22] The Minister says that, since it never received N. A.'s first two applications, it had no ability to assess them, either initially or on reconsideration. It says that, if it did lose or mishandle the applications, the appropriate venue for resolving N. A.'s allegations would have been pursuant to section 66(4) of the *Canada Pension Plan*, which allows the Minister to correct administrative errors.

[23] I agree. The Minister has never admitted to making such an error, and there is nothing that either the General Division or the Appeal Division can do to compel such an admission. Moreover, even if the Minister had admitted to administrative error, neither the General Division nor the Appeal Division would have had the authority to correct it. In a case called *Esler*,[13] the Federal Court reversed an attempt by the CPP Review Tribunal to extend retroactive OAS benefits beyond the legislative limitation. The Court wrote, "The Review Tribunal is a pure

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[11] Given the way this sentence is structured, I suspect that the word "not" was inadvertently omitted. Later, in para 14, the Court wrote: "Accordingly, I conclude that the Review Tribunal did not have jurisdiction to award pension benefits retroactively from the month of July 2002, as this is contrary to the legislative and regulatory provisions on which the Minister's initial decision and revised decision are based."
[12] *Vinet-Proulx,* Note 7, para 8.
[13] *Canada (Minister of Human Resources Development) v Esler*, 2004 FC 1567.

creature of statute and as such, has no inherent equitable jurisdiction which would allow it to ignore the clear legislative provision contained in subsection 8(2)[14] of the Act and use the principle of fairness to grant retroactive benefits in excess of the statutory limit."

The General Division erroneously assumed that unreturned mail is delivered

[24] In order to find that the Minister did receive N. A.'s earlier applications, the General Division took "judicial notice" of the fact that "mail in Canada is usually delivered within 7 days."[15] The General Division added: "I acknowledge that the Minister says there is no record of the documents being received. I acknowledge that the evidence I have to weigh is not ideal. However, there is a presumption that registered mail is in fact received."[16]

[25] I agree with the Minister that the General Division committed an error law when it make these statements. As discussed, the General Division's decision falls on the issue of jurisdiction alone. However, in attempting to breathe life into N. A.'s first two applications, the General Division also made several leaps of logic that I feel obliged to address.

[26] First, the General Division did not make an explicit finding that N. A. actually sent earlier applications in April 2017 and January 2018, nor did it attempt to confirm what method—whether regular or registered mail—she used. In the absence of any documentary evidence one way or the other, the General Division simply took N. A.'s word for it that the applications were sent and, what's more, received. I am not challenging the General Division's right to make factual findings, but when those findings are based entirely on witness testimony, the General Division must at least go to the trouble of explaining why that testimony deserves weight.

[27] Of course, it was not enough for the General Division to believe that N. A. had sent two earlier applications; the General Division also had to find that the Minister had received them. To do so, the General Division took judicial notice of the fact that mail in Canada is usually

[14] Section 8 is the provision of the *Old Age Security Act* that limits retroactive payment of the OAS pension to 11 months before the date of application.
[15] General Division decision, para 16.
[16] General Division decision, para 16.

delivered within seven days. Judicial notice is typically invoked to recognize facts that are "so notorious or generally accepted as not to be the subject of debate among reasonable persons."[17] However, I don't think that the infallibility of mail delivery is something that can be presumed.

[28] In the context of the *Canada Pension Plan*, there is no presumption that regular mail always reaches its intended destination within a reasonable time. The General Division itself seemed to recognize this reality by noting that mail "usually" arrives within a week. In doing so, the General Division implicitly allowed for the possibility that the Minister did **not** receive the two applications. Whether the Minister received the applications (assuming they were mailed) was therefore not a question "beyond debate." As such, the General Division's finding on this point fell short of the standard for judicial notice.

The General Division erroneously assumed that the two earlier applications were complete

[29] The General Division not only found that the earlier applications were sent and received, it also found that they were complete. The Minister alleges that the General Division based its decision on a perverse or capricious finding that N. A. filled out the two applications according to the CPP's statutory requirements.

[30] Again, I agree with the Minister. Under the *Canada Pension Plan*, applicants for the survivor's pension must provide in writing a long list of information, including the respective names, birth dates, and social insurance numbers of the deceased contributor and the proposed beneficiary.[18] When it receives an application, the Minister usually checks to see if it is complete. At the General Division, N. A. submitted copies of the two applications that she claimed to have sent to the Minister. In its decision, the General Division made the following observations:

> While I am satisfied that the Minister received both applications, I note that the 2017 application does not appear to be signed. On the other hand, the 2018 application is signed. However, I cannot decide if the application was complete.[19]

[17] *R. v Find*, 2001 SCC 32.
[18] *Canada Pension Plan Regulations*, s 52.
[19] General Division decision, para 17.

In the end, the General Division granted N. A. additional retroactivity as if one or both of the earlier applications were complete. Yet the General Division noted at least one indication that, in fact, the April 2017 application wasn't complete, and it explicitly declined to make a finding about the January 2018 application. I see an inconsistency here. On one hand, the General Division recognized, not just the existence, but the validity of the earlier applications; on the other hand, it identified potential deficiencies with one or both of them without explaining why those deficiencies did not render them incomplete.

REMEDY

There are two ways to fix the General Division's errors

[31] The Appeal Division has the authority to address whatever errors the General Division may have committed.[20] I can refer this matter back to the General Division for another hearing or give the decision that the General Division should have given.

[32] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. It has been nearly two years since N. A. applied for the survivor's pension. Returning this matter to the General Division would only delay final resolution of what is already a drawn-out proceeding.

[33] The parties agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the survivor's pension start date. Of course, the parties had different views about what the result should be. N. A. argued that, whatever the General Division's errors, she should still get a survivor's pension dating back to her husband's death. The Minister insisted that I had no alternative under the law but to limit N. A.'s retroactive payments to 11 months.

The record is sufficiently complete to decide this matter on its merits

[20] DESDA, s 59(1).

[34] I am satisfied that I have enough information to decide when N. A.'s pension should start. The General Division gave N. A. a full opportunity to argue that she had previously submitted two applications, and the Minister had an equal opportunity to argue that it had never received them. However, as I have indicated above, it doesn't matter whether or when N. A. made those first two applications. The fact remains that they didn't generate any reconsideration letters and therefore could not have been the subject of a General Division appeal. In the end, this case comes down to jurisdiction—in particular, whether the General Division had the power to consider any issues other than those raised by the Minister's reconsideration letter dated March 29, 2020.

[35] As a result, I am in a position to apply the law to the established facts and give the decision that the General Division should have given. In my view, if the General Division had properly applied section 82 of the *Canada Pension Plan*, then it would have realized that it had no authority to tie retroactive pension payments to any application other than the one N. A. submitted in March 2019. Since that application generated the only reconsideration letter on file, the General Division was bound to grant retroactive pension payments no earlier than April 2018.[21]

CONCLUSION

[36] I am allowing this appeal. The General Division exceeded its jurisdiction by considering two applications that were never the subject of a Ministerial reconsideration letter. My own assessment of the record convinces me that, since the Minister granted N. A. a survivor's pension based on her March 2019 application, she is entitled to no more than 11 months of retroactive payments from that date.

Member, Appeal Division

HEARD ON:	February 9, 2021

[21] *Canada Pension Plan*, s 72. See also Note 1.

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Ian McRobbie, Representative for the Appellant N. A., Respondent