



Citation: *WM v Minister of Employment and Social Development*, 2021 SST 350

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** W. M.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Jordan Fine (counsel)

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**Decision under appeal:** General Division decision dated August 28, 2020  
GP-20-654

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**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference

**Hearing date:** July 13, 2021

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** July 26, 2021  
**File number:** AD-21-136

## Decision

[1] The General Division failed to address an important issue. I am correcting that mistake. But, it does not change the final outcome or result of the General Division decision. Payment of a Canada Pension Plan retirement pension can only go back as far as 11 months – to January 2018 in the Claimant's case.

## Overview

[2] The Appellant W. M.(Claimant) is appealing the General Division decision. The General Division found that the earliest that payment of a Canada Pension Plan retirement pension could start for the Claimant was January 2018. This was 11 months before he had filed an application for the pension. (This does not include the month in which the Respondent, the Minister of Employment and Social Development (Minister) received his application.) The General Division summarily dismissed the Claimant's appeal.

[3] The Claimant argues that the General Division failed to consider whether he was incapacitated and therefore unable to file an application before he did. If the Claimant was incapacitated, then the Minister could deem his application to have been made earlier.<sup>1</sup> He is asking the Appeal Division to find that he was incapacitated.

[4] The Claimant also argues that an 11-month maximum of retroactive payments amounts to an expropriation of entitlements. He calls that unfair. He is asking for reform of the *Canada Pension Plan*.

[5] I have to decide whether the General Division made any mistakes when it decided that, at most, payment of the pension could only go back a maximum of 11 months from when the Claimant applied.

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<sup>1</sup> See the incapacity provisions under section 60(8) of the *Canada Pension Plan*.

[6] I find that the General Division failed to consider the Claimant's incapacity argument. But, I also find that the General Division's oversight did not change the outcome. There was insufficient evidence of incapacity.

[7] The *Canada Pension Plan* does not give me any discretion or power to give more than 11 months of retroactive payments. The Appeal Division does not have any power to reform the *Canada Pension Plan*.

## **Preliminary matters**

### **– The Minister argues the Claimant is too late to appeal**

[8] The Minister argues that the Appeal Division has no choice but to dismiss the appeal because the Claimant was late when he filed his appeal with the Appeal Division. The Minister argues that the section 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA) required the Claimant to file an appeal within 90 days after he received the Commission's reconsideration decision.

[9] The Minister also argues that the Appeal Division cannot give the Claimant an extension of time to file his appeal because he did not meet the requirements for an extension. The Minister argues, for instance, that the Claimant failed to provide a reasonable explanation for his delay.

[10] The General Division summarily dismissed the Claimant's appeal on August 27, 2020. The Claimant filed an appeal of the General Division decision with the Appeal Division on April 23, 2021. While this is clearly more than 90 days after the Claimant received the General Division decision, I find that the Claimant was not late.

[11] I find that there is no time limit by which a claimant must file an appeal of a summary dismissal decision.

[12] Although the Minister refers to the time limits in section 57(1)(b) of the DESDA, that section does not apply. That section relates to applications for leave to appeal. For most appeals, a claimant has to seek leave to appeal. That means they have to get permission before the Appeal Division considers the merits of their case.

[13] However, in cases where the General Division summarily dismissed a claimant's appeal, a claimant has an appeal as of right to the Appeal Division. They do not have to seek leave to appeal.

[14] Here, the General Division summarily dismissed the Claimant's appeal. For that reason, the Claimant did not have to seek leave to appeal. The time limit for leave to appeal does not apply to him. The Claimant was not late when he filed his appeal to the Appeal Division. And, he does not have to explain why he did not file his appeal earlier.

– **The Minister argues that the Claimant's application is deficient**

[15] The Minister also asks the Appeal Division to reject the Claimant's appeal because the Claimant's application to the Appeal Division is deficient. The Minister argues that the Claimant's appeal does not meet the formal requirements under section 35 of the *Social Security Tribunal Regulations*. For one, the Claimant did not use the appropriate application form, and two, the Claimant's letter does not identify the grounds on which he bases his appeal.

[16] The Claimant fixed any deficiencies after the Minister raised them. He filed an application to the Appeal Division using the appropriate form, on which he identified the grounds of appeal.<sup>2</sup> The Claimant's application is not deficient.

## **Issues**

[17] Did the General Division overlook the Claimant's argument that he was incapacitated?

[18] If so, did the General Division's mistake make a difference to the outcome?

## **Background Facts**

[19] The facts are not in dispute:

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<sup>2</sup> See Claimant's Application to the Appeal Division – Income Security, filed on June 16, 2021, at AD3.

- the Claimant was 71 years of age when he applied for a Canada Pension Plan retirement pension in December 2018.
- the Minister approved his application for the retirement pension
- the Minister told the Claimant that the earliest that it could pay him the retirement pension was 11 months back from his application – to January 2018
- the Claimant is asking for greater retroactive payments. He says that he should have received a retirement pension dating back to June 2017, the month after he turned 70 years of age.

## Analysis

[20] If the General Division made any jurisdictional, procedural, legal, or certain types of factual errors, the Appeal Division can intervene and fix the General Division's mistake.<sup>3</sup>

### The Parties' Positions

[21] The Claimant argues that he should receive the Canada Pension Plan retirement pension dating back to June 2017, the month after he turned 70 years age. After all, he contributed to the Canada Pension Plan and was entitled to receive a retirement pension then.

[22] The Claimant explained why he did not apply for a retirement pension before December 2018. He claims that he was incapacitated and unable to file an application. He says that he "encountered several catastrophic health and family issues."<sup>4</sup> His son's health and affairs deteriorated significantly through 2017, until his death in May 2018. His son left a young child. There were also complicated business and estate matters.

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<sup>3</sup> Sections 58(1) and 59 of the *Department of Employment and Social Development Act*.

<sup>4</sup> See Notice of Appeal – Income Security – General Division, at GD1-3.

[23] The Claimant had his own health issues. He had an attack of shingles that began in late July 2018 and “remained a limiting factor for several months until symptoms ended in December, 2018.”<sup>5</sup>

[24] The Claimant argues that he was unable to file an application for a retirement pension because he was incapacitated. He argues that the General Division should have recognized that he was incapacitated. He argues it should have given him a retirement pension dating to June 2017. Instead, he argues that the General Division failed to even consider whether he was incapacitated.

[25] The Minister argues that this is the first time that the Claimant is arguing that he was incapacitated and had been unable to file an application for retirement benefits. The Minister argues that the Claimant cannot raise a new argument that he did not make at the General Division.

[26] Alternatively, the Minister argues that, if the Claimant raised the incapacity issue, the General Division addressed it at paragraph 7 of its decision. There, the General Division referred to the Claimant’s “family circumstances.” The Minister argues that it is clear that the General Division found that it could not consider the Claimant’s circumstances. The member wrote that he could not render decisions on the basis of fairness, compassion, or extenuating circumstances.<sup>6</sup>

[27] The Minister also argues that, even if the General Division did not directly address the incapacity issue, there was no evidence that could have established that the Claimant had been incapacitated. The Minister submits that there was no evidence that showed that the Claimant had been incapable of forming or expression an intention to make an application.<sup>7</sup>

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<sup>5</sup> See Claimant’s request for reconsideration, at GD2-13.

<sup>6</sup> See General Division decision, at para. 9.

<sup>7</sup> Under section 60(8) of the *Canada Pension Plan*, a person had to have been incapable of forming or expressing an intention to make an application. And, under section 60(10), the period of incapacity has to be continuous.

**Did the General Division fail to address the Claimant's argument that he was incapacitated?**

[28] Yes. The General Division failed to consider the Claimant's argument that he was incapacitated.

[29] The Minister argues that this is the first time that the Claimant is raising this issue. But, it is clear that the Claimant raised the incapacity issue at the General Division.

[30] After all, even the Minister addressed the incapacity issue in its Recommendation to Summarily Dismiss. The Minister acknowledged that the Claimant's personal circumstances were very tragic and time consuming. Even so, the Minister argued that the Claimant's circumstances did not meet the definition of incapacity.<sup>8</sup> Surely the Minister would not have addressed the issue if the Claimant had not already raised the issue.

[31] Alternatively, the Minister argues that the General Division addressed the incapacity issue at paragraph 7, when it referred to the Claimant's family circumstances. The Minister notes that the General Division then concluded that it could not consider any compassionate or extenuating circumstances.

[32] I find it unlikely that the mere reference to the Claimant's family circumstances necessarily includes the Claimant's own health issues. Apart from this, I do not see any indication that the General Division considered whether the Claimant had been incapable of forming or expression an intention to make an application.

[33] Given the fact that the Claimant raised the incapacity issue—albeit indirectly—the General Division should have considered it. This is a legal error. The General Division should have assessed whether the Claimant had been incapable of forming or expression an intention to make an application.

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<sup>8</sup> See Claimant's Recommendation to Summarily Dismiss, filed June 23, 2020, at GD3-4, at para. 11.

## **Did the General Division’s mistake make a difference to the outcome?**

[34] The Claimant argues that, if the General Division had considered the incapacity issue, it would have accepted that he was incapacitated. And, he claims that it would have then found he was entitled to payments of the retirement pension to June 2017.

[35] The Claimant says that he faced several catastrophic health and family issues. He claims that they affected his physical and mental health, to the point that he was incapacitated and unable to apply for a retirement pension.

[36] The Claimant acknowledges that there is no medical evidence to support his claim of incapacity.<sup>9</sup> But, he says that it should be apparent that an accumulation of all of the family and personal health issues took a significant toll on him. He says that he can get a supporting medical report from his doctor to show that he was incapacitated.

[37] The Minister argues that there was insufficient or no evidence that could have established that the Claimant had been incapacitated. There was nothing that showed the Claimant had been incapable of forming or expression an intention to make an application.<sup>10</sup>

[38] Clearly the Claimant’s circumstances, including his own personal health, had a significant impact on him. But, the courts have narrowly defined incapacity. For instance, being “markedly restricted”<sup>11</sup> or unfit to work are insufficient. Having post-traumatic stress disorder,<sup>12</sup> “undoubted difficulties”<sup>13</sup> or being disabled are insufficient.

[39] The issue is whether, during the entire period, the Claimant was incapable of forming or expressing an intention to make an application. While there are no supporting medical records, the activities of a claimant may be relevant, as they could

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<sup>9</sup> Appeal Division hearing on July 13, 2021.

<sup>10</sup> Under section 60(8) of the *Canada Pension Plan*, a person had to have been incapable of forming or expressing an intention to make an application. And, under section 60(10), the period of incapacity has to be continuous.

<sup>11</sup> See *O’Rourke v Canada (Attorney General)*, [2018] FCJ No. 544, 2018 FC 498.

<sup>12</sup> See *O’Rourke v Canada (Attorney General)*, [2018] FCJ No. 544, 2018 FC 498.

<sup>13</sup> See *E.D.B. v. Canada (Minister of Human Resources and Skills Development)* [2011] FCJ No. 670, 2011 FCA 158, leave to appeal refused [2011] SCCA No. 517.



show whether that claimant had a continuous incapacity to form or express an intention.<sup>14</sup> A claimant's capacity to form an intention with respect to other choices may also be relevant. It is similar to the capacity to form an intention to make an application.<sup>15</sup>

[40] Here, the Claimant states that he made a conscious decision to focus on his health and other issues. The Claimant suggests that he tended to his son's business and estate.<sup>16</sup> During 2018, the Claimant was also in contact with Service Canada about his pension and deadlines.<sup>17</sup>

[41] These facts demonstrate that the Claimant did not continuously lack the capacity to form or express an intention to make an application. So, although the General Division failed to consider the incapacity issue, it would not have changed the outcome.

[42] The Claimant also raises the issue of erroneous advice. He claims that a Service Canada agent essentially advised him to look after his health first and worry about making an application later. He says that he should not be penalized for having followed this advice from the Service Canada agent.

[43] The Tribunal does not have the authority to address any allegations of erroneous advice. This power resides exclusively with the Minister.<sup>18</sup> The Minister is currently investigating this claim, so any appeal on this issue is premature.<sup>19</sup> Any appeals of the Minister's decision would require applying for judicial review at the Federal Court.<sup>20</sup>

[44] Finally, the Claimant argues for reform of the *Canada Pension Plan*. He argues that no other pension schemes effectively expropriate funds from a pension fund. And, he argues that, generally, limitation periods run six to seven years, not 11 months. In

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<sup>14</sup> See *Canada (Attorney General) v Kirkland*, 2008 FCA 144.

<sup>15</sup> See *Sedrak v Canada (Social Development)*, 2008 FCA 86.

<sup>16</sup> See Claimant's request for reconsideration, at GD2-13.

<sup>17</sup> See Notice of Appeal – Income Security – General Division, at GD1-3.

<sup>18</sup> The Minister points to section 66(4) of the *Canada Pension Plan*. That section states that where the Minister is satisfied that a person received erroneous advice, the Minister shall take remedial action to place that person in the position they would have been in had the erroneous advice not been given.

<sup>19</sup> See Minister's submissions, dated June 2, 2021, at AD2-2.

<sup>20</sup> See Minister's submissions, dated June 2, 2021, at AD2-2.

other words, he argues that, irrespective of when a claimant applies for a retirement pension, they should not be limited to their entitlement by the date of their application.

[45] The Tribunal has no role in reform of the *Canada Pension Plan*. Reform is a matter for Parliament to pursue, and it may have to get provincial consent.

## **Conclusion**

[46] The General Division overlooked the Claimant's fundamental argument that he was incapacitated and unable to apply for a Canada Pension Plan retirement pension. However, the General Division's error would not have changed the outcome. There was no medical evidence and the Claimant's activities failed to show that he was incapable of forming or expressing an intention to make an application. The appeal is dismissed.

Janet Lew  
Member, Appeal Division