



Citation: *SM v Minister of Employment and Social Development*, 2022 SST 182

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant (Claimant):** S. M.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** General Division decision dated October 12, 2021  
(GP-21-242)

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**Tribunal member:** Kate Sellar

**Type of hearing:** Teleconference

**Hearing date:** March 7, 2022

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

**Decision date:** March 16, 2022

**File number:** AD-21-396

## Decision

[1] I am dismissing the appeal. The General Division didn't make an error. These reasons explain why.

## Overview

[2] S. M. (Claimant) says this case has turned out to be more difficult for him than his experience with colon cancer. He has been under a lot of stress, and he had a support person with him during his hearing for this appeal.

[3] In June 2020, the Claimant was 61 years old. He had a bad back and was looking for work he could do that would earn him a living. Service Canada told him that he owed them over \$63,000 (more than triple his best year of earnings since 2013), but it would forgive some of that debt so that he owed \$42,163.76.

[4] That is a lot of money.

[5] The background facts matter a lot to this Claimant, so I will describe them in some detail.<sup>1</sup>

## Cancer, CPP disability pension, and going back to work

[6] The Claimant applied for a Canada Pension Plan (CPP) disability pension in July 2012.<sup>2</sup> His colon cancer was at stage 3. His doctors booked him for surgery and chemotherapy. The prognosis was good. The Minister of Employment and Social Development (Minister) approved his application, with payments starting as of May 2012.<sup>3</sup>

[7] He signed a paper that said he would tell Service Canada if he went back to work.<sup>4</sup>

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<sup>1</sup> The Minister's representative was careful to highlight for the Claimant some facts that the Claimant didn't dispute, which was helpful in this process.

<sup>2</sup> See GD2-53.

<sup>3</sup> See GD2-208.

<sup>4</sup> See GD2-236.

[8] The Claimant went back to work in April 2013, and he earned income until 2018.<sup>5</sup>

[9] The Claimant didn't tell Service Canada that he had gone back to work. He filed his taxes every year as usual. He figured the federal government understood that he had been working since 2013. He didn't work many hours, and he wasn't able to do all the work he had been able to do before. He had fatigue and back problems that got worse over time.

[10] The Claimant wants me to understand that he **never** wanted **any** kind of benefits. He tried to find work he could do that would earn him a living.

[11] It is important to the Claimant for me to note that he never got a pamphlet called "Staying in Touch." It reminds people on CPP disability to tell Service Canada if anything changes. For example, they should tell Service Canada if the impact of their disability lessens, they start earning money at a job, or they move.

### **The Claimant makes a substantially gainful income**

[12] The amount of money the Claimant made from 2014 to 2019 is what the *Canada Pension Plan Regulations* (Regulations) call "substantially gainful."<sup>6</sup> The Regulations say that income is "substantially gainful" if it is equal to or more than the maximum annual amount you could get as a disability pension.<sup>7</sup>

[13] The Claimant never made more than \$19,132 in any of the years he worked while on CPP disability. The year he made \$19,132, he still made more than the \$15,763 he would have made that year if he got the maximum CPP disability pension and nothing else.

[14] So, "substantially gainful" for the CPP is measured by looking at how much CPP benefits are. It isn't measured by considering what the word "substantial" might mean given the cost of living in any given city, the poverty line, or the cost of food. This

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<sup>5</sup> See GD2-5 and 6.

<sup>6</sup> The Claimant earned income in 2013 too. But the section of the *Canada Pension Plan Regulations* (Regulations) that defines "substantially gainful" didn't come into force until 2014.

<sup>7</sup> See section 68.1(1) of the Regulations.

matters to the Claimant. I think he is upset because he doesn't see the income he earned while on CPP disability to be substantial in the regular sense of the word.

### **Service Canada makes a mistake**

[15] In December 2017, Service Canada looked at four years of the Claimant's income from his income tax slips, or T4s. It decided that the money listed there was benefits, not income (earnings from working).<sup>8</sup> I will refer to this as the "2017 decision."

[16] The Service Canada worker made a mistake. The T4s actually showed that the Claimant was making money at his job. According to the Minister's arguments at the Appeal Division hearing, the employee turned off whatever red flag these T4s normally raise about whether the Claimant should still get a CPP disability pension.

### **The Minister stops the disability pension**

[17] In June 2020, the Minister reassessed the Claimant's disability file. It decided that the Claimant had stopped being disabled within the meaning of the *Canada Pension Plan* in July 2013. The overpayment was over \$63,000, but the Minister recalculated it because of Service Canada's mistake in 2017 about the T4s.<sup>9</sup>

[18] The Minister decided that the Claimant was responsible for an overpayment of \$42,163.76. It didn't require him to repay the benefits he had received from January 2018 onward.

### **The Claimant appeals**

[19] The Claimant appealed to the General Division of this Tribunal. The General Division made the following findings:

- The Claimant stopped being disabled when he went back to work, and the Minister was entitled to stop the pension.

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<sup>8</sup> See GD2-35 to 38.

<sup>9</sup> See GD2-26 to 29.

- The Minister had shown that it was entitled to stop the pension as of July 2013.
- There was nothing the General Division could do to change the amount of the overpayment.

## **What I need to decide and what I have decided**

[20] The Claimant was granted leave (permission) to appeal the General Division's decision. I have to decide whether the General Division made an error. If it did make an error, I need to decide how to fix it.

[21] I conclude that the General Division didn't make an error.

## **Issues**

[22] The issues in this appeal are as follows:

- a) Did the General Division make an error of law by failing to give sufficient (good enough) reasons why the 2017 decision wasn't a "last standing decision confirming eligibility" like the one in *Kinney*?<sup>10</sup>
- b) Did the General Division make any other error by ignoring the evidence about the Minister's role in the overpayment?

## **Analysis**

[23] This is where I explain:

- what my role is in reviewing General Division decisions
- why I find that the General Division's reasons are sufficient
- why I find that the General Division didn't make any other error about the Minister's role in the overpayment

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<sup>10</sup> See *Kinney v Canada (Attorney General)*, 2009 FCA 158.

## My role in reviewing General Division decisions

[24] The Appeal Division hearing isn't a chance for the Claimant or the Minister to re-argue their case from the beginning. Instead, the Appeal Division reviews the General Division's decision to decide whether it made any errors.

[25] That review is based on the wording of the *Department of Employment and Social Development Act*, which lists the "grounds of appeal" (the errors I can consider).

[26] Failing to follow the legal analysis required by the *Canada Pension Plan* and the case law is an error of law. Failing to provide reasons on a key issue can be an error of law too.<sup>11</sup> An error of law is one of the grounds of appeal.<sup>12</sup>

## The General Division's reasons are sufficient

[27] The General Division gave sufficient reasons for deciding what kind of decision Service Canada made in 2017. It could have explained a little more how it had decided what counts as a "last standing decision confirming eligibility." This expression comes from a Federal Court of Appeal decision called *Kinney*. However, the General Division's reasons didn't fall short in a way that would count as an error of law.

[28] The General Division asked the Claimant and the Commission for arguments to help answer the question of whether the 2017 decision was a "last standing decision confirming eligibility." Neither party gave any arguments on this question.

[29] This question was key. If the 2017 decision was a "last standing decision confirming eligibility," then the Minister would not be able to collect any pension money the Claimant was overpaid any time **before** December 2017.

[30] This rule against collecting overpayments for pension benefits before the last standing decision on eligibility comes from *Kinney*.

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<sup>11</sup> See paragraph 39 of the Supreme Court of Canada's decision in *R v Sheppard*, 2002 SCC 26; and paragraph 6 of the Federal Court of Appeal's decision in *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292.

<sup>12</sup> See section 58(1)(b) of the *Department of Employment and Social Development Act*.

[31] *Kinney* fixes the unfairness that could come up if Service Canada were to reassess a claimant's eligibility several times over many years.<sup>13</sup> *Kinney* is important to the Claimant's case. If the 2017 decision was a "last standing decision confirming eligibility," then there would be basically no overpayment at all.<sup>14</sup>

[32] The General Division decided that *Kinney* didn't help the Claimant: The 2017 decision wasn't a last standing decision on eligibility.<sup>15</sup>

[33] The General Division didn't directly define "last standing decision confirming eligibility" using the *Canada Pension Plan*. It is possible to assume from its decision that the General Division considers that a "last standing decision confirming eligibility" must:

- be more than a review of the source of T4 earnings
- include an investigation of whether the claimant was able to do substantially gainful work again
- involve notifying the claimant

[34] The Minister argues that there is no error of law. The General Division considered what goes into the initial decision about whether a claimant is eligible for a disability pension. The *Canada Pension Plan* describes those requirements:

- The Minister needs to consider a claimant's disability pension application and notify the claimant of its decision in writing.<sup>16</sup>

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<sup>13</sup> In a case with multiple reassessments over a long period, *Kinney* requires Service Canada to stand by a reassessment finding the claimant eligible. If a later reassessment decides that the claimant isn't eligible anymore, the Minister should not be able to collect overpayment for the period covered by the reassessment finding the claimant eligible.

<sup>14</sup> The overpayment is from 2013 to the end of 2017.

<sup>15</sup> See paragraphs 6 to 12 of the General Division's decision.

<sup>16</sup> See section 60(7) of the *Canada Pension Plan*.

- The claimant needs to give the Minister information in support of the application. The Minister uses that information to assess eligibility the first time.<sup>17</sup>
- When reviewing that information, the Minister is deciding whether the claimant has a severe and prolonged disability.<sup>18</sup>
- A disability is severe if the claimant is unable regularly to do some kind of work that they could earn a living from.<sup>19</sup>
- The Minister can stop the disability pension in the month the claimant stops being disabled.<sup>20</sup>
- When using its power to stop a disability pension like that, the Minister needs to decide on the claimant's continuing eligibility.<sup>21</sup>

[35] The Minister argues that all the requirements above, like notifying the claimant in writing and reviewing the information about whether the disability is severe, need to apply to continuing eligibility assessments. Otherwise, the Minister could stop a disability pension without reviewing the file and notifying the claimant.<sup>22</sup>

[36] So, while the General Division didn't review these sections of the *Canada Pension Plan*, it is in reading these sections together with the *Kinney* decision that it concluded that all the same rules for deciding eligibility the first time also apply to reassessments.

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<sup>17</sup> See sections 52 and 68 of the *Canada Pension Plan Regulations* for the information the claimant provides, and section 60(7) for the need for the Minister to process that information as an application.

<sup>18</sup> See section 42(2)(a) of the CPP.

<sup>19</sup> See section 42(2)(a)(i) which explains that a disability is severe if the claimant is "incapable regularly of pursuing any substantially gainful occupation."

<sup>20</sup> See section 70(1)(a) of the CPP.

<sup>21</sup> See section 70(1)(a) of the CPP.

<sup>22</sup> See the Minister's arguments at AD6-11.



[37] This means that Service Canada's review of the T4s can't be a last standing decision on eligibility like in *Kinney*. This is because:

- the Claimant was never notified of that review when it happened in 2017
- he wasn't given the chance to provide information about his disability
- the Minister didn't review that information to consider whether his disability was severe again until 2020

[38] I agree with the Minister's arguments. The General Division was interpreting what a last standing decision on eligibility is. It would have been better to explain what the authority in the law is, but failing to refer to the *Canada Pension Plan* to make this connection wasn't an error of law. The General Division applied the law correctly. But it would have been helpful for it to explain its reasoning in more detail.

[39] The Minister argues that there is "no mystery as to why the [General Division] distinguished *Kinney*." That may not have been the case for the unrepresented Claimant. It was arguable that there was some mystery about how the General Division interpreted the requirements of a last standing decision on eligibility.

[40] The Minister's arguments have helped solve that mystery. The General Division was reading the *Canada Pension Plan* and Regulations in a certain way, even if it didn't specifically note those sections in its decision. The Minister's arguments have satisfied me that the parts that were missing don't add up to an error of law.

[41] The General Division's reasons are what the Supreme Court of Canada calls "functionally adequate."<sup>23</sup> This means that the reasons are enough to support the General Division's conclusion. The General Division explained how the 2017 decision was different from the kind of decision in *Kinney*, even if it didn't reference the *Canada Pension Plan* and Regulations the way the Minister did at the Appeal Division.

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<sup>23</sup> The Minister's representative talked about this in his arguments at paragraph 25 of AD6.

[42] I am satisfied that the General Division didn't fully explain how we know what a last standing decision is. However, the law is clear about initial decisions, and when you read that together with the parts of the law that explain that the Minister can reassess and stop a disability pension, the General Division's reasons are sufficient.

### **The General Division didn't make any other error about the Minister's role in the overpayment**

[43] The General Division didn't make any other error about the Minister's role in creating the overpayment.

[44] Once it decided that there was no last standing decision on eligibility in 2017 and that the Minister was entitled to stop the pension after its review in 2020, there was nothing more for the General Division to decide.

[45] The General Division could not make any decision about the Minister's contributing to the overpayment based on the following facts, even though they are important:

- The Claimant explained under oath that he had never gotten the Service Canada pamphlet "Staying in Touch."<sup>24</sup>
- Service Canada didn't look at any T4s at all until December 2017, at which time it reviewed 2013, 2014, 2015, and 2016 all at once.
- The Claimant's tax slips didn't alert Service Canada that he had gone back to work.

[46] In my view, the General Division didn't make an error of law. The General Division didn't have any decision-making power to erase or lower overpayments based

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<sup>24</sup> If the Claimant had gotten that pamphlet, it may well have led him to contact Service Canada and explain he had been working long before Service Canada reassessed his file.

on any of these facts.<sup>25</sup> There was nothing more that the General Division could do within its power with those facts.

## Next steps

[47] At the Appeal Division hearing, the parties also talked about the path the parties called “debt forgiveness.” Debt forgiveness is about how much (if any) of the debt is ever collected, for example, because of the claimant’s financial hardship.<sup>26</sup>

[48] The Minister’s lawyer was mindful of the challenges the Claimant has had in his dealings with the CPP. At the hearing, he made it clear to the Claimant that, if I dismissed the appeal, and if there were no further appeals, his client at Service Canada would reach out to the Claimant to start the process for considering debt forgiveness.

[49] Debt forgiveness will be an important process for the Claimant. He has a bad back, lives in subsidized housing, and says he lives so far below the poverty line that he has to “reach up to touch the bottom.”<sup>27</sup>

[50] I thank both parties for their participation in this process.

## Conclusion

[51] The appeal is dismissed. The General Division didn’t make an error.

Kate Sellar  
Member, Appeal Division

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<sup>25</sup> See *Lazar v Canada (Attorney General)*, 1999 CanLII 7669. The Review Tribunal and the Pension Appeals Board can find that the claimant was legally entitled to the benefits that the Minister was attempting to collect as overpayment.

<sup>26</sup> See section 66(3) of the *Canada Pension Plan*.

<sup>27</sup> This is from the audio recording of the March 7, 2022, hearing at 1:13:50.