Citation: *SW v Minister of Employment and Social Development*, 2022 SST 952

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. W.
Representative:	Barb Capeling
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie and Helli Raptis

Decision under appeal:	General Division decision dated March 7, 2022 (GP-21-335)

Tribunal member:	Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	August 11, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representatives
Decision date:	September 26, 2022
File number:	AD-22-295

Decision

[1] The appeal is dismissed. The General Division did not make any errors that justify overturning its decision to find the Claimant no longer disabled.

Overview

[2] The Claimant is a 61-year-old former self-employed janitor who injured his right shoulder in a December 1991 car accident. Despite undergoing rotator cuff surgery, he was left with chronic pain.

[3] In November 1994, the Claimant applied for a Canada Pension Plan (CPP) disability pension. After reviewing his medical records, the Minister determined that the Claimant had a severe and prolonged disability. The Minister approved the Claimant's application retroactive to December 1993.

[4] At the time of approval, the Minister was aware that the Claimant had operated a business in which he contracted out his janitorial services. However, the Minister awarded him the disability pension anyway, because the Claimant said that he had been subcontracting out all of his work since his accident.

[5] In 2009, the Minister initiated a review of the Claimant's eligibility for the pension after receiving information that the Claimant was still working. Although the review was complete by 2012, the Minister did not take any action until eight years later.

[6] In October 2020, the Minister sent the Claimant a letter informing him of the results of the review.[1] The letter said that the Claimant's activities since 2007 showed he was no longer disabled. The Minister suspended the Claimant's pension as of May 2007 and demanded repayment of all of the money he had received from the government since that date, an amount totaling more than $111,000.

[1] See Minister's letter dated October 6, 2020, GD2-18.

[7] The Claimant asked the Minister to reconsider her decision. He explained that the income he received from his business was not for any physical work that he performed. He said that, instead, he hired contract labourers to do the physical work for him. He insisted that his role was purely managerial.

[8] The Minister decided to maintain its decision to suspend the Claimant's benefits as of May 2007. The Claimant then appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[9] The General Division held a hearing by videoconference and dismissed the appeal in part. The General Division found that the Minister did not have the authority to suspend the Claimant's pension earlier than January 2010.[2] According to the General Division, that date was the last time the Minister affirmed the Claimant was disabled. However, the General Division also found that, based on the available evidence, the Claimant's disability was not severe as of that date. As a result, the Claimant was not entitled to the benefits that he had received between January 2010 and August 2020.

[10] The Claimant then asked the Appeal Division for permission to appeal. He alleged that, in coming to its decision, the General Division made the following errors:

- It found, without any evidence, that he had understated his net income for income tax purposes by inflating his business expenses;
- It failed to consider how long it took the Minister to suspend his pension and assess an overpayment after she completed her investigation; and
- It found that the evidence around the Claimant's education level was inconsistent, even though he testified that he left school in Grade 9.

[11] I granted the Claimant permission to appeal because I thought he had an arguable case. In July, I held a hearing by videoconference to discuss his allegations in full.

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[2] See General Division, paragraph 24.

Preliminary matter

[12] On July 30, 2022, the Claimant submitted to the Tribunal an 82-page package of financial documents, including invoices, sales receipts and income statements.[3] For reasons that I explained at the outset of the hearing, I declined to admit these documents, none of which had been previously submitted to the General Division. The Appeal Division does not have the authority to consider new evidence or to entertain arguments on the merits of a disability claim.[4] Rather, the Appeal Division's mandate is to determine whether the General Division made errors in coming to its decision.

What the Claimant had to prove

[13] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[5]

[14] In this appeal, I had to consider these questions:

- Did the General Division make an error by failing to assess the Minister's use of her discretionary powers?
- Did the General Division make an error when it determined that the Minister's "last standing decision" was January 2010?
- Did the General Division make an error when it determined that the Claimant's income was substantially gainful?

[3] Labelled AD4 in the record.
[4] See *Belo-Alves v Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100.
[5] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

- Did the General Division make an error when it found that the Claimant had a Grade 10 education?

Analysis

The General Division had no authority to assess the Minister's use of her discretionary powers

[15] In my leave to appeal decision, I raised the possibility that the General Division had neglected to consider whether the Minister appropriately exercised her discretion when she revisited her decision to grant benefits to the Claimant.

[16] I have considered this question at length and concluded that the General Division did not make an error.

– The Minister reviewed the Claimant's entitlement but delayed acting on the results of the review

[17] In May 2009, after receiving third-party tip that he was still working, the Minister's Integrity Service Branch (ISB) began reviewing the Claimant's continued entitlement to the disability pension. Over the next three years, the ISB interviewed the Claimant and his wife multiple times and requested information about his business affairs and finances.

[18] The ISB completed its review in January 2012. The resulting report found that the Claimant was managing a successful business and recommended an entitlement review.[6] However, the Minister took no further action until January 2020, when ISB sent the Claimant another request for information. In July 2020, the Minister terminated the Claimant's pension and demanded the return of payments going back 13 years.

[19] More than eight years passed between the completion of the review and the decision to terminate the Claimant's pension. When the Claimant learned that he was being cut off, he expressed dismay and confusion.

[6] See report of investigation by Julie Stoffyn, ISB investigator, dated February 25, 2012, GD2-164.

[20] It appears that the Claimant didn't realize his benefits were in jeopardy until the moment they were terminated. After the flurry of inquiries in 2009–12, the Claimant went years without hearing anything from the Minister except confirmation that his monthly pension payments were being deposited in his account. It is likely that the passage of time lulled the Claimant into a false sense of security.

– The General Division lacked the authority to consider the Minister's delay

[21] However, even though the Minister waited more than eight years before finally cutting off the Claimant, the General Division had no power to do anything about it. Nor do I.

[22] The Minister has two types of power: mandatory and discretionary. The first are things the Minister must do under the law; the second are optional—things the Minister can do if she wants to but doesn't necessarily have to.

[23] The Minister has broad discretionary powers to review a CPP disability recipient's eligibility for CPP disability benefits. Under the *Canada Pension Plan Regulations*, the Minister may "from time to time" require a recipient to undergo special examinations, supply reports, supply statements of occupation and earnings, or undergo reasonable rehabilitation measures for the purpose of determining whether any amount "shall continue to be paid."[7]

[24] Once the Minister has determined that a claimant is no longer disabled, the law gives her no discretion: she **must** terminate the pension for the month in which the recipient ceases to be disabled.[8] In this case, the Minister made an initial decision that

[7] See section 69 of the *Canada Pension Plan Regulations.*
[8] See section 70(1)(a) of the *Canada Pension Plan*, which uses none of the language (for instance, "may," "reserves the right," or "where satisfied") typically associated with discretionary power.

the Claimant had stopped being disabled as of April 2007.[9] It later conformed that decision on reconsideration.[10] That reconsideration was then appealed to the Tribunal.[11]

[25] Once the appeal happened, the General Division took over. It became seized of the key question in this matter—whether the claimant remained eligible for the CPP disability pension. The Minister's prior assessments were suddenly history, and so were her actions in arriving at those assessments. That meant that the General Division had to look at the claimant's disability claim from the ground up, without regard for whatever the Minister might have said or done before. The General Division's only mandate was to determine whether the Claimant was still disabled and, if not, when his disability ceased to be severe and prolonged according to the criteria set out in the *Canada Pension Plan*.

[26] The Minister is the only who can decide if her department committed an administrative error, whether that error takes the form of delay or some other type of negligence.[12] Any attempt by the General Division to address such error would exceed its authority.

[27] The Minister's department may have sat on the ISB investigator's report for eight years before acting on its findings. But this error, assuming that's what it was, could only be corrected by the Minister at her discretion. It was therefore beyond the review of the General Division, which has no jurisdiction to consider whether the Minister used or abused her powers in a judicial manner.

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[9] See Minister's letter dated October 6, 2020, GD2-18. This letter was the Minister's initial decision made under section 81(1)(c) of the *Canada Pension Plan*: This section allows a beneficiary who is "dissatisfied with any determination as to the amount of a benefit payable to the beneficiary or as to the beneficiary's eligibility to receive a benefit" to request reconsideration from the Minister.
[10] See Minister's letter dated January 13, 2021, GD2-8. This letter was the Minister's reconsideration decision made under section 81(2) of the *Canada Pension Plan*.
[11] See section 82 of the *Canada Pension Plan*, which allows a party who is dissatisfied with a decision of the Minister under section 81 to appeal it to the Tribunal.
[12] Under sections 66(3) and 66(4) of the *Canada Pension Plan*, the Claimant can ask the Minister to forgive all or part of his debt on the ground that her department committed an administrative error. However, since this is a discretionary matter, there is no guarantee that the Minister will agree to such a request.

The General Division did not err when it determined that the Minister's "last standing decision" was January 2010

[28] In my leave to appeal decision, I raised the possibility that, by failing to act on the results of the ISB investigation and by letting the Claimant collect benefits for eight years, the Minister made an implied decision to confirm the Claimant's disability during that entire period. I thought there was a case that the Minister's continuing pension payments, despite the findings of her investigator, was a tacit admission that the Claimant remained disabled.

[29] Having heard submission on this issue from both sides, I ultimately decided that monthly pension payments could not be understood as a series of "last standing decisions," as defined by a case called *Kinney*.[13]

[30] *Kinney* limits the Minister's ability to revisit eligibility for benefits no earlier than her last decision confirming that eligibility. But I see nothing in *Kinney* to suggest that merely continuing to pay benefits can be construed as such a decision. The Appeal Division has previously decided that a Ministerial decision is confirmed by more than just a review of documents: something of substance is required, such as an investigation or formal notice to the claimant. I see no reason to depart from this approach.[14]

[31] Citing *Kinney*, the General Division found that the Minister can't disentitle a CPP recipient earlier than her "last standing decision" to confirm eligibility. In this case, the General Division found that the Minister in effect confirmed the Claimant's eligibility when she sent him questionnaires asking him to describe his activities since January 2010.[15] I don't see how the General Division erred in making this finding, either in fact or law.

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[13] See *Kinney v Canada (Attorney General)*, 2009 FCA 158.
[14] See *S.M. v Minister of Employment and Social Development*, 2022 SST 182.
[15] See General Division decision, paragraphs 23–26.

The General Division did not make an error in determining that the Claimant's income was substantially gainful

[32] The Claimant has always insisted that he never stopped being disabled. He has repeatedly argued that the Minister always knew he was operating a modest janitorial business, and he maintains that it was mostly unprofitable. He alleges that the General Division made an error by focusing on his business's gross income from 2010 to 2020, rather than its net profits or losses.

[33] I don't see any error in how the General Division assessed the Claimant's business income.

[34] Both parties agree that the Claimant's business income, as reported to the Canada Revenue Agency, was as follows:

Year	Gross Earnings ($)	Net Earnings ($)
2010	18,300	3,705
2011	18,093	(3,864)
2012	31,130	(2,074)
2013	30,043	91[16]
2014	30,806	(15,876)
2015	31,488	3,470
2016	34,032	7,908
2017	27,890	0
2018	33,572	6,344

[35] The General Division analyzed these numbers in some detail. It concluded that they pointed to capacity, not disability. It came to this conclusion for the following reasons:

- Managerial work can be just as substantially gainful as physical work;
- The Claimant's gross earnings had been consistently above the substantially gainful threshold since 2010;

[16] See claimant's income tax return, five-era comparative statement 2009-13, GD2-147. The General Division's decision marked "N/A" in place of this figure, but it appears the Claimant's net earnings for 2013 were listed on the wrong line.

- The Claimant's gross earnings for 2010 and 2011 represented only half a year's work;
- Losses or low net incomes do not prove that a person is disabled;
- The Claimant's business was more profitable than he admits because
  - There would have been no reason for the Claimant to operate his business for as long as he did unless it was substantially gainful;
  - The Claimant gave inconsistent evidence about the number of workers he employed; and
- There is a natural tendency for businesses to overstate expenses and understate profits for income tax purposes.

[36] In my leave to appeal decision, I called this last point into question. I thought there was an argument that it amounted to an unfounded generalization—one that was unsupported by evidence. However, on reflection, I have concluded that the General Division did not commit such an error.

[37] In finding that self-reported business income tends to be under-reported for income tax purposes, the General Division was doing no more than repeating a widely recognized truth—one that has been recognized in previous Appeal Division decisions.[17] The General Division was not necessarily accusing the Claimant of fraud or tax evasion, but it was making the point that his income assessments were almost certainly conservative.

[38] This point is consistent with the principle, well established in case law, that the profitability, or lack thereof, of a claimant's business venture is not necessarily an indicator of their capacity to do work.[18] It is also consistent with a major reason the General Division refused the Claimant: it simply didn't believe him when he said his business was making little or no money year after year. That was its right. As long as

[17] See *Minister of Employment and Social Development v P.C.*, 2021 SST 530.
[18] See *Kiriakidis v Canada (Attorney General)*, 2011 FCA 316.

the General Division did not stray into error, it was within its authority to make findings about the Claimant's credibility.

[39] In short, I don't see any factual error in the General Division's findings, much less one that rises to the requisite standard of "perverse, capricious or without regard for the material."[19] One of the General Division's jobs is to establish facts. In doing so, it is entitled to some leeway in how it chooses to weigh the evidence.[20] I see no reason to second-guess the General Division's findings, which it reached after what strikes me as a careful assessment of the evidence and applicable law.

The General Division did not err when it found that the Claimant had a Grade 10 education

[40] In his request for leave to appeal, the Claimant alleged that the General Division did not report his "correct level of education." He said that he had clearly testified that he left school during Grade 9.

[41] I don't see any error in how the General Division addressed this topic. In its decision, the General Division considered the Claimant's employability and found "inconsistent evidence" about the highest grade he completed in school.[21] After reviewing the record, the General Division noted that the Claimant reported various education levels ranging from Grades 5 to 11. In the end, the General Division relied on a Transferrable Skills Analysis report to conclude that the Claimant had a Grade 10 education.[22]

[42] The General Division was entitled to make this finding based on the evidence before it. Mere disagreement with the General Division's factual findings does not constitute an error. In any event, I am certain that nothing turned on whether the General Division got the Claimant's education level wrong by a single grade level.

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[19] Here, I am quoting the wording of section 58(1)(c) of the DESDA.
[20] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[21] See General Division decision, paragraph 74.
[22] See Transferrable Skills Analysis report dated May 24, 1995, GD2-218.

Conclusion

[43] The General Division did not commit any errors that fall within the permitted grounds of appeal. The General Division's decision stands.

[44] That said, the Claimant has a right to be upset. If the Minister had evidence that the Claimant was no longer disabled in 2012, then she could have cut him off then, rather than keeping him in pay and allowing him to believe that he was still entitled to the CPP disability pension. However, because the eight-year delay arose from the Minister's use of her discretionary powers, the General Division could not do anything about it. My hands are similarly tied by the law.

[45] The appeal is dismissed.

Member, Appeal Division