Citation: *MG v Minister of Employment and Social Development*, 2022 SST 1434

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. G.
Respondent:	Minister of Employment and Social Development
Representative:	Viola Herbert

Decision under appeal:	General Division decision dated January 24, 2019 and corrected on April 5, 2019 (GP-18-252)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	November 15, 2022
Hearing participants:	Respondent's representative
Decision date:	December 12, 2022
File number:	AD-22-487

Decision

[1] The appeal is allowed. The General Division made an error when it corrected its decision without giving the Appellant a chance to make additional submissions. I am returning this matter to the General Division for another hearing.

Overview

[2] The Appellant is a 67-year-old former psychotherapist. In 1999, he was injured in motor vehicle accident (MVA). In 2009 and 2010, his mother sustained injuries in successive MVAs, leaving her in his care until her death in 2014. The Appellant worked intermittently after 2003 and had stopped completely by 2016.

[3] In June 2016, the Appellant applied for a Canada Pension Plan (CPP) disability pension. He said that he could no longer work because of severe depression and chronic pain, among other medical conditions. The Minister refused the application.

[4] On appeal, the Social Security Tribunal's General Division granted the disability pension. In its decision dated January 24, 2019, the General Division found the Appellant disabled as of September 2011 and ordered a first payment date of July 2015 — 11 months before the application date and the maximum retroactive payment usually allowed by the law.

[5] On April 5, 2019, in response to a request from the Minister's department, the General Division issued a corrected decision, formally known as a corrigendum. The corrigendum did not change the result — the pension remained payable as of July 2015 — but the General Division now found that the Appellant had met the test for disability in April 2014, rather than September 2011.

[6] The Appellant sought permission to appeal the General Division's corrected decision.[1] He made the following submissions:

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[1] See Appellant's letter dated July 2, 2019, asking the Appeal Division for leave to appeal, AD1. The Appellant supplemented his reasons for appealing in numerous letters and emails over the next three years.

- The General Division should have found him disabled as of December 2003;
- The General Division did not explain why it changed his date of disability from September 2011 to April 2014;
- The General Division did not give him an opportunity to make submissions before changing the date of disability; and
- If the General Division was going to find him disabled as of September 2011, it should have ordered his pension paid back to that date.

[7] In October 2020, the Appeal Division refused the Appellant permission because it saw no arguable case for any of his submissions.

[8] The Appellant then went to the Federal Court and asked it to review the Appeal Division's decision. On July 28, 2022, the Court found the Appeal Division's decision unreasonable and ordered it set aside. The Court returned to matter to the Appeal Division for reconsideration.[2]

[9] In September, I granted the Appellant permission to appeal, because I thought he had an arguable case that the General Division had breached a rule of procedural fairness when it issued its corrigendum. Last month, I held a hearing to discuss the Appellant's allegations in full.

Preliminary Matters

[10] On October 12, 2022, I held a pre-hearing conference with the parties to discuss the issues, specifically the implications of the Federal Court's decision returning this matter to the Appeal Division.

[11] On October 28, 2022, the Appellant requested an adjournment of the impending hearing because he hadn't yet received, as requested, a recording of the pre-hearing conference. He said that he could not make further submissions until he had reviewed it.

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[2] See *Goldhagen v Canada (Attorney General)*, 2022 FC 1132.

[12] I refused the adjournment request. I noted that the Appellant himself was present at the pre-hearing conference and had fully participated in the discussion. I also informed the Appellant that the Tribunal had already mailed him the recording and, if he had not already received it, he would presumably be receiving it soon — in advance of the hearing.

[13] In written submissions filed on November 4, 2022, the Minister conceded that the General Division erred and recommended returning the matter to the General Division for a new hearing.

[14] In response, the Appellant sent the Tribunal an email wondering whether, in light of the Minister's concession, it was necessary to hold a hearing at all. He again asked for an adjournment, claiming that he was psychologically unable to cope with the demands of a hearing. He also enclosed a letter of support from his psychologist, Dr. Lisa Keith.

[15] I again refused the Appellant's request and declared that the hearing would proceed as scheduled. I explained that the Minister's concession did not decide the matter because, even if the Appellant agreed to it, the Appeal Division would still have to ratify such an agreement. I made it clear that I still had questions about the nature of the errors that the General Division may have committed. I also said that I wanted to hear submissions from the parties about what remedy, if needed, would be most appropriate under the circumstances.

[16] The hearing proceeded in the Appellant's absence.

What the Appellant had to prove

[17] There are four grounds of appeal to the Appeal Division. An appellant 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.[3]

[18] My job was to determine whether the General Division committed an error that fell into one or more of the above grounds of appeal.

Analysis

[19] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I am satisfied that the General Division misinterpreted the law governing the so-called proration provision. I also find that, in attempting to address that misinterpretation, the General Division materially changed its decision without giving the Appellant an opportunity to make submissions.

There was no evidence that the Claimant became disabled when the General Division said he became disabled

[20] The Appellant's case is unusual in that there was a lengthy gap in his CPP disability coverage.

[21] The Canada Pension Plan is a government-sponsored insurance policy that covers Canadians who, for various reasons, experience loss of income. Coverage is established by working and contributing to the CPP, subject to restrictions.

[22] CPP disability claimants must show that they developed a severe and prolonged disability during their minimum qualifying period (MQP) or, alternatively, during their prorated period.

[23] An MQP is established when a claimant has valid earnings and contributions in four years of any six-year window. The Appellant had four years of valid earnings and contributions in 1998, 1999, 2002, and 2003. Those four years gave him an MQP ending December 31, 2003.

[3] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

[24] In addition to his MQP, the Appellant's earnings and contributions gave him another coverage period — through the proration provision.

[25] The proration provision is designed to ensure that disability claimant with three years of valid earnings and contributions are not disadvantaged if they become disabled in what would have otherwise been a valid fourth year. Under proration, a claimant's required earnings and contributions are reduced in proportion to the number of months that they were able to work in the final year of their contributory period.[4]

[26] The difficulty for claimants seeking to avail themselves of the proration provision is that they must show that the onset of their disability occurred during that fourth year, when they last had earnings and contributions.

[27] In this case, the Appellant had three additional years of valid earnings and contributions in 2009, 2010, and 2011. He also had a year of partial earnings and contributions in 2014.[5] To benefit from his prorated period, the Appellant had to show that the **onset** of his severe and prolonged disability occurred in the relatively narrow timeframe between January 1, 2014 and April 30, 2014.

[28] However, this second coverage period came 10 years after his MQP. That meant that the Appellant had no CPP disability coverage for a decade.

[29] In its decision dated January 24, 2019, the General Division found that the Appellant became disabled as of September 2011. The problem is that, according to the law, the Appellant had no coverage at the time.

[30] That prompted the Minister to request a corrigendum. The presiding General Division member obliged by changing the date of disability onset — and nothing else — from September 2011 to April 2014.

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[4] See sections 19 and 44(2.1) of the *Canada Pension Plan.* See also *Micelli-Riggins v Canada (Attorney General)*, 2013 FCA 158.
[5] The Appellant's record of earnings shows that he recorded $1,958 in earnings for 2014. The Year's Basic Exemption for that year was $5,200. See Minister's calculation of the proration provision at GD2-96.

[31] However, that led to another problem. In his application for disability benefits, the Appellant stated that he was no longer able to work as of September 2011. In his decision, the General Division member agreed:

> I have determined that, while the Claimant did return to work after his reported claim date of September 2011, his return to work was essentially unsuccessful and I agree with his claim date of September 2011.[6]

[32] This sentence remained unchanged after the correction, leaving it at odds with the General Division's revised finding elsewhere in the decision that the Claimant's disability began in April 2014. What's more, having examined the Appellant's medical file, I saw nothing to suggest that the Appellant **became** disabled between January 1, 2014 and April 30, 2014.

[33] When he appealed to the General Division, the Appellant claimed that he could no longer work as of June 2016.[7] Later, he claimed that he became disabled as a result of a January 1999 MVA. However, the General Division explicitly found that "[t]here is no medical evidence provided to support that he was disabled from this incident. In fact, he returned to work for several years following the MVA."[8]

[34] Going by the text of the General Division's decision, the periods in which the Appellant had coverage (that is, before December 31, 2003 and between January 1, 2014 and April 30, 2014) were also periods in which his disability did **not** begin.

[35] The General Division's decision was wrong in law before the corrigendum. However, the corrigendum did not correct the error; it only created another legal error and, in the process, rendered the rest of the decision self-contradictory.

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[6] See General Division decision, paragraph 9.
[7] See Appellant's CPP questionnaire for disability benefits dated August 8, 2016, GD2-150.
[8] See General Division decision, paragraph 9.

The General Division unfairly changed the substance of its decision without notifying the Appellant

[36] The Appellant was surprised to learn that the General Division changed its mind about the his date of disability:

> I am uncertain as to the motivation and role Service Canada played in [the General Division's] revision of the date in which I became disabled, from September 2011 to April 2016? If there was correspondence from Service Canada to the Tribunal asking for this change, why did I not receive a copy?[9]

The Appellant has always suspected that the change damaged his interests. He feels that he has never received an adequate explanation for the change. He says that the General Division should have given him a chance to weigh in before revising the disability date.

[37] I agree. The General Division altered the substance of its decision without giving notice to the Appellant. That amounted to a breach of the rules of procedural fairness because the Appellant was denied an opportunity to be heard.

[38] As the Federal Court noted,

> I disagree that this corrigendum "corrected a mistake," as I find the corrigendum decision in this case was a new decision and far more than a correction of a typo or small mistake or syntax correction. To make a substantial change like this by corrigendum — even though it did not, in the view of the General Division, change the date disability pension was payable to the Applicant — is an error of law. This is not a clerical error, or any sort of error which ought to be corrected by corrigendum… In this case, the change from September 2011 (as noted, the year that the submissions pertained to) to April 2014 constituted a change in a major part of the decision itself and affects the Applicant's remuneration. This corrigendum was a re-determination that involved a meaningfully different conclusion.[10]

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[9] See Appellant's letter requesting leave to appeal, AD1.
[10] See Federal Court decision, note 2, at paragraph 18.

[39] The General Division's corrigendum did not address a mere slip. Rather, it went to the heart of one of the central issues of the appeal — **when**, if at all, the Appellant became regularly incapable of a substantially gainful occupation. If the General Division was going to make such a significant change to its decision, then it should have first asked the Appellant to make submissions on the matter. That way, he would have had a dedicated opportunity to argue that his disability began during his MQP ending December 31, 2003, rather than his four-month prorated period ending April 30, 2014.

Remedy

[40] When the General Division makes an error, the Appeal Division can fix it by one of two ways: it can (i) send the matter back to the General Division for a new hearing or (ii) give the decision that the General Division should have given.[11]

[41] The Tribunal is required to proceed as quickly as fairness permits. I would ordinarily be inclined to give the decision that the General Division should have given and decide this matter on its merits myself, but I do not think that the record is complete enough to allow me to do so. That is because the way in which the General Division conducted its proceedings was flawed.

[42] It was flawed because the presiding General Division member did not appear to understand the proration provision. As we have seen, that led him to issue a decision containing a significant legal error and, later, a corrigendum rendering the decision incomprehensible.

[43] One only has to look at the General Division's decision to suspect that the presiding member didn't know that the Appellant's CPP disability coverage was broken into two parts — the first ending on December 31, 2003 and the second from January 1, 2014 to April 30, 2014:

> [T]he Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. At my request, the Respondent

[11] See DESDA, section 59(1).

> submitted a Record of Earnings printed on January 14, 2019. By law, I must find Record of Earnings from the Canada Revenue Agency accurate. **Therefore, I find the Claimant's MQP to be April 30, 2014** [emphasis added].[12]

This passage suggests that the presiding member was operating under the false impression that he was free to find the Appellant disabled at any time up to April 30, 2014. The General Division's decision contained no mention of the proration provision and no sign of any awareness that the Appellant had a 10-year gap in his CPP disability coverage.

[44] I have also listened to the recording of the General Division. Oddly enough, it reveals that the presiding member seemed cognizant of the proration provision. Indeed, he can be heard properly explaining its implications to the Appellant: "In order to take that path, I would have to find a triggering event that took place in 2014 by the end of April. But I don't see it."[13]

[45] Of course, the member later reversed his view about what happened during the four-month prorated period. That leaves me unsure about whether he did, in fact, fully understand the provision and, in particular, its effect on the Appellant's eligibility. I also worry that the member's variable understanding of the provision may have led him to neglect some important avenues of inquiry.

[46] In my view, the General Division owed it to the Appellant to give him a hearing before a member who had a firm grasp of the rules around CPP disability coverage. I think it is best if the Appellant gets another opportunity to tell his side of the story to a Tribunal member who is better equipped to direct a hearing of this kind. I am also mindful that, in its decision to return this matter to this Tribunal, the Federal Court made the following entreaty:

> I am of the view that the situation is so obscured at present by errors that it is not possible to view the underlying facts in a way that will allow the true picture to be glimpsed. I hope that at

[12] See General Division decision, paragraph 3.
[13] Refer to recording of General Division hearing at 53:30.

> some point the merits of the matter is heard with the ability of the parties to present their fulsome case.[14]

[47] However, I am reluctant to decide the merits of this matter myself. Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to assess the Appellant's medical evidence and to hear what he has to say about his impairments and when they prevented him from working. In this particular instance, I feel the best option is to refer this matter back to the General Division for rehearing.

Conclusion

[48] For the above reasons, I find that the General Division erred in law and breached a rule of procedural fairness. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

[49] The appeal is allowed.

Member, Appeal Division

[14] See Federal Court decision, note 2, at paragraph 23.