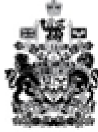

Citation: *LS v Minister of Employment and Social Development*, 2024 SST 776

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant: L. S.
Representative: J. S.

Respondent: Minister of Employment and Social Development
Representative: Jordan Fine

Decision under appeal: General Division decision dated October 12, 2023 (GP-21-1182)

Tribunal member: Neil Nawaz

Type of hearing: Videoconference
Hearing date: June 18, 2024
Hearing participants: Appellant
Appellant's representative
Respondent's representatives

Decision date: July 5, 2024
File number: AD-23-1016

Decision

[1] The appeal is dismissed. The Appellant is not entitled to receive *Canada Pension Plan* (CPP) disability pension payments earlier than May 2018.

Overview

[2] The Appellant is a 65-year-old former sheet metal journeyman. In 2004, he stopped working because of chronic back pain. He hasn't worked since.

[3] The Appellant first applied for a CPP disability pension in August 2010. The Minister of Employment and Social Development refused the application, initially and on reconsideration, after determining that the Appellant did not have severe and prolonged disability during his coverage period, which ended on December 31, 2006.

[4] The Minister issued its reconsideration decision in November 2011.[1] The Appellant had the right to appeal that decision to the former CPP Review Tribunal (RT) within 90 days. He did not do so.

[5] More than seven years went by. In April 2019, the Appellant again applied for the CPP disability pension. The Minister refused this application too, ultimately issuing a reconsideration decision in July 2020.[2] This time, the Appellant appealed the Minister's refusal to the RT's successor, the Social Security Tribunal (SST).

[6] In October 2022, the SST's General Division allowed the Appellant's appeal. It decided that the Appellant had a severe and prolonged disability when he stopped working in 2004. However, the General Division determined that the pension could start no earlier than May 2018. According to the General Division, the law permitted a maximum of 11 months of retroactive pension payments from the application date.

[7] The Appellant thought that he was entitled to more retroactive payments. He asked the Appeal Division for permission to appeal the General Division's decision. He argued that the General Division should have granted him pension payments going

[1] See the Minister's first reconsideration letter dated November 17, 2011, GD2-60.
[2] See the Minister's second reconsideration letter dated July 23, 2020, GD2-10.

back to 2004, when he actually became disabled, or to 2010, when he first applied to for the disability pension.

[8] The Appeal Division refused the Appellant permission to appeal. It found that his argument had no reasonable chance of success on appeal for the following reasons:

- The Appellant's first application was filed in August 2010 and the Minister's reconsideration decision was issued in November 2011. Citing section 52(2) of the Department of Employment and Social Development Act (DESDA), the Appeal Division found that the General Division couldn't, under any circumstances, accept an appeal filed more than a year after the Minister communicated the reconsideration decision to the Appellant.

- The Appellant's second application was filed in April 2019. Citing section 42(2) of the Canada Pension Plan, the Appeal Division found that the General Division couldn't find the Appellant disabled any earlier than 15 months before his application date. The Appeal Division also found that, given the four-month waiting period set out in section 69, the General Division made no error in specifying a first payment date of May 2018.

[9] The Appellant then asked the Federal Court to judicially review the Appeal Division's decision to refuse permission to appeal. On October 11, 2023, the Court set aside the Appeal Division's decision because it was unreasonable. The Court found that the Appeal Division had failed to provide an analysis surrounding the retrospective application of section 52(2) to the Minister's November 2011 reconsideration decision.[3]

[10] The Federal Court returned the matter to the Appeal Division for reconsideration. Last December, I granted the Appellant permission to procced because I saw an arguable case that the General Division had failed to consider the law as it existed in 2011. At the Appellant's request, I held a hearing by videoconference to discuss his case in full.

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[3] See *Sapiente v Attorney General of Canada*, 2023 FC 1355.

Issues

[11] In this appeal, I had to decide the following questions:

- Does the Tribunal have any authority to consider the Appellant's August 2010 application?
- Is the Appellant entitled to retroactive CPP disability benefits earlier than May 2018?

Analysis

[12] Now that I have considered the parties' evidence and arguments, I have concluded that the Appellant cannot succeed. The law strictly limits retroactive disability payments to 11 months before the date of application, and neither the General Division nor the Appeal Division have any authority to consider the Appellant's first application. Even if we did, the Appellant's appeal would be statute barred because it came many years after the minister's first reconsideration decision.

The Federal Court didn't rule on the merits of the Appellant's claim for more retroactive benefits

[13] In his request for permission to appeal, the Appellant expressed his unhappiness with the start date of his CPP disability pension. He couldn't understand why the start date was tied to his second application rather than his first.

[14] After finding that he had a severe and prolonged disability by the end of his CPP coverage period, the General Division concluded:

> The Appellant had a severe and prolonged disability in April 2004.
>
> However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application. After that, there is a four-month waiting period before payments start.

> The Minister received the Appellant's application in April 2019. That means he is considered to have become disabled in January 2018.
>
> Payments of his pension start as of May 2018.[4]

[15] Nowhere in its decision did the General Division refer to the Appellant's first application of August 2010. Nor was there any indication that the General Division considered starting the Appellant's pension as of 11 months before that date. It appears that the General Division took for granted that the DESDA's absolute prohibition on appeals made more than one year after the issuance of the Minister's reconsideration decision also applied to claims made before section 52(2) came into effect.

[16] When this matter came before the Federal Court, the Appellant argued that, since section 52(2)'s one-year limitation wasn't effective until April 2013, it didn't apply to his first application. In response, the Minister argued that the transitional provisions of the *Growth, Jobs, and Long-Term Prosperity Act* (JGLTPA), along with case law interpreting those provisions, meant that the Appellant had no arguable case that he was entitled to pension payments earlier than May 2018.

[17] At the Appeal Division, the Appellant didn't explicitly argue that his appeal should proceed because it originated before the implementation of the one-year deadline. Nevertheless, the Federal Court found the Appeal Division's decision unreasonable because it turned on section 52(2) yet failed to consider whether the provision applied retrospectively. The Court made the following observations:

- The JGLTPA's transitional provisions did not speak directly to whether section 52(2) has retrospective application.[5]
- A case called *Pelletieri* addressed the transitional provisions but didn't provide a relevant retrospectivity analysis because the Minister's decision in that case was made in 2014, after section 52(2) came into effect.[6]

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[4] See General Division decision, paragraphs 51–54.
[5] Here the Federal Court referred to sections 24 and 255 to 257 of the JGLTPA.
[6] See *Pelletieri v Canada (Attorney General)*, 2019 FC 1585.

- The one case that did contain a relevant retrospectivity analysis was an Appeal Division case called *P.L.*[7]

[18] The Court left the distinct impression that it didn't think the Minister's position was strongly supported by precedent. And although the Federal Court quoted at length from *P.L.*, it didn't say whether it agreed with its reasoning. Instead, the Court said that it didn't have to decide whether *P.L.* was valid law because the Appeal Division failed to provide an analysis surrounding the retrospective application of section 52(2).

The SST has no authority to consider the Appellant's first application

[19] Having conducted my own review of the relevant legislation and case law, I have concluded that the SST could not, and cannot, consider the Appellant's first CPP disability application.

[20] That application culminated in the Minister's November 2011 reconsideration decision letter, which advised the Appellant of his right to appeal to the RT and specified a 90-day deadline in which to do so. The Appellant could have filed an appeal with the RT or asked it for an extension of the deadline.[8] He did neither. Nearly a decade later, he could not seek redress from a body that had ceased to exist.

[21] The SST has never received an appeal or a request for an extension of time pursuant to the November 2011 reconsideration decision. For that reason, it has no jurisdiction to consider the subject matter of an appeal related to the first application. The Appellant's notice of appeal to the SST's General Division concerned the Minister's July 2020 reconsideration decision, which flowed exclusively from the second application.[9]

[22] The *Canada Pension Plan* requires claimants to take all necessary steps to advance their claims and satisfy the relevant legal criteria. The Appellant's notice of appeal to the General Division did not refer to the Minister's November 2011

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[7] See *P.L. v Minister of Employment and Social Development*, 2017 SSTADIS.
[8] Refer to the *Canada Pension Plan*'s former section 82(1), which granted the Commissioner of Review Tribunals the authority to grant an extension beyond 90 days.
[9] See the Appellant's notice of appeal to the General Division dated October 19, 2020, GD1-2.

reconsideration decision. Indeed, it specifically asked the General Division to **not** consider the record associated with the first application. The Appellant urged the General Division to disregard "older information submitted back in 2011 instead of referring to new evidence provided in 2019.[10] He also made it clear that he wanted the General Division to focus on the "new application submitted in January 2019 [*sic*]."[11]

[23] To appeal a reconsideration decision to the General Division, a party must bring their appeal "in the prescribed form and manner and within […] 90 days after the day on which the decision is communicated to the appellant," subject also to the absolute one-year limit. The DESDA does not stipulate the "prescribed form and manner," but the *Social Security Tribunal Rules of Procedure* requires an appellant to "file a notice of appeal with the SST's General Division," which includes, among other things, the reasons for the appeal and a copy of the reconsideration decision at issue.[12]

[24] In this case, the Appellant's notice of appeal to the General Division contained no reasons for appealing the November 2011 reconsideration decision, nor a copy of that decision, nor any request for an extension of time to consider an appeal of that decision. The only documents included in the notice of appeal were the Appellant's April 2019 application for benefits and the Minister's July 2020 reconsideration decision letter.

[25] If the General Division was unable to consider the first application, then neither am I. Since the General Division was not seized with the November 2011 reconsideration decision, the Appeal Division cannot grant the Appellant an extension of time to appeal that decision. Parliament did not give the Appeal Division authority to grant extensions of time in which to hear appeals of ministerial decisions. That authority rests solely with the General Division under section 52 of the DESDA. The Appeal Division can address a request for an extension of time to appeal a ministerial reconsideration only if the General Division does so first and, even then, it can only review potential errors that the General Division might have made in arriving at its

[10] See the Appellant's notice of appeal to the General Division dated October 19, 2020, GD1-4.
[11] In fact, the Appellant's second application was submitted in April 2019.
[12] See the *Social Security Tribunal Rules of Procedure*, sections 24(1) and 24(3).

decision. In the absence of a General Division decision, the Appeal Division's power to grant time extensions applies only to applications for leave to appeal decisions made by the General Division under section 57(1)(b) of the DESDA. If a request for a time extension wasn't put to the General Division, the Appeal Division can't step into its place and grant it.

[26] Nor did Parliament give the Appeal Division original jurisdiction to consider an appeal for the first time. Under section 81 of the *Canada Pension Plan,* the Appeal Division can only consider decisions of the General Division. An appeal to the General Division is by right, whereas an appeal to the Appeal Division requires leave or permission. Although recent amendments have created a *de novo* process whereby the Appeal Division adjudicates claims afresh, the DESDA still requires that an appeal of a ministerial reconsideration decision proceed first to the General Division.[13] Section 58.3 permits the Appeal Division to hear and determine an appeal "as a new proceeding," but that refers only to issues that were already considered by the General Division; it is not an invitation for appellants to entirely remake or reconceive their claims.

[27] The Appellant is seeking an extension of time to appeal a reconsideration decision that is now more than 12 years old. However, the Appeal Division cannot decide substantive matters that were never raised at the General Division. The Appellant's October 2020 notice of appeal did not ask the General Division to consider his first application or the Minister's November 2011 reconsideration decision. Instead, the appeal was entirely about the second application and the Minister's resultant July 2020 reconsideration decision. At his August 2022 hearing before the General Division, the Appellant never argued that his benefits should be backdated to his first application.

[28] Asking the Appeal Division to act as an avenue of first recourse is contrary to the letter and spirit of the DESDA's appeal regime. The General Division's decision on the November 2011 reconsideration decision — or any reconsideration decision — remains a prerequisite to the Appeal Division having jurisdiction to grant leave and then hear an appeal *de novo* under section 58.3 of the recently amended DESDA.

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[13] See the *Canada Pension Plan*'s section 82 and the DESDA's section 52.

The Appellant is not entitled to retroactive CPP disability benefits before May 2018

[29] The Appellant is in effect attempting to appeal a ministerial decision that was made many years ago. His first CPP disability application was made under one set of laws in November 2011, and his second was made under another set of laws in April 2019. I have decided that the old laws were not applicable to the second application.

– The laws governing appeal deadlines changed in 2013

[30] On June 29, 2012, the JGLTPA came into force. Starting April 1, 2013, it changed the way in which appeals for federal government benefits were heard.

[31] Under the old regime, an CPP disability applicant could appeal a ministerial reconsideration decision to an RT. The applicant had 90 days in which to do so, or any longer period that the RT, in its discretion, allowed.[14]

[32] Under the new regime, the RT was replaced by the SST. As in the old regime, an unsuccessful applicant had 90 days in which to appeal but, unlike the old regime, there was an absolute limit on appeals made after that point.[15] The SST's General Division could allow further time to make the appeal, but not if the request came more than one year after the Minister's reconsideration decision was communicated to the applicant.[16] This meant that, unlike the RT, the General Division had no discretion to allow an extension of time to appeal past one year.

[33] The question here is whether the old laws apply to the Appellant. Can his CPP disability benefits be backdated to his first application? Was his second application in effect a request for an extension of time to appeal the Minister's November 2011 reconsideration decision? If so, did the old or new deadline limitations apply?

[34] For reasons that I will explain, I find that the Appellant's claim is entirely governed by the new laws. That is because transitional provisions — rules that specified

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[14] See the former section 82(1) of the *Canada Pension Plan.*
[15] See DESDA, section 52(1)(b).
[16] See DESDA, section 52(2).

how the old regime switched over to the new regime — only transferred to the SST appeals that were **outstanding** at the RT as of April 1, 2013.

– The transitional provisions don't help the Appellant

[35] Under the transitional provisions, the old rules about late applications continued to apply, but **only** to those appeals over which the RT had control on March 31, 2014.[17] After that date, the RT ceased to exist, and all its files were transferred to the SST. By necessary implication, the old rules did not apply to appeals to the SST.

[36] In this case, the Minister mailed its first reconsideration decision letter to the Appellant on November 17, 2011.[18] Nearly eight years later, on April 24, 2019, the Appellant submitted an appeal to the SST.[19] This obviously occurred well outside any 90-day time limitation, not to mention the strict one-year deadline set out in the post-2013 rules.

[37] Since, according to the transitional provisions, the appeal was not filed before April 1, 2013, the RT was never seized of the appeal. Instead, the appeal was made to the SST's General Division. By that time, the RT, and the legislative regime associated with it, had been abolished. The net result was that the Appellant's appeal was subject to the absolute one-year deadline. Since it was many years late, his appeal was thus statute-barred from proceeding.

[38] I find support for this result in the Federal Court's decision in a case called *Belo-Alves.*[20] That case involved an applicant who filed an application for leave to appeal with the Appeal Division's predecessor, the Pension Appeals Board (PAB), prior to April 1, 2013. Applying the transitional provisions, the Court found that, since the PAB had never rendered a decision on the matter, the leave to appeal application was deemed to be filed with the SST's Appeal Division on April 1, 2013.

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[17] See JGLTPA, section 262.
[18] See the Minister's reconsideration decision letter dated November 17, 2011, GD2-60.
[19] See the Appellant's application for the CPP disability pension dated April 26, 2019, GD2-40.
[20] See *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100.

[39] The Appeal Division in *Belo-Alves* had decided that, based on the applicant's legitimate expectations at the time his leave application was filed, he was permitted to introduce new evidence. That was because, under the old regime, applicants were permitted to do so before the PAB. The Federal Court disagreed with the Appeal Division, finding that the applicant's legitimate expectations were irrelevant in light of the transitional provisions, which suggested that Parliament intended the SST to be subject to the new legislation.

[40] *Belo-Alves* concerned an application that was refused before April 1, 2013. The Federal Court found that the transitional provisions precluded reliance on the legislative regime that existed before the JGLTPA came into force. Later, the Appeal Division came to a similar conclusion in cases called *P.F.* and *P.L.*, which involved claimants, like the Appellant, whose application for benefits was refused under the old regime and who filed an appeal or a second application under the new one.[21]

[41] In this case, given (i) the repeal of the old deadline rules; (ii) their replacement with more restrictive ones; and (iii) clear language indicating that appeals to the SST would only be governed by the new regime, the Appellant was subject to the strict one-year deadline. He is therefore barred from appealing the Minister's reconsideration decision to the SST.

– The Appellant has no vested rights

[42] According to a case called *Gustavson Drilling*, no one has a vested right in the continuance of the law as it stood in the past.[22] The Supreme Court of Canada reiterated that a statute should not be interpreted to impair existing rights unless its language requires such an interpretation. But if the language is unclear or unambiguous, then there is a presumption that vested rights are unaffected.

[43] In this case, the JGLTPA, in particular, the transitional provisions, clearly say that the new deadlines apply to all appeals to the General Division. As noted, the old

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[21] See *Minister of Employment and Social Development v P.F.*, 2017 SSTADIS 476; and *P.L. v Minister of Employment and Social Development*, 2017 SSTADIS 385.
[22] See *Gustavson Drilling (1964) Ltd. v Minister of National Revenue*, [1977] 1 S.C.R. 271.

deadlines were repealed on April 1, 2013, and only continued to apply to appeals of which the RT or PAB were seized as of that date. The Appellant is thus unable to benefit from the absence of an absolute one-year deadline for filing an appeal.

[44] *Gustavson Drilling* addressed the common-law principles with respect to vested rights. In *Puskas*, the Court considered a provision of the federal *Interpretation Act* that deals with vested rights.[23] Section 43(c) says that the repeal of an enactment does not affect any right, privilege, obligation, or liability acquired, accrued, accruing or incurred under the enactment so repealed. In *Puskas*, the Court held that "a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled."

[45] In the old statutory appeal regime, a claimant was required to file a notice of appeal in order to exercise his or her right to appeal. Filing a notice of appeal was therefore a condition precedent to accruing a right to appeal. Here, the Appellant filed a notice of appeal or request an extension of time with the RT after the transitional provisions came into effect on June 29, 2012. Applying the Court's reasoning in *Puskas*, the Appellant had not accrued or acquired the right to appeal or to seek an extension of time before the one-year limitation came into effect. For that reason, section 43(c) of the *Interpretation Act* was not engaged.

[46] Because the Appellant did not file a notice of appeal or a request an extension of time until after April 1, 2013, his appeal was not one of those with which the RT remained seized. The JGLTPA therefore required that his appeal be brought to the General Division, which in turn meant that the new regime applied to his appeal. As a result, his appeal was subject to the absolute one-year deadline.

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[23] See *R. v Puskas*, [1998] 1 S.C.R. 1207.

Conclusion

[47] For the reasons discussed above, I am dismissing this appeal. The JGLTPA's transitional provisions make it clear that the Appellant's appeal of an eight-year-old reconsideration decision is subject to the new regime's absolute one-year deadline.

[48] For appeals submitted more than one year after reconsideration, the new regime's rules are strict and unambiguous. The governing legislation states that in no case may an appeal be brought more than one year after the reconsideration decision was communicated to a claimant. While extenuating circumstances may be considered for appeals that come after 90 days but within a year, the wording of the legislation eliminates any scope for a decision-maker to exercise discretion once the year has elapsed. The Appellant's explanations for filing his appeal late are therefore rendered irrelevant, as are other factors, such as the merits of his claim for CPP disability benefits.

[49] It is unfortunate that the Appellant's failure to appeal the Minister's November 2011 reconsideration refusal impaired his right to claim additional retroactive benefits. However, I am bound to apply the law as I interpret it. The Appellant may regard this outcome as unfair, but I can only exercise the powers granted to me by the SST's enabling legislation.[24]

Member, Appeal Division

[24] See *Pincombe v Canada (Attorney General)*, [1995] F.C.J. No. 1320 and *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.