Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *T. H. v. Minister of Employment and Social Development*, 2018 SST 569

Tribunal File Number: AD-17-534

BETWEEN:

T. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: May 25, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, T. H., began receiving his Old Age Security pension (OAS pension) and Guaranteed Income Supplement (GIS) in April 2012. The amount of the GIS that he received was based on, among other things, his income and his marital status (i.e. "separated" according to the information on his application form).[1]

[3] In October 2013, however, the Respondent, the Minister of Employment and Social Development (Minister), wrote to the Appellant saying that it had determined that the Appellant and his ex-spouse had reconciled for certain periods, resulting in a $3,450.42 overpayment of his GIS benefits during the period from April 2012 to September 2013. Furthermore, the overpayment would be recovered by withholding $125 from the Appellant's monthly payments, starting in November 2013. If he disagreed with the decision, the letter stated that he could ask that it be reconsidered within 90 days of receiving the Minister's letter.[2]

[4] The Appellant did not write to the Minister about the amount of his benefits until August 2015.[3] At no point after receiving that letter did the Minister establish whether the Appellant had, in fact, received its October 2013 decision, nor did it advise the Appellant that the 90-day time limit for requesting reconsideration of a decision could be extended if certain factors were met. Rather, the Minister responded to the Appellant in February 2016, simply saying that it would not reconsider its initial decision because the 90-day time limit for making a reconsideration request had already passed.[4] And since the Appellant had not requested an extension of time for making his reconsideration request, the Minister says that it was not required to consider the factors associated with making such a decision.

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[1] GD2-4.
[2] GD2-19.
[3] GD2-6.
[4] GD2-7.

[5] The Appellant appealed the Minister's February 2016 decision to the Social Security Tribunal's General Division, saying that the 90-day time limit should not apply to him because he had never received the Minister's initial decision from October 2013. Nevertheless, the General Division concluded that one of the factors required for obtaining an extension of time had not been met, so it dismissed his appeal. I later granted leave to appeal and, for the reasons set out below, have concluded that the General Division's decision must be set aside and that the Minister must reconsider its October 2013 decision without delay.

ISSUES

[6] The issues on which I have focused are these:

a) Did the General Division commit a relevant error of fact or law by failing to determine whether or when the Appellant received the Minister's October 2013 decision?

b) If so, what is the appropriate remedy?

ANALYSIS

Legal framework

[7] For the Appellant to succeed, he must show that the General Division committed at least one of the three relevant errors (or grounds of appeal) set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act). In this case, the relevant errors concern whether the General Division

a) rendered a decision that contains an error of law; or

b) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] When considering the degree of scrutiny with which I should review the General Division's decision, I have focused on the language set out in the DESD Act.[5] As a result, any error of law could justify my intervention, but the same is not true for errors of fact. Rather, for an erroneous finding of fact to justify my intervention, the General Division's decision must be based on that error and it must have made the error in a perverse or capricious manner or without regard for the material before it.

Issue 1: Did the General Division commit a relevant error of fact or law by failing to determine whether or when the Appellant received the Minister's October 2013 decision?

[9] The General Division's analysis depends on when the Appellant received the Minister's October 2013 letter, if at all. Indeed, while the Appellant asserted that he had never received the letter, the General Division seems to have assumed, without any express finding of fact being made, that it was received and in a timely way. In my view, the General Division made this assumption without regard to the material before it, and its decision must be set aside.

[10] On August 17, 2015, the Appellant wrote a letter expressing concern regarding the amount of his GIS benefit.[6] The Minister refused to act on the Appellant's letter because the Minister considered it to be a request that it reconsider an earlier decision—one dated October 3, 2013—and that letter clearly stated this: "To ask us to reconsider our decision, you have to write to us **within 90 days** of receiving this letter [bold in original]."[7]

[11] This 90-day deadline comes from s. 27.1 of the *Old Age Security Act* (OAS Act), which specifies that the 90 days start on the day on which the person is notified in writing of the minister's decision:

> **Request for reconsideration by Minister**
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> **27.1 (1)** A person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to the person, or respecting the amount of a benefit that may be paid to the person, may, within ninety days after the day on which the person is notified in writing

[5] *Canada (Attorney General) v. Jean*, 2015 FCA 242, at para. 19; *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.
[6] GD2-6.
[7] GD2-20.

> of the decision or determination, or within any longer period that the Minister may, either before or after the expiration of those ninety days, allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

[12] While s. 27.1 of the OAS Act establishes the 90-day deadline for reconsideration requests, it also states that the deadline can be extended. Normally, there are two factors that the Minister must consider before extending the 90-day deadline for accepting a reconsideration request. However, if the request is received more than 365 days after the person is notified in writing of the decision or if the person has reapplied for the same benefit, then there are four factors that the Minister must consider.[8]

[13] In this case, the General Division concluded that the Minister did not have to extend the time for the Appellant to make his reconsideration request because it had no reasonable chance of success. This is one of the two additional factors that need be considered only for reconsideration requests that are beyond the 365-day mark.[9]

[14] Despite the importance of these timing provisions to the rest of the analysis, the Minister says that the General Division committed no error of fact by failing to precisely determine the day on which the Appellant was notified in writing of the Minister's initial decision. Rather, it highlights that the initial decision was made in October 2013 and implemented the following month. Since the Appellant's monthly payments were reduced by $125, the Minister argues that the Appellant knew or should have known about the initial decision. In addition, given that the Appellant's inquiry was not made until nearly two years later, it was open to the General Division to conclude that that the reconsideration request was more than 365 days late, meaning that it could embark on a consideration of the reasonable chance of success factor.

[15] In my view, the Minister's submission overlooks the clear language of s. 27.1 of the OAS Act. The relevant question is not when the Appellant should have learned of the Minister's decision but when he was notified in writing of that decision. When I focus on the clear language of the statute, it becomes obvious that the General Division based its decision on an erroneous finding of fact that it made without regard for the evidence before it.

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[8] *Old Age Security Regulations*, at s. 29.1.
[9] *Ibid.*, at s. 29.1(2).

[16] The crucial question is when was the Appellant notified in writing of the Minister's October 2013 decision? Since the Minister relies on this date as the start of the 90-day period when the Appellant had to make his reconsideration request, it is the Minister's obligation to prove that its decision was effectively communicated to the Appellant on the alleged date.[10]

[17] In my view, a reduction of the Appellant's benefits cannot replace notice in writing that a decision has been made.

[18] The only evidence that could support the General Division's implicit conclusion that the Appellant received the Minister's October 2013 decision in a timely way is a file copy of the October 2013 letter that was provided by the Minister as part of its mandatory disclosure obligations.[11] However, the record contains absolutely no evidence that the letter was either sent by department officials or received by the Appellant. Meanwhile, the uncontradicted evidence of the Appellant is that he never received written notification of the October 2013 decision.

[19] In addition, the Appellant's subsequent behaviour is consistent with his assertion. For example, at the time of writing his August 2015 letter, the Appellant seems to have been aware that the Minister had questioned his marital status in 2013, but the letter reveals no awareness of a negative decision having been made in this regard.[12]

[20] Moreover, while the Minister highlights the fact that, in his August 2015 letter, the Appellant did not request an extension of time to seek a reconsideration of the Minister's October 2013 decision, this too is consistent with the Appellant's assertions that he had never received the October 2013 decision in the first place. In other words, why would the Appellant ask for an extension of time to appeal a decision that he had never received? Rather, the Appellant declared that he had copies of all his correspondence with Service Canada from 2011 to the date of his appeal and that, if he had received the October 2013 decision, he definitely would have replied to it.[13]

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[10] *Bartlett v. Canada (Attorney General)*, 2012 FCA 230, at paras. 39–40.
[11] *Social Security Tribunal Regulations*, at s. 26.
[12] GD2-6.
[13] GD1-2.

[21] In my view, therefore, when the General Division implicitly concluded that the Appellant had received the Minister's October 2013 decision in a timely way, it did so without regard for the material before it. As a result, it committed a reviewable error of fact, as described in s. 58(1)(*c*) of the DESD Act. Furthermore, by then embarking on a consideration of the factors for extending the time to make a reconsideration request, it also committed an error of law, as described in s. 58(1)(*b*) of the DESD Act.

[22] I have concluded, therefore, that the General Division committed errors that justify my intervention.

Issue 2: What is the appropriate remedy in this case?

[23] Among the remedies available to me under s. 59(1) of the DESD Act, I have especially considered whether I should give the decision that the General Division should have given or refer the matter back to the General Division for reconsideration, with or without directions.

[24] In the end, I concluded that this is an appropriate case to give the decision that the General Division should have given. In reaching this conclusion, I considered the completeness of the evidentiary record before the General Division and s. 3(1)(*a*) of the *Social Security Tribunal Regulations* (SST Regulations), which instructs the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[25] In particular, the Minister chose not to participate in the proceeding before the General Division other than to file the required documents under s. 26 of the SST Regulations.[14] Indeed, that provision required the Minister to file, before the end of March 2016, any documents relevant to its February 2016 decision. In the context of this case, that provision is sufficiently broad to capture any proof the Minister might have had that its October 2013 decision was, in fact, sent to or received by the Appellant. Yet the Minister provided no such evidence. Despite this gap in the evidence, the Minister provided no objection to the General Division proceeding on the basis of the documents and submissions already filed.

[14] GD2.

[26] The absence of evidence from the Minister is to be balanced against the Appellant's consistent declarations, both on his notice of appeal and application requesting leave to appeal, that he never received the Minister's October 2013 decision.[15] And as mentioned above, the Appellant's subsequent actions and correspondence are consistent with this assertion.

[27] The record is also complete in the sense that both parties made submissions on the merits of the appeal before me. As part of those submissions, the Minister also indicated that the appeal could proceed in writing, based exclusively on the current record.[16]

[28] In the circumstances, I see no practical utility in returning this matter to the General Division for reconsideration. Rather, the evidence before the Tribunal establishes that the Appellant never received the Minister's October 2013. As a result, the Minister erred when it refused to reconsider its October 2013 decision based on the date of the Appellant's reconsideration request. For the Minister's refusal to be valid, it had to first establish when the Appellant received its October 2013 decision, but it provided no evidence on this point.

CONCLUSION

[29] The appeal is allowed, and I am exercising my authority to give the decision that the General Division should have given:

a) The Minister's decision dated February 23, 2016, is rescinded.

b) The Appellant's August 2015 reconsideration request is considered on time.

c) As a result, s. 27.1(2) of the OAS Act requires that the Minister reconsider its decision dated October 3, 2013, without delay.

[15] GD1 and AD1.
[16] AD3-16, at para. 45.

[30] As part of his request for leave to appeal, the Appellant provided some new statements regarding his marital status from July 2011 to July 2017.[17] While this new evidence could not be considered as part of this appeal, it may be considered as part of the Minister's reconsideration process.[18]

Jude Samson
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	Ian R. Bruce, Representative for the Appellant Christian Malciw, Representative for the Respondent

[17] AD1-3 and 17–20.
[18] *Mette v. Canada (Attorney General)*, 2016 FCA 276, at para. 12.