Citation: *Minister of Employment and Social Development v CB*, 2021 SST 765

# Social Security Tribunal of Canada
## Appeal Division

# Decision

| | |
|---|---|
| **Appellant:** | Minister of Employment and Social Development |
| **Representatives:** | Ian McRobbie and Samaneh Frounchi |
| **Respondent:** | C. B. |
| **Representative:** | J. B. |

---

| | |
|---|---|
| **Decision under appeal:** | General Division decision dated January 5, 2021 (GP-19-921) |

---

| | |
|---|---|
| **Tribunal member:** | Shirley Netten |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | June 28, 2021 |
| **Hearing participants:** | Appellant's representatives<br>Respondent<br>Respondent's representative |
| **Decision date:** | December 14, 2021 |
| **File number:** | AD-21-106 |

## Decision

[1] The appeal by the Minister of Employment and Social Development Canada (Minister) is allowed in part.

[2] C.B. has lived in Greece and in Canada. Based on his years of residency in Canada, the Minister[1] gave him a partial Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS). Later, the Minister investigated C.B.'s residency. She eventually changed her mind about C.B.'s entitlement. She decided that he should get a smaller OAS pension and pay back the GIS he received.

[3] The General Division said that the Minister didn't have the power to reopen her previous decisions. This was an error of law. The Minister has an implied discretionary power to revisit her initial OAS decisions.[2] But, the Minister didn't exercise her discretion properly when she reopened her decisions about C.B.'s GIS. Those decisions won't be reopened. This means that C.B. remains entitled to the GIS payments that he received from 2006 to 2011, as the Minister initially decided.

## Overview

[4] C.B. immigrated to Canada when he was 28 years old. He lived and worked here for 12 years before moving back to Greece. He returned to Canada in 2004. Beginning in September 2006, C.B. received his Canada Pension Plan retirement pension, a 14/40$^{ths}$ OAS pension, and the GIS. The OAS pension and GIS were based on Canadian residency from 1969 to 1981, and ongoing from 2004.

[5] In 2009, the Minister started an investigation because C.B. had changed his address to that belonging to his tax consultant. In January 2011, before the investigation was finished, C.B. reported that he had left Canada and was living permanently in Greece. As a result, the Minister stopped paying C.B.'s OAS pension and GIS effective June 2011. This was because C.B. did not have the 20 years of Canadian residency

---

[1] For simplicity, this decision mainly refers to the Minister's authority and decisions. In practice, Service Canada acts on behalf of the Minister, conducting investigations and making decisions under the OASA.
[2] By OAS decisions, I mean decisions about all benefits available under the *Old Age Security Act* (OASA), and not just the OAS pension.

needed to receive the OAS pension outside of Canada, and the GIS can only be paid for six months after ceasing to reside in Canada.[3]

[6] C.B. then re-applied for the OAS pension under the Agreement on Social Security between Canada and Greece (the Canada/Greece Agreement). In February 2016, The Minister approved an 11/40$^{ths}$ OAS pension, based on residency in Canada from 1969 to 1981. This pension was payable outside of Canada, because of the Canada/Greece Agreement.

[7] Contrary to her original decisions, the Minister ultimately decided in March 2018 that C.B. had not re-established residency in Canada in 2004. The Minister said that C.B. had been entitled to the 11/40$^{ths}$ OAS pension from September 2006, but he had not been entitled to the GIS received from 2006 to 2011. The GIS overpayment was $48,940.85.

[8] C.B.'s request for reconsideration was denied in April 2019. He appealed, and the Social Security Tribunal's General Division allowed his appeal. The General Division did not decide whether or when C.B. had been a resident of Canada. Rather, the General Division decided that the Minister could not change her previous decisions granting the 14/40$^{ths}$ OAS pension in 2006 and approving the GIS from 2006 to 2011. The General Division also relied on a lack of evidence that C.B. knowingly gave false or misleading information about his residency.

[9] The Minister appealed to the Appeal Division. I have now found that the Minister has an implied discretionary power to reopen her initial decisions. However, I have also found that the Minister did not properly exercise her discretion when she reopened her decisions about C.B.'s GIS entitlement. And, I have decided that the discretion to reopen the GIS decisions should not be exercised in this case.

---

[3] OASA, sections 9, 11(7)(d)

## Issues

[10] In this appeal, I answer the following questions:

a) Did the General Division make an error of law when it decided that the Minister does not have the power to change her initial decisions under the *Old Age Security Act* (OASA)?

b) If so, how should I fix that error?

- Should I give the decision the General Division should have given?
- Is the Minister's power discretionary?
- Does the Tribunal have jurisdiction to consider the Minister's exercise of discretion?
- Did the Minister exercise her discretion in a judicial manner?
- What decision should the Minister have made?

## The General Division made an error of law: the Minister has an implied authority to reopen her initial decisions

[11] This appeal was heard alongside two other appeals raising a common legal issue: did the General Division err in law when it decided that the Minister could not change initial decisions made under the OASA?

[12] These reasons talk about the Minister's "initial" decisions. "Initial" refers to the fact that the Minister makes this decision at the first level, after a claimant applies for benefits (or their application is waived). An "initial" decision is contrasted with a "reconsideration" decision made at the second level, in response to a claimant's request for reconsideration. An initial decision may be a one-time decision or an annual decision. It is not preliminary, tentative or interim. Unless a claimant requests a reconsideration within 90 days, the decision is implemented by Service Canada.

## I am deciding whether the General Division's interpretation was right or wrong

[13] One of the grounds of appeal to the Appeal Division is that the General Division "erred in law in making its decision."[4] Based on this unqualified language, I agree with the Minister's representatives that I don't owe the General Division any deference on questions of law. This means that I am deciding whether the General Division's interpretation of the law is correct, and not whether it is reasonable.[5] Because of this, I can turn directly to the question of whether the Minister does or does not have the power to reopen her initial OAS decisions.

## The General Division applied the doctrine of *functus officio*

[14] When courts and tribunals ask whether a decision-maker has the power to reopen or change a decision, they often talk about the doctrine of *functus officio*. *Functus officio* is a Latin term for the principle that a decision-maker, having made their decision, has no further power in the matter. As a general rule, judges, adjudicators and administrative officials can't reopen their decisions; they "must get it right the first time, for that will be their only time."[6] The principle of *functus officio* favours finality. It lets people rely on the decisions they receive.

[15] Sometimes, a law says that an administrative body can reopen its decisions. This overrides the doctrine of *functus officio.* For example, the *Canada Pension Plan* and the *Employment Insurance Act* both include specific provisions allowing the Minister or the Canada Employment Insurance Commission (Commission) to change an initial decision.[7] In contrast, the OASA says that the Minister must reconsider her initial

---

[4] See section 58(1)(b) of the *Department of Employment and Social Development Act.*
[5] For the purpose of judicial review, the federal courts review the reasonableness of the Tribunal's interpretations of the law (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). This is a deferential approach, and leaves open the possibility that more than one interpretation can be reasonable. An appeal to the Appeal Division is not a judicial review of a General Division decision. The Appeal Division is guided by the grounds of appeal set out in the *Department of Employment and Social Development Act*.
[6] Wong, A., "Doctrine of *Functus Officio:* The Changing Face of Finality's Old Guard," Canadian Bar Review, Dec 2020.
[7] Section 81(3) of the *Canada Pension Plan* allows the Minister to change a decision if there are new facts. Section 111 of the *Employment Insurance Act* allows the Commission to change a decision if there

decision if a claimant asks, but it doesn't say whether the Minister can revisit an initial decision **on her own initiative**. I agree with the General Division that the OASA does not expressly give this power to the Minister.

[16] The General Division decided that this silence, especially compared to the explicit authority in other laws, means that the Minister has no power to reopen her initial OAS decisions (at least not in the absence of fraud or misrepresentation).[8] Without specifically saying so, the General Division effectively applied the doctrine of *functus officio*.

## *Functus officio* doesn't always apply

[17] Initially, *functus officio* prohibited the reopening of final decisions — those where the decision-maker had completed their task and the decision was ready for implementation — with limited exceptions.[9] But in 1989, in a case called *Chandler*, the Supreme Court of Canada called for greater flexibility in the administrative context. Among other things, the Court said that the principle of *functus officio* "should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation."[10] Courts have since found that some administrative decision-makers have an implied statutory power to reconsider.[11]

[18] Consistent with this approach, the Supreme Court of Canada has separately explained that the powers in a law include "not only those expressly granted but also, by

---

are new facts, or if important facts weren't known or were mistaken, and section 52 allows the Commission to reconsider its benefits decisions within certain timeframes.

[8] The General Division followed the lead of the Appeal Division in *BR v Minister of Employment and Social Development*, 2018 SST. *BR* also relied on *Kinney v Canada (Attorney General)*, 2009 FCA 158. I have not addressed *Kinney* because the parties did not rely on it, and I find it to be of little assistance. *Kinney* said that the Minister's decision to stop paying a disability pension (under section 70 of the *Canada Pension Plan*) could not take effect prior to a decision confirming entitlement. *Kinney* did not directly address the Minister's power to reopen a previous decision.

[9] Such as clerical errors, or an error in expressing the court's clear intention: *Paper Machinery Ltd v JO Ross Engineering Corp*, [1934] SCR 186.

[10] *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC).

[11] This has happened in cases such as: *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC); *Kleysen Transport Ltd v Hunter*, 2004 FC 1413; *Merham v Royal Bank of Canada,* 2009 FC 1127; *GFL Environmental Inc v Wheatland (County of),* 2019 ABQB 976.

implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."[12]

[19] So, even though the power to reopen a decision may be unusual (or, as the General Division said, extraordinary), the absence of an explicit authority is not conclusive. Figuring out whether an administrative decision-maker has an implied power to reopen a decision is a matter of statutory interpretation.[13] Statutory interpretation (deciding what a law means) involves looking at the text, context and purpose of the statute: "The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[14] Laws that grant benefits should be interpreted in a broad and generous manner, with any ambiguity resolved in favour of the claimant.[15]

[20] Since the OASA is silent about a power to reopen initial decisions, there is no single provision for me to interpret. I must consider the text, context and purpose of the OASA more broadly. Are there indications that the Minister can reopen her initial entitlement decisions? Is it sometimes a practical necessity to reopen such decisions?

[21] In my view, the answer to both these questions is "yes." Consequently, I agree with the Minister's representatives that there is implied authority to revisit entitlement decisions.[16]

---

[12] This is called the doctrine of necessary implication: *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, at paragraph 51.
[13] The Federal Court of Appeal said this in *Ramos v Canada (Attorney General)*, 2019 FCA 205.
[14] This quote is from the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), at paragraph 21, citing Driedger in *Construction of Statutes*. This approach to statutory interpretation was recently confirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
[15] The Supreme Court of Canada also said this in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), at paragraph 21.
[16] Because the Minister succeeded on this point, my decision doesn't address the Minister's alternative argument that *functus officio* doesn't apply to administrative, as opposed to adjudicative, decisions. *Chandler* does not make this distinction and I would not in any case characterize all OAS decisions as purely administrative. Indeed, the Federal Court has described the Minister's OAS entitlement decisions as adjudication: *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277 at paragraph 22. See also the discussion about the administrative/adjudicative distinction in Wong, A., "Doctrine of *Functus Officio:* The Changing Face of Finality's Old Guard," Canadian Bar Review, Dec 2020.

## There are several indicators that the Minister can reopen initial OAS decisions

### – Purpose and structure of the legislation

[22] The purpose of the OASA is to provide financial assistance to seniors who are, or were, Canadian residents for a period of time. Each of its benefits (the OAS pension, the GIS, the Allowance for spouses of GIS recipients, and the Allowance for the Survivor) has a direct or indirect residency requirement. Benefits vary depending on the length of Canadian residence, income and marital status. There is an emphasis on the alleviation of poverty: the OAS pension is universal but clawed back above a certain income level, and the GIS and Allowances are only available to low-income seniors and their spouses. As noted by the Federal Court, the OASA fulfills a social goal; it "should therefore be construed liberally, and persons should not be lightly disentitled to OAS benefits."[17]

[23] At the same time, the OASA strives to give benefits only to those who qualify, and to recover any overpayment of benefits. These objectives are seen in the legislation, as described below.

[24] In order to receive benefits, a claimant must meet certain eligibility criteria and the Minister must approve the benefits.[18] An application is not always required; in some circumstances, the Minister will proceed based on information it already has about the claimant's eligibility.[19]

[25] There are limitations on payment. For example, the OAS pension can't be paid during certain prison terms;[20] the GIS and Allowances can't be paid to those who have not been present or resident in Canada for six months, or to certain sponsored

---

[17] *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466.
[18] OASA, sections 3-5 for the OAS pension; sections 11-16 for the GIS; section 19 for the Allowance; sections 21-24 for the Allowance for the Survivor.
[19] OASA, section 5(4) for the OAS pension; sections 11(3), (3.1), (4) for the GIS; section 19(4.1) for the Allowance; section 21(5.1) for the Allowance for the Survivor.
[20] OASA, section 5

immigrants;[21] and the amount of the GIS varies (potentially to nil) depending on marital status and income.[22]

[26] The Minister undertakes the approval process once for the OAS pension, and annually for all other benefits. After an initial decision, the following provisions in the OASA and the *Old Age Security Regulations* (OASR) could come into play:

- Reconsiderations and appeals: a claimant can ask the Minister to reconsider her decision, and can appeal the reconsideration decision to the Tribunal;[23]

- Investigation: the Minister can "at any time before or after approval" obtain further information about, or make an investigation into, a claimant's eligibility for a benefit;[24]

- Suspension of benefits related to eligibility: the Minister has to suspend benefits if it believes that the claimant is ineligible. The Minister may suspend benefits during an investigation;[25]

- Suspension of benefits for other reasons: the OAS pension is suspended when a claimant has not been present or resident in Canada for six months, unless the claimant had over 20 years' residence in Canada; the OAS pension and Allowances may be suspended for failure to comply with a provision in the OASA or the OASR.[26]

- Adjustment of GIS payments: GIS payments are adjusted when actual income is different from estimated income;[27]

- Return and recovery: a claimant must return benefits they received but were "not entitled" to. The debt is recoverable in court or by set-off against other benefits;[28]

- Write-off of overpayment: Unless there has been a related conviction, the Minister can write off some or all of an overpayment for financial reasons or because of "erroneous advice or administrative error in the administration of this Act."[29]

---

[21] OASA sections 11(7), 19(6), 21(9)
[22] OASA section 12
[23] OASA, sections 27.1, 29
[24] OASR, section 23
[25] OASR, section 26
[26] OASA, sections 9, 20
[27] OASA, section 18
[28] OASA, section 37 and OASR, section 27
[29] OASA, section 37(4)

- Offences and penalties: certain wrongdoing may lead to a summary conviction or monetary penalty, if initiated within five years of the Minister becoming aware of the situation.[30]

[27] I recognize that the investigation and suspension provisions relating to eligibility are in the regulations rather than the statute. The OASA permits regulations for putting "the purposes and provisions of this Act into effect," and specifically permits regulations "for the suspension of payment of a benefit during an investigation into the eligibility of the beneficiary." As such, the OASA (and not just the OASR) contemplates the possibility of investigating eligibility and suspending payments after benefits have been approved.

[28] The Minister previously focused on the investigation power as the source of her authority to reopen initial decisions. I agree with the General Division that a power to investigate does not necessarily include a power to reopen a previous entitlement decision. But the power to investigate is not the focus in these appeals; it is just one piece of a larger puzzle.

[29] Collectively, the above provisions reflect a legislative intent to pay benefits only to individuals who qualify for them, and to recoup benefits that were paid to those who shouldn't have received them. The latter objective is seen in section 37(1) of the OASA — which requires recipients to pay back benefits to which they were not entitled — and that objective is supported by the investigation, suspension, recovery and write-off procedures.

[30] Parliament chose not to simply suspend payments prospectively when entitlement is in doubt, but also to reach back and recover benefits wrongly paid. In my view, as described below, this necessarily implies that the Minister has the authority to go back and change her initial entitlement decisions in appropriate cases.

[30] OASA, sections 44, 44.1

### – Primary indicator: The OASA requires the return of benefits if ineligible

[31] Section 37 of the OASA says that if you receive benefits that you aren't entitled to, you have to return them, and the debt is recoverable:

> 37(1) A person who has received or obtained by cheque or otherwise a benefit payment to which the person is **not entitled**, or a benefit payment **in excess of the amount of the benefit payment to which the person is entitled**, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.
>
> (2) If a person has received or obtained a benefit payment to which the person is **not entitled**, or a benefit payment **in excess of the amount of the benefit payment to which the person is entitled**, the amount of the benefit payment or the excess amount, as the case may be constitutes a debt due to Her Majesty and is recoverable at any time… [Emphasis added.]

[32] The representative in one of the companion cases argued that approval in and of itself amounts to entitlement: once approved, you are entitled, and so section 37 would only require the return of benefits paid without approval. This argument relies on an Appeal Division decision that discusses the difference between eligibility and entitlement.[31] I agree that eligibility relates to the criteria needed to qualify for benefits (such as residency), and that entitlement is about the right to receive a benefit. But I can't agree that entitlement "is the Minister approving the application and paying."[32] As outlined previously, you have the right to receive OAS benefits if you apply (or your application is waived), you are eligible, **and** the Minister approves. These elements together amount to entitlement. Consequently, I don't agree that section 37 only requires the return of benefits paid without approval.

[33] The General Division similarly suggests (without focusing on the meaning of entitlement) that section 37 could be limited to payment errors such as miscalculation of benefits or continued payment of benefits when entitlement ceases — in other words, errors that do not raise questions of eligibility (and so would not require a previous

---

[31] *Minister of Employment and Social Development v MB*, 2021 SST 8.
[32] *Minister of Employment and Social Development v MB*, 2021 SST 8, at paragraph 115.

decision to be reopened). But section 37 does not limit the return of benefits to such payment errors. A plain reading of section 37 is that you must return benefits if it turns out that you weren't supposed to get them, **whether that is because of a payment error or because you weren't actually eligible for them**.

[34] There is historical and contextual support for this plain reading of section 37:

- A claimant's obligation to return benefits is linked, in the same section, to the Minister's power to recover or forgive the overpayment. For many years, the Minister could recover an overpayment due to wilful misrepresentation or fraud at any time, but could only recover other overpayments within the year following the year the benefits were received.[33] Then and now, the Minister cannot write off an overpayment if the person has committed an offence "in connection with the obtaining of the benefit payment."[34] Offences such as making a false or misleading statement, and obtaining benefits by false pretences,[35] go to benefit eligibility. By prohibiting a write-off of the associated overpayments, Parliament must have intended the Minister to recover this type of overpayment under section 37.

- Since 1995, the Minister has had the power to forgive overpayments resulting from "administrative error in the administration of this Act."[36] Administrative errors are not limited to payment errors; they could include, for example, mistakenly granting approval to an ineligible claimant. By allowing the Minister to write off the associated overpayments, Parliament must have intended such overpayments to be created in the first place. The fact that section 37 addresses the return of overpayments associated with administrative errors

[33] OASA, section 37(2), until amended by S.C.1995, c. 33: " … may be recovered as a debt due to Her Majesty in proceedings commenced (a) at any time, where that person made a wilful misrepresentation or committed fraud for the purpose of receiving or obtaining that amount or excess amount; and (b) in any case where paragraph (a) does not apply, at any time before the end of the fiscal year immediately following the fiscal year in which that amount or excess amount was received or obtained."
[34] OASA, section 37(4)
[35] OASA, section 44
[36] The possibility of forgiving debts due to erroneous advice or administrative error was added when the time limit on recovery was removed. OASA, section 37(4)(d).

also refutes the argument made by the representative in one of the companion cases that section 37 only requires the return of benefits received as a result of fraud or misrepresentation.

- Elsewhere in the OASA, the possible consequences of wrongdoing are summary conviction or a monetary penalty of up to $10,000 "to promote compliance with this Act."[37] The offence and penalty provisions of the OASA do not include recovery of the benefits to which the offender was not entitled. If ineligibility could not lead to an overpayment under section 37, there would be no mechanism to recover benefits obtained, for example, through wilful misrepresentation or fraud.[38] The General Division offers as a possible solution the suspension of payments followed by recovery under section 37 — yet that recovery would itself require a change to the initial entitlement decision.

[35] The requirement for people to return benefits that they weren't entitled to, including benefits that they weren't eligible for, is a strong indicator that Parliament intended the Minister to be able to reopen her initial entitlement decisions. How can you be asked to return benefits that were previously granted, without first receiving a revised decision from the Minister that you weren't actually entitled to those benefits?

### – Other indicators: The options of suspending or resuming payment aren't enough

[36] The suspension provisions are another indicator that Parliament intended the Minister to have the power to reopen initial decisions. Section 34(j) of the OASA permits regulations "providing for the suspension of payment of a benefit during an investigation into the eligibility of the beneficiary and the reinstatement or resumption of the payment thereof." Section 26 of the OASR states that a suspension continues until there is

---

[37] OASA, sections 44, 44.1

[38] In *BR v Minister of Employment and Social Development*, 2018 SST 844, the Appeal Division stressed that the Minister is not powerless in cases of fraud, because of the risk of summary conviction or administrative penalty. While these may be deterrents, they do not allow for the recovery of benefits after the fact. In *Minister of Employment and Social Development v MB*, 2021 SST 8, the Appeal Division suggested that a fraudulent application nullifies the approval. This seems to confirm that the Minister needs to be able to revise her initial decisions in such cases.

satisfactory evidence of eligibility, and allows for retroactive payment for periods of eligibility.

[37] If, following a suspension and investigation, it turns out that you were not entitled to benefits, the initial decision may have to be revised in order for the overpayment to be recovered. This point was made above. But what if it turns out that you were not fully disentitled but instead entitled to a different period or level of benefits? This would happen if, for example, the Minister investigated and found that your years of residency permitted only a partial rather than full OAS pension.

[38] Without the ability to change the initial entitlement decision, there would be no way to pay the correct benefits. The options would be all or nothing: resumption of the full pension previously approved (paying more than entitled to), or continued suspension of benefits (paying less than entitled to). In this situation, the power to amend an initial decision may be necessary, to achieve the purpose of providing financial assistance to those seniors who qualify.

– **Other indicators: The Minister must respond to changes in status**

[39] The income threshold for the GIS varies with marital status. A single person receiving the GIS may no longer be eligible once married or in a common-law relationship, or they may qualify for a lower payment. Conversely, a recently separated person may become eligible for the GIS, or for a higher payment.

[40] The Minister has to “approve payment of a supplement and fix its amount” annually.[39] If a claimant doesn’t report a change in marital status promptly, and the Minister can’t reopen the previous entitlement decisions, that claimant could potentially receive the wrong level of benefits (higher or lower) for years. The Minister needs the power to revisit her initial decisions in these circumstances, to ensure that the correct level of income assistance is provided to those who qualify.

[39] OASA, section 16(1)

## Summary

[41] As outlined above, there are strong indications in the OASA that Parliament intended the Minister to be able to revisit her initial entitlement decisions. After benefits are in pay, the Minister can investigate eligibility, suspend benefits, and reach back to recover benefit payments for which there was no entitlement. Within this structure, the Minister may need to reopen her initial entitlement decision when it turns out that a claimant wasn't eligible for benefits, or was eligible for different benefits. This power is "practically necessary," so that seniors receive the benefits they are entitled to, and return benefits that they received but were not entitled to. Accordingly, the Minister has an implied power to reopen her initial decisions under the OASA. It was an error of law for the General Division to conclude otherwise.

[42] I recognize that my conclusion is different from that of other Appeal Division decisions, including those that the General Division relied upon.[40] I have had the benefit of new arguments and evidence; ultimately, a focus on whether the OASA indicates an implied power to reconsider led me to a different result. While consistency at the Appeal Division is important, the question of the Minister's power to revisit initial decisions is still relatively novel. Precedent develops over time, and "the tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges."[41]

[43] By finding an implied power to reopen initial decisions, I am not endorsing hasty OAS approvals with verification to follow — after all, the Minister is not supposed to approve anyone's benefits unless they qualify. Rather, having the option of reopening initial decisions reflects the reality that Service Canada will occasionally make mistakes, and some claimants will misrepresent the facts or fail to meet their reporting obligations. I understand my colleagues' concern that the Minister could in theory repeatedly or

---

[40] *BR v Minister of Employment and Social Development*, 2018 SST 844, *MA v Minister of Employment and Social Development*, 2020 SST 269, *Minister of Employment and Social Development v MB*, 2021 SST 8, and others.
[41] The Supreme Court of Canada said this in *Tremblay v Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC).

unfairly reassess eligibility. In my view, that concern is largely addressed through limits on the Minister's discretion, which I address below.

## Remedy: I will replace the General Division's decision with my own

[44] C.B. told the General Division and the Appeal Division that he accepts the revised OAS pension decision, made under the Canada/Greece Agreement.[42] He did not ask for reconsideration of the 2016 decision granting him the 11/40$^{ths}$ OAS pension, and he does not want to dispute that part of the 2019 reconsideration decision (even though he disagrees with the residency determination). This is C.B.'s choice. The Tribunal's role is not to decide on benefits that are not in dispute. Accordingly, I will only address the reopening of the previous GIS decisions.

[45] After finding an error of law, the Appeal Division can make the decision that the General Division should have made.[43] I will do so in this case, because the evidence needed to finalize this matter is on the record. I have given the parties the opportunity to make arguments about the appropriate remedy, as well as the nature and consequences of the delays in this case.

[46] I can decide any question of law or fact necessary to dispose of the appeal.[44] I have already found that the Minister has an implied power to revisit her initial decisions under the OASA. But that is not the end of the story. How is that implied power to be exercised?

### The Minister's authority is discretionary and must be exercised "in a judicial manner"

[47] I am not persuaded by the Minister's argument that, having investigated a claimant's eligibility, the authority to revisit the initial decision is not discretionary.[45] As the Minister's representative said, an investigation includes a recommendation, but it is

---

[42] C.B. has said this multiple times, including at GD10 and AD6-2.
[43] This is set out in section 59(1) of the *Department of Employment and Social Development Act*.
[44] These powers are found in section 64(1) of the *Department of Employment and Social Development Act*.
[45] A discretionary power is one that you can choose to use, or not.

not a decision. In other words, investigating eligibility and deciding to change a previous decision are separate tasks. The law does not oblige the Minister to reopen an initial decision, on her own initiative (even following an investigation).

[48] Elsewhere, even explicit authority to reopen decisions is typically discretionary.[46] And, when recognizing an implicit power to reopen for other administrative bodies, the courts have described a discretionary power. For example, in permitting an immigration officer to reconsider a decision, the Federal Court of Appeal noted the officer's obligation "to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider."[47] Similarly, the Federal Court decided that the Canadian Human Rights Commission could reconsider its decisions even though no specific statutory provision provided for this, "but this is a discretionary power which must be used sparingly in exceptional and rare circumstances."[48]

[49] The Minister's representatives have separately acknowledged that the Minister's discretion is not unrestricted, and that there are checks on the exercise of the power to revisit initial decisions. I agree that these checks exist: a discretionary power must be exercised "judicially." This means that a discretionary decision will be set aside if the decision-maker "acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner."[49]

---

[46] Some examples of this are found in section 81(3) of the *Canada Pension Plan*; sections 52, 111 of the *Employment Insurance Act;* section 25 of the *Employment Equity Act;* section 32(3) of the *Royal Canadian Mounted Police Act.* See also the Federal Court of Appeal decision in *Gareau v Canada (Employment and Immigration Commission)* [1986] F.C.J. No. 746.
[47] *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230
[48] *Merham v Royal Bank of Canada,* 2009 FC 1127
[49] This summary is found in *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA). The Tribunal takes a similar approach to other discretionary decisions by the Minister or Commission, including the Commission's discretion to change its initial decisions (for example, *JP v Canada Employment Insurance Commission*, 2021 SST 109).

– **Discretion to fix incorrect decisions, while considering finality**

[50] What is a proper purpose, for the exercise of the Minister's discretion to reopen a previous decision? The obvious answer is to fix incorrect entitlement decisions[50] — so that benefits are paid correctly going forward and overpayments are recovered.

[51] What else must the Minister consider when deciding whether to reopen an entitlement decision? In my view, the policy of finality that underlies the doctrine of *functus officio* is a relevant and important factor in the exercise of the Minister's discretion, and must be considered. This approach was endorsed by the British Columbia Court of Appeal (and cited by the Federal Court), when it found that applying the doctrine of *functus officio* wasn't the only way to give effect to the "sound policy" of finality: "That policy [of finality] will **necessarily govern the manner in which the jurisdiction to reconsider is exercised**…"[51] [Emphasis added.]

[52] The OAS pension provides basic financial assistance to seniors, and the GIS and Allowances provide a modest income to those with limited means. In this context, it is especially important for claimants to be able to rely on their entitlement decisions, without fear that they will have to return money already spent. Because of the importance of finality, and because seniors "should not be lightly disentitled to OAS benefits,"[52] the discretionary power should be used sparingly. Yet the Minister does not seem to have a policy or guidelines outlining when decision-makers should exercise the discretion to reopen initial decisions.[53] And, the Minister's Expert Report describes a routine, risk-based approach in which applications are approved on a presumption of eligibility, followed by a post-decision audit process.[54]

---

[50] While the Minister's representatives preferred the term "accurate," I find it difficult to describe an initial decision as "accurate" or "inaccurate," as opposed to "correct" or "incorrect."
[51] *Zutter v. British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BCCA), cited by the Federal Court in *Merham v Royal Bank of Canada,* 2009 FC 1127 at paragraph 23.
[52] *Canada (Minister of Human Resources Development) v. Stiel*, 2006 FC 466, previously cited in this decision.
[53] The Minister's policy on overpayments skips over this exercise entirely, indicating simply that overpayments are "discovered" or "identified" and then entered into the system for recovery. See the Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report.
[54] It is unclear how this approach fits with the Minister's obligation under the OASA to be satisfied that a claimant is qualified before approving or paying their benefits.

[53] The fact situations in the three appeals that I heard together suggest two ways in which the policy of finality limits the exercise of the Minister's discretion. These overlap with factors that are sometimes considered when deciding whether to apply the doctrine of *functus officio*: the nature of the error, the circumstances giving rise to the possible reopening, and the passage of time and delay.[55] There may be others that I haven't considered here.

– **Is this repeat assessment, without new material information?**

[54] First, to respect the importance of finality, the purpose of reopening initial decisions (fixing incorrect decisions) should be interpreted narrowly. An initial entitlement decision might be incorrect because of a failure on the part of the claimant (such as non-disclosure, late reporting, contradictory information or misrepresentation of important information) or because of an error in the administration of the OASA (such as clerical or system errors, not collecting the right information, or overlooking conclusive information).[56] But an initial decision is not incorrect (or "inaccurate") simply because a second decision-maker took a different view of similar facts. The purpose of the power to reopen decisions cannot be simply to repeat, for no compelling reason, the adjudicative task of applying the law to the facts to determine eligibility.

[55] In other words, in the absence of new information likely to change the original result, reopening a decision that turned on the judgment of the decision-maker would be an improper exercise of the Minister's discretionary power. This is similar to the approach the representative in one of the companion cases recommended, that new and contradictory evidence should be required for reopening, to guard against repeated reassessment of claims. In this way, the discretionary power to fix incorrect entitlement

---

[55] Wong, A., "Doctrine of *Functus Officio:* The Changing Face of Finality's Old Guard," Canadian Bar Review, Dec 2020, at pages 577-8.

[56] This overlaps with the Minister's list of reasons for overpayments. That list covers both payment errors (which would not involve fixing an incorrect entitlement decision) and eligibility errors: "original and duplicate cheques negotiated, amendments to periods of residence, a calculation error, income declared incorrectly, incorrect information provided, duplicate benefits paid to the same person, revision of estimated income, change of rate table for OAS benefits, or events such as death, marriage, separation." See section 2 of the Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report.

decisions can be balanced against the importance of people being able to rely upon decisions made about their benefits.

– **Has there been excessive delay?**

[56] Second, because the importance of finality increases with the passage of time, timeliness is also a relevant factor in the exercise of the discretion to reopen an initial decision. Over time, a claimant becomes more reliant on their existing entitlement, and it becomes more difficult for them to challenge a revised decision with historical evidence.

[57] The representative for one of the companion cases suggested that the five-year limitation period for commencing a proceeding for an offence under the OASA must, by implication, apply to the recovery of overpayments. I disagree: Parliament chose to establish a limitation period for offences but not for the recovery of overpayments.[57] Nevertheless, when deciding whether to exercise her discretion to reopen an initial decision, the Minister should consider the question of excessive delay.

[58] The Minister has the power to investigate a claimant's eligibility "at any time."[58] This makes sense, because new material information could come to the Minister's attention long after an initial decision was made. But to the extent that the timelines are within the Minister's control (particularly after initiating an investigation), it is the Minister's responsibility to decide promptly whether to reopen a previous entitlement decision and, if so, to inform the claimant of the revised decision.[59] Excessive delay could possibly amount to an abuse of process,[60] such that the Minister should not exercise her discretion to revisit the initial decision.

---

[57] OASA, sections 44 and 37. As previously mentioned, an earlier limitation period for recovery of some overpayments was repealed in 1995.
[58] OASR, section 23
[59] The Minister appears to recognize this principle. The Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report, encourages staff to act "in a timely manner." It permits the write-off of overpayments where Service Canada fails to correct an error within "one year of discovery," even though this reason is not found in the OASA.
[60] For example, where there is significant prejudice or the delay "would offend the community's sense of decency and fairness": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44. See also

– **Summary**

[59] To summarize, the Minister does not have an unrestricted discretion to reopen initial entitlement decisions. Her authority must be exercised for the purpose of fixing incorrect decisions, and that purpose must be narrowly construed. She should consider the nature and timeliness of the proposed revised decision — Is this repeat assessment without important new information? Has there been excessive delay? In every case, the Minister should ensure that the benefit of reopening the original decision outweighs the importance of that decision being final.

## The Tribunal has jurisdiction over the intertwined decision

[60] The Minister argues that, if the power to revisit decisions is discretionary, these discretionary decisions are not subject to appeal to the Tribunal. Any objection to the exercise of discretion would only be subject to review by the Federal Court. I disagree.

[61] The Tribunal has jurisdiction to hear an appeal of a reconsideration decision, and claimants have the right to request reconsideration of a decision about entitlement to, or the amount of, an OAS benefit.[61]

[62] A revised entitlement decision has two components. The Minister has to decide: Should I exercise my discretion to reopen the previous decision? And if I do, what is the new decision? These two components are intertwined and cannot reasonably be disentangled for recourse purposes. Under the Minister's preferred approach, a claimant whose OAS entitlement was reopened would have to challenge the Minister's discretion to do so at the Federal Court, while at the same time pursuing the reconsideration and appeal processes for the new substantive decision. That would make no sense.[62]

---

*Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 (leave to appeal granted by the Supreme Court of Canada, February 2021).

[61] Reconsideration rights are described in section 27.1 of the OASA, and appeal rights are found in section 28.

[62] If there is an overpayment, the Minister should go on to decide whether to forgive the overpayment. The Minister's decision about writing off a debt is not subject to reconsideration or appeal to the Tribunal but, as the last stage in the decision-making process, it is easily separable from the entitlement decisions.

[63] The Tribunal should take a broad approach to its jurisdiction, within the limits of the law, to manage appeals efficiently and to allow for meaningful recourse. I am satisfied that both aspects of the revised decision — the exercise of discretion and the new decision — are ultimately about OAS benefit entitlement. Both aspects are subject to reconsideration by the Minister and appeal to the Tribunal.[63]

## In this case, the Minister did not properly exercise her discretion to revisit the previous GIS decisions

[64] I turn now to the question of how the Minister exercised her discretion to reopen the GIS entitlement decisions in this case.

### – The sequence of events

[65] On behalf of the Minister, Service Canada decided that C.B. met the requirements for the GIS beginning in September 2006: he was a pensioner (receiving a partial OAS pension), his income was low enough, and he resided in Canada. Service Canada later approved C.B.'s GIS in each of 2007, 2008, 2009 and 2010.

[66] Service Canada has an Integrity Services Branch. That branch began an investigation of C.B.'s residency in January 2009, because C.B. had started using his tax consultant's address. The investigating officer reviewed the file and went to the address. After that, the investigating officer took no steps for over a year, from September 2009 to November 2010.[64] By then, C.B.'s GIS had been approved two more times.[65] The investigation then picked up with another visit to the address and requests for bank records.

[67] In February 2011, based on "inconclusive" information, the investigating officer recommended suspending C.B.'s benefits until his residency could be clarified.[66] She requested interim overpayment calculations for two situations: C.B. not being a resident

---

[63] The Tribunal has similarly held that the Commission's exercise of its discretionary power to reopen its decisions is subject to appeal, such that the Tribunal can step in if the discretion is not properly exercised. See for example *FB v Canada Employment Insurance Commission*, 2016 CanLII 102760 (SST).
[64] GD2-52
[65] In July 2009 and July 2010. Service Canada makes the annual GIS decisions in July each year, using information from claimants' income tax returns.
[66] GD2-53, 54

from either September 2006 (when benefits started) or from January 2008 (six months after he had changed his address). The investigating officer sent her request to another branch of Service Canada, the Processing and Payment Services Branch (PPSB). She then contacted C.B.'s references from 2006, but she did not contact C.B. or his family members.[67]

[68] Service Canada did not action the investigating officer's request for interim calculations for almost three years, because the file was lost or misplaced.[68] In the meantime:

- C.B. told Service Canada that he had left Canada permanently, and so Service Canada stopped his pension and GIS benefits six months after his departure, effective June 2011; and

- C.B. applied for the OAS pension under the Canada/Greece Agreement, in December 2013, to see if his pension could be paid even though he wasn't living in Canada.

[69] Then, in January 2014, the investigation file was found. The interim calculations were given to the investigating officer in April 2014. The investigating officer did not conduct any further investigation of C.B.'s residency. She gave her opinion in May 2014 that C.B. had not lived in Canada after 1981, and that his benefits should be confirmed on that basis.[69] She mentioned the Canada/Greece Agreement, but seemed not to know that C.B. had already applied.

[70] The investigating officer also spoke with C.B. in May 2014, telling him that he had not met the requirements for a pension, he had been overpaid the full amount of benefits, but there "might be some movement" under the Canada/Greece Agreement; the GIS does not appear to have been specifically mentioned.[70]

---

[67] GD2-167 to GD2-169
[68] See notes at GD2-60, GD2-76, GD2-77. In January 2014 the file was described as "missing since February 2011."
[69] GD2-61
[70] GD2-67

[71] There was no formal decision or written communication at that time. The investigating officer referred the matter back to PPSB, with a recommendation for "Eligibility or Entitlement Review." [71] There is no documentation of any steps taken by PPSB in response to this recommendation.

[72] Service Canada has a division called International Operations. That division made a decision on C.B.'s application for the OAS pension under the Canada/Greece Agreement, after collecting additional information from C.B. in 2015 and early 2016. In February 2016, International Operations granted C.B. an 11/40$^{ths}$ OAS pension (based on Canadian residency between 1969 and 1981), payable outside of Canada. They did not mention the earlier investigation or any possible overpayment.

[73] It seems that Service Canada's International Operations was unaware of the investigation of C.B.'s residency until it received the domestic file on March 6, 2018.[72] A Benefits Officer with International Operations followed the investigating officer's recommendation promptly, issuing a decision on March 12, 2018. That decision replaced the initial OAS pension and GIS decisions. For the GIS, the decision stated that C.B. had not been entitled to the payments he received from September 2006 to May 2011, because he was not resident in Canada during that period.

– **Nature of the delay**

[74] The Minister's representative argued that this matter was complicated, involving an initial domestic investigation as well as a transfer to the international division. He said that Service Canada typically waits for a final decision on the OAS pension before deciding on the GIS. But in this case, that approach makes no sense: no matter what was decided about C.B.'s partial OAS pension, he was not supposed to receive the GIS if he had not been resident in Canada between 2006 and 2010.[73] In other words, the decision about reopening C.B.'s GIS decisions did not depend on, or need to wait for, a decision about his OAS pension.

---

[71] GD2-56
[72] GD2-41
[73] OASA, section 11(7)(d)

[75] It took **more than nine years** (from January 2009 to March 2018) to reach a decision on reopening C.B.'s GIS entitlement. This was well beyond the inherent time requirements. The delay attributable to the Minister was both excessive and egregious:

- The investigation itself took over two years, with no action for 14 months of that period;
- The file then went missing for three years;
- The investigating officer made her recommendation in the next four months, but the decision to reopen wasn't made for almost four more years (over two years after deciding on the OAS pension).

– **Exercise of discretion**

[76] Why does this delay matter? The Tribunal does not supervise the Minister's processes or punish it for its failures.[74] There are no proceedings against C.B. that could be stayed (stopped or cancelled) for delay.[75] And I have no authority to forgive an overpayment for delay.[76]

[77] The delay in this case matters because, as set out above, the policy of finality and the timeliness of decision-making are important factors to consider in the exercise of the Minister's discretion to reopen her previous decisions.

[78] It is clear from the notes written by the Benefits Officer at International Operations that she did not turn her mind to the question of whether she should exercise the discretion

---

[74] Under sections 54 and 59 of the *Department of Employment and Social Development Act,* the Tribunal can replace the Minister's decision, but it can't sanction the Minister or tell her how to do her job.
[75] This possibility was canvassed in the human rights context in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 and in the disciplinary context in *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 (leave to SCC granted).
[76] The Minister's Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report, contemplates the possibility of debt forgiveness for delay, as an aspect of administrative error. But the Minister's decisions about forgiveness of overpayments are not subject to reconsideration or appeal to the Tribunal: see sections 27.1 and 28 of the OASA. I asked the representative if the Minister would consider debt forgiveness in this case, since this could affect C.B.'s position and the need for a decision on remedy, but the representative was unable to share any information about this.

to reopen the previous GIS decisions.[77] She simply implemented the investigating officer's recommendation. This was consistent with the purpose behind reopening initial decisions: to fix incorrect entitlement decisions. But the Benefits Officer did not weigh the merits of reopening the previous GIS decisions against the importance of finality in this case. In particular, she did not consider the impact of the extensive delays. The Benefits Officer ignored relevant factors, and so I conclude that she did not exercise her discretion judicially.

[79] When the Minister does not exercise her discretion judicially, the General Division can make the discretionary decision the Minister should have made; in turn, I can make the decision the General Division should have made.[78] So, I will decide whether to exercise the discretion to reopen the GIS entitlement decisions.

## Substituted decision: the previous GIS decisions will not be reopened

[80] The Minister's representatives argue, and I agree, that the courts have set a high threshold for a stay of administrative proceedings due to delay: the onus is on the individual to raise the issue, and proof of prejudice specific to the individual is generally required.[79] But I am not deciding whether C.B. should have to face the consequences of a disciplinary, human rights or other misconduct proceeding. This case is about the exercise of discretion, not a stay of proceedings. I am deciding, in place of the Minister, whether to reopen her previously implemented decisions about C.B.'s GIS entitlement, or to leave those decisions in place.

[81] There are important, competing interests for me to consider when choosing whether to reopen C.B.'s previous GIS decisions: the possibility of fixing incorrect decisions and facilitating the return of benefits; the need for seniors to be able to rely on

---

[77] GD2-41 and 42. This is not surprising, because the Minister has not provided Service Canada with direction on how to exercise this discretion.
[78] Examples of this are found in *PP v Minister of Employment and Social Development*, 2021 SST 166, *JP v Canada Employment Insurance Commission*, 2021 SST 109, and *LT v Minister of Employment and Social Development*, 2021 SST 289.
[79] See *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

decisions previously made about their basic benefits; and the potential impact of excessive delay on fairness. Each of these affects the integrity of the OAS program.

[82] As a result of an investigation, there is new evidence suggesting that C.B. may not have met the test for Canadian residence, at least after he changed his address. The new evidence isn't conclusive: the test for Canadian residence is complex, there are both favourable and unfavourable statements from C.B.'s references, and C.B. was not interviewed during the investigation. Still, there is a real possibility that C.B. received GIS payments that he wasn't entitled to, for several years.

[83] If the GIS decisions were reopened, C.B. would be put in the position of having to prove his residency between 2006 and 2010 for a second time. Because of the excessive delay by the Minister, C.B. would have to do this as an elderly, low-income senior who hasn't been in Canada for over ten years. The lengthy delay has likely made the tasks of collecting documents dating back to 2006, locating witnesses, and building a case more difficult for C.B., raising questions of procedural fairness.[80] And, waiting seven years after completing an investigation before going on to reopen previously implemented decisions is itself an affront to fair play.

[84] It also matters that the impact of leaving the existing decisions in place is relatively minor. Even if it were the case that C.B. shouldn't have received the GIS, the entitlement decisions cover a fairly brief historical period, there is no chance that C.B. is continuing to receive benefits he isn't entitled to, and there are no ongoing related proceedings.[81]

[85] In these circumstances, the benefit of reopening the previous GIS decisions does not outweigh the importance of those decisions being final and the impact of excessive delay. I emphasize that the delay in this case was extreme and – one hopes – unusual. As an exercise of discretion, the 2006 to 2010 GIS decisions will not be reopened.

---

[80] Even the Minister's file is incomplete at this point: the original GIS application is missing, along with any record of GIS payments made prior to December 2007 or of C.B.'s change of address.
[81] Such as offence or administrative penalty proceedings under sections 44 or 45 of the OASA.

Those decisions remain in place, and so there is no overpayment of the GIS paid to C.B. between September 2006 and May 2011.

[86] I made this decision (and the decisions in the companion cases) without being able to consider Ministerial policy about the discretionary power because, as I have mentioned, no such policy exists. In the employment insurance context, the Commission has a policy to help Service Canada decide in a fair and consistent manner whether to reopen previous entitlement decisions.[82] The Minister could develop and publish her own policy to guide Service Canada in the exercise of the discretion to reopen initial OAS decisions. Recognizing the importance of finality and incorporating elements of fairness into that discretionary exercise could well reduce the number of appeals of reopened decisions in the future.

## Conclusion

[87] The appeal is allowed in part. The Minister has an implied discretionary power to revisit her initial decisions under the OASA. The Tribunal has jurisdiction over the Minister's exercise of this discretion. C.B. does not dispute the decisions granting him the 11/40$^{ths}$ partial OAS pension, and so I have not addressed those decisions. As for the GIS decisions made from 2006 to 2010, the Minister did not exercise her discretion in a judicial manner when she reopened them. The GIS decisions will not be reopened.

Shirley Netten
Member, Appeal Division

[82] The policy is about the Commission's explicit discretionary power to reopen decisions under section 52 of the *Employment Insurance Act.* It is found in chapter 17.3 of the *Digest of Benefit Entitlement Principles,* and it is publicly available. With a goal of preventing debt when a claimant is overpaid through no fault of their own, decisions will only be reopened in certain circumstances. This policy recognizes the discretion at the stage of reopening decisions, and it is separate from guidance (in chapter 20) on writing off an overpayment after a decision has been reopened.