[TRANSLATION]

Citation: *SL v Minister of Employment and Social Development*, 2021 SST 990

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	S. L.
Representative:	T. S.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated January 15, 2019 (issued by Service Canada)

Tribunal member:	Jean Lazure
Type of hearing:	On the record
Decision date:	November 17, 2021
File number:	GP-19-584

Decision

[1] The appeal is allowed.

[2] The Minister did not have the power to reassess its November 30, 2006, decision. I also find that the Appellant was not ineligible for Guaranteed Income Supplement (GIS) benefits at any point.

[3] This decision explains why I am allowing the appeal.

Overview

[4] The Appellant is an 81-year-old man as of the date of this decision.

[5] On October 3, 2006, the Minister received the Appellant's application for an Old Age Security (OAS) pension.[1] On November 30, 2006, the Minister approved the application,[2] finding that the Appellant was entitled to a partial pension of 22/40 from November 2005 and that he was also entitled to the GIS from June 2006.

[6] On November 16, 2015, the Minister contacted the Appellant to have him complete a questionnaire and provide information about his trips outside Canada.[3]

[7] On March 21, 2016, the Minister asked for an investigation into the Appellant's file. From March 2016 to January 2018, the investigation ran its course. The GIS benefits were suspended in July 2017.[4] On March 21, 2018, the Minister sent the Appellant a letter asking him to refund an overpayment of $95,532.10 in GIS benefits.[5]

[8] On May 28, 2018, the Appellant requested a reconsideration of that decision.[6] On January 15, 2019, the Minister issued a Reconsideration Decision Letter[7] maintaining the original decision.

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[1] See GD2-3 in the record.
[2] GD3-26.
[3] GD2-168.
[4] GD3-5 and GD3-23.
[5] GD2-18.
[6] GD2-17.
[7] GD2-15.

[9] On March 30, 2019, the Appellant appealed that last decision to our Tribunal.[8]

[10] A pre-hearing conference was scheduled in this matter for January 20, 2021. Given the Appellant's absence, I asked that the matter be scheduled to be heard by teleconference. The hearing was scheduled for May 21, 2021. The Appellant did not attend, and the hearing did not take place.

[11] On May 31, 2021, I wrote to the parties[9] to tell them that I would make my decision on the record.

Issues

[12] There are two issues in this appeal:

[13] First, did the Minister have the power to reassess its November 30, 2006, decision?

[14] Second, did the Appellant cease being eligible for GIS benefits, and if so, when?

Reasons for my decision

[15] I find that the Minister did not have the power to reassess its November 30, 2006, decision. I also find that the Appellant was not ineligible for GIS benefits at any point. These are my reasons below.

The Minister did not have the power to reassess its November 30, 2006, decision

– **Minister's arguments**

[16] The Minister argues that the Tribunal must not, on its own initiative, raise the issue of the Minister's authority to investigate and reassess the Appellant's eligibility for benefits under the *Old Age Security Act* (OAS Act).

[8] GD1-1.
[9] This letter is at GD7-1 in the record.

[17] The Minister says that section 23 of the *Old Age Security Regulations* gives it the authority to investigate a person's eligibility and to assess it at any time.

[18] The Minister argues that I am not bound by other Tribunal decisions. At the same time, the Minister wants me to follow certain General Division decisions, including *RS*[10] and *RD*.[11]

– **I may raise an issue not raised by the parties**

[19] In my above-mentioned letter of May 31, 2021, I also asked [translation] "the parties to provide the Tribunal with written submissions on whether the Minister has jurisdiction to change its initial decision to grant the Appellant benefits."[12] I asked this of the parties in light of our Appeal Division's decision in *BR*.[13]

[20] I felt that my failure to raise the issue of the Minister's power to reassess an initial decision risked an injustice. It is also a fundamental issue concerning the Minister's jurisdiction. I felt I had to do this. That is why I did it.

[21] The Minister filed written submissions with the Tribunal on June 30, 2021.[14] The Appellant did not file any submissions.

[22] Lastly, I adopt the reasons of my colleague Anne Clark in her November 24, 2020, decision[15] as to whether the Tribunal may raise an issue not raised by the parties:

> [17] I raised the issue and invited submissions because there are have been several recent decisions addressing the Minister's authority to revisit and change previous decisions. BR was the first and not all subsequent decisions agree completely with the analysis in BR. I felt the issues in BR were similar to this appeal and the decision could apply. The General Division (GD) of the Tribunal is not required to question the validity of the Minister's powers in all appeals, particularly when no party raised any issues with those powers. While I may not be obliged to raise this

[10] *RS v Minister of Employment and Social Development*, 2018 SST 1350.
[11] *RD v Minister of Employment and Social Development*, GP-18-1472, is at GD11-536 in the record.
[12] GD7-1.
[13] *BR v Minister of Employment and Social Development*, 2018 SST 844.
[14] They are at GD8-1 to GD8-4269 in the record.
[15] *AL c/o JS v Minister of Employment and Social Development*, 2020 SST 1099.

> question in every appeal, it does not mean I should not raise it when I question it. The question of the Minister's powers in appeals under the OAS Act is important, and the issue of the Minister's jurisdiction to reopen previous decisions has already arisen in OAS matters. The Tribunal has discretion to raise such issues[16] "when failing to do so would risk an injustice."[17]
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> [18] In this appeal, it would be an injustice not to raise this as an issue. Since the principle of law discussed in BR could affect the outcome of this appeal, I must give the parties a full opportunity to address it. Parties may not have ready access to decisions especially new or unpublished decisions from the Tribunal. To ensure fairness I advised both parties that I am aware of BR and it may apply the same principles to this appeal. I gave the parties full opportunity to make written or oral submissions.
>
> [19] I recognize that the Tribunal should not build a party's case, but if there is a fundamental question such as jurisdiction, the parties should have the opportunity to address the question. Following the directions of the Federal Court, I gave notice to the parties and the opportunity to respond.[18]

– **Why I prefer *BR* and *MB* to *RS* and *RD***

[23] In *BR*, our Appeal Division, after an exhaustive review of the enabling legislation—the OAS Act and *Old Age Security Regulations*—and relevant case law, found that, short of fraud or new facts, the Minister may not "cancel an OAS benefit and demand that monies already paid out be reimbursed."[19]

[24] I find our Appeal Division's analysis in *BR* compelling, especially concerning the language used in the enabling legislation, including the concept of cessation. I also find that "the power that the Minister claims to have—to change previous decisions at any time and for any reason—is extraordinary."[20] I find *BR* well-reasoned, and I am inclined to follow it.

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[16] *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 89.
[17] *Adamson*, citing *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 at para 41.
[18] *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 89.
[19] *BR v Minister of Employment and Social Development* at para 81.
[20] *BR v Minister of Employment and Social Development* at para 61.

[25] As I said above, the Minister would rather I follow the General Division decisions in *RS* and *RD*. In *RS*, our General Division ruled that the Minister's powers to revisit initial decisions are necessary to:

> help to balance the goals of honoring the altruist nature of OAS benefits conferring legislation, by avoiding undue delay in processing applications with the need to safeguard the OAS purse strings by denying payment of benefits to those not entitled.[21]

[26] I read my colleague's decision as considering that only those entitled should be receiving OAS benefits, and that the Minister's power to reassess is a necessary protection in that regard.

[27] In *RD*, my General Division colleague uses the above quote from *RS* and further states that he disagrees with the Appeal Division's decision in *BR*: "I am not compelled to follow the reasoning in the AD decision and I find that the Minister's power to reassess eligibility is broad and extends to cases where there is no suggestion of fraud or misrepresentation."[22]

[28] In addition, I have the benefit of having read *MB*,[23] a more recent decision of our Appeal Division. In this decision, the Appeal Division interpreted the concepts of entitlement to benefits and eligibility in order to determine the Minister's powers as to an initial decision: "Fraudulent applications nullify entitlement. New facts affect new decisions on eligibility."[24]

[29] I read the Appeal Division's decision in *MB* as saying that a Minister's decision on entitlement to benefits, in a case of fraud, could be retroactive, while a decision on eligibility could only have a forward effect. This conclusion is also found in *BR*: "And once applications are approved, the Minister can continue to assess a pensioner's ongoing eligibility for benefits (or their amount)."[25]

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[21] *RS v Minister of Employment and Social Development* at para 33.
[22] GD11-539.
[23] *MB v Minister of Employment and Social Development*, 2021 SST 8.
[24] *MB v Minister of Employment and Social Development* at para 115.
[25] *BR v Minister of Employment and Social Development* at para 77.

[30] As to the argument put forth in *RS*, that is, the "necessity" of the Minister's power to reassess initial eligibility or entitlement decisions to prevent persons not entitled to benefits from receiving them, I believe that the Appeal Division rejected it in *MB*:

> [131] In schemes designed to assist seniors with basic fundamental income security, there may be times when a person receives a benefit and, later, more information becomes available showing that they should not have received it. We live with that outcome because, in benefits-conferring schemes, getting benefits out to those who need them requires an application process that moves with the speed and efficiency suited to the task.
>
> [132] The OAS Act and Regulations are part of a social safety net for seniors. I cannot infer there is a power to reassess initial eligibility and collect giant overpayments when the legislation does not clearly state it.[26]

[31] The Appeal Division's analysis in *MB*, of the above wording ("entitlement to benefits" vs. "eligibility"), but also of Parliament's intention, is thorough and compelling. I am inclined to follow it as well.

– **Why I choose to be bound by these Appeal Division decisions**

[32] The Minister argues that I am not bound by other Tribunal decisions. This is true, and includes decisions by our Appeal Division.

[33] However, there are important reasons why I may choose to follow such decisions. The consistency and predictability of our Tribunal's decisions is one such reason, but I would not want to follow decisions I fundamentally disagreed with. In *RS* and *RD*, my General Division colleagues did not follow *BR* due to such a fundamental disagreement.

[34] I find the Appeal Division's decisions in *BR* and *MB* to be most consistent with Parliament's intention and the purpose of the OAS Act. I concur with our Appeal Division in *MB* that "the object and purpose of the OAS Act are to provide modest

[26] *MB v Minister of Employment and Social Development* at paras 131 and 132.

income support for seniors in recognition of their contributions to Canada. This object and purpose do not require a mistake-free eligibility assessment."[27]

[35] I believe that, in interpreting the Minister's powers in that way, our Appeal Division's decisions in *BR* and *MB* grant the benefit of the doubt to the Appellant because the enabling legislation is not specific enough. I believe this is consistent with the altruistic nature and purpose of the OAS Act. It is why I choose to follow these decisions.

[36] Lastly, I also have the benefit of having read *AL*[28] and *SF and CF*,[29] two recent Appeal Division decisions. These decisions recognize the Minister as having an implied discretionary power to revisit initial decisions regarding the OAS Act. In light of the above, I disagree with these decisions. I find that such a broad power needs to have been explicitly set out in the enabling legislation.

The Appellant was never ineligible for GIS benefits

[37] Concerning the Appellant's eligibility for GIS benefits, I will summarily review the parties' positions below.

– Appellant's arguments

[38] The Appellant argues that he is still a resident of Canada to this day: [translation] "To tell you that I still live in Quebec. Canada is still my permanent resident [*sic*]."[30]

– Minister's arguments

[39] The Minister's position has somewhat changed from what it was in its January 15, 2019, Reconsideration Decision Letter. Now, its position is that the Appellant ceased to reside in Canada on November 10, 2010.

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[27] *MB v Minister of Employment and Social Development* at para 73.
[28] *AL v Minister for Employment and Social Development*, AD-21-60.
[29] *SF and CF v Minister of Employment and Social Development*, AD-21-132 and AD-21-133. This decision also upheld the first-level decision, since the Minister had not properly exercised the discretion that the Appeal Division recognizes it as having in those two decisions.
[30] GD1-4.

[40] The Minister says that, as a result, the Appellant ceased being eligible for GIS benefits in June 2011 and that there is an overpayment of $74,186.56 for the period from June 2011 to June 2017.[31]

[41] The Minister admits that the Appellant has resided in Canada since June 16, 2017.[32]

– **The Appellant was never ineligible for GIS benefits**

[42] So, the Minister argues that the Appellant ceased being a Canadian resident in November 2010. However, I found that the Minister could not reassess its November 30, 2006, decision. As indicated above, I find that the Minister's subsequent decision on eligibility could only have a forward effect.

[43] The Minister suspended the Appellant's GIS benefits in July 2017. That decision cannot have a retroactive effect. As for a forward effect, the Minister admits that the Appellant has resided in Canada since June 16, 2017.

[44] This means that the Appellant was not ineligible for GIS benefits at any point.

Conclusion

[45] I find that the Minister did not have the power to reassess its November 30, 2006, decision. I also find that the Appellant was not ineligible for GIS benefits at any point.

[46] This means that the appeal is allowed.

Jean Lazure

Member, General Division – Income Security Section

[31] The Minister's position is at GD3-11 in the record.
[32] GD3-16.