Date: 20231011

Docket: T-656-23

Citation: 2023 FC 1355

Toronto, Ontario, October 11, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

LUCIANO SAPIENTE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This Judgment and Reasons address an application for judicial review of a decision dated March 3, 2023 [Decision] of the Appeal Division of the Social Security Tribunal [Appeal Division], refusing the Applicant's application for leave to appeal a decision made on October 12, 2022, by the General Division of the Social Security Tribunal [General Division]. The Applicant sought to appeal to the Appeal Division to dispute the start date for his disability

benefits under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP], as decided by the General Division. The Appeal Division refused the application, finding that the Applicant had not raised an error by the General Division that would justify giving him permission to appeal.

[2] As explained in greater detail below, this application for judicial review is allowed, because the Appeal Division's Decision relied materially on a statutory limitation period applicable to appeals to the General Division, without conducting any analysis as to whether that limitation period applies to an appeal of a decision that pre-dates the enactment of the limitation period.

II. **Background**

[3] The Applicant, Mr. Luciano Sapiente, sustained a work-related injury in December 2000 that resulted in pain, headaches, and fatigue. This pain started in his occipital area and radiated to his left upper extremity. This pain became worse with prolonged sitting, neck extension and rotation. His left shoulder had pain that was made worse by overhead activities and shoulder abduction.

[4] As a result of his chronic pain, Mr. Sapiente has not worked since 2004. Prior to the injury, he had done sheet metal work, as he has a certificate as a sheet metal journeyman.

[5] Mr. Sapiente's Minimum Qualifying Period [MQP], representing the date by which he must be found disabled to qualify for benefits under the CPP, is December 31, 2006.

[6] Mr. Sapiente first applied for CPP disability benefits on August 9, 2010, when he was 51 years old [First Application]. His First Application was denied, both initially and upon reconsideration, based on the conclusion by the Minister of Employment and Social Development Canada [Minister] that Mr. Sapiente's condition did not meet the criteria of a "severe" and "prolonged" disability. The negative reconsideration decision was issued by the Minister on November 17, 2011 [2011 Reconsideration Decision]. Mr. Sapiente did not appeal the 2011 Reconsideration Decision at the time.

[7] On April 24, 2019, Mr. Sapiente applied for CPP disability benefits for a second time based on degenerative disc disease and extreme fatigue [Second Application]. Again, Mr. Sapiente's Second Application was denied both initially and upon reconsideration. On October 19, 2020, Mr. Sapiente appealed the reconsideration decision to the General Division. An oral hearing took place before the General Division on August 18, 2022.

[8] The General Division allowed Mr. Sapiente's appeal, finding that he is eligible for a CPP disability pension, with payments beginning as of May 2018. The General Division found Mr. Sapiente and his wife to be credible witnesses and concluded that his medical evidence supported his claim that his functional limitations affected his ability to work by the MQP date. Ultimately, the General Division found that Mr. Sapiente's disability was both severe and prolonged as of April 2004, which was when he had to stop working because of his condition.

[9] In determining when Mr. Sapiente's payments would begin, the General Division considered subsection 42(2)(b) of the CPP, explaining that an appellant cannot be considered

disabled more than 15 months before the Minister receives their disability pension application. The General Division noted that section 69 of the CPP also imposes a 4-month waiting period before payments start. As the Minister received the Second Application in April 2019, the General Division found that Mr. Sapiente became disabled in January 2018, and his payments would start as of May 2018.

[10] On December 23, 2022, Mr. Sapiente requested leave to appeal the decision of the General Division, arguing that the General Division had erred by failing to calculate his benefits' effective date using his First Application from 2010. In its resulting Decision, which is the subject of this judicial review, the Appeal Division denied Mr. Sapiente's application for leave to appeal.

III. **Appeal Division Decision**

[11] At the beginning of the Decision, the Appeal Division explained that it was required to consider whether the General Division may have made an error under the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA] that would justify granting the appeal.

[12] As a preliminary issue, the Appeal Division considered whether Mr. Sapiente, who was not represented by counsel, intended to appeal the Minister's 2011 Reconsideration Decision that resulted from his First Application in 2010. Referencing subsection 52(2) of the DESDA, it reasoned that the General Division cannot accept an appeal filed more than a year after the Minister communicates a reconsideration decision and, given that more than ten years had passed

since the 2011 Reconsideration Decision, the Appeal Division concluded that there was no reasonable chance that the General Division would consider such an appeal.

[13] The Appeal Division then cited section 58.1 of the DESDA, which provides the only grounds of appeal open to Mr. Sapiente before the Appeal Division :

58.1 Leave to appeal a decision made by the Income Security Section is to be granted if the application for leave to appeal	**58.1** La demande de permission d'en appeler d'une décision rendue par la section de la sécurité du revenu est accordée dans les cas suivants :
(a) raises an arguable case that the Section failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la demande soulève une cause défendable selon laquelle la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) raises an arguable case that the Section erred in law, in fact or in mixed law and fact, in making its decision; or	**b)** elle soulève une cause défendable selon laquelle la section a rendu une décision entachée d'une erreur de droit, de fait ou de droit et de fait;
(c) sets out evidence that was not presented to the Section.	**c)** elle présente des éléments de preuve qui n'ont pas été présentés à la section.

[14] The Appeal Division explained that there are four rules that the General Division was required to follow to calculate the start date of payments, namely:

A. that a claimant must have been covered under the CPP during the relevant period;

B. that the claimant must have had a severe and prolonged disability during the relevant coverage period (see CPP, s 42(2));

C. the earliest a person can be considered disabled for purposes of receiving disability payments is fifteen months before they applied (see CPP, s 42(2)); and

D. pension payments start to become payable four months after the claimant is considered disabled for the purpose of payment, *i.e.*, four months after the date calculated under the preceding rule above (see CPP, s 69).

[15] The Appeal Division concluded that the General Division had applied these four rules to calculate Mr. Sapiente's start date for payments, and Mr. Sapiente had not raised an argument that it had made an error in doing so.

[16] Concluding that Mr. Sapiente did not have an argument that had a reasonable chance of success, the Appeal Division refused the application for leave to appeal.

IV. **Issues**

[17] This application for judicial review raises only one substantive issue for the Court's determination, which is whether the Appeal Division's refusal to grant leave to appeal was reasonable.

[18] As reflected in that articulation of the issue, the applicable standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Roy v Canada (Attorney General)*, 2022 FC 667 at para 15).

[19] As an additional procedural issue, the Respondents' counsel seeks an amendment to the style of cause to reflect only the Attorney General of Canada as the Respondent, raising the application of Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 [Rules].

V. **Analysis**

A. Procedural Issue

[20] Rule 303(1)(a) provides that, subject to Rule 303(2), an applicant for judicial review shall name as a respondent every person directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought. Rule 303(2) in turn provides that, where in an application for judicial review there are no persons that can be named under Rule 303(1), the applicant shall name the Attorney General of Canada as a respondent.

[21] In his application for judicial review, Mr. Sapiente has named not only the Attorney General of Canada but also the Social Security Tribunal of Canada and the individual member of the Appeal Division who made the Decision. The Respondents' counsel submits that, as these decision-makers should not have been named because of the effect of Rule 303(1)(a), the style of cause should be amended to reflect the Attorney General of Canada as the sole Respondent. Mr. Sapiente has made no submissions on this procedural issue.

[22] I agree with counsel's submissions, and my Judgment will amend the style of cause, as set out above, to name as Respondent only the Attorney General of Canada

B. Whether the Appeal Division's refusal to grant leave to appeal was reasonable.

[23] My decision to allow this application for judicial review turns on the preliminary issue identified by the Appeal Division, whether Mr. Sapiente intended to appeal the Minister's 2011 Reconsideration Decision that resulted from his First Application in 2010, and his ability to do so. In addressing this issue, the Appeal Division held as follows (at para 9 of the Decision):

> 9. The General Division cannot, under any circumstances, accept an appeal filed more than a year after the Minister communicated the reconsideration decision. The reconsideration decision on the Claimant's 2010 application is more than 10 years old. There is no reasonable chance that the General Division would consider an appeal of the 2011 reconsideration decision.

[24] In arriving at this conclusion, the Appeal Division cited subsection 52(2) of the DESDA.

[25] Subsection 52(2) of the DESDA operates in the context of subsection 52(1)(b), the effect of which is that an appeal of a decision made under the CPP must be brought to the General Division within 90 days of the day on which the decision is communicated to the appellant. Subsection 52(2) provides that the General Division may allow further time within which an appeal may be brought but that in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[26] In his Memorandum of Fact and Law in this application for judicial review, one of Mr. Sapiente's principal arguments is that subsection 52(2) of the DESDA, which created the limitation period relied upon by the Appeal Division in the Decision, came into force on April 1, 2013, and therefore did not apply at times relevant to his First Application.

[27] At the time Mr. Sapiente filed his First Application on August 9, 2010, and at the time of the Minister's 2011 Reconsideration Decision (issued on November 17, 2011) related to that application, subsection 82(1) of the CPP provided for an appeal of such a reconsideration decision to a Review Tribunal, also established under section 82 of the CPP. Subsection 82(2) permitted an appellant to bring such an appeal within 90 days, or any longer period that the Commissioner of Review Tribunals may (either before or after the expiration of those 90 days) allow, after the day on which the appellant was notified of the decision being appealed. In other words, under the legislation of the day, there was potential to seek an extension of the 90-day appeal period without an outside limit of the sort that was subsequently introduced by subsection 52(2) of the DESDA when it came into effect on April 1, 2013.

[28] In response to Mr. Sapiente's argument that this one year outside limit for appeal does not apply to the 2011 Reconsideration Decision, the Respondent has referred the Court to transitional provisions that were enacted when subsection 52(2) of the DESDA came into force, as well as authorities from the Social Security Tribunal and the Federal Court that have considered the application of that subsection.

[29] Subsection 52(2) of the DESDA was enacted by section 24 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19 [GJLTPA]. As transitional provisions, the Respondent references sections 255 to 257 of the GJLTPA. However, these provisions do not speak directly to the question raised in this application for judicial review, which is whether subsection 52(2) has retrospective application. Rather, these provisions governed whether it was the old Review Tribunal or rather the new Social Security Tribunal (General Division) that would be seized of

an appeal that was filed before April 1, 2013, which depended on whether the Review Tribunal had heard the appeal before April 1, 2013, and issued its decision by March 31, 2014.

[30] The Respondent has also referred the Court to the decision in *Pellettieri v. Canada (Attorney General)*, 2019 FC 1585 [*Pellettieri*], as support for the conclusion that the subsection 52(2) limitation period applies notwithstanding that it was not enacted until after the Minister's issuance of the 2011 Reconsideration Decision. In *Pellettieri*, Justice Grammond relied on subsection 52(2) in finding that the Appeal Division reasonably decided to deny leave to appeal, because the General Division had no choice but to dismiss the appeal before it, in circumstances where the notice of appeal was filed with the General Division more than three years after the impugned reconsideration decision by the Minister (see para 7).

[31] However, *Pellettieri* does not provide a retrospectivity analysis. In *Pellettieri*, the impugned decision by the Minister was made in 2014 (see para 3). As such, Justice Grammond was not required to consider whether subsection 52(2) applies retrospectively to a reconsideration decision made before the subsection came into force on April 1, 2013. I do not regard *Pellettieri* as supporting the reasonableness of the Decision in the case at hand.

[32] The Respondent also relies on a decision of the Appeal Division in *PL v Minister of Employment and Social Development*, 2017 SSTADIS 385 [*PL*], which does contain a relevant retrospectivity analysis (at paras 19 to 26):

> 19. An applicant prior to April 1, 2013, did not face a one-year limitation within which a request for an extension of time had to have been made. If an extension of time request exceeded one year, the Office of the Commissioner of Review Tribunals made a

decision to grant or refuse it based on the specific circumstances and in accordance with the jurisprudence at that time.

20. The one-year limitation came into effect on April 1, 2013 when the DESD Act came into force.

21. There is a general rule of statutory interpretation that new legislation is not to be interpreted as having retrospective application. In *Tabingo v. Canada (Citizenship and Immigration)*, 2013 FC 377, the Federal Court stated that legislation may not be interpreted in a manner that removes existing rights or entitlements unless Parliament's intention to do so is clear. If the plain and obvious meaning of the legislation requires that it be retrospective and interfere with vested rights, it is valid, regardless of any perceived unfairness. As well, subsection 44(c) of the *Interpretation Act* states that where a former enactment is repealed and replaced by a new enactment, proceedings commenced under the former enactment are to be continued in conformity with the new enactment, insofar as it is possible to do so consistently with the new enactment.

22. There were transitional provisions drafted into the *Jobs, Growth and Long-term Prosperity Act* to cover undecided appeals and applications that were filed with the Tribunal's predecessor bodies and needed to be transferred to and resolved by the Tribunal. These provisions covered the period between April 1, 2013 and April 1, 2014 (the transitional period). Once these provisions were no longer needed, they were repealed.

23. This appeal was not filed with the Tribunal's predecessor bodies. It was filed in June 2016, more than three years after this Tribunal began operations.

24. In situations where a reconsideration decision was issued before April 1, 2013 and an appeal was filed with the Tribunal before April 1, 2014 (i.e. during the transitional period), the Appeal Division has previously determined that the one-year time limit in subsection 52(2) does not necessarily apply. See for example *Minister of Employment and Social Development v. J.P.*, 2016 SSTADIS 509 and *Minister of Employment and Social Development v. S.D.*, AD-16-239, 2017-01-27 (not yet published).

25. The current situation, however, pertains to a reconsideration decision that was issued before April 1, 2013 and an appeal that was filed with the Tribunal after April 1, 2014. The Appeal Division cases referred to in paragraph 24, above, did not have the same fact situation (i.e. timeline) as in the present matter.

> 26. For appeals filed with the Tribunal after April 1, 2014, subsection 52(2) of the DESD Act applies, and the General Division may not allow further time within which an appeal may be brought.

[33] The conclusion in *PL* favours the Minister's position in the present application. However, it is necessary at this stage of my analysis to consider principles that *Vavilov* explains must govern the process of judicial review of administrative decision-making. Judicial review must focus on the decision that the administrative decision-maker actually made, including the justification offered for it (see *Vavilov* at para 15). For a decision to be reasonable, in circumstances where reasons for the decision are required, the decision must be justified by the decision-maker itself, by way of those reasons (see *Vavilov* at para 86).

[34] In the Decision currently under review, the Appeal Division provided no analysis surrounding the retrospective application of subsection 52(2) to the 2001 Reconsideration Decision, so as to bar Mr. Sapiente's appeal of that decision to the General Division. It is possible that the Appeal Division was relying on *PL* or comparable reasoning. It is also possible that the Appeal Division did not turn its mind at all to the retrospectivity question. It is not possible for the Court to tell from the Appeal Division's reasons whether it was conscious of the retrospectivity question raised by the timing of the facts of this case and, if so, how it analysed that question in support of a conclusion that subsection 52(2) applied on these facts. In my view, the Appeal Division's reliance on subsection 52(2) on the facts of this case, in absence of any such analysis, undermines the reasonableness of the Decision on the principles explained in *Vavilov*.

[35] In arriving at this conclusion, I am also conscious of the principle that the conduct of reasonableness review must be guided in part by the particular submissions of the parties before the administrative decision-maker (see *Vavilov* at para 94). An applicantion for judicial review should not be permitted to raise new arguments before the Court that were not before the decision-maker (see, e.g., *Vitale v Canada (Attorney General)*, 2021 FC 1426 at para 27). I refer to this principle, because it does not appear that Mr. Sapiente raised before the Appeal Division the issue of whether subsection 52(2) applied retrospectively. Indeed, it is not clear to me that the application of subsection 52(2) was raised at all, before either the General Division or the Appeal Division. However, the Appeal Division itself identified and relied on subsection 52(2) as foreclosing Mr. Sapiente's ability to appeal the 2001 Reconsideration Decision, on facts the timing of which necessarily required any application of that limitation period to be retrospective. In my view, these circumstances warrant the Court's consideration of the reasonableness of that aspect of the Decision.

[36] I should also note that, if it was abundantly clear from relevant legislative provisions, or from the jurisprudence of this Court, that subsection 52(2) applied retrospectively, then I would not necessarily have expected the Decision to include an express retrospectivity analysis in order to be reasonable. However, as previously observed, the only authority identified by the Respondent that I consider to speak directly to the retrospectivity question is the Appeal Division's decision in *PL*.

[37] With respect to the reasoning in *PL*, it is not immediately clear to me how the Appeal Division in that case arrived at its conclusion based on the transitional provisions in the

GJLTPA. However, without any indication in the Decision in the case at hand that the Appeal Division either relied on *PL* or an analysis comparable to that conducted in *PL*, the Court will not, in the present application for judicial review that concerns only the present Decision, undertake a detailed review of the reasoning in *PL*. Any such review should be left to a case where such reasoning is relied upon in an impugned decision, as a result of which the Court would have the benefit of argument on such reasoning.

[38] Finally, I note that the Respondent raises, as an alternative basis to support the reasonableness of the Decision, an argument that, even if the Mr. Sapiente was not barred by a limitation period, he was unable to appeal the 2011 Reconsideration Decision because of the application of principles of *res judicata* or issue estoppel. I question whether those principles could assist the Respondent in the absence of an applicable limitation period, because those principles apply to a decision that is final (see, e.g., *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at p 477; *Dillon v Canada (Attorney General)*, 2007 FC 900 at paras 23-24). However, I need not make a finding on that question because, as the Respondent acknowledges, the Decision does not reveal consideration of these principle by the Appeal Division.

VI. **Conclusion**

[39] Based on the analysis in these Reasons, I conclude that the Decision is unreasonable and will therefore allow Mr. Sapiente's application for judicial review. I note that, in his written submissions identifying the Order he seeks in this application, Mr. Sapiente (who is self-represented) asks "that the first application of 2010 be reopened for reconsideration to appeal." However, the Court's role in judicial review is to consider the reasonableness of the decision

under review and, in the event the decision is not reasonable, the usual remedy is to return the matter to the decision-maker for re-determination. That re-determination, taking into account the reviewable error I have identified and whether subsection 52(2) applies, will necessarily engage with the question whether the potential effect of the First Application and the 2011 Reconsideration Decision justify granting Mr. Sapiente leave to appeal.

[40] My Judgment will therefore set the Decision aside and return this matter to a different member of the Appeal Division to re-determine Mr. Sapiente's application for leave to appeal.

[41] Neither party has sought costs, and no costs are awarded.

JUDGMENT IN T-656-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended, as set out above, to name as Respondent only the Attorney General of Canada.
2. The Decision is set aside and the Applicant's application for leave to appeal is returned to a different member of the Appeal Division for re-determination.
3. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-656-23
STYLE OF CAUSE:	LUCIANO SAPIENTE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 5, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 11, 2023

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