

Federal Court



Cour fédérale

**Date: 20150702**

**Docket: T-1153-13**

**Citation: 2015 FC 817**

**Ottawa, Ontario, July 2, 2015**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**JOSEPH A. KELLY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is the judicial review of a decision by a delegate of the Minister of Human Resources and Skills Development Canada [Minister] which determined that the Applicant had not been denied a benefit as a result of erroneous advice or administrative error pursuant to s 66(4) of the *Canada Pension Plan*, RSC 1985 c C-8 [CPP Act].

[2] The central points of this matter are the denial of a disability pension [disability benefits] in 2002, the claim in 2012 to these benefits retroactive to 2002 and the Minister's decision not to grant a retroactive disability pension.

## II. Background

[3] Mr. Kelly suffered a work-related injury in 2001 while working in Cape Breton. In September 2001 he moved back to the Hamilton area to be closer to his family doctor, Dr. Wong.

[4] While Mr. Kelly cannot recall the event, the best evidence is that he applied for disability benefits in August 2002, which were denied in October 2002. He cannot recall being advised of the decision and therefore never applied for reconsideration of this negative decision. Mr. Kelly states that he was advised, at some point, that at age 60 he could re-apply for those benefits.

[5] In January 2012, Mr. Kelly applied for the disability benefits which were granted in July 2012 retroactive to February 2011.

[6] This case has been complicated by the fact that Mr. Kelly's disability benefits paper file was destroyed in January 2010 in accordance with the department's record retention policy. Fortunately, however, the computer notes on this file were not expunged and were available when he sought retroactive benefits back to 2002.

[7] Having received a positive decision on his 2012 benefits application, Mr. Kelly asked for reconsideration of the period of retroactive benefits back to February 2002.

[8] Over the period, 2002 to 2012, Mr. Kelly made numerous claims to Ontario and Nova Scotia work place compensation authorities - or, as he clearly put it, “fighting at least 5 claims all at the same time”. The Applicant’s record in this Court included large amounts of this exchange with provincial authorities.

[9] The Minister’s delegate determined that Mr. Kelly had not been denied his disability benefits through erroneous advice/administrative error because he: had received the refusal letter that contained information on reconsideration rights; was likely aware of the refusal of benefits decision in 2002; had not contacted the disability benefits section until January 2012; and, had not applied for reconsideration.

[10] This judicial review centres on the reasonableness of the decision of the Minister’s delegate.

### III. Analysis

[11] The Federal Court of Appeal recently confirmed that the standard of review applicable to this type of decision is reasonableness (*Canada (Attorney General) v Torrance*, 2013 FCA 227, 366 DLR (4<sup>th</sup>) 556).

[12] The decision under review is made pursuant to s 66(4) of the CPP Act.

**66.** (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any

**66.** (4) Dans le cas où le ministre est convaincu qu’un avis erroné ou une erreur administrative survenus dans le cadre de l’application de la

person has been denied	présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,	a) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or	b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(c) an assignment of a retirement pension under section 65.1,	c) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

[13] The statutory scheme requires an application before any benefit is payable (s 60(1)) and provides a 90-day window to seek reconsideration of any decision denying such a benefit (s 81(1)).

[14] While Mr. Kelly may not know the intricacies of the disability provisions of the Canada Pension Plan, he is presumed in law to know the law and the government officials are bound by the law.

[15] The reasonableness of the decision rests on four major points:

- 1) From the computer records, Mr. Kelly's application was denied on October 29, 2002;
- 2) It was departmental policy at the time that an applicant was to be informed of a benefits decision in an established format which contained a description of the reconsideration rights;
- 3) The 2004 notes of Mr. Kelly's doctor, which Mr. Kelly submitted in his 2012 application, contained an notation that Mr. Kelly had been told to re-apply because he had been turned down initially; and,
- 4) There was no evidence that Mr. Kelly had been told that he had to wait until 60 years old to re-apply. In fact, there are no computer notations of contact with Mr. Kelly between 2003 and 2012.

[16] I am unable to see anything unreasonable about the decision. While the initial denial letter was apparently destroyed in the government files and Mr. Kelly states that he never received it, the best evidence is that the decision was communicated to him. Dr. Wong's notation corroborates not only the initial decision but also that Mr. Kelly was aware of it and took no steps to challenge it or seek reconsideration.

[17] Again, the best evidence is that Mr. Kelly was not in contact with any official who could have suggested waiting until age 60 to re-apply for a disability benefit. Mr. Kelly can shed no particular light on this topic.

IV. Conclusion

[18] Under these circumstances, I conclude that the decision was reasonable and that this judicial review will be denied without costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is denied  
without costs.

"Michael L. Phelan"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1153-13

**STYLE OF CAUSE:** JOSEPH A. KELLY v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** FREDERICTON, NEW BRUNSWICK

**DATE OF HEARING:** JUNE 29, 2015

**JUDGMENT AND REASONS:** PHELAN J.

**DATED:** JULY 2, 2015

**APPEARANCES:**

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