

Federal Court



Cour fédérale

Date: 20161007

Docket: T-293-16

Citation: 2016 FC 1123

Ottawa, Ontario, October 7, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SALVATORE CONSIGLIO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Salvatore Consiglio applied for *Canada Pension Plan* disability benefits in 1991. At that time, he had three small children. His application for disability benefits was subsequently approved, and Disabled Contributor's Child Benefits (DCCB) were also approved for Mr. Consiglio's children.

[2] Mr. Consiglio's wife gave birth to a fourth child, Niki, on November 22, 1993. Mr. Consiglio did not apply for benefits for Niki until 2011, explaining in his application that he was unaware that he needed to make a further application for DCCB benefits, should he have

another child. Mr. Consiglio also sought the retroactive payment of benefits for Niki in his application.

[3] Mr. Consiglio's application for DCCB benefits for Niki was approved, and he was provided with 11 months of retroactive DCCB benefits for her, which was the maximum permitted under the legislation. Mr. Consiglio's subsequent attempts to challenge this decision before a Review Tribunal, the Pension Appeal Board and this Court were all unsuccessful.

[4] Mr. Consiglio also requested that the Minister of Employment and Social Development Canada undertake an investigation in order to determine whether the denial of DCCB benefits for Niki was due to an administrative error or erroneous advice on the part of Employment and Social Development Canada. A Minister's delegate subsequently determined that no erroneous advice or administrative error had been made that resulted in Mr. Consiglio being denied the additional DCCB benefits for Niki.

[5] Mr. Consiglio sought judicial review of the Minister's delegate's decision. His application was granted on consent. The matter was then remitted to a different Minister's delegate to reassess Mr. Consiglio's allegations of erroneous advice or administrative error.

[6] A second Minister's delegate also found that Mr. Consiglio had failed to establish that he had suffered a loss of benefits by reason of erroneous advice or an administrative error on the part of Employment and Social Development Canada. By this application for judicial review, Mr. Consiglio seeks to challenge the second Minister's delegate's decision.

[7] While I am very sympathetic to the position in which Mr. Consiglio finds himself, as will be explained below, he has not persuaded me that the decision of the Minister's delegate was

unreasonable. Consequently, there is no basis on which I can intervene in the decision, and Mr. Consiglio's application for judicial review will accordingly be dismissed.

I. The Legislative Regime

[8] Mr. Consiglio's application for disability benefits is governed by the provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. Subsection 74(2) of the Plan says that when an application for benefits is approved, retroactive benefits cannot be approved for a period that is "earlier than the twelfth month preceding the month following the month in which the application was received". This is why Mr. Consiglio only received retroactive benefits for Niki going back 11 months before the date of his 2011 application for benefits.

[9] However, in accordance with the provisions of subsection 66(4) of the Plan, the Minister or her delegate had the power to award additional retroactive benefits for the full period requested by Mr. Consiglio, if he could establish that he was denied a benefit to which he would otherwise have been entitled because of erroneous advice or an administrative error in the administration of the Plan. However, as noted, the second Minister's delegate determined that Mr. Consiglio had failed to establish that there had been any such erroneous advice or administrative error made by Employment and Social Development Canada in relation to his application for benefits for Niki.

II. The Standard of Review

[10] In a case such as this, it is not my role to decide whether I agree with the decision of the Minister's delegate, or whether I would have come to the same decision as did the Minister's delegate. My role is to determine whether the Minister's delegate's decision was reasonable in

light of the evidence that was in the record: *Canada (Attorney General) v. Torrance*, 2013 FCA 227 at para. 34, [2013] F.C.J. No. 1049.

III. Why the Minister's Delegate's Decision was Reasonable

[11] Mr. Consiglio says that when he was first approved for *Canada Pension Plan* disability benefits in 1991, he received a notice advising him of the total monthly amount of the benefits that he would be receiving. He did not, however, receive a breakdown indicating what proportion of the monthly amount he was receiving represented disability benefits for him, and what amounts were DCCB benefits for his children. Nor did Mr. Consiglio receive a call from Employment and Social Development Canada explaining how his monthly benefits had been calculated.

[12] Mr. Consiglio submits that his evidence on this point is confirmed by an internal email from Employment and Social Development Canada indicating that breakdowns of monthly benefits were not being provided to recipients in 1991. The Minister submits that the information in the emails in question pre-dated the investigation into Mr. Consiglio's subsection 66(4) application, and is not correct. According to the Minister, the Notice of Entitlement that was provided to recipients in 1991 did contain a breakdown of benefits, and would have identified each of Mr. Consiglio's recipient children by name.

[13] Regardless of which version of events is accurate, Mr. Consiglio does not deny that he received an application kit when he first applied for disability benefits. The Minister has produced the kit that was in use at the time of Mr. Consiglio's original application for benefits. This document clearly explains that the dependent children of a disabled individual are entitled to benefits provided that the children are under the age of 18, or are between 18 and 25, as long

as they are in full-time attendance at a school or university. The document further makes it clear that it is necessary to make a written application for such benefits.

[14] While not disputing that he received such a kit, Mr. Consiglio says that by the time his application for benefits was approved a year later, he had forgotten what it said. He further insists that he did not understand that part of the monthly payment he started receiving in 1991 was made up of DCCB benefits for his children.

[15] Mr. Consiglio's evidence as to his understanding of the make-up of his benefits for his children has not, however, been consistent. When the problem with Niki's benefits surfaced in 2011, Mr. Consiglio initially stated that he had understood that *all four* of his children had been receiving benefits. More recently, Mr. Consiglio has submitted that he did not understand that the monthly benefit payment that he had received included a component representing DCCB benefits for *any* of his children.

[16] Mr. Consiglio acknowledges that his benefits were reduced in 2004, when his oldest child turned 18, and that his benefits were reduced again in 2006 and in 2009 as his second and third children each reached the age of majority. The first time that this happened, Mr. Consiglio says that he contacted Employment and Social Development Canada seeking an explanation as to why his benefits had been reduced. He says that he was told that because his oldest child had turned 18, DCCB benefits would henceforth be paid directly to the child.

[17] Despite receiving this explanation, Mr. Consiglio says that he "just didn't get it" that he had been receiving DCCB benefits for his children. In each of these cases, moreover,

Mr. Consiglio was able to have benefits continue, payable directly to his children, by providing evidence from a scholastic institution confirming that the children were still in school.

[18] In 2011, just before Niki turned 18, Mr. Consiglio contacted Service Canada in order to obtain a school registration form for her so that she could continue to receive DCCB benefits. It was only then that he was told that no application for DCCB benefits had ever been made for Niki.

[19] Mr. Consiglio acknowledges that the Minister could have had no way of knowing that he had had a fourth child if he did not advise the Minister accordingly. Mr. Consiglio submits, however, that he did not understand that he was receiving DCCB benefits for his children, nor was he told that he had to update the Minister if his family circumstances changed.

[20] To be entitled to relief under subsection 66(4) of the Plan, the burden was on Mr. Consiglio to establish on a balance of probabilities that he had been given erroneous advice, or that there had been an error in the administration of the Plan: *Manning v. Canada (Human Resources Development)*, 2009 FC 523 at para. 37, [2009] F.C.J. No. 646, citing *Graceffa v. Canada (Minister of Social Development)*, 2006 FC 1513, [2006] 306 F.T.R. 193.

[21] The Federal Court of Appeal discussed the meaning of the term “erroneous advice” in *King v. Canada (Attorney General)*, 2009 FCA 105 at para. 31, [2009] F.C.J. No. 384. There, the Court stated that the term “refers to advice given by the Department of Human Resources and Skills Development to a member of the public”. The Court went on to observe that where an official gives a member of the public incorrect information which results in the denial of a benefit, the Minister may decide to provide a remedy.

[22] Mr. Consiglio does not suggest that there was an error in the administration of the Plan. Nor does he suggest that he was ever provided with erroneous advice. What he complains about is not receiving *sufficient* advice. That is not, however, a basis for relief under subsection 66(4) of the Plan. Consequently, it cannot be said that the decision of the Minister's delegate denying relief to Mr. Consiglio was unreasonable.

[23] Mr. Consiglio is emphatic that he did not know that he had to apply for benefits for Niki. He points out that, as a disabled man raising four children, he would have every reason to do so, had he known that he was entitled to additional benefits for Niki. As he put it, every bit of money would have helped.

[24] I accept that Mr. Consiglio honestly did not realize when Niki was born that he had to apply for DCCB benefits for her. Unfortunately, as was noted earlier, his honest but mistaken understanding of the benefits process does not entitle him to relief under subsection 66(4) of the Plan.

[25] The case law has established that there is no legal obligation on the part of Employment and Social Development Canada to inform individuals of their entitlement to a benefit. Rather, the Plan puts the onus on applicants to apply for benefits. There is, moreover, no obligation on Employment and Social Development Canada to remind benefit recipients of their obligation to inform the Department of any changes to their status, such as the birth of a child: see, for example, *Lee v. Canada (Attorney General)*, 2011 FC 689 at paras. 72-73, [2011] F.C.J. No. 889.

IV. Conclusion

[26] As was noted earlier, I am very sympathetic to Mr. Consiglio's situation. It could not have been easy raising four children on a disability pension, and the lives of Mr. Consiglio and his family could, no doubt, have been made a little easier, had Mr. Consiglio applied for DCCB benefits for Niki in a timely fashion. I also accept that Mr. Consiglio honestly did not understand that he was required to apply for DCCB benefits for Niki following her birth in 1993.

[27] That said, Mr. Consiglio has not established that he was provided with erroneous advice by anyone at Employment and Social Development Canada or Service Canada. Consequently, he has not demonstrated that the decision of the Minister's delegate refusing him relief under subsection 66(4) of the *Canada Pension Plan* was unreasonable.

[28] Consequently, Mr. Consiglio's application for judicial review is dismissed. The respondent does not seek her costs, and none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-293-16

STYLE OF CAUSE: SALVATORE CONSIGLIO v ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 4, 2016

JUDGMENT AND REASONS: MACTAVISH J.

DATED: OCTOBER 7, 2016

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