



Tribunal de la sécurité
sociale du Canada

Social Security
Tribunal of Canada

[TRANSLATION]

Citation: *R. D. v. Minister of Employment and Social Development*, 2017 SSTGDIS 202

Tribunal File Number: GP-16-3504

BETWEEN:

R. D.

Appellant

and

**Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Antoinette Cardillo

DATE OF DECISION: December 19, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent approved the Appellant's Old Age Security (OAS) pension application in July 2001. On November 19, 2015, the Respondent informed the Appellant that his OAS pension benefits would be suspended as of December 2015 because he was incarcerated. The Appellant's representative requested a reconsideration of the decision, but the Respondent maintained its initial decision. The Appellant's representative appealed the reconsideration decision to the Social Security Tribunal.

[2] The appeal was heard by written questions and answers for the following reasons:

- a) There were gaps in the information in the file or clarification was needed; and
- b) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[3] The *Old Age Security Act* (OAS Act) was amended so that, as of January 1, 2011, the OAS pension, Guaranteed Income Supplement, and Allowance are no longer payable during periods of incarceration. Subsection 5(3) of the OAS Act stipulates the following:

Incarcerated persons

(3) No pension may be paid in respect of a period of incarceration—exclusive of the first month of that period—to a person who is subject to a sentence of imprisonment

(a) that is to be served in a penitentiary by virtue of any Act of Parliament; or

(b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Employment and Social Development Act*.

[4] The Tribunal finds that the Appellant is eligible to receive OAS benefits from December 2015 to May 2016 because he was not incarcerated within the meaning of subsection 5(3) of the OAS Act.

EVIDENCE

[5] The Respondent received the Appellant's OAS pension application on July 6, 2001, and approved it.

[6] Based on the evidence on file, the Correctional Service of Canada (CSC) informed the Respondent on November 18, 2015, that the Appellant was incarcerated.

[7] On November 19, 2015, the Respondent sent the Appellant a letter informing him that his OAS pension benefits would be suspended as of December 2015 because he was incarcerated. The letter stated that Old Age Security benefits cannot be paid to individuals who are incarcerated due to a sentence of imprisonment of two years or more in a federal penitentiary or for more than 90 days in a provincial correctional facility where an information sharing agreement has been negotiated.

[8] According to the letter from the Appellant's representative dated March 29, 2016, the Appellant was preventively detained in a federal institution and awaiting trial. He had not been found guilty, and he had not been sentenced. OAS benefits should therefore not have been suspended.

[9] The evidence on file indicates the following:

- The Appellant was subject to a long-term supervision order (LTSO) in 2012, after the expiry of a sentence he served for six years and seven months.
- On October 31, 2015, the Appellant did not comply with the LTSO.
- On November 10, 2015, an arrest warrant suspending the LTSO was issued against the Appellant for breaching section 753.3 of the *Criminal Code*.

- The arrest and suspension warrant was executed on November 12, 2015.
- The Appellant was preventively detained in a federal penitentiary for 90 days starting November 12, 2015, while awaiting trial before the Court of Quebec (Court), and the status of the LTSO was suspended.
- Two charges were brought against the Appellant, namely possession of child pornography and breach of an LTSO.
- On January 28, 2016, the Parole Board of Canada (PBC) recommended that an information be laid charging the Appellant with an offence under section 753.3 of the *Criminal Code* (copy of the PBC decision).
- On February 8, 2016, the maximum detention period of 90 days expired under section 135.1 of the *Corrections and Conditional Release Act*, and the Appellant was then detained under a remand warrant.
- On May 31, 2016, the Appellant was acquitted by the Court of the charge of possession of child pornography and received a one-day sentence from May 30, 2016, to May 31, 2016, for breaching the LTSO (electronic transcript from the Court of Quebec dated May 31, 2016, and warrant indicating three months of detention and one day of incarceration).
- He was released on May 31, 2016.

[10] In an email dated May 31, 2017, the CSC sentence officer handling the Appellant's case explained that a LTSO suspension warrant was issued and executed against the Appellant in November 2015. She stated that the Appellant was re-admitted (following release in 2010) to a federal penitentiary with an LTSO suspension. Charges were brought against him, and a remand warrant was issued on February 8, 2016. The Appellant's status was changed as of that date to federal detention supervision. The suspension warrant thus expired, and the detention in a federal institution was the result of a remand warrant. This detention was federal and not provincial,

because of the Appellant's LTSO status. It is the only known exception where a defendant serves their preventive detention in a federal institution.

[11] Based on the evidence submitted by the Appellant's representative on June 7, 2017, an LTSO order is a non-custodial sentence that courts can impose on an offender to extend the period during which CSC can monitor and support an offender in the community. The LTSO, which has a maximum duration of 10 years, goes into effect when the offender finishes serving their sentence. She went on to clarify that CSC can issue a suspension and arrest warrant, which allows it to detain an offender for a maximum of 90 days. The Appellant's representative stated that this is not a sentence and that, during this period, the PBC can recommend bringing charges against the offender for breach of a LTSO condition. The laying of criminal charges for breaching an LTSO condition is the only mechanism CSC can use to re-incarcerate an offender. The offender can be released at any moment because they are not serving a fixed period of detention. The representative stated that PBC recommended laying an information against the Appellant on January 28, 2016, charging him with the offence in section 753.3 of the *Criminal Code*. The Appellant's representative stated that on May 31, 2016, the Court acquitted the Appellant of the charge of possession of child pornography but imposed a one-day sentence for breaching the LTSO.

[12] Concerning the one-day sentence, the Appellant's representative explains that, following its suspension, the passing of the Appellant's LTSO time was uninterrupted. Thus, the period between November 12, 2015, and February 8, 2016, was counted for his LTSO period. Since this period could not be counted twice, the Court could not consider it when sentencing the Appellant. For that reason, the first 90 days of preventive detention cannot be counted for the filing of a case under section 753.3 of the *Criminal Code*. Based on the legislation, an inmate cannot be granted a double deduction. However, the Appellant's 180 days of preventive detention were deducted from the overall sentence. On May 31, 2016, he was therefore sentenced to serve a sentence of one day. The Appellant's representative specified that the Appellant was therefore not detained or sentenced between November 12, 2015, and May 31, 2016, because his federal sentence ended in 2012. His LTSO was suspended, and this preventive detention was federal, rather than provincial, because of the Appellant's LTSO status. The

wording of the legislation that provides for the termination of inmates' OAS benefits concerns people who are convicted or are detained in federal penitentiaries for sentences of imprisonment of two years or more.

SUBMISSIONS

[13] The Appellant's representative submits that he qualifies for an OAS pension because the Appellant was not serving a sentence of imprisonment according to subsection 5(3) of the OAS Act. He was preventively detained in a federal institution.

[14] The Respondent argued, in writing, that the Appellant does not qualify for an OAS pension because the evidence and legislation are clear. According to subsection 5(3) of the OAS Act, the OAS pension had to be suspended because the Appellant was incarcerated.

ANALYSIS

[15] The issue before the Tribunal in this appeal is whether the Appellant qualifies for an OAS pension from December 2015 to May 2016, when he was preventively detained in a federal penitentiary.

[16] The evidence on record shows that the Appellant filed an application for an OAS pension, which was stamped on July 6, 2001. His application was approved.

[17] The Appellant's OAS benefits were suspended in December 2015 because CSC informed the Respondent on November 18, 2015, that the Appellant was incarcerated.

[18] After considering the evidence, the Tribunal accepts the June 7, 2017, submissions of the Appellant's representative stating that the Appellant was detained preventively in an federal institution; he was awaiting trial; he had not been found guilty; and no sentence had been imposed, except for a one-day sentence, which he served while he was detained, as stated by the electronic Court transcript dated May 31, 2016, and the warrant indicating three months of detention and one day of incarceration.

[19] The Tribunal relied on the email dated May 31, 2017, from the CSC sentence officer handling the Appellant's case, which explains that an LTSO-suspension warrant was issued and executed against the Appellant in November 2015. The Appellant had been re-admitted (following a release in 2010) in a federal penitentiary with a suspended LTSO status. Charges were brought against him, and a remand warrant was issued on February 8, 2016. The Appellant's status was changed as of that date to federal detention supervision. The suspension warrant therefore expired, and the detention in a federal establishment was a result of the remand warrant. This detention was federal instead of provincial because of the Appellant's LTSO status.

[20] According to Subsection 5(3) of the OAS Act, no pension may be paid in respect of a period of incarceration—exclusive of the first month of that period—to a person who is subject to a sentence of imprisonment:

- a) that is to be served in a penitentiary by virtue of any Act of Parliament; or
- b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Human Resources and Skills Development Act*.

[21] The OAS Act therefore stipulates that the payment of benefits be interrupted for people who are serving (1) a sentence of imprisonment in a federal penitentiary; and (2) a sentence of imprisonment of more than 90 days in a provincial prison.

[22] The first condition to meet for subsection 5(3) of the OAS Act to apply is that a person must serve a sentence of imprisonment in a federal penitentiary. The evidence supports the Appellant was detained in a federal penitentiary from November 12, 2015, to May 31, 2016, but preventively with suspended-LTSO status for the first 90 days and then under a remand warrant, while awaiting his trial. Two charges were laid against him. He was acquitted on May 31, 2016, of the first charge (possession of child pornography) and was sentenced to one day from May 30 to 31, 2016, for the second charge (breach of the LTSO). It follows that the Appellant was not serving a sentence of imprisonment in a federal penitentiary between November 12, 2015, and

May 31, 2016; he was just in preventive detention. He was sentenced to serve one day only. From the evidence submitted by the Appellant's representative in her June 7, 2017, letter and the Respondent's November 19, 2015, letter, the legislation provides for the interruption of OAS benefits to people who are convicted or detained in federal institutions for sentences of imprisonment of two years or more. The Appellant was not sentenced to serve a sentence of imprisonment of two years or more during his detention period. Moreover, he was detained preventively.

[23] The second condition to meet for subsection 5(3) of the OAS Act to apply is that a person must serve a sentence of imprisonment of more than 90 days in a provincial prison. The evidence supports that the Appellant did not serve a sentence of more than 90 days in a provincial prison. As stated by the Appellant's representative on June 7, 2017, and by the CSC sentence officer on May 31, 2017, the Appellant was detained preventively while awaiting his trial, and this detention was federal, rather than provincial, because of the Appellant's LTSO status.

[24] The Respondent submits that the Appellant is not entitled to an OAS pension since the evidence and the legislation are clear: according to subsection 5(3) of the OAS Act, the OAS pension had to be suspended because the Appellant was incarcerated.

[25] However, being incarcerated does not mean subsection 5(3) automatically applies. According to the legislation, a prison sentence must be served of more than two years in a federal institution or more than 90 days in a provincial prison, which is something the Appellant does not appear to have done. On May 31, 2016, the Court acquitted the Appellant of possession of child pornography charges [*sic*] and sentenced him only to a one-day sentence from May 30, 2016, to May 31, 2016, for breaching the LTSO. According to the Tribunal, the evidence does not allow the determination that subsection 5(3) of the OAS Act applies to these proceedings because the Appellant was not incarcerated but preventively detained, and he served a one-day sentence only.

[26] Concerning the sentence the Appellant served during his detention period, section 135.1 of the *Corrections and Conditional Release Act* gives the following explanations for the 90-day detention as stated by the Appellant's representative:

(1) A member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of a long-term supervision order or a condition referred to in section 134.1 or when the member or person is satisfied that it is necessary and reasonable to suspend the long-term supervision in order to prevent a breach of any condition of it or to protect society, may, by warrant,

- (a) suspend the long-term supervision;
- (b) authorize the apprehension of the offender; and
- (c) authorize the commitment of the offender to a community-based residential facility or a mental health facility or, where the member or person is satisfied that commitment to custody is necessary, to custody until the suspension is cancelled, new conditions for the long-term supervision have been established or the offender is charged with an offence under section 753.3 of the *Criminal Code*.

(2) The period of the commitment of the offender mentioned in paragraph (1)(c) must not exceed ninety days.

(3) Where an offender is committed under paragraph (1)(c), the period of the commitment is included in the calculation of the period of long-term supervision ordered under a long-term supervision order, but if there is a period between the issuance of the warrant and the commitment to custody, that period is not included in that calculation.

[27] Subsection 753.3(1) of the *Criminal Code* sets out that “An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years”

[28] Consequently, the Tribunal accepts the evidence submitted by the Appellant’s representative and the CSC sentence officer that the Appellant was not incarcerated but detained preventively and that the Court sentenced the Appellant to only a one-day sentence, which he served while he was detained, as indicated by the electronic Court transcript dated May 31, 2016, and the warrant indicating three months of detention and one day of incarceration.

[29] The Tribunal therefore finds that the Appellant is entitled to receive OAS benefits from December 2015 to May 2016 because he was not incarcerated within the meaning of subsection 5(3) of the OAS Act.

CONCLUSION

[30] The appeal is allowed.

Antoinette Cardillo
Member, General Division – Income Security