



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. D. R.*, 2018 SST 954

Tribunal File Number: AD-18-330

BETWEEN:

Minister of Employment and Social Development

Appellant

and

D. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: September 27, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] In April 2009, the Respondent, D. R. (Claimant), applied to the Appellant, the Minister of Employment and Social Development (Minister), for a benefit known as the Allowance for the Survivor (Allowance). The Minister approved her application, and the Allowance was paid retroactively to May 2008. In 2013, upon reaching 65 years of age, the Claimant applied for an Old Age Security (OAS) pension and for the Guaranteed Income Supplement. In 2015, however, the Minister not only denied the Claimant's most recent applications, but determined that she had not been eligible for the Allowance either, and demanded that she repay the nearly \$35,000 in benefits that she had already received.

[3] The Claimant appealed the Minister's decision to the Tribunal's General Division. It concluded that the Claimant's eligibility for the Allowance ended in January 2011, but that she was eligible for a full OAS pension starting in February 2013.

[4] The Minister then applied for leave to appeal the General Division decision, something I granted on the basis that the General Division decision might have contained errors of law. The Minister now agrees that the Claimant was entitled to the Allowance until the end of January 2013, but argues that she is only entitled to a partial OAS pension rather than to a full pension. For the reasons set out below, I have concluded that the General Division decision does contain errors of law and that the appeal should be allowed.

PRELIMINARY MATTERS

[5] I concluded that an oral hearing was unnecessary in this case and that the appeal could be decided based on the documents and submissions on file. I chose this form of hearing because:

- a) the Minister was satisfied that the appeal could proceed in writing and, despite the invitation in my leave to appeal decision, the Claimant provided no submissions on this question or on the merits of the appeal more generally;¹
- b) the issues in dispute are not complex and are largely legal, rather than factual, in nature; and
- c) the *Social Security Tribunal Regulations* direct me to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] On September 21, 2018, the Claimant submitted a request, through her member of parliament's office, for this appeal to be expedited.² I decided not to deal with the Claimant's request, since my decision was nearly complete by the time that it was brought to my attention. Nevertheless, I would urge the Minister to implement this decision as quickly as possible.

ISSUES

[7] The Minister alleges that the General Division committed errors of law when it concluded that:

- a) the Claimant was entitled to a full OAS pension; and
- b) the Claimant's eligibility for the Allowance ended in January 2011.

¹ AD1-19 at para 24; AD2.

² AD4.

ANALYSIS

The Appeal Division's Legal Framework

[8] To succeed at the Appeal Division, the Minister must show that the General Division committed at least one of the three recognized errors (or grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

Generally speaking, these reviewable errors concern whether the General Division:

- a) breached a principle of natural justice or made an error relating to its jurisdiction;
- b) rendered a decision that contains an error of law; or
- c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] When considering the degree of scrutiny with which I should review the General Division decision, I have focused on the language set out in the DESD Act.³ As a result, any error of law in the General Division decision could justify my intervention.

Issue 1: Did the General Division commit an error of law when it concluded that the Claimant was entitled to a full OAS pension?

[10] Yes, the Claimant is not entitled to a full OAS pension.

[11] All of the pensions or benefits described above are ones provided for under the *Old Age Security Act* (OAS Act), and the number of years in which applicants have “resided” in Canada is among the eligibility criteria for each of them.

[12] In order to be entitled to a full OAS pension, applicants must meet the eligibility criteria set out in sections 3(1)(a), (b) or (c) of the OAS Act. In this case, the General Division concluded that the Claimant met the requirements of section 3(1)(b), which states the following:

³ *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

Payment of full pension

3 (1) Subject to this Act and the regulations, a full monthly pension may be paid to

[...]

(b) every person who

(i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,

(ii) has attained sixty-five years of age, and

(iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, **and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved;** [emphasis added]

[13] This case turns on section 3(1)(b)(iii) of the OAS Act, which, somewhat confusingly, wraps several eligibility requirements into one provision.

[14] In this particular case, the effective date of the Minister's approval was January 21, 2013, the Claimant's 65th birthday.⁴ As a result of section 3(1)(b)(iii), therefore, the General Division had to decide whether the Claimant had resided in Canada during the 10 years before this date. According to this provision, certain interruptions in the Claimant's Canadian residence during the first 9 years of this 10-year period could be made up for in other ways. However, the wording of section 3(1)(b)(iii) makes clear that, in order to be eligible for a full OAS pension, the Claimant had to reside in Canada continuously during the last year of this 10-year period.

[15] Assessing a person's residence in Canada can be a difficult task; it was especially difficult in this case because the Claimant lives in an area that straddles the Canada–United

⁴ *Old Age Security Regulations*, s 5(2). The General Division incorrectly found that February 4, 2013, (the date the Claimant applied for her OAS pension) was the effective date of the Minister's approval, though nothing turns on this point.

States border. At the hearing before the General Division, the Minister changed its earlier position and submitted that the Claimant had resided in Canada from October 17, 1985, to January 26, 2011. Nevertheless, the General Division conducted its own detailed analysis and concluded that the Claimant had resided in Canada from December 18, 1984, to January 26, 2011 (that is, for a period of over 26 years and 1 month).

[16] At the Appeal Division, the Minister is not challenging the General Division's conclusion about the Claimant's residence in Canada. Rather, it says that, based on the General Division's conclusion, the Claimant is not entitled to a full OAS pension because she does not meet all of the requirements set out in section 3(1)(b)(iii) of the OAS Act.

[17] I agree. Since the Claimant did not reside in Canada between January 26, 2011, and January 21, 2013, it cannot be said that she resided in Canada during the entire year before the Minister's approval of her application. As a result, the General Division erred in law when it concluded that the Claimant met the requirements set out in section 3(1)(b) of the OAS Act and was therefore entitled to a full OAS pension. To the contrary, the Claimant has not met those requirements and is not entitled to a full OAS pension.

Issue 2: Did the General Division commit an error of law when it concluded that the Claimant's eligibility for the Allowance ended in January 2011?

[18] Yes, the Claimant's eligibility for the Allowance ended in January 2013, not in January 2011.

[19] The General Division concluded that the Claimant's entitlement to the Allowance ended on January 26, 2011, when she stopped being a resident of Canada. It is not entirely clear on which legislative provision the General Division was relying when it reached that conclusion.

[20] In its application requesting leave to appeal, the Minister submitted that, based on section 21(9)(b) of the OAS Act, the Claimant's entitlement to the Allowance continued for six months after she stopped residing in Canada.

[21] Following my leave to appeal decision, however, the Minister changed its position and now acknowledges that section 21(9) of the OAS Act does not apply to this case because the

Claimant has not been absent from Canada for six consecutive months. Rather, the Minister now recognizes that the Claimant's Allowance continued to be payable until the end of the month in which she turned 65 (namely, the end of January 2013).⁵ I agree, and the General Division based its decision on an error of law when it concluded that the Claimant's entitlement to the Allowance ended in January 2011.

CONCLUSION

[22] There is no dispute in this case regarding the periods of residence in Canada that the Claimant has accumulated. Rather, the dispute concerns the legal impact of that finding on her Allowance and OAS pension. In the circumstances, therefore, and in keeping with the Minister's request, I find that this is an appropriate case for me to give the decision that the General Division should have given.⁶

[23] Although I have already concluded that the Claimant was not entitled to a full OAS pension, the Minister concedes that she is entitled to a partial pension at the rate of 26/40ths of a full pension.⁷ Based on the years of residence that the Claimant has accumulated in Canada, I agree with the Minister's submissions on this point. Payment of the Claimant's partial OAS pension starts in February 2013.⁸

[24] With respect to the Allowance, the Minister submits that it paid this benefit to the Claimant for the period from May 2008 until January 2013.⁹ While the Minister initially demanded that these monies be repaid, it now concedes, based on her years of residence in Canada, that the Claimant was entitled to this benefit. In addition, the Claimant's entitlement to the Allowance ended only on her 65th birthday. Again, I agree with the Minister's submissions on this point.

⁵ OAS Act, s 21(8); AD3.

⁶ DESD Act, s 59(1); AD1-18 at para 23.

⁷ OAS Act, ss 3(2) to (5).

⁸ OAS Act, s 8(1).

⁹ AD1-13 at para 5.

[25] The appeal is allowed. The General Division decision is set aside and replaced by the following:

- a) The Claimant is entitled to a partial OAS pension at the rate of 26/40ths of a full pension, payable from February 2013; and
- b) The Claimant's entitlement to the Allowance for the period from May 2008 until January 2013 is confirmed.

Jude Samson
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	D. R., self-represented Matthew Vens, Counsel for the Appellant