



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *JS v Minister of Employment and Social Development*, 2020 SST 732

Tribunal File Number: GP-18-2234

BETWEEN:

J. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: François Guérin

HEARD ON: January 17, 2020

DATE OF DECISION: February 21, 2020

REASONS AND DECISION

INTRODUCTION

[1] On March 21, 2002, the Appellant applied for an Old Age Security (OAS) pension¹ as well as the Guaranteed Income Supplement (GIS).² The Respondent approved the entire application on January 13, 2003.³ On December 15, 2009, the Respondent initiated an administrative investigation into the Appellant's file. Following the investigation, the Respondent determined that the Appellant was not entitled to the GIS for the period of June 2003 to September 2010 because the Appellant had not been in Canada since November 2002 and was no longer a resident within the meaning of the law. In a decision letter⁴ dated November 2, 2010, the Respondent requested an overpayment of \$84,929.18 from the Appellant for the period during which he was not entitled to receive the GIS.

[2] On March 26, 2018, the Appellant filed a late request for reconsideration⁵ of the November 2, 2010, decision with the Respondent.

[3] The Respondent denied the late request for reconsideration because it determined that the Appellant did not meet the criteria to grant him an extension of time. The Respondent provided the Appellant with the reasons for its refusal to proceed with a reconsideration of its September 20, 2018, decision.⁶

[4] The Appellant appealed the Respondent's decision not to allow a longer period to request a reconsideration of the Respondent's decision before the Social Security Tribunal (Tribunal) on September 28, 2018.⁷

¹ GD2-12 to 19.

² GD2-13, question 11.

³ GD2-410 to 411.

⁴ GD2-195 to 196.

⁵ GD2-20 to 112.

⁶ GD2-7 to 11.

⁷ GD1.

PRELIMINARY MATTER

[5] The Appellant did not attend the hearing because he was in Haiti and was represented by his son, as indicated on his notice of appeal.⁸ Therefore, at the hearing, his son made submissions on behalf of his father.⁹

ISSUE

[6] Did the Respondent exercise its discretion judicially when it refused to grant the Appellant an extension of time to make a request for reconsideration?

ANALYSIS

[7] Section 27.1 of the *Old Age Security Act* (OAS Act) states that a person who is dissatisfied with a decision made under this Act that no benefit may be paid to the person may, within 90 days after the day on which the person is notified in writing of the decision, make a request to the Minister for reconsideration of that decision. The Minister may allow a longer period if the request for reconsideration is made following the 90 days after the day on which the person is notified in writing of the decision.

[8] Section 29.1(1) of the *Old Age Security Regulations* (OAS Regulations) states that the Minister may allow a longer period to make a request for reconsideration of a decision if the Minister is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration.

[9] Section 29.1(2) of the Regulations also states that, if the request for reconsideration is made after the 365-day period after the refusal decision, the Minister must also be satisfied that the request for reconsideration has a reasonable chance of success and that no prejudice would be caused to any party.

[10] Therefore, the Respondent considers that the Appellant does not meet the conditions for allowing a longer period to make a request for reconsideration of a decision because the

⁸ GD1-4, question 7.

⁹ GD1-4, questions 7, 8, and 9, and GD2-148.

Appellant has met only one of the four requirements mentioned above allowing the Minister to agree to review his file. The Respondent found that the only requirement that the Appellant meets is the fourth requirements, which is that no prejudice would be caused to the Respondent by allowing a longer period to make the request.¹⁰

[11] At the hearing, the Appellant's representative said that he believed that the Tribunal should consider September 28, 2017, as the date on which the Appellant showed his intention to appeal the Respondent's decision because it was on that date that the Appellant had made a written request¹¹ to obtain his OAS file. The Appellant also considers that, since September 28, 2017, the Appellant has still shown a continuing intention to request a reconsideration of the Appellant's [*sic*] decision.

[12] The Respondent's decision to grant or refuse a late reconsideration request is considered a discretionary decision. Case law sets out that the Respondent's discretion must be exercised judicially and judiciously.¹² To show that the Respondent did not exercise its discretion "judicially," it must be established that the Respondent acted in bad faith, acted for an improper purpose or notice, took into account an irrelevant factor, ignored a relevant factor, or acted in a discriminatory manner.¹³

[13] Therefore, the Tribunal's role is not to determine whether the Respondent was correct in its decision to not proceed with a late reconsideration of the file, but whether the Respondent exercised its decision judicially or judiciously.

Reasonable Explanation for the Delay

[14] In his March 13, 2018, request for reconsideration,¹⁴ the Appellant submitted that his delay in filing his request for reconsideration was due in part to his advanced age and in part to his level of education and literacy, which pose language barriers that make him vulnerable, or

¹⁰ GD3-9 to 11.

¹¹ GD2-182.

¹² *Canada (Attorney General) v Uppal*, 2008 FCA 388.

¹³ *Canada (Attorney General) v Purcell*, [1996] 1 FC 644.

¹⁴ GD1-10 to 12.

even unable and unfit, to respond to certain requests for information and to understand the decisions made regarding his OAS and GIS file.

[15] At the hearing, the Appellant's representative indicated that, because of his father's health and general state, he decided to look after him on a more personal level and have him stay at his house after he returned to Canada in April 2017. It is at that point that he looked into his father's financial situation and contacted Service Canada for the first time on May 25, 2017.¹⁵ The representative talked with the Service Canada agent after his father gave him verbal permission to deal with him. The Appellant requested a copy of his file¹⁶ on September 28, 2017. The Appellant then gave consent authorizing Service Canada to contact his son—the new representative for his father on June 27, 2018.¹⁷

[16] Beforehand, on May 7, 2010, the Appellant had given his consent allowing Service Canada to communicate with another one of his sons by the name of D.¹⁸

[17] At the hearing, the representative stated that he had helped his father complete his initial OAS application in 2002¹⁹ and had not looked after his father's affairs until his father moved into his house in April 2017. The Appellant's current representative also stated that he is not accountable for the action or inaction of the representative on file who came before him, which was before he took steps to understand what happened with his father's OAS pension and GIS benefit.

[18] The representative stated that from 2010 to September 2012 (the month when the Appellant went to live in Haiti) the Appellant lived in a triplex belonging to 2 of his 13 children, his son B. and his daughter M. Each of his children lived in a different apartment within this building while having a different street number. In November 2010, the representative stated that only two of the Appellant's children lived in the building in question—J., who had mental health issues, and the Appellant's youngest daughter, who was a minor at the time.

¹⁵ GD3-17.

¹⁶ GD 2-182.

¹⁷ GD2-148.

¹⁸ GD 2-406.

¹⁹ GD2-12 to 19.

[19] The representative stated that the Appellant was unaware of and did not learn about the decision until after he returned to Canada in April 2017, when the representative learned about the file and was able to explain the nature of it to his father. Furthermore, in his request for reconsideration,²⁰ the Appellant indicated himself that he returned home in April 2017.

[20] The Respondent maintains that the Appellant was not receiving any more pension or benefit payments beginning November 2010 because 100% of the payments were being withheld and allocated to the overpayment in his file at that time. If the Appellant or his representative at that time (another one of his sons) wished to inquire about that stop payment, either one of them could have done that. The Respondent argues that the Appellant inquired about his file only after he returned to Canada in 2017.²¹ This was confirmed at the hearing by the Appellant's representative when he started looking after his father's file.

[21] I find it difficult to imagine that none of the Appellant's 13 children were helping their father at that time, especially since the current representative stated that the Appellant had health problems and that his level of literacy was very low because of the small amount of education he had received.

[22] I also find it difficult to imagine that, when the Respondent stopped making payments into the Appellant's bank account starting in 2010, the Appellant did not speak to one of his children about his difficult financial situation or that none of his 13 children was able to notice it. I appreciate that the representative stated that his father is a proud person and that he did not want to inconvenience his children with his problems, but the Appellant still had minimal needs to meet, such as meals and a place to live, both in Canada, where he was between the date of the Respondent's letter in November 2010 until he left in September 2012, as well as in Haiti. The representative also stated that the Appellant is someone without financial means and that he was not financially independent, which makes it even less likely that he had not asked his family for help, whether in Canada or in Haiti.

²⁰ GD1-10, third paragraph.

²¹ GD1-8 to 9.

[23] Furthermore, given that the representative stated that his father had literacy problems, it is also difficult to understand why the Appellant did not ask one of his children or another person for help to explain to him the nature of the information in the mail he was receiving. Once again, the Respondent's decision letter was sent in November 2010, and the representative stated that his father went to live in Haiti in September 2012.

[24] I agree with the representative that, from May 2017 onward, the representative has looked after his father's affairs, but this cannot reasonably explain the reason that would support a request for an extension of time eight years later, after the Respondent's decision was made in November 2010.

Continuing Intention to Pursue the Appeal

[25] The Respondent believes that the Appellant has not shown a continuing intention to pursue the appeal because he did not inquire about his file between the date of the November 2, 2010, notice of decision and the first call to Service Canada's client services on May 25, 2017.²²

[26] At the hearing, the representative stated that he had started looking after his father's affairs when the Appellant moved into his house in April 2017 and that he is not accountable for the action or inaction of the representative on file who came before him, which was before he took steps to understand what happened with his father's OAS pension and GIS benefit. He also stated that he was unaware of what happened between the time he had helped his father complete the OAS application and the time he started helping his father with his OAS file in May 2017. As a result, if he does not know what happened between 2010 and 2017, I can only find that the representative did not provide evidence to the Tribunal about the Appellant's continuing intention during those years to make a request for reconsideration.

[27] I agree with the representative that, from May 2017 onward, the representative has looked after his father's affairs, but this cannot reasonably explain the reason that would support a late request for reconsideration. The representative cannot explain why nothing was done during all the years his brother represented their father. The fact that he has been looking after

²² GD1-8 to 9 and GD3-17.

his father's affairs since 2017 still does not explain the eight-year delay between the Respondent's decision letter in 2010 and his 2018 request for reconsideration.

Arguable Case—or the Request for Reconsideration has a Reasonable Chance of Success

[28] The Respondent maintains that the Appellant does not have a chance of success in his request for reconsideration because the Appellant contacted the Respondent only on May 25, 2017, even though 100% of his benefits were being withheld starting November 2010.²³ The Respondent also notes that the benefits claimed from the Appellant are for the period of June 2003 to September 2010—the month of the last payment. The Respondent maintains that the Appellant has not provided new evidence that could establish his residence and other reasons to support his request for reconsideration, and, therefore, the Respondent considers that challenging the claim does not have a reasonable chance of success.²⁴

[29] The Appellant believes that the information that was used to establish the overpayment is riddled with errors.²⁵ Those errors are explained in the Appellant's request for reconsideration.²⁶ The Appellant also believes that he has been the victim of abusive generalization and inferences that are not based on any facts or reasonable or sufficient evidence.

[30] The Appellant has stated that there are errors in the table of entries and exits²⁷ and in their calculation; however, the burden of proof regarding the Appellant's residence rests on his shoulders, and it is up to him to show that he was indeed a resident of Canada within the meaning of the Act, namely that he had made his home and ordinarily lived in a region of Canada. However, I note that the Appellant has not submitted additional documentary evidence showing that the Respondent's analysis was erroneous at the time of the initial decision.

²³ GD2-9 and 10.

²⁴ GD3-10.

²⁵ GD1-3.

²⁶ GD1-10 to 12 and GD2-20 to 22.

²⁷ GD1-24 to 26.

Prejudice to the Other Party

[31] The Respondent does not appear to be prejudiced given the short period of time that has passed since the reconsideration decision. Moreover, the Respondent confirms that it had the necessary documents when making the decision.²⁸

CONCLUSION

[32] In its analysis, the Tribunal found no evidence to suggest that the Respondent acted in bad faith or with an improper purpose or motive. The Tribunal also finds that the Respondent did not take any irrelevant factor into account. There is no dispute that the Respondent's decision letter was sent on November 2, 2010. The representative confirmed himself that it was only once his father came to live with him in 2017 that he began looking after his father's affairs personally and that he began the process to request a reconsideration of his father's file. The Appellant had another representative on file beginning May 7, 2010, who was another of his sons. The Appellant's current representative stated himself during the hearing that he did not know what happened on the file between 2010 and 2017, so he was unable to show that there had been a continuing intention to request a reconsideration of the file since 2010.

[33] The Tribunal also finds that the Respondent did not ignore the relevant factors, even if the Appellant submitted in his request for reconsideration that the Respondent had made errors in its analysis because the Appellant submitted no documentary evidence that refuted the Respondent's analysis.

[34] In light of the evidence on file and the submissions heard from the Appellant's representative, the Tribunal finds that the Respondent exercised its discretion judicially or judiciously. The Appellant is not granted an extension of time to make a request for reconsideration.

[35] The appeal is dismissed.

François Guérin
Member, General Division – Income Security

²⁸ GD2-10 and GD3-11.