Citation: *P. M. D. v. Minister of Employment and Social Development,* 2014 SSTAD 132

Appeal #: AD-13-29

BETWEEN:

P. M. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

DATE OF DECISION: June 2, 2014

DECISION

[1] The application for leave to appeal is refused.

INTRODUCTION

[2] By a decision issued May 29, 2013 a Review Tribunal determined that the Applicant was not entitled to receive Old Age Security ("OAS") benefits earlier than the effective date of November 2010. On August 7, 2013, the Social Security Tribunal received the Applicant's Application for Leave to Appeal the said decision, (the "Application").

GROUNDS OF THE APPEAL

[3] The Applicant submits that she should receive OAS benefits from the month following her 65th birthday, namely, September 2002. She submits that the delays in processing her earlier applications for OAS benefits were caused by the Respondent who among other things, insisted on the Applicant providing proof of residency as opposed to discovering that for itself; insisted on proof of residency after the Applicant had become a Canadian citizen; and refused to approve her for OAS even as she was approved for a pension under the Canada Pension Plan.

[4] The Applicant also complains that the Respondent's letter of August 30, 2001 that stated that the Applicant may be eligible for an OAS benefit is proof that she was eligible for such payment as of that date. She further complains that the Respondent did not offer her an opportunity for reconsideration after her first application for an OAS benefit was denied.

THE LAW

[5] Subsection 56(1) of the *Department of Employment and Social Development* (DESD) *Act* provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." The subsection makes it clear that an appeal to the Appeal Division is not automatic: an Applicant must seek and obtain leave to bring his or her appeal. Subsection 58(3) clarifies that "the Appeal Division must either grant or refuse leave to appeal". Subsection 58(2) is the statutory provision governing the grant or refusal of an Application for

Leave to Appeal. The test for granting leave is whether the Applicant requesting leave has raised an arguable case.[1] In *Carroll*[2] O'Reilly J. stated that an applicant "will raise an arguable case if she …; raises an issue not considered by the Review Tribunal; or can point to an error in the Review Tribunal's decision."

ISSUE

[6] The issue before the Tribunal on this Application is whether the appeal has a reasonable chance of success.

ANALYSIS

[7] Part I of the *Old Age Security Act,* ("OASA") governs when and to whom a pension is payable. Section 3 sets out the circumstances when a full or partial pension is payable; section 4 mandates legal residence in Canada; while section 8 addresses when payment of a pension will commence.

[8] It is not in dispute that the Applicant made a total of five applications for an OAS pension. The first was made on October 30, 2001. She was successful on her fifth application, which was made on October 6, 2011. What is being disputed is the date she should begin to receive the pension. As stated above, the Applicant takes the position that payment ought to have commenced in September 2002; while the Respondent takes the position that November 2010, is the appropriate date of commencement. November 2010 represents the effective date, calculated retroactively according to OASA subsection 8 (1).

[9] The Applicant in essence states she ought not to be penalized because her first application for the OAS pension was not approved. She submits that the delays in processing her application are all due to the actions or inactions of the Respondent. In particular, she submits that the Respondent acted unreasonably in relation to her residency, by asking her to provide

[1] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD.
[2] *Canada (Attorney General) v. Carroll,* 2011 FC 1092.

proof of residency in Canada. Residency in Canada is a plank of the OASA.[3] Residency requirements are an integral part of section 3. Whether the applicant qualifies for a full pension or a partial pension depends on residence, namely, how many years the applicant resided in Canada after turning eighteen. The minimum number of years is ten per s. 3 (1) (b) (iii); while per s. 3(1) (c) (iii) the maximum number of years is forty.

[10] That the residence required has to be legal residence is clearly set out in section 4 of the OASA.

> 4. *Residence in Canada must be or have been legal* – (1) a person who was not a pensioner on July 1, 1977 is eligible for a pension under this Part only if,
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> a) on the day preceding the day on which that person's application is approved that person is a Canadian citizen or, if not, is legally resident in Canada; or
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> b) on the day preceding the day on which that person ceased to reside in Canada that person was a Canadian citizen or, if not, was legally resident in Canada, or, if not, was legally resident in Canada.

[11] Furthermore, the case law is clear that Canadian citizenship is irrelevant in the calculation of residency.[4]

[12] It is clear from the legislative provisions that payment of the OAS pension is not automatic. One must apply for the pension. It is incumbent upon an applicant to complete the application as required. The Applicant's first four applications were denied because the Respondent found them to be incomplete. This fact is expressly agreed by Amit Khanna in his letter of October 4, 2011. Thus, while there may have been correspondence back and forth and some duplication, the Application cannot be considered to have been made prior to

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[3] *Canada (Minister of Human Resources Development) v. Stiel*, 2000 FC 466. The OAS regime is altruistic in purpose. Unlike the CPP, OAS benefits are universal and non- contributory, based exclusively on residence in Canada. This type of legislation fulfills a broad minded social goal. It should therefore be construed liberally, and persons not be lightly disentitled to OAS benefits. However, it cannot be ignored that the OASA provides benefits first and foremost to residents of Canada…

[4] C-61948 v. MHRD (September 11, 2003) (RT). Canadian citizenship is irrelevant as an appropriate criterion to either qualify for benefits or quantify a partial pension.

October 6, 2011. The Tribunal is not satisfied that the Applicant's submissions in this regard demonstrate that the appeal has a reasonable chance of success.

[13] The crux of the Applicant's complaint is that the Review Tribunal is in error with respect to the start date of her pension. Paragraph 8 governs commencement of OAS pension payments. It provides as follows:

> 8. *Commencement of pension* – (1) Payment of pension to any person shall commence in the first month after the application therefor has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulation.
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> 2*) Exception* – Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of
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> (a)) a day one year before the day on which the application was received, and (S.C. 1995, c. 33, s 3(1).)
>
> (b) the day on which the applicant attained the age of sixty-five years, as may be prescribed by regulation.

[14] The Respondent applied the exception in subsection 8(2) to approve payment as of November 2010, which is the later of the day one year before the day on which it received the Applicant's application and her sixty-fifth birthdate.

[15] In light of the clear legislative provisions governing payment of an OAS pension; residency; and commencement of payment of the pension; and also in light of the fact that the application was not properly made until October 6, 2011, the Tribunal finds that the Applicant has not raised an arguable case in that she has not raised an issue not considered by the Review Tribunal nor has she pointed to an error in the Tribunal's decision. The case law is

clear, a Review Tribunal being a creature of statute, cannot grant retroactive benefits in excess of the statutory limit. (*Canada (Minister of Human Resources Development) v. Esler*, 2004 FC 1567). It must apply the legislation that is in force at the date of the application.

CONCLUSION

[16] Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division