

Citation: *Minister of Employment and Social Development v. M. A.*, 2015 SSTAD 1187

Date: October 2, 2015

File number: AD-15-379

APPEAL DIVISION

Between:

Minister of Employment and Social Development

Applicant

and

M. A.

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on October 2, 2015

DECISIONS

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is granted. As well, the appeal is allowed.

INTRODUCTION

[2] On March 26, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision in respect of the Respondent's appeal of a reconsideration decision denying him an Old Age Security, (OAS), pension. The General Division held that the Respondent was entitled to a pension at the rate of 10/40ths effective July 2010. The Applicant seeks leave to appeal the decision, (the Application).

GROUND OF THE APPLICATION

[3] The Applicant submitted that the General Division committed an error of law with respect to its calculation of the start date for the payment of the OAS pension to the Respondent. The Applicant submits that when paragraph 5(2)(c) of the *Old Age Security Regulations* is properly applied the correct start date is June 2010.

[4] The Applicant also submitted that the Appeal Division should grant the Application and, pursuant to s. 59 of the *Department of Employment and Social Development, (DESD), Act* give the decision that the General Division ought to have given, namely that the payment of the OAS pension commences June 2010.

ISSUES

[5] The Appeal Division of the Tribunal must decide,

1. whether the appeal has a reasonable chance of success;
2. should the Appeal Division grant the Application, it must then decide the appeal. Further, the Appeal Division must decide whether this is an appropriate case in which to exercise its power under s. 59 of the DESD Act to give the decision that the General Division should have given.

THE LAW

[6] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.¹ To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success². In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[7] The legislation provides for only three grounds of appeal. These grounds are set out in section 58 of the DESD Act and are,

- (1) a breach of natural justice;
- (2) that the General Division erred in law; and
- (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.³

[8] Preliminary to a decision to grant the Application the Appeal Division must first find that, were the matter to proceed to a hearing,

- (a) at least one of the grounds of the Application relate to a ground of appeal; and
- (b) there is a reasonable chance that the appeal would succeed on this ground.

[9] For the reasons set out below the Appeal Division is satisfied that if the Application is granted this appeal would have a reasonable chance of success.

¹ Sections 56 to 59 of the DESD Act. Subsections 56(1) and 58(3) govern the granting of leave to appeal, providing that “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal.”

² The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

³ **58(1) Grounds of Appeal –**

- a. The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or The General Division 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.

ANALYSIS

[10] At the General Division hearing, the issue under appeal was whether the Respondent had established sufficient residence in Canada to qualify for an OAS pension. The Respondent made his application for the OAS pension on June 10, 2010. However, the Applicant had taken the position that during the period May 28, 2000 to May 4, 2011 the Respondent had been residing mainly in his country of origin and thus did not qualify for an OAS pension. However, the General Division concluded that the Respondent met the residency requirements for the disputed period.

[11] While not disputing the General Division finding, the Applicant states that the General Division misapplied the applicable law; specifically, subsection 5(2)(c) of the *OAS Regulations*.⁴ The Applicant's arguments are contained in the following paragraphs of its submissions:

6. Since the SST-GD determined that the Respondent began residing in Canada on May 28, 2000, this means that he met the 10-yr residence requirement in accordance with sections 3 to 5 of the OAS Act on May 28, 2010. Pursuant to paragraph 5(2)(c) of the OAS Regulations, the approval date is the day the applicant became qualified. Therefore the Applicant respectfully submits that the SST-GD committed an error when they determined that the approval date was June 10, 2010, the Respondent's OAS application date instead of May 28, 2010, the date he became qualified in accordance with paragraph 5(2)(c) of the OAS Regulations and sections 3 to 5 of the OAS Act.

8. Based on sections 3 to 5 of the OAS Act, the Applicant respectfully submits that the deemed approval date for his OAS benefits is May 28, 2010 and not June 10, 2010. With this deemed approval date, the correct start date for payment should be June 2010 not July 2010.

[12] The issue turns on the interpretation and application of the provisions governing the approval of an application for an OAS pension. Section 5 of the *Old Age Security Regulations* provide that

5. (1) Subject to subsection (2), where the Minister
 - (a) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and
 - (b) approves the application after the last day of the month in which it was received,

⁴ *Old Age Security Regulations* SOR/2013-23.

The Minister's approval shall be effective on the latest of

- (c) the day on which the application was received,
- (d) the day on which the applicant became qualified for a pension in accordance with section 3 to 5 of the Act, and
- (e) the date specified in writing by the applicant.

(2) Where the Minister is satisfied that an applicant mentioned in subsection (1) attained the age of 65 years before the day on which the application was received, the Minister's approval of the application shall be effective as of the latest of

- (a) the day that is one year before the day on which the application was received,
- (b) the day on which the applicant attained the age of 65 years;
- (c) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act; and
- (d) the month immediately before the date specified in writing by the applicant.

[13] Together the statutory provisions clarify when the approval of an application becomes effective. The Applicant states that in the Respondent's case, this date is one month earlier than the date determined by the General Division. In reading the statutory provisions the Appeal Division is satisfied that the Applicant has raised an arguable case.

[14] Accordingly, the Appeal Division grants the Application.

THE APPEAL

[15] Counsel for the Applicant also requested that, in the event that the Appeal Division granted the Application, it should allow the appeal, making its findings on the basis of the written record and further exercise its power under s. 59 of the DESD Act to give the decision that the General Division should have given. The Respondent was not averse to the Applicant's position.

[16] In light of its finding that the Applicant has raised an arguable case; the Appeal Division is of the view that this is an appropriate case in which to allow the appeal and to exercise the jurisdiction granted by s. 59 of the DESD Act. The Appeal Division reaches this position based on the applicable statutory provisions; the circumstances of the case; and the respective positions of the parties. The Appeal Division also considered the fact that this appeal arose after the Applicant's unsuccessful request that the General Division issue a corrigendum amending the payment date; and in light of the Tribunal's mandate to conduct proceedings as informally and

quickly as possible as the circumstances and the considerations of fairness and natural justice permit.

ANALYSIS

[17] Section 3 of the OAS sets out the eligibility requirements for the receipt of a pension. The section provides for both full and partial pensions as follows:

Payment of full pension

3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to
- (a) every person who was a pensioner on July 1, 1977;
 - (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.

Payment of partial pension

3. (2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and
- (a) has attained sixty-five years of age; and
 - (b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.

[18] Section 8 of the OAS governs the payment of the OAS pension. The section provides:

Commencement of pension

8. (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.

Exception

(2) 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

(a) a day one year before the day on which the application was received, and

(b) the day on which the applicant attained the age of sixty-five years. as may be prescribed by regulation.

[19] As the General Division found the Respondent met the requirements for residency and, thus, was eligible for a partial pension, it was obliged to apply the statutory provisions governing commencement of payment, namely OAS section 8 and section 5 of the OAS Regulations. The Respondent, who was born in Pakistan in January 1937, became 65 years old in 2002. Sixty-five is the threshold age of eligibility for an OAS pension. However, as stated earlier, the Respondent did not apply for the OAS pension until June 10, 2010. This was eight years and some weeks after his 65th birthday. Ultimately, his application was approved well after the last day of the month in which it was received. The Applicant submitted that the General Division should have applied subsection 5(2)(c) of the OAS Regulations, but did not. On the facts of the case, the Appeal Division agrees.

[20] According to subsection 5(2) of the OAS Regulations, the approval of an OAS pension becomes effective on the later of one of four, discrete events. The first being the day that is one year before the day on which the application was received. In the Respondent's case that date is May 28, 2009. Secondly, the approval could become effective on the day on which an applicant attained the age of 65 years. The Respondent was not eligible for a pension on the day he turned 65 years old. Next, the approval could become effective on the day on which an applicant became qualified for a pension in accordance with sections 3 to 5 of the Act. The General Division determined the Respondent's residency in Canada during the disputed period. It resolved the question in his favour, holding that he had established residency during the period May 28, 2000 to May 4, 2011. As the Respondent had immigrated to Canada in May 2000, he met the ten-year threshold and, thus, applying OAS subsection 3(2)(b), he qualified for a partial

OAS pension effective May 2010. Finally, the approval could take effect the month immediately before the date specified in writing by the applicant. This the Respondent did not do.

[21] It seems clear that in determining the start date of the Respondent's OAS pension as June 10, 2010, the General Division applied the date he made the application. The Applicant points out that the date of the application for OAS pension is not one of the criteria set out at subsection 5(2)(c). The Appeal Division agrees. Accordingly, the General Division committed an error of law. On the facts, the latest of the four criteria was the day on which the Respondent became qualified for a pension in accordance with sections 3 to 5 of the Act. This is the date when he attained 65 years of age, and also met the ten year residency requirement, namely, May 28, 2010. Thus, pursuant to subsection 8(1) of the OAS, the Respondent's OAS pension properly commences in June 2010 not July 2010 as the General Division determined.

CONCLUSION

[22] The Appeal is allowed.

DECISION

[23] The Appeal Division exercises its jurisdiction under s. 59 of the DESD Act to give the decision the General Division should have given. Accordingly, it is the decision of the Appeal Division that, pursuant to subsection 8(1) of the OAS, payment to the Respondent of an OAS partial pension commences in June 2010.

Hazelyn Ross
Member, Appeal Division