

Citation: *E. M. v. Minister of Employment and Social Development*, 2016 SSTGDIS 8

Date: January 14, 2016

File number: GT-125514

GENERAL DIVISION - Income Security Section

Between:

E. M.

Appellant

and

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

Respondent

Decision by: Shane Parker, Member, General Division - Income Security Section

Heard by Teleconference on September 24, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant

Igor Trutanow, Interpreter (German-English)

BACKGROUND

[1] This appeal pertains to the amount of the Appellant's Old Age Security (OAS) pension. He initially applied for the OAS pension on April 1, 2010, and was awarded a partial pension at the rate of 5/40ths effective May 2011. The Appellant subsequently applied for and received the Guaranteed Income Supplement (GIS).

[2] On July 20, 2012 the Respondent advised that based on additional information from the pension institution in Switzerland, the Appellant's OAS pension was amended to 7/40ths (original decision at GT1-50 to 51). On September 14, 2012 the Appellant asked the Respondent to reconsider its recalculation of his OAS pension. On December 10, 2012 the Respondent maintained its original decision (GT1-6 to 7).

[3] The Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT) in March 2013. The OCRT transferred the appeal to the Social Security Tribunal of Canada in April 2013.

[4] The hearing of this appeal was by teleconference for the following reasons:

- Videoconferencing is not available within a reasonable distance of the area where the Appellant lives;
- The issues under appeal are complex; and,
- This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] The issue to be decided in this appeal is the amount of the Appellant's OAS pension.

LAW

Transitional

[6] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the Review Tribunal before April 1, 2013 and not heard by the Review Tribunal are deemed to have been filed with the Social Security Tribunal of Canada (the Tribunal).

Eligibility Requirements

[7] The most relevant legislative provisions from the OAS Act are 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.

[8] Section 8 of the OASA deals with payment of the pension. It reads:

Payment of Pension 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.

[9] According to subsection 3(4) of the OASA the amount of the partial pension shall be rounded to the lower multiple of a year when it is not a multiple of a year.

[10] Section 5 of the OAS Regulations deals with approval of an OAS application:

Approval of an Application for a Pension

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, 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 sections 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.

[11] Section 20 of the OAS Regulations deals with the determination of residence:

Residence

20. (1) To enable the Minister to determine a person's eligibility in respect of residence in Canada, the person or someone acting on the person's behalf shall

provide a statement giving full particulars of all periods of residence in Canada and of all absences from Canada that are relevant to that eligibility.

[12] Section 21 of the OAS Regulations distinguishes between being resident and present in Canada:

21. (1) For the purposes of the Act and these Regulations,

(a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and

(b) a person is present in Canada when he is physically present in any part of Canada.

[13] Section 23 of the OAS Regulations enables the Respondent to require an applicant for the OAS to make available further information or evidence at any time:

23. (1) The Minister, at any time before or after approval of an application or after the requirement for an application is waived, may require the applicant, the person who applied on the applicant's behalf, the beneficiary or the person who receives payment on the applicant's behalf, as the case may be, to make available or allow to be made available further information or evidence regarding the eligibility of the applicant or the beneficiary for a benefit.

[14] Section 40 of the OAS Act provides that Canada can enter into reciprocal arrangements with other countries regarding the administration of social security benefits.

[15] Canada and Switzerland entered into such an arrangement. Part 3, Article 10, subsection b) of the *Convention on Social Security between Canada and the Swiss Confederation* (the Canada-Switzerland Agreement) states:

"For the purpose of determining eligibility for benefits and of calculating benefits under the Old Age Security Act of Canada:

b. if a person is subject to the legislation of Switzerland by reason of employment during any period of residence in the territory of Canada, that period of residence shall not be considered as a period of residence in Canada for that person and for that

person's spouse and dependants who reside with him or her and who are not subject to the Canada Pension Plan or to the comprehensive pension plan of a province of Canada".

SUBMISSIONS

[16] The Appellant submits that he is entitled to an OAS pension in the amount of 18/40ths effective April 2010 (GT1-117).

[17] The Respondent contended that the Appellant was entitled to a partial OAS pension at the rate of 7/40ths. This was due to the Appellant being subject to the Swiss legislation by reason of employment and/or made obligatory contributions to the Swiss pension scheme for the following periods: January 1966 to September 1968; January 1982 to December 1987; September 1988 to September 1993; June 1997 to December 1999; January 2000 to December 2001; and June 2002 to November 2004. (GT1-50)

[18] The Respondent further submitted that the effective date of payment of the OAS pension is May 2011, despite the fact the benefit is payable the month after he turned age 65 in April 2010. The Respondent treated the year of April 2010 to April 2011 as a calculation year to increase his pension amount to 7/40ths effective May 2011. (GT1-6)

EVIDENCE

[19] What follows is an overview of the evidence found to be most relevant in determining the outcome of this appeal.

[20] The Appellant's OAS pension application was received by the Respondent on April 1, 2010 (the "OAS application") (pages GT1-58 to 61). The OAS application included important pieces of evidence, as follows:

- (a) The Appellant was born in Switzerland on April 1, 1945 [he was 65 in April 2010];
- (b) His home address was in Chilliwack, British Columbia;

(c) He stated he resided in Canada from January 6, 1966 to the date of his application; however his time alternated between Canada and Switzerland for employment reasons in Switzerland, and that he has never stayed in Switzerland longer than 5.5 months at a time.

[21] The Appellant listed his employers and employment periods in Switzerland (GT1-121). Letters from his employers were also filed (see for example: Swiss Touring Club at GT1-127).

[22] At the hearing, the Appellant discussed his Swiss employment during the Respondent's alleged overlap periods:

- January 1966 to September 1968: Union Bank in 1966; Sport club (3 mo) in 1967; 1968 Howeg for 2 months (see GT1-155);
- January 1982 to December 1987: Hypo (3 mo in 1981), worked for CP Hotel in 1982...and other Canadian employers, and foreign employers Union Bank, etc per (see GT1-157);
- September 1988 to September 1993 as per GT1-157;
- June 1997 to December 1999 as per GT1-158;
- January 2000 to December 2001 as per GT1-158;
- June 2002 to November 2004: Jan/99 – 2005 living as permanent resident in Canada, filed taxes with CRA; but CRA replied that he was not a permanent resident and thanked him for filing taxes.

[23] The Appellant's other reason for regularly returning to Switzerland was to visit his ailing parents (GT1-120).

[24] The Appellant detailed his residence history by letter dated August 21, 2011:

January 6, until January 31, 1966: I was staying at the YMCA, downtown Toronto, Ontario.

February 1966 until December 1968: I was living with a friend (Lawyer) in downtown Toronto and in January until March 1969 I was in Switzerland for medical reasons.

April 1969 until April 1972: I was living with my friend V. H. at X X Avenue, X, Ontario, X (In Spring 1969 I was in Vancouv (sic) CPAir-Training-Course as a Flight-Attendant plus 3 months prob(sic) then I asked for a transfer back to the CPAir-Toronto- Base.

October 1972 until December 1973: I was living and working in Switzerland for CPAir[...] In the Zurich City Office In Switzerland. (CANADIAN COMPANY)

April 1981 until May 1982: I was living first with my friend V. H. in X, On [...] at X Road and X Street in Toronto and for the Winter Months in X, Ontario.

June 1982 until June 1984: I was living at X X Street, West- End, Vancouver and[...] CPAir-CPHotels Flight Kitchen at Vancouver-International Airport

July 1984 until January 1985: I was living with my long-time friend V. H. in X [...] as I did apply In Toronto for my Canadian Citizenship [...] September 11, 1984, then I returned back to Switzerland due family-reasons.

March 1997 until May 1999: I was living at X X in X, B.C., X

June 1999 until November 2004: I was living at X X Street in X, N.B. (the Appellant purchased a condo – see letter at GT1-147)

March 2010 until today: I am living at #X-X X Street in X, BC.

(GT1-117)

[25] At the hearing, the Appellant swore to the accuracy of this letter.

[26] During the Appellant's time in Canada he possessed a valid driver's licence and public health care card (GT1-117).

[27] The Appellant filed income tax returns in Canada for the years 1967, 1968, 1980 through 1984 inclusive, 1999 through 2003 inclusive; and 2009 through 2011 inclusive. He indicated his residence to be Canada in these tax returns. (GT1-119)

Ties to Canada versus Switzerland

[28] The Appellant contrasted his connections to Canada and Switzerland in a September 14, 2010 letter this way:

I do not have family members in Canada but I do have very good Swiss-friends (with family) on a farm in Agassiz, BC and I do feel at home here.

[...]

I do not have family members in Switzerland , as I was since January 1966 “off and on” most of the time in Canada, I "lost" all of my friends in Switzerland. I only do have 1 very good friend, who I know for over 35 years and with whom I stay, when I visit Switzerland 1 to 2 months per year

[...]

When I was born on April 1st.1945 in Switzerland I was not able to "choose" my homeland BUT when I was 20years of age , I was able to do so and on January 6th. 1966 I did become a “landed Immigrant" to my NEW-Homeland-CANADA, my new adopted home-country, that ' s why I do believe I am a resident of Canada, especially NOW since I am retired; but I do like to visit Switzerland and EUROPE ever year for a few months as long as my health allows me to do so. As I do own a "home" in Canada and none in Switzerland and as I am since 1984 a “CANADIAN-CITIZEN”!!! I do not see “WHY” I should visit my new and long-time "Homeland-Canada" and be (in your point view) suddenly a "Visitor" to Canada and a “Resident" of Switzerland

I do not have any "strings" attached to Switzerland that I could called a "Resident of Switzerland" except that I do have a Swiss Passport and I can not change that.

(GT1-168 to 169)

[29] The Tribunal has also taken note of the Appellant’s questionnaire responses of July 27, 2010, found at GT1-170 of the Hearing File. This evidence also contrasts his ties to Canada versus Switzerland. For instance, he owns an apartment in Canada whereas he rents when in Switzerland. He has a family doctor in Canada; he does not in Switzerland.

ANALYSIS

[30] The Respondent’s argument does not clearly explain how the evidence supports its position that the Appellant was entitled to an OAS pension at 7/40ths. That said, the burden

of proof rests on the Appellant to establish entitlement to an OAS pension (*De Carolis v. Canada (Attorney General)*, 2013 FC 366).

[31] In the *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, the Federal Court set out factors to be taken in account in determining whether a person makes his or her home in and ordinarily lives in Canada. They are as follows:

- a) ties in the form of personal property (bank accounts, business, furniture, automobile, credit card);
- b) social ties (membership with organizations or associations, professional membership);
- c) other ties to Canada (hospital and medical insurance coverage, driver's license, property tax statements, public records, immigration and passport records, federal and provincial income tax records);
- d) ties in another country;
- e) regularity and length of stay in Canada and the frequency and length of absences from Canada; and
- f) the lifestyle of the person or his establishment in Canada.

[32] The Federal Court of Appeal held that the list of factors enumerated in *Ding* is not exhaustive. There may well be other factors which become relevant according to the particular circumstances of the case. The test is a fluid one (*Singer v. Canada (Attorney General)*, 2010 FC 607, affirmed 2011 FCA 178). Residence is a factual issue that requires an examination of the whole context of the individual under scrutiny (*De Bustamente v. Canada (Attorney General)*, 2008 FC 1111).

[33] Lengthy absences from Canada are not determinative of whether a person makes his or her home and ordinarily lives in Canada (*Perera v. MNHW*, [1994] F.C.J. No. 351 (T.D.)).

[34] In the present appeal, there is no real dispute that the Appellant was accumulated sufficient residence in Canada since his immigration here in January 1966 to qualify for a partial OAS pension.

[35] The contentious question in this appeal is the number of years of Canadian residence to be considered in determining the amount of OAS pension to which the Appellant is entitled. The Tribunal reviewed the evidence from January 1966 up to and including the end of the Respondent's "calculation year" being April 2010 to April 2011.

[36] On balance, the Appellant's ties were stronger to Canada than to his native country of Switzerland. His ties to Switzerland were scarce: he had a Swiss passport, one really close friend, and periodic employment. Aside from his parents, he did not have any family there and he owned no property. His visits were temporary and less than 6 months. In Canada, his "chosen" country, he owned a home; felt close kinship with several friends in British Columbia; had a family doctor; was covered under the public healthcare system; filed income taxes; and was also employed. He spent the majority of his time in Canada although he regularly returned to Switzerland for employment reasons and to visit his ailing parents.

[37] Based on the above, the Appellant accumulated sufficient years of Canadian residence to qualify for a full OAS pension at 40/40 when he turned 65 in April 2010. There is no need to add a "calculation year" because for all intents and purposes, he maxed out in April 2010. However, his full pension is reduced by virtue of the overlap provision of the Canada-Switzerland Agreement.

[38] The provision of importance, again, is Article 10, paragraph b), which essentially states that periods of employment in Switzerland cannot be considered as periods of residence in Canada. The provision's exact wording is replicated here in part:

"If a person is subject to the legislation of Switzerland **by reason of employment** during any period of residence in the territory of Canada, that period of residence shall not be considered as a period of residence in Canada ... " [emphasis added here]

[39] In the present appeal it is not disputed that the Appellant was employed in Switzerland for various periods. The Appellant reviewed and clarified these employment periods during the hearing. Of the alleged overlap periods identified by the Respondent, the Tribunal finds on balance that the following periods of employment in Switzerland overlap his Canadian residency:

- January 1966 to September 1968: Union Bank in 1966 (12 months); Sport club (3 months) in 1967; 1968 Howeg for 2 months (TOTAL: 17 MONTHS OVERLAP);
- January 1982 to December 1987: Hypo (3 mo in 1981), worked for CP Hotel in 1982...and other Canadian employers, and foreign employers Union Bank, etc per GT1-157 (TOTAL: 74 MONTHS OVERLAP including the 3 months in 1981);
- September 1988 to September 1993 (60 MONTHS OVERLAP);
- June 1997 to December 1999 (30 MONTHS OVERLAP);
- January 2000 to December 2001 (23 MONTHS OVERLAP);
- June 2002 to November 2004: The Tribunal acknowledges the Appellant's testimony that from January 1999 to 2005 he was living as a permanent resident in Canada, he filed taxes with CRA and CRA replied that he was not a permanent resident and thanked him for filing taxes. However the period of 2002 indicates Swiss employment for Berg-Bahnen. The remaining part of this time period (to November 2004) indicates he was "not gainfully occupied" (GT1-158). As such, the Tribunal finds for 12 MONTHS of overlap (for his employment in 2002).

[40] The total number of months the Appellant was subject to the legislation of Switzerland by reason of employment during the alleged overlap periods above is 216, or 18 years. In accordance with Article 10, paragraph 'b' of the Canada-Switzerland Agreement,

this overlap period shall be deducted from his residence period in Canada (January 1966 to April 2010). In this case, 40/40 less 18 is 22/40.

CONCLUSION

[41] The Appellant qualifies for a partial pension at 22/40ths effective the month after reaching age 65 pursuant to subsection 5(1) of the OAS Regulations and subsection 8(1) of the OAS Act. In this case, the Appellant turned 65 in April 2010. His OAS pension of 22/40ths is effective May 2010.

[42] The appeal is allowed.

Shane Parker
Member, General Division - Income Security