



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. J. v. Minister of Employment and Social Development*, 2016 SSTGDIS 41

Tribunal File Number: GP-13-3320

BETWEEN:

**S. J.**

Appellant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Shane Parker

DATE OF DECISION: May 31, 2016

## **REASONS AND DECISION**

### **INTRODUCTION**

[1] The Appellant applied for an Old Age Security (OAS) pension pursuant to the Agreement on Social Security Between Canada and the United States (Canada/US Agreement) in November 2012. It was received in Canada on January 24, 2013. The Respondent denied the application in its original decision. The Appellant asked that the Respondent reconsider this decision on October 7, 2013. In its reconsideration decision dated October 23, 2013, the Respondent maintained its original decision. The Appellant appealed this decision to the Tribunal's General Division on November 15, 2013.

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

- There are gaps in the information in the file and/or a need for clarification; 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.

[3] The Tribunal adjourned the hearing so the Appellant could attempt to obtain an updated record of his contributions to the United States Social Security system. The Appellant was unsuccessful, so the hearing was adjourned again to request that the Respondent produce this information.

[4] However, for the reasons explained at the outset of the Evidence section below, and on the authority of the following sections of the Tribunal Regulations, the appeal is proceeding on the basis of the documents and submissions filed.

### **SOCIAL SECURITY TRIBUNAL REGULATIONS**

General principle

2. These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.

Informal conduct

3.(1) The Tribunal

(a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit;

Decision or further hearing

28. After every party has filed a notice that they have no documents or submissions to file — or at the end of the applicable period set out in section 27, whichever comes first — the Income Security Section must without delay

(a) make a decision on the basis of the documents and submissions filed;

## **APPEAL**

### **THE LAW**

[5] Paragraph 3(2)(b) of the OAS Act pertains to the minimum residence period required for a foreign resident to qualify for an OAS pension abroad:

#### **Payment of partial pension**

(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.** [emphasis added here]

[6] Subsection 3(4) of the OAS Act provides that the rate of a partial pension is rounded down to the lower multiple of a year when it is not a multiple of a year:

### **Rounding of aggregate period**

(4) For the purpose of calculating the amount of a partial monthly pension under subsection (3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.

[7] Section 40 of the OAS Act permits Canada to enter into reciprocal arrangements with other countries in regards to the administration of social security benefits. Section 40 reads:

### **Reciprocal arrangements re administration, etc.**

40. (1) Where, under any law of a country other than Canada, provision is made for the payment of old age or other benefits including survivors' or disability benefits, the Minister may, on behalf of the Government of Canada, on such terms and conditions as may be approved by the Governor in Council, enter into an agreement with the government of that country for the making of reciprocal arrangements relating to the administration or operation of that law and of this Act, including, without restricting the generality of the foregoing, arrangements relating to

(a) the exchange of such information obtained under that law or this Act as may be necessary to give effect to any such arrangements;

(b) the administration of benefits payable under this Act to persons resident in that country, the extension of benefits under that law or this Act to persons employed in or resident in that country and the increase or decrease in the amount of the benefits payable under that law or this Act to persons employed in or resident in that country;

(c) the administration of benefits payable under that law to persons resident in Canada, the extension of benefits under that law or this Act to persons employed in or resident in Canada and the increase or decrease in the amount of the benefits payable under that law or this Act to persons employed in or resident in Canada;

**(d) the totalization of periods of residence and periods of contribution in that country and periods of residence in Canada; and**

**(e) the payment by that country and Canada respectively, where applicable as a result of totalization, of prorated benefits based on periods of residence and periods of contribution in that country and periods of residence in Canada.**

[emphasis added here]

[8] Canada and the Czech Republic entered into an agreement on May 27, 2001 called the Agreement on Social Security Between Canada and the Czech Republic (the Canada/Czech Agreement). For the purposes of qualifying for an OAS pension, the totalization principle under this agreement is found under Article 11, which reads:

### **Article 11**

#### **Periods under the Legislation of Canada and the Czech Republic**

1. If a person is not eligible for a benefit because he or she has not accumulated sufficient creditable periods under the legislation of a Party, the eligibility of that person for that benefit shall be determined by totalizing these periods and those specified in paragraphs 2 through 4, provided that the periods do not overlap.
2.
  - a. For purposes of determining eligibility for a benefit under the *Old Age Security Act* of Canada, a creditable period under the legislation of the Czech Republic shall be considered as a period of residence in Canada.

[9] The amount of OAS pension payable is governed by Article 14, which reads:

### **Article 14**

#### **Benefits under the *Old Age Security Act***

1. If a person is eligible for an Old Age Security pension or an allowance solely through the application of the totalizing provisions of Chapter 1, the competent institution of Canada shall calculate the amount of the pension or allowance payable to that person in conformity with the provisions of the *Old Age Security Act* governing the payment of a partial pension or allowance, **exclusively on the basis of the periods of residence in Canada which may be considered under that Act.** [emphasis added here]

[10] Article 12 of the Canada/Czech Agreement provides that “[i]f a person is not eligible for a benefit on the basis of the creditable periods under the legislation of the Parties, totalized as provided in Article 11, **the eligibility of that person for that benefit shall be determined by totalizing these periods and creditable periods accumulated under the legislation of a third State with which both Parties are bound by social security instruments which provide for the totalizing of periods.**” [emphasis added here]

[11] In this case, there is such a third State. The Appellant was subject to the Canada/US Agreement.

[12] Chapter 2, Article VIII of the Canada/US Agreement (Second Supplementary Agreement dated May 28, 1996) provides:

### **Article VIII**

1.

- a. **If a person is not entitled to the payment of a benefit because he or she has not accumulated sufficient periods of residence under the *Old Age Security Act*, or periods of coverage under the Canada Pension Plan, the entitlement of that person to the payment of that benefit shall, subject to sub-paragraph (1)(b), be determined by totalizing these periods and those specified in paragraph (2), provided that the periods do not overlap.**
- b. In the application of sub-paragraph (1)(a) of this Article to the *Old Age Security Act*:
  - i. only periods of residence in Canada completed on or after January 1, 1952, including periods deemed as such under Article VI of this Agreement, shall be taken into account; and
  - ii. if the total duration of those periods of residence is less than one year and if, taking into account only those periods, no right to a benefit exists under that Act, the agency of Canada shall not be required to pay a benefit in respect of those periods by virtue of this Agreement.

2.

- a. **For purposes of determining entitlement to the payment of a benefit under the *Old Age Security Act*, a quarter of coverage credited under United States laws on or after January 1, 1952 and after the age at which periods of residence in Canada are credited for purposes of that Act shall be considered as three months of residence in the territory of Canada.**  
[emphasis added here]

[13] Article IX of the Canada/US Agreement relates to payment of the pension once eligibility is achieved solely through the totalization principle, and is nearly identical to Article 14 of the Canada/Czech Agreement. Article IX is reproduced here:

#### **Article IX**

1. If a person is entitled to the payment of an Old Age Security pension or a spouse's allowance solely through the application of the totalizing provisions of Article VIII, the agency of Canada shall calculate the amount of the pension or spouse's allowance payable to that person in conformity with the provisions of the *Old Age Security Act* governing the payment of a partial pension or a spouse's allowance, **exclusively on the basis of the periods of residence in Canada** on or after January 1, 1952 which may be considered under that Act or are deemed as such under Article VI of this Agreement.

[emphasis added]

#### **ISSUE**

[14] The issue in this appeal is whether the Appellant met the minimum residence requirement of 20 years, as a foreign (US) resident applying for the OAS pension, pursuant to paragraph 3(2)(b) of the OAS Act and the totalization principle adopted in the Canada/US Agreement and/or the Canada/Czech Agreement.

#### **EVIDENCE**

[15] At the outset of the hearing on March 30, 2016 the Appellant informed the Tribunal under oath that he was employed in the United States from 1976 to present. The US Social Security Certified Coverage Record (US Record) on file was printed in 2006 and did not consider the years before 1980 (GD2-46). The Tribunal adjourned the hearing on its own motion. The Tribunal then twice requested by letter to the Respondent that it request an updated

US Record, failing which an adverse inference may be drawn in these proceedings. The Respondent did not file an updated US Record with the Tribunal, request an extension to do so, or provide any response whatsoever by or after the initial and extended deadline set out in the Tribunal's letters.

### **Documentary evidence**

[16] The Appellant is a Canadian citizen (GD2-61) residing in the United States, where he moved after divorcing his wife, also a Canadian citizen. His marriage was dissolved by a Florida Court order in July 1979 (GD1-2, GD1-7, GD2-4).

[17] The Appellant was born on August 17, 1941 in the former Czechoslovakia (he turned 65 in August 2006). Before turning 18, he worked in the coal mines in the former Czechoslovakia. After turning 18, he worked in the Oil Refinery in that country (GD2-17).

[18] According to the Appellant's OAS application, he was residing in Florida. He outlined his residence history and/or periods of employment in a country other than Canada and the US as follows:

a) The former Czechoslovakia:

August 1941 to November 1968 (residence);

September 1955 to November 1968 (employment).

b) Canada:

December 1968 to December\*1976 (residence and employment).

c) United States:

December 1976 onward (residence) (GD2-21)

[19] The Respondent calculated the Appellant's Canadian residence to be from December 6, 1968 to October 9, 1976 (7 years, 9 months, 28 days) (GD2-30).



[20] A Czech Administration of Social Security chart displayed the Appellant's list of creditable periods in that country (GD2-37 to 40). The Respondent contended that he contributed 8 years, 10 months, 25 days in the Czech Republic after age 18 (from August 17, 1959 to July 16, 1960; and from November 1, 1960 to November 27, 1968). The chart refers to the Appellant's creditable periods after turning 18, including his military service from November 1, 1960 to October 2, 1962; and November 23, 1967 to November 29, 1967.

[21] The United States Social Security Administration Office informed that the Appellant had 7 quarters of coverage in the US (1 year, 9 months of Canadian residence) (GD2-46).

## **SUBMISSIONS**

[22] The Appellant submitted that he has 20 years Canadian residence based on the totalization of his Canadian residence, US contributions, and creditable periods under Czech legislation.

[23] The Respondent submitted that the Appellant's residence in Canada after age 18 and his creditable periods in the Czech Republic after age 18 do not total the 20 years required for payment of the OAS pension abroad.

[24] The Respondent also argued that the Appellant did not meet the minimum residence requirement of 20 years since his combined Canadian residence and US contributions total 9 years, 6 months, and 28 days (GD2-11).

[25] Finally, the Respondent argued that when the Appellant's creditable periods from all three countries is totalized, he has 18 years, 6 months and 23 days of creditable periods, which is less than the 20 years required for eligibility under the OAS Act (GD7-6).

## **ANALYSIS**

[26] The Appellant must prove on a balance of probabilities that he is entitled to an OAS pension.

[27] In the present appeal, the undisputed period of actual Canadian residence is December 6, 1968 to October 9, 1976 (7 years, 9 months, 28 days) (GD2-30). As a foreign resident applying

for the OAS pension, this is insufficient residence to qualify for the pension abroad pursuant to domestic laws, namely paragraph 3(2)(b) of the OAS Act, which requires 20 years of Canadian residence.

[28] The Tribunal must therefore review the applicable international agreements to determine if the Appellant is eligible for an OAS pension. Under the Canada/Czech Agreement, the Appellant also fails to meet the minimum residence threshold of 20 years for a foreign resident to qualify for an OAS pension. Under that agreement he contributed 8 years, 10 months, 25 days in the Czech Republic after age 18 (from August 17, 1959 to July 16, 1960; and from November 1, 1960 to November 27, 1968) (GD2-37 to 40). These periods do not overlap the aforementioned period of actual Canadian residence. However, when combined with that period of residence, the Appellant is still shy of the 20 years required.

[29] With respect to the Canada/US Agreement, the US Record on file indicates 7 quarters of coverage in the US (1 year, 9 months of Canadian residence) for the years 1980 through to 2006 inclusive (GD2-46). When this evidence is combined with the period of non-overlapping actual Canadian residence, the Appellant is also short of the 20 years required. However, in the circumstances, the Appellant said under oath that he had been working in the United States from 1976 to 2016. As such, an updated US Record capturing this entire period is relevant in adjudicating the OAS eligibility issue. The US Record on file (GD2-46) is incomplete and outdated. The Tribunal accepts that the Appellant made his best efforts to obtain this evidence, but was unsuccessful. The Tribunal finds that the Respondent, with its resources, was better suited to obtain this evidence, as it had successfully done previously by request to the US Social Security Administration (GD7-6, paragraph 21). Further to the Tribunal's repeated requests, the Respondent failed to produce this evidence. In the circumstances, the Tribunal draws an adverse inference from the Respondent's inaction on this front, and infers that the missing evidence would benefit the Appellant. The Tribunal therefore gives the Appellant the benefit of the doubt, and finds that he meets the eligibility requirements for the OAS pension when totalizing the creditable periods of all three countries (Canada, the Czech Republic, and the US).

[30] As far as payment, it is only actual residence that counts (see: Article 14 of the Canada/Czech Agreement; Article IX, paragraph 1 of the Canada/US Agreement). In this case,

the Appellant qualifies for a partial OAS pension at the (rounded down) rate of 7/40ths (subsection 3(4) OAS Act, the “rounding down” provision). Under domestic law, one must apply for the pension to qualify for it (subsection 5(1) of the OAS Act). The Respondent received the Appellant’s application in January 2013. The Appellant was over 65 years of age at the time.

[31] Subsection 8(2) of the OAS Act and paragraph 5(2)(a) of the OAS Regulations apply in this case. Based on these legislative provisions, payment begins eleven months before the application was received. As noted, the application was received in January 2013. Approval takes effect in January 2012. Payment begins in the month after the month of approval. Therefore payment begins in February 2012.

## **CONCLUSION**

[32] The appeal is allowed.

Shane Parker  
Member, General Division - Income Security