Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *F. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 227

Tribunal File Number: AD-15-1337

BETWEEN:

F. M.

Appellant

and

Minister of Employment and Social Development
(Formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 22, 2016

Canada

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), dismisses the appeal.

INTRODUCTION

[2] The Appellant resided and worked in three different countries, namely Canada, the United States of America, (the US), and France. He sought a partial pension pursuant to subsection 3(2)(b) of the *Old Age Security, (OAS), Act.* He sought to use the aggregate periods of his residence in these three countries to qualify for the partial OAS pension. The Respondent denied his application initially and maintained the denial upon reconsideration. The Appellant appealed to the General Division of the Tribunal, which denied his appeal in a decision issued on October 17, 2015. The General Division based its determination on the totality of the Appellant's periods of residence in Canada and the US, which fell short of the required twenty years by some 16 days.

GROUNDS OF THE APPEAL

[3] The Appellant sought leave to appeal on the basis that the General Division failed to observe a principle of natural justice and/or erred in law. He submitted that the General Division

> "misinterpreted the provisions of the Canada –US Agreement for totalization of residence/coverage periods, by erroneously assuming that the smallest denomination of a period of totalization to be one quarter or 3 months, and therefore deciding against crediting me that portion of the quarter of coverage that does not truly overlap with my residency in Canada (i.e. March 15, 1981 to March 31, 1981) a period of 16 days, which fully covers my eligibility, and allow me to fulfil the OAS 20 years residence requirement." (AD1-2)

[4] The Appellant referred the Tribunal to paragraphs 32 and 33 of the General Division decision.

[5] A different panel of the Appeal Division granted leave to appeal on the single issue that the General Division may have erred by failing to consider the terms of the Agreement between Canada and France on Social Security, (the Agreement).

ISSUE

[6] The issue before the Appeal Division is:- Did the General Division err in law by failing to consider the terms of the "Agreement between Canada and France on Social Security" when it determined the Appellant's eligibility for a partial pension under the OAS Act?

THE GOVERNING STATUTORY PROVISIONS

[7] The Appeal Division is empowered by the *Department of Employment and Social Development (DESD) Act* to decide appeals on the basis of the following three grounds:-

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

[8] Subsection 3(2) of the OAS Act sets out the eligibility requirements for payment of a partial OAS pension.[1] To qualify for a partial OAS pension, an applicant must:

a. Be at least 65 years of age; and

b. Have resided in Canada after attaining 18 years of age and prior to the day on which that person's application is approved for an aggregate period of at least 10 years, but less than 40 years and, where that aggregate period is less than 20 years, was resident in Canada on the day preceding the day on which that person's application is approved.

[9] The Appellant resides in Fort Washington, Pennsylvania in the US; therefore, he was required to establish an aggregate period of twenty (20) years of residence in Canada before he could receive a partial OAS pension.

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[1] (2) Payment of partial pension – 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 18 years of age and prior to the day on which that person's application is approved for an aggregate period of at least 10 years, but less than 40 years and, where that aggregate period is less than 20 years, was resident in Canada on the day preceding the day on which that person's application is approved.

SUBMISSIONS

[10] After leave to appeal was granted, the Appellant made no further submissions. On February 4, 2016 the Tribunal received a "Notice of No Submissions" from the Appellant, in which he stated he was relying on the submissions he had made in the application for leave to appeal. (AD2-1)

[11] The Respondent's representative submitted that the General Division had come to the appropriate determination concerning the Appellant's ability to benefit from the Agreement. The crux of the Respondent's submission is contained in the following paragraphs:-

> 2. In essence, the Appellant wants to add together his qualifying years in Canada with the years accumulated under each separate bilateral agreement between Canada and the United States and Canada and France into a "grand total" in order to qualify for an OAS pension. It is not disputed that the Appellant does not meet the residency requirement for a pension under the OAS based on his Canadian residency alone, and therefore must rely on a bilateral international social security agreement, such as the agreements between Canada and the United States and Canada and France, in order to qualify.
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> 3. However, this is not permitted under the relevant agreements or the OAS. The SST-GD correctly determined that the Appellant did not meet the residence requirement to qualify for a pension under the OAS when his years were calculated under either the Canada-France agreement or the Canada-US Agreement (Agreement between the Government of Canada and the Government of the United States of America with Respect to Social Security (the Canada-US Agreement). The Tribunal then correctly held that the Appellant could not combine the years calculated under each Agreement into a "grand total" as this is not permitted under the Canada-US Agreement."
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> 4. The SST-General Division made no error in their determination and the matter should be dismissed.

ANALYSIS

Did the General Division fail to consider the Canada-France Agreement?

[12] The Appellant submitted that the General Division ought to have included his period of residence in France in its determination of whether or not he meets the residency requirement set out in subsection 3(2) of the OAS Act. In granting leave, the Appeal Division

found that the General Division may have erred as it did not consider the terms of the Agreement between Canada and France. Having read the decision of the General Division, the terms of the Canada- France Agreement and the submissions of the Respondent, the Appeal Division finds that the General Division did not err. In the view of the Appeal Division, the General Division considered the Agreement and concluded that it, like the Canada-US Agreement, was a bilateral as opposed to a multi-lateral agreement. Accordingly, the Appellant's residence in France could not be taken into account so as to bring him within the operation of subsection 3(2) of the OAS Act. (decision at para. 36; 37)

[13] In coming to this conclusion, the Appeal Division finds the following:-

1. The Agreement speaks to Contracting States, defined as France and Canada. Indeed, the preamble to the Agreement expresses it as an agreement between the Government of Canada and the Government of the French Republic. Nowhere in the Agreement is there a reference to the inclusion of a third state as a Contracting Party to the Agreement.
2. With regard to the specific argument made by the Appellant, eligibility for benefits is discussed under Article 12 of the Agreement. The Article states, in part:-

Eligibility for Benefits
A national of France or Canada who has been subject in succession or alternately to the old age insurance plans of each Contracting State shall receive benefits under the following conditions:

a. If the interested person meets the eligibility requirements for benefits under the legislation of both States, the competent institution or authority of each Contracting State shall determine the amount of the benefit in accordance with the provisions of the legislation which it is applying, taking into account only the insurance periods completed under that legislation.
b. Where the requirements of duration of insurance for eligibility under neither State's legislation are met by the interested person, the benefits which may be claimed from the institutions or authorities applying the legislation shall be determined and paid in accordance with the following rules:
    a. Totalization of Periods
        1. For the purposes of applying the legislation of France and of Canada, all of the insurance or assimilated periods shall be totalized to the extent necessary, provided they do not overlap, in order to establish eligibility for benefits and to maintain or regain this eligibility.

2. The periods assimilated with insurance periods shall be, in each State, those which are recognized as such or credited under the legislation of that State.

The general administrative arrangement will set out the rules to follow in the case of overlapping periods.

[14] The totalisation referred to in the Agreement is clearly with respect to periods of residence or contribution in those two countries. This language is repeated in section 40 of the OAS Act, which enables such arrangements.

> 40. *Reciprocal arrangements re administration, etc.* - (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, arrangement relating to (d) the totalization of periods of residence and periods of contribution in that country and periods of residence in Canada.

[15] As submitted by the Respondent, the General Division found at paragraph 37 of its decision that the totalisation that would have been provided under the Agreement could not assist the Appellant to reach the 20-year residency requirement. Therefore, the General Division turned its attention to whether the Appellant could qualify under the Canada-US Agreement.

[16] The General Division found that the Canada-US agreement excluded third countries. The applicable provision is Article II of the Canada-US agreement, which states, "Unless otherwise provided in this Agreement the applicable laws referred to in paragraph (1) of this Article do not include treaties or other agreements concluded between either Contracting State and a third State and laws or regulations promulgated for their implementation." The laws and regulations referred to are set out as:-

a. As regards the United States, the laws governing the Federal Old-Age, Survivors and Disability Insurance Program:
    i. Title II of the Social Security Act and regulations pertaining thereto, except sections 226, 226A and 228 of that title and regulations pertaining to those sections, and

Chapter 2 and Chapter 21 of the Internal Revenue Code of 1986 and regulations pertaining to those chapters;

b. As regards Canada:
   i. the Old Age Security Act and regulations made thereunder, and

   ii. the Canada Pension Plan and regulations made thereunder.

[17] The only reference to a third state is contained in Article IV of the Agreement. Article IV addresses payment of benefits to persons who reside in neither Contracting State, namely Canada or the US.

CONCLUSION

[18] In light of the above discussion, the Appeal Division finds that the General Division did not err in that at paragraphs 36 and 37 of the decision it specifically considered the Agreement between Canada and France on Social Security but found that it could not provide the Appellant with sufficient residency credits so as to bring him under subsection 3(2) of the OAS Act.

[19] The Appeal is dismissed.

Hazelyn Ross
Member, Appeal Division