



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *J. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 268

Tribunal File Number: AD-16-678

BETWEEN:

J. T.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 13, 2016

REASONS AND DECISION

INTRODUCTION

[1] On February 10, 2016, the General Division (“the GD”) of the Social Security Tribunal of Canada (“the Tribunal”) summarily dismissed the Appellant’s appeal. The GD held as follows:

- (a) the Appellant attained the age of 65 years in September 2008 and filed an application for an Old Age Security (“OAS”) pension in January 2014;
- (b) the Respondent granted him a pension payable starting in February 2013;
- (c) the Appellant was not advised to submit his OAS pension application before attaining the age of 65 years or earlier until January 2014;
- (d) the Respondent determined that the Appellant had received the maximum retroactivity allowed by law;
- (e) in accordance with subsections 5(2) of the *Old Age Security Regulations* (“the OAS Regulations”) and 8(1) of the *Old Age Security Act* (“the OAS Act”), approval of his application took effect in January 2013 and his OAS pension became payable starting in February 2013;
- (f) the Tribunal does not have jurisdiction to consider matters pertaining to the “conduct and advice of the Respondent’s agents;” and
- (g) the appeal has no reasonable chance of success.

[2] For these reasons, the GD dismissed the appeal.

History of the file

[3] In January 2014, the Appellant filed an application for an OAS pension. He had attained the age of 65 years in September 2008. The former Department of Employment and Social

Development (“the Department”) approved a pension, and that pension was granted to him starting in February 2013.

[4] In January 2009, the Appellant filed an application with the Canada Pension Plan (“the CPP”), while he was already receiving payments from the Quebec Pension Plan (“the QPP”). An explanation of the CPP’s decision was sent and an application for an OAS pension (“the form”) was appended thereto.

[5] The Appellant denies having received the OAS pension application form. He contends that the Respondent’s agents did not advise him to file an OAS application before he did so in January 2014.

[6] He filed an application for reconsideration concerning the OAS pension in May 2014 so that his period of retroactivity would begin the month following his 65th birthday, in October 2008. The Respondent maintained his decision and informed the Appellant of that fact in September 2014.

[7] The Appellant appealed before the GD in October 2014, and the Notice of Appeal was completed in January 2015.

[8] On January 19, 2016, the Tribunal sent a letter to inform the parties that the Tribunal was “considering summarily dismissing the appeal.”

[9] The Respondent responded with his written submissions on January 29, 2016. The Appellant filed his written submissions on February 9, 2016.

[10] The GD summarily dismissed the appeal on February 10, 2016.

Appeal to the Appeal Division

[11] The Appellant filed a Notice of Appeal with the Tribunal’s Appeal Division (“the AD”) on May 11, 2016, within the prescribed time limit. The notice contained the Appellant’s submissions.

[12] The Respondent filed his submissions in June 2016. He contends that the GD did not err in fact or in law in making the decision or in applying the law to the facts, which are not in dispute.

[13] This appeal proceeded in the form of a hearing on the merits for the following reasons:

- (a) the fact that the Member determined that no hearing was necessary; and
- (b) the need to proceed as informally and quickly as possible in accordance with the criteria of the Social Security Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

ISSUES

[14] The Tribunal's AD must determine whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision.

THE LAW AND ANALYSIS

Statutory provisions

[15] Subsection 53(1) of the *Department of Employment and Social Development Act* ("the DESD Act") provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[16] Subsection 58(1) of the DESD Act provides that the only grounds of appeal are that:

- (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.

[17] The AD must determine, in accordance with subsection 58(1) of the Act, whether the decision under review contains a question of law, fact or jurisdiction, or relating to a principle of natural justice.

[18] The relevant provisions of the OAS Act in the OAS Regulations read as follows.

OAS Act

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.

32 Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or a portion of a benefit, to which that person would have been entitled under this Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.

OAS Regulations

3(1) Where required by the Minister, an application for a benefit shall be made on an application form.

(2) Subject to subsections 5(2) and 11(3) of the Act, an application is deemed to have been made only when an application form completed by or on behalf of an applicant is received by the Minister.

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.

Legal test for summary dismissal

[19] The first issue before the AD is whether the GD correctly identified and applied the legal test for summary dismissal of the appeal.

[20] The parties filed no submissions respecting the legal test for summary dismissal.

[21] Although the Federal Court of Appeal has not yet considered the matter of summary dismissal in the context of the Tribunal's legislative and regulatory framework, it has considered the question on several occasions in the context of its own summary dismissal procedure. *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, are representative examples of those judgments.

[22] In *Lessard-Gauvin*, the Court stated:

The standard for a preliminary dismissal of an appeal is high. This Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail...

[23] The Court expressed similar sentiments in *Breslaw*, finding that:

... the threshold for the summary dismissal of an appeal is very high, and while I have serious doubt about the validity of the appellant's position, the written representations which he has filed do raise an arguable case. The appeal will therefore be allowed to continue.

[24] I note that the determination to summarily dismiss an appeal is a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed. The question to be asked for summary dismissal is as follows: Is it plain and obvious on the record that the appeal is clearly bound to fail?

[25] For further clarity, the question to be asked is not whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, it must be determined whether the appeal is bound to fail regardless of the evidence or arguments that might be submitted at a hearing.

The GD's decision

[26] The GD Member reviewed the sections and subsections of the applicable laws, the evidence in the file, the appeal application and the submissions of the parties concerning the notice of summary dismissal and found as follows:

[15] As a statutory entity, the Tribunal has only the powers conferred on it by its enabling statute. The Tribunal interprets and applies the provisions as set out in the OAS Act and Regulations.

[16] In this case, the Applicant attained the age of 65 years before applying for an OAS pension. The Respondent has no statutory duty to submit an application on behalf of individuals (including the Appellant) or to advise individuals (the Appellant in this instance) to file an application. It is up to individuals, the Appellant in this case, to make an application (subsections 5(1) of the OAS Act and 3(1) of the OAS Regulations). In this instance, the Appellant did so in January 2014 when the Respondent received the application (subsection 3(2) of the OAS Regulations).

[17] Since the appellant had already attained the age of 65 years when he made his OAS application, approval of the application took effect in January 2013 and the pension became payable starting in February 2013 under subsections 5(2) of the OAS Regulations and 8(1) and (2) of the OAS Act.

[18] The Tribunal notes the Appellant's comments on the conduct and advice of the Respondent's agents. However, in view of section 32 of the OAS Act, the Tribunal does not have jurisdiction to consider such matters.

[19] Consequently, the Tribunal finds that the appeal has no reasonable chance of success.

GD's error

[27] The GD's decision refers to the sections of the OAS Act and Regulations applicable to the issues in this case. The GD applied the law to the Applicant's situation and considered the case on the merits in the absence of the parties since it concluded that the appeal could not succeed.

[28] The GD did not err in applying the law (the OAS Act and Regulations) to the situation.

[29] However, the GD did not state the legal test that it applied in summarily dismissing the appeal. It is not clear from a reading of the GD's decision what legal test was applied. That constitutes an error in law.

Appeal to the AD

[30] Consequently, the AD must decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision.

[31] With respect to the Appellant's request to be present at a hearing before the Tribunal, the GD has the discretion to decide how an appeal will proceed. Subsection 53(1) of the DESD Act provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[32] Furthermore, section 28 of the *Social Security Tribunal Regulations* ("the Regulations") provides that the GD may make a decision on the basis of the documents and submissions already in the file or after hearing the parties at a hearing. The GD deemed that a hearing was not necessary and that the necessary information was in the file.

[33] The GD's decision to proceed on the record is in accordance with the law.

[34] The AD finds that a hearing is not necessary and that the necessary information is in the file. Consequently, I am proceeding in the form of hearing on the record.

[35] The facts are not in dispute and there is no reason to refer the matter back to the GD. The AD may give the decision that the GD should have given by applying the legal test applicable to a summary dismissal.

Application of legal test

[36] In applying the legal test for summary dismissal – is it plain and obvious on the record that the appeal is clearly bound to fail? – to the present situation, I note the following.

[37] The established facts are as follows:

- (a) the Appellant attained the age of 65 years in September 2008 and made an application for an OAS pension in January 2014;

- (b) the Respondent approved a pension and that pension was granted to the Appellant starting in February 2013; and
- (c) the retroactivity period was one year preceding receipt by the Respondent of the Appellant's OAS application.

[38] The Appellant claims that:

- (a) he did not receive the OAS pension application form before he attained the age of 65 years;
- (b) the Respondent's agents did not advise him to make an OAS application before he did so in January 2014; and
- (c) he was entitled to his OAS pension as soon as he attained the age of 65 years and is owed a sum of money retroactive to September 2008.

[39] The Respondent contends that:

- (a) the Tribunal does not have the discretion to depart from the statutory framework;
- (b) the retroactivity is limited under subsections 8(1) and (2) of the OAS Act;
- (c) in the Appellant's circumstances, the retroactivity is limited to the date preceding by one year that of receipt of the application, that is to say January 2013; and
- (d) the first pension payment was made in the months following approval of the application, that is to say February 2013 in this case.

[40] The question for the AD is now the following: In the event the Appellant received erroneous advice from the Respondent's agents, is the appeal (on the retroactivity period) bound to fail? The answer is yes for the following reasons:

- (a) section 32 of the OAS Act provides that the Minister may take remedial action where the Minister is satisfied that a person has been denied a benefit, or a portion of

a benefit, to which that person would have been entitled as a result of erroneous advice or administrative error in the administration of the OAS Act;

- (b) as that discretion is reserved for the Minister, the Tribunal (the GD or the AD) does not have discretion to intervene in the event erroneous advice is given: the Tribunal does not have that authority; and
- (c) regardless of the evidence or arguments that could be presented at a hearing, the appeal is plainly and obviously bound to fail.

[41] Upon review of the Appellant's appeal application, the submissions of the parties, the file, the GD's decision, the applicable statutory provisions and previous summary dismissal decisions, and in applying the applicable legal test for summary dismissal, I dismiss the appeal.

CONCLUSION

[42] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division