



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. G. v. Minister of Employment and Social Development*, 2016 SSTGDIS 76

Tribunal File Number: GP-15-621

BETWEEN:

R. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shane Parker

DATE OF DECISION: September 27, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for an *Old Age Security* (OAS) pension was date stamped by the Respondent on January 29, 2013 (GD2-11 to 14). On February 21, 2013 the Respondent wrote that it approved the application, and awarded the Appellant a partial pension at the rate of 25/40ths with payment beginning August 2013 ("initial decision" at GD2-15 to 17). In a letter received by the Respondent on December 23, 2014 the Appellant asked that the Respondent reconsider its initial decision (GD2-18). On December 31, 2014 the Respondent replied to this request, stating that after reviewing the Appellant's file, it would not reconsider its initial decision because the 90-day deadline to make the request had passed (the "reconsideration refusal" at GD2-7). On February 6, 2015 the Appellant appealed the reconsideration refusal to the Social Security Tribunal (Tribunal).

[2] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The member has decided that a further hearing is not required.
- b) There are no gaps in the information in the file or need for clarification.
- c) Credibility is not a prevailing issue.
- d) 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.

THE LAW

[3] Section 27.1 of the *Old Age Security Act* (OAS Act) states that a person who is dissatisfied with a decision of the Minister (the Respondent) that no benefit may be paid to the person, or respecting the amount of a benefit, may request a reconsideration within 90 days. The Minister may, either before or after the expiration of the 90 days, allow a longer period to submit the request for reconsideration.

[4] Subsection 29.1(1) *Old Age Security Regulations* (OAS Regulations) provides that the Minister may allow a longer period to make a request for reconsideration if the Minister is satisfied that:

- a) there is a reasonable explanation for requesting a longer period and
- b) the person has demonstrated a continuing intention to request a reconsideration.

[5] Further, subsection 29.1(2) of the OAS Regulations provides that if the request for reconsideration is made:

- a) **after 365 days of the person being notified in writing of the decision**, or
- b) by a person who has applied again for the same benefit;

then, the Minister must also be satisfied that:

- 1. the request for reconsideration has a reasonable chance of success, and**
- 2. no prejudice would be caused to the Minister or a party by allowing a longer period to make the request.**

[emphasis added]

[6] Subsection 29.1(3) of the OAS Regulations states that the Minister may take any necessary steps to obtain information that the Minister may require to decide whether to allow a longer period to make a request for reconsideration.

[7] Section 28 of the OAS Act provides that a person who is dissatisfied with the Minister's decision under section 27.1, including a decision in relation to further time to make a reconsideration request, can appeal that decision to the Tribunal.

ISSUE

[8] The Tribunal must determine if the Respondent exercised his discretion judicially when he refused to allow a longer period of time for the Appellant to request reconsideration of the

initial decision letter awarding a partial pension of 25/40ths. If not, then the Tribunal must render the decision the Respondent should have made pursuant to section 29.1 of the OAS Regulations.

EVIDENCE

[9] The Appellant's application for an OAS pension was received on January 29, 2013.

[10] On February 21, 2013 the Respondent advised the Appellant that she was awarded a partial pension at the rate of 25/40ths. In that initial decision she was advised that if she did not agree with the decision "you have to write to us **within 90 days** of receiving this letter." (GD2-16, bold emphasis in the original letter)

[11] The Appellant did not write to the Respondent to request a reconsideration until December 16, 2014. The Respondent received this request on December 24, 2014 (GD2-18). The letter is very short. It states:

*Please reconsider your decision regarding calculation of my OAS portion of my pension.
You calculated portion as 25/40*

*I came to Canada on Aug.051987 and my first OAS payment was in Aug.2013, so I think
the portion should be 26/40*

[12] On December 31, 2014 the Respondent refused the Appellant's request to reconsider the initial decision. It provided the following reasons:

*On February 21, 2013, we sent you a letter explaining our decision. The letter stated that
you had 90 days to ask us to reconsider our decision. We cannot consider your
application because the 90 days have passed.*

(underlining added here; GD2-7)

[13] The Appellant provided additional information regarding her late reconsideration request in her Notice of Appeal to the Tribunal in February 2015 (GD2-4 to 5). This information was not before the Respondent when it rendered its reconsideration refusal on December 31, 2014.

SUBMISSIONS

[14] Further to the Tribunal's process, the parties were given an opportunity to file additional documents and/or submissions in writing by Notice dated July 5, 2016. The parties did not file any additional material with the Tribunal within the filing periods set out in that Notice. The Tribunal was therefore left to consider the submissions found in the appeal file which existed prior to the Notice.

[15] The Appellant submitted that the Respondent should reconsider its initial decision because:

- a) She has a valid case to be awarded a pension of 26/40ths based on 26 years of Canadian residence (August 1987 to August 2013). It is unfair to not reconsider the merits of her argument because she missed the reconsideration request deadline (GD2-5 and 18);
- b) Prior to formally requesting a reconsideration in December 2014, the Appellant and her husband were in contact with Service Canada agents and repeatedly presented her case for an increase in her pension (GD2-4 to 5).

[16] The Respondent's only discernible argument for refusing the late reconsideration request was that the Appellant missed the 90-day deadline (GD2-7).

ANALYSIS

[17] The Tribunal must determine if the Respondent exercised its discretion judicially when it refused to allow a longer period for the Appellant to request a reconsideration.

[18] The decision of the Respondent to grant or refuse a late reconsideration request is considered a discretionary decision. Case law indicates that the Minister's discretion must be exercised judicially (*Canada (A.G.) v. Uppal*, 2008 FCA 388).

[19] A discretionary power is not exercised "judicially" if it can be established that the decision-maker:

- a) acted in bad faith,

- b) acted for an improper purpose or motive,
- c) took into account an irrelevant factor,
- d) ignored a relevant factor, or
- e) acted in a discriminatory manner. (*Canada (A.G.) v. Purcell*, [1996] 1 FC 644)

[20] Subsection 29.1(1) of the OAS Regulations sets out the specific legal test under the OAS regime in assessing Ministerial discretionary power to allow or refuse late reconsideration requests. Under this provision, the Respondent must consider whether: a) there is a reasonable explanation for requesting a longer reconsideration period; and b) the person has demonstrated a continuing intention to request a reconsideration.

[21] In this case, since the reconsideration request was made over 365 days after the reconsideration was communicated to the Appellant, subsection 29.1(2) of the OAS Regulations also applies. This provision requires the Respondent to consider whether: a) the request for reconsideration has a reasonable chance of success, and b) no prejudice would be caused to the Minister or a party by allowing a longer period to make the request.

[22] Since the Respondent's refusal decision only gave reasons citing the time limitation, the Respondent does not appear to have considered any of the factors set out under subsections 29.1(1) and (2) of the OAS Regulations in denying the Appellant a longer period to request a reconsideration. In fact, the Respondent does not address any of the four factors.

[23] For the above reasons, the Tribunal finds that the Respondent did not exercise his discretion judicially in refusing the late reconsideration request. The Tribunal must now give the decision the Respondent should have given pursuant to section 29.1 of the OAS Regulations.

Reasonable explanation for delay and continuing intention to pursue

[24] The Tribunal notes that the Appellant's reconsideration request fails to explain the reason for the delay and explain a continuing intention to pursue a reconsideration. However, considering the Notice of Appeal, the Tribunal is satisfied that these factors are met. The

Appellant explained that she and her husband repeatedly pressed her case at Service Canada offices without getting a “straight answer.” (GD2-4 to 5).

Reasonable chance of success

[25] The Tribunal notes that the Appellant’s reconsideration request and Notice of Appeal argue that she be awarded a partial pension of 26/40ths on the basis of 26 years of Canadian residence (August 5, 1987 to August 28, 2013) (GD2-5). This is an arguable case. It cannot be said she has no reasonable chance of success.

Prejudice to Respondent

[26] Finally, having reviewed the file, the Tribunal finds there to be no discernible prejudice to the Respondent in allowing a late reconsideration.

CONCLUSION

[27] For the reasons above, the Respondent did not exercise his discretion judicially in this case. The Appellant’s late reconsideration can proceed and the Respondent will have to conduct a reconsideration on the merits. Once this is done, the Appellant will have the right to appeal to the Tribunal for adjudication of the merits of her case, should she choose to do so.

[28] The appeal is allowed.

Shane Parker
Member, General Division - Income Security