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

Citation: *S. A. v. Minister of Employment and Social Development*, 2017 SSTGDIS 4

Tribunal File Number: GP-15-3061

BETWEEN:

S. A.

Appellant

and

Minister of Employment and Social Development

Respondent

and

K. H.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Virginia Saunders

HEARD ON: December 14, 2016

DATE OF DECISION: January 6, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

S. A. Appellant

INTRODUCTION

[1] The Appellant received an Allowance under the *Old Age Security Act* (OAS Act) for the month of May 2015. The Respondent then determined that, as the Appellant's spouse was receiving a Guaranteed Income Supplement (GIS) calculated as if he was single, the Appellant was not eligible to receive the Allowance. She was assessed an overpayment of $261.89. The Respondent maintained this decision on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] This appeal was heard by teleconference for the following reasons:

a) The issues under appeal are not complex.

b) 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 19 of the OAS Act provides for an Allowance to be paid to the spouse, common- law partner, or former common-law partner of a pensioner who is receiving a GIS, if the applicant meets other eligibility requirements.

[4] Subsection 19(1) of the OAS Act states that:

> 19 (1) Subject to this Act and the regulations, an allowance may be paid to the spouse, common-law partner or former common-law partner of a pensioner for a month in a payment period if the spouse, common-law partner or former common-law partner, as the case may be,

(a) in the case of a spouse, is not separated from the pensioner, or has separated from the pensioner where the separation commenced after June 30, 1999 and not more than three months before the month in the payment period;

(a.1) in the case of a former common-law partner, has separated from the pensioner where the separation commenced after June 30, 1999 and not more than three months before the month in the payment period;

(b) in the case of a spouse, common-law partner or former common-law partner, has attained sixty years of age but has not attained sixty-five years of age; and

(c) in the case of a spouse, common-law partner or former common-law partner, has resided in Canada after attaining eighteen years of age and prior to the day on which their application is approved for an aggregate period of at least ten years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which their application is approved.

[5] Subsections 19(1.1) and (1.2) state:

(1.1) For the purposes of subsection (1), common-law partners do not become former common-law partners if the sole reason for their separation is that one of the partners is an incarcerated person described in subsection 5(3) or paragraph 19(6)(f).

(1.2) For the purposes of paragraph (1)(a), a spouse is not considered to be separated from the pensioner if the sole reason for the separation is that the pensioner is an incarcerated person described in subsection 5(3).

[6] If a person has a spouse or common-law partner, the amount of the GIS or the Allowance that will be paid is based on the couple's combined income, as set out in section 12 and subsection 22(3) of the OAS Act. For this reason, a person who is single will often receive a higher amount than a person who has a spouse or common-law partner.

[7] Paragraph 15(3)(b) of the OAS Act states:

(3) Where an application for a supplement in respect of any payment period has been made by a person, the Minister may, after any investigation of the circumstances that the Minister considers necessary, direct that the application be considered and dealt with as though the person did not have a spouse or common-law partner on the last day of the previous payment period, in any case where . . .

(b) the Minister is satisfied that the person, as a result of circumstances not attributable to the person or the spouse or common-law partner, was not living with the spouse or common-law partner in a dwelling maintained by the person or the spouse or common- law partner at the time the application was made.

ISSUE

[8] The Tribunal must decide if the Appellant was eligible to receive the Allowance for May 2015 and after.

EVIDENCE

[9] The Respondent was unable to produce the Appellant's application for the Allowance or the entitlement letter that was sent to her. It relied on its electronic records which indicated that the Appellant was granted the benefit effective May 2015, the month following her 60th birthday. The Appellant agreed that she had applied for the Allowance and that she received that sum.

[10] The Appellant was born on April 18, 19555. She testified that the Added Party was born on August 8, 1946, and that they were married on February 27, 2003.

[11] The Appellant testified that the Added Party suffered from depression which gradually grew worse, and that he was eventually diagnosed with bipolar disorder. Around 2012 he began to spend considerable amounts of time in hospitals and group homes because of his condition, as the Appellant was unable to manage him and care for him. She testified that but for this fact, they remain together as a married couple. She has Power of Attorney for him and is authorized to complete forms for him and make decisions regarding his care. She visits him and makes additional purchases to improve his quality of life.

[12] The Appellant was uncertain as to when the Added Party began to receive a GIS. The file indicated that the Added Party applied for renewal of his GIS on April 20, 2012 (GD2-19). He indicated on his application that he was married to the Appellant. On May 28, 2012, he was asked by Service Canada to confirm his marital status by completing an attached statement (GD2-23).

[13] At the hearing the Appellant was referred to the document at GD2-21, which is a questionnaire that was filled out but not signed, dated June 4, 2012. She recalled that this was sent by Service Canada, and that she completed it for the Added Party. At the time, he was in a group home. She was working full-time and was earning a good income. She understood that

by completing this form the amount of GIS the Added Party was receiving would increase, and this in fact happened.

[14] The Appellant testified that she filled out a Statement of Income every year for the Added Party's GIS renewal. In April 2014 she submitted a Statement of Income for the period July 2014 to June 2015 (GD2-17). She recalled that Service Canada then sent the form that is at GD3-7, which she completed and both spouses signed on December 16, 2014.

[15] This form is a "Statement of Involuntary Separation" for OAS, in which the Appellant stated that she and the Added Party were involuntarily separated since May 11, 2014. She stated that on May 12, 2014, the Added Party was hospitalized and he remained there until he was transferred to a nursing home in December 2014.

[16] The Appellant testified that after she submitted this form the Added Party began to receive GIS of about $1100.00 per month.

[17] The Appellant applied for an Allowance, and received $261.89 for May 2015. Her husband received a total of $917.36 for OAS and GIS, which was less than he had received in the past. The Appellant used all of the funds she received to pay her husband's additional expenses at the nursing home.

[18] The Appellant testified that she telephoned Service Canada to ask about the change in the amount of her husband's payment. This apparently led to the decision on June 5, 2015, that she had been overpaid the full amount of the Allowance she had received. The decision explained that this was because:

> The information in your file shows that you and your spouse have been living apart since May 2014. The Guaranteed Income Supplement is based on marital status and the couple's total income. When spouses live apart for reasons beyond their control, the supplement is paid to the pensioner (your spouse) as a single· person the month after the month you started living apart for reasons beyond their control, if it is to the overall advantage.

[19] The Appellant testified that after this her husband's account was adjusted and he began to receive the higher GIS amount and continues to do so. She has not received an Allowance since May 2015.

[20] The Appellant testified that the Added Party remained in the nursing home until April 2015. He was then transferred to Scarborough Grace Hospital, where he stayed for about two months before being transferred to Ontario Shores Centre. He was at Ontario Shores until November 2016, when he was moved into a nursing home. Throughout this period the Added Party has not returned to the family home to live.

[21] The Appellant testified that in September 2016 she was laid off from her job and she now has no income. She testified that it will be very difficult for her to repay the amount that the Respondent claims she owes.

SUBMISSIONS

[22] The Appellant submitted that she should not have to repay the Allowance she received because she used it to pay for the Added Party's expenses, which are higher than the amounts he receives for Canada Pension Plan, OAS and GIS.

[23] The Respondent submitted that the Appellant was not eligible to receive the Allowance because she and the Added Party had been separated for more than three months as of May 2015.

ANALYSIS

[24] While the Tribunal has sympathy for the Appellant's financial position, it does not have jurisdiction to allow the appeal on that basis. The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the OAS Act. It cannot consider extenuating circumstances to forgive an overpayment or to allow the Appellant to receive the Allowance when the legislation provides otherwise.

[25] However, the Tribunal considered whether the Appellant is in fact ineligible pursuant to the legislation.

[26] The Appellant turned 60 on April 18, 2015, and thereby met the age requirements for the Allowance, with payment to begin the following month. There is no dispute that she also

met the residence requirements and that she was the spouse of a pensioner, who is the Added Party in this appeal.

[27] Two different reasons have been advanced by the Respondent to explain its position that the Appellant was not entitled to receive the Allowance in May 2015 or after. In the initial decision letter and the reconsideration decision, the Respondent indicated that because the spouses were living apart for reasons beyond their control, it could consider the Added Party to be single for GIS purposes if doing so was to his advantage. The Respondent determined that it was to the Added Party's advantage, because his income as a single person was substantially lower. Such a decision would be based on paragraph 15(3)(b) of the OAS Act.

[28] In its submission to the Tribunal the Respondent did not rely on the above rationale; instead it submitted that the Appellant and the Added Party had been separated for more than three months when she first met the other requirements for the Allowance in May 2015, and so she was not eligible. That decision would be based on subsection 19(1) of the OAS Act.

Paragraph 15(3)(b) of the OAS Act

[29] Paragraph 15(3)(b) of the OAS Act allows the Minister to "direct that the [Added Party's GIS] application be considered and dealt with as though [he] did not have a spouse" if the Minister is satisfied that the Added Party as a result of circumstances not attributable to him or the Appellant, was not living with the Appellant in a dwelling maintained by either of them at the time the application was made.

[30] The legislation does not refer to such an arrangement as an "involuntary separation", although this term was used by the Respondent in apparently relying on paragraph 15(3)(b).

[31] The intention of Parliament with respect to this provision was discussed in *Canada (Minister of Human Resources Development) v. Leavitt*, 2005 FC 664:

> [25] A sense of the intention of Parliament can be gleaned from the remarks made on December 2, 1970 by the Honourable John C. Munro, then Minister of National Health and Welfare, during second reading of the Bill C-202, to amend the Old Age Security Act. With respect to the amendments that included the predecessor to the current s.15(3)(b), he stated (House of Commons Debates, 3rd Session, 28th Parliament, Volume II, 1970, Dec. 2, 1970, p. 1693) that:

> Other changes in the legislation have also been proposed to make it more equitable. . . . In cases where one spouse is in a hospital or nursing home and the other has to live alone with the same costs as a single person, that spouse can be treated as though he were single.

[26] The introduction of this provision and others was also addressed by the government of the day as follows:

> This provision will assist in those cases where one spouse is in a hospital, a nursing home or other institution and the other spouse has to live alone with the same costs as a single person. (28th Parliament, White Paper, *Income Security for Canadians*, Appendix I - "*Guaranteed Income Security for the Aged*", at p. 42).

[32] The legislation's purpose is to provide additional assistance to couples where one spouse is hospitalized, not to limit the availability of the social benefits provided by the OAS Act.

[33] To interpret paragraph 15(3)(b) as somehow deeming an Allowance recipient to no longer be a spouse would run contrary to this intention. A direction under paragraph 15(3)(b) is that the GIS recipient be dealt with as though he did not have a spouse or common-law partner, but only for the purposes of his GIS application. The legislation does not deem him to be separated, nor does it indicate that his spouse is also to be considered single.

[34] A more reasonable interpretation that is consistent with the wording used is that a direction made under paragraph 15(3)(b) may be used to increase the amount of a person's GIS, without affecting the entitlement of the person's spouse or common-law partner to an Allowance.

[35] The Tribunal finds that, regardless of whether the Added Party is considered to be single for the purposes of his application, at May 2015 the Appellant was the spouse of a pensioner to whom a supplement was payable, and she continues to be so.

Subsection 19(1) of the OAS Act

[36] As indicated above, the Respondent later submitted that the Appellant was not eligible to receive the Allowance pursuant to paragraph 19(1)(a) because at May 2015 she and the Added Party had been separated for more than three months.

[37] The Respondent noted in its submission that the Appellant "does not dispute that she is not entitled to the ALW benefit." The Appellant did not expressly state that she agreed that she was not entitled. She is unschooled in the law and unrepresented. Her primary concern was the order to repay approximately $260.00, which she cannot afford. It is apparent that she merely accepted the Respondent's conclusion that she was "involuntarily separated" and focussed her efforts on having the overpayment forgiven.

[38] Nothing prevents the Tribunal from considering whether or not the Appellant and the Added Party were in fact separated such that she is not eligible to receive the Allowance.

[39] Previously, section 17 of the OAS Regulations provided that spouses were deemed to be separated in the following circumstances:

> a) The pensioner left the spouse or *vice versa* in accordance with the law of the province in which the spouse and the pensioner most recently resided together;
>
> b) The spouse and the pensioner were living separate and apart as a result of marriage breakdown; and
>
> c) The spouse and the pensioner were divorced and a decree absolute of divorce or a judgment of nullity of the marriage has been issued.

[40] Section 17 was repealed in 2000, and nothing has replaced it. The terms "separate" or "separated" are not defined in the OAS Act or the OAS Regulations. The Tribunal therefore considered the ordinary meaning of the word "separated". The word is used to describe objects, persons or ideas that are apart. However, in a marital context the term is used to describe persons who are apart because their relationship has ended and they are no longer living as man and wife (dictionary.cambridge.org/dictionary/English/separate. Accessed 2017-01-07).

[41] The Tribunal notes that subsection 19(1) provides that there is no eligibility for the Allowance where a spouse or a former common-law partner has been separated from the pensioner for more than three months. A separation of common-law partners is not contemplated. Under this provision, a person who is physically separated from his or her partner but who remains in the common-law relationship is still eligible for the allowance.

[42] Under the OAS Act, a "common-law partner" is defined as a person cohabiting in a conjugal relationship at the relevant time. Case law has defined a conjugal relationship as "a mutual intention to live together in a marriage-like relationship of some permanence" (*MSD v. Pratt*, 2006 CP 22323 (PAB)) and has determined that co-habitation is not synonymous with co- residence, in that two people can cohabit even though they do not live under the same roof (*Hodge v. Canada* 2004 SCC 65).

[43] Parliament cannot have intended that a person who was legally married would be treated differently than a person who had a common-law partner. Thus the factors that establish that a person is separated from a spouse for the purposes of paragraph 19(1)(a) must be the same as those that establish that a person has become a former common-law partner for the purposes of paragraph 19(1)(a.1). Paragraph 19(1)(a) requires marital breakdown that is similar to ceasing to cohabit in a conjugal relationship.

[44] The Tribunal considered whether the fact that subsections 19(1.1) and (1.2) specifically state that incarcerated persons are not considered to be separated means that other situations where spouses or partners do not live together ought to be regarded as separation for the purposes of section 19. While these provisions clarify what the legislation means in one circumstance, they do not alter the plain meaning of the words used in paragraphs 19(1)(a) and 19(1)(a.1).

[45] The Tribunal accepts the Appellant's testimony that the only reason that she and the Added Party do not live in the same residence is that he requires institutional care due to his health. There is no other evidence suggesting otherwise. She has Power of Attorney and makes his health care decisions. She provides him with what care, comfort and companionship she can. She is not and never has been separated from the Added Party in the sense that they no longer have a marriage-like relationship of some permanence.

[46] A physical separation caused entirely by the medical needs of one spouse is not the type of separation contemplated by subsection 19(1), and the Appellant cannot be denied the Allowance on that basis.

[47] The Tribunal finds that as of May 2015 the Appellant was and remains eligible to receive an Allowance. She has not separated from the Added Party, and any direction that he is to be considered single does not affect her entitlement.

CONCLUSION

[48] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security