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

Citation: *J. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 16

Tribunal File Number: AD-16-865

BETWEEN:

J. A.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of decision: January 22, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated March 30, 2016. The General Division conducted a hearing on the record and determined that the Applicant was not eligible to collect a pension under the *Old Age Security Act* (OASA) while living abroad, as she did not have the requisite minimum 20 years of Canadian residency.

[2] On June 27, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[3] The Applicant was born in February 1942. In her application for the Old Age Security (OAS) pension, submitted June 15, 2012, she disclosed that she lived in Canada from July 1, 1967 to September 29, 1971, at which time she moved to the United States. She has lived there ever since.

[4] The Applicant also advised Service Canada that she had made contributions to U.S. Social Security. On March 21, 2014, pursuant to the Social Security Agreement (SSA) between Canada and the United States, the U.S. government provided the Respondent with a Certified U.S. Social Security Coverage Record, which indicated the Applicant had 58 quarters, or 14½ years, of coverage.

[5] The Respondent denied the application, initially and on reconsideration, on the basis that the Applicant had only 18½ years of totalized residence, short of the 20 years required to receive an OAS pension if living outside Canada. On July 21, 2014, the Applicant appealed this

decision to the General Division, arguing that, as she had not worked all the time while living in the United States, she therefore did not have wages to make contributions to U.S. Social Security. She submitted that she had spent four years babysitting her two grandchildren and, although she was not paid for this work, it would bring her totalized residency to more than 22 years.

[6] In its decision of March 30, 2016, the General Division dismissed the Applicant's appeal, finding that the Respondent's calculation of the total periods of Canadian residency and U.S. coverage had been made correctly.

THE LAW

OASA

[7] Under section 3 of the OASA, a person must have resided in Canada for at least 40 or more years after his or her 18th birthday in order to receive a full OAS pension.

[8] To receive a partial pension, an applicant must have resided in Canada for at least 10 years if he or she resides in Canada on the day before the application is approved. An applicant who resides outside of Canada on the day before the application is approved must prove that he or she had previously resided in Canada for at least 20 years.

[9] Under section 40 of the OASA, where an applicant has spent time living and working abroad, international social security agreements with other countries may assist him or her to qualify for OAS benefits.

[10] Under the Canada-U.S. SSA, periods of contributions to the U.S. Federal Old Age, Survivor's and Disability Insurance Program may be added to periods of residence in Canada to assist the applicant in meeting the minimum residence requirement. Article VIII states:

> 1. In this Article, "pension" means a monthly pension under Part I of the *Old Age Security Act*.
>
> 2. (a) If person is entitled to a pension under paragraph 3(1)(a) or (b) of the Act, the totalization provisions of subparagraphs (3)(a) and (b) of this Article may be used, if necessary, to accumulate the required 20 years of residence in Canada for payment of a pension in the United States. Only a partial pension calculated in accordance with the Act may be paid.

(b) If a person is entitled to a partial pension under subsection 3(1.1) of the Act, that pension may be paid in the United States if the periods totalized according to subparagraphs (3)(a) and (b) of this Article equal not less than 20 years.

3. (a) If a person is not entitled to a pension under the *Old Age Security Act* because of insufficient periods of residence, entitlement to a pension may be determined by totalizing periods of residence in Canada on or after January 1, 1952 and after the attainment of age 18, and periods of coverage under United States laws as specified in subparagraph (3)(b) of this Article, but where the periods coincide, only one period shall be counted.

   (b) For the purposes of establishing entitlement to a pension by means of totalization, a quarter of coverage under United States laws on or after January 1, 1952 and after the attainment of age 18, shall be counted as three months of residence in Canada.

   (c) The agency of Canada shall calculate the amount of the pro-rated pension at the rate of 1/40th of the full pension for each year of residence in Canada which is recognized as such in subparagraph (3)(a) of this Article or deemed as such under Article VI of this Agreement.

4. If the total duration of the periods of residence completed in Canada in accordance with subparagraph (3)(a) of this Article or Article VI of this Agreement is less than one year, the agency of Canada shall not pay a pension in respect of those periods.

DESDA

[11] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[12] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[13] According to subsection 58(1) of the DESDA, the only grounds of appeal are the following:

(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 made in a perverse or capricious manner or without regard for the material before it.

[14] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[15] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the applicant does not have to prove the case.

ISSUE

[16] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[17] In her application requesting leave to appeal, the Applicant alleged that the General Division failed to comply with the Canada-U.S. SSA. According to the OASA, a minimum of 20 years of coverage is needed, whereas according to page 10 of the Canada-U.S. SSA, an applicant must have resided in Canada for at least one year after 1951 and after the age of 18. The Applicant noted that is not necessary to consider U.S. Social Security credits in determining eligibility for the Canada Pension Plan (CPP).

ANALYSIS

[18] Having reviewed the Genera Division's decision against the documentary record, I see no error that might warrant intervention. The Applicant has argued that the General Division misinterpreted the Canada-U.S. SSA, but she has not cited the Agreement itself, rather background information on the Agreement downloaded from a U.S. government website. Moreover, she has highlighted extracts from this website in isolation in a way that distorts the meaning and intent of the applicable law. It is true that to qualify for totalization under the Canada-U.S. SSA, an applicant must have resided in Canada for at least one year after 1951 and after the age of 18. However, Article VIII specifies that periods of contributions to U.S. Social

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Security may be added to periods of residence in Canada only to assist the applicant in meeting the minimum residence requirements established under section 3 of the OASA. This applies to both the minimum eligibility requirement of 10 years and the 20-year requirement to receive the OAS pension while residing outside Canada.

[19] The Applicant also refers to a fragment of a sentence that she submits relieves applicants from considering Social Security credits in determining CPP eligibility. However, she ignores the rest of the sentence, which reads "…since anyone who has made at least one contribution to [the CPP] can qualify for a retirement benefit at 65…" Moreover, her application, and thus her appeals, are concerned only with her entitlement, if any, to the OAS pension. The CPP is irrelevant in this matter.

[20] In sum, the Applicant has not identified any specific errors that might warrant granting leave to appeal. Her submissions amount to a request that I conduct a new hearing on the merits of her claim and substitute the General Division's decision for one in her favour. However, I am unable to do this, as my authority under subsection 58(1) permits me to determine only whether the Applicant's reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success.

[21] As she has not identified any specific errors of fact or law, I am unable to consider granting leave under the claimed grounds of appeal.

CONCLUSION

[22] The application is refused.

Member, Appeal Division