



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 180

Tribunal File Number: AD-16-1032

BETWEEN:

W. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 25, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for the Old Age Security (OAS) pension and the Respondent approved the application effective December 2014. In January 2015, the Respondent advised the Appellant that the OAS pension would be suspended because he was incarcerated.

[2] The Appellant filed a request for reconsideration. The Respondent advised him, by letter dated May 12, 2015, that the initial decision was being maintained.

[3] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) on August 24, 2015. On September 1, 2015, the Tribunal informed the Appellant that additional information was required in order to complete his Notice of Appeal. He replied on October 26, 2015, and the Tribunal treated the appeal as complete but late. He requested that the Tribunal allow his appeal because he was wrongfully convicted, cannot afford a lawyer and needs the OAS pension. His appeal was filed with the Tribunal beyond the 90-day limit.

[4] On March 21, 2016, the General Division granted an extension of time for the Appellant to appeal. However, it gave notice to the Appellant that it intended to summarily dismiss the appeal pursuant to section 22 of the *Social Security Tribunal Regulations*. The Appellant was given a reasonable time to make submissions, which he did.

[5] On May 30, 2016, the General Division dismissed the appeal summarily on the basis that the Appellant is incarcerated and, as such, he is not entitled to receive payment of the OAS pension for the months of his incarceration, with the exception of the month of incarceration and the month of release, as provided by subsections 5(3) and 8(2.1) of the OAS Act. The General Division also noted that it is required to interpret and apply the provisions as they are set out in the OAS Act.

[6] The Appellant filed an incomplete application to appeal to the Tribunal's Appeal Division on August 17, 2016. In a letter dated August 19, 2016, the Tribunal asked him to complete his application. The Appellant provided further information on September 6, 2016,

and his appeal was then considered complete. His reasons for appeal can be summarized as follows:

- a) He was wrongfully convicted and continues to fight the conviction.
- b) Not all inmates are “monsters” like C. O. It is wrong to deny him OAS just because he is an inmate. He has not caused bodily harm.
- c) He cannot afford a lawyer.
- d) He has an elderly mother who needs his assistance.
- e) He should not be denied OAS as part of a “blanket” rule. Each case should be reviewed individually.

[7] The Respondent did not file submissions before the Appeal Division other than an email stating: The Respondent does not have any submissions as it is evident that the appeal of this summary dismissal decision should be dismissed as subsection 5(3) of the OAS Act does not allow payment of an OAS pension while the Appellant is incarcerated.

[8] This appeal proceeded on the basis of the record for the following reasons:

- a) the lack of complexity of the issue under appeal;
- b) the fact that the Appeal Division member had determined that no further hearing was required; and
- c) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUE

[9] The Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division, or confirm, reverse or modify the General Division’s decision.

LAW AND ANALYSIS

[10] The Appellant appeals a decision dated May 30, 2016, whereby the General Division summarily dismissed his appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[11] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Because no further hearing is required, this appeal before the Appeal Division is proceeding pursuant to paragraph 37(a) of the *Social Security Tribunal Regulations*.

[12] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

- 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.

[13] The Appellant does not dispute any of the factual findings that the General Division made. Rather, he alleges that he was wrongfully convicted, continues to fight the wrongful conviction and should not be treated the same way as inmates who have physically harmed others.

[14] The relevant provisions of the OAS Act are:

- a) Subsection 5(3), which states that no pension may be paid in respect of a period of incarceration—exclusive of the first month of that period—to a person who is subject to a sentence of imprisonment:
 - (a) that is to be served in a penitentiary by virtue of any Act of Parliament; or

(b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Employment and Social Development Act*.

- b) Subsections 8(2.1) and 9.2, which provide for the suspension of payment to a person who is approved for a pension while incarcerated and the resumption of payment after release.

Legal Test for Summary Dismissal

[15] Subsection 53(1) of the DESD Act allows the General Division to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[16] Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or it may confirm, rescind or vary the General Division's decision in whole or in part.

[17] Here, the General Division correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 3 of its decision.

[18] However, it is insufficient to simply cite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act without properly applying it. After identifying the legislative basis, the General Division must correctly identify the legal test and apply the law to the facts.

[19] The General Division asked "whether the appeal should be summarily dismissed" at paragraph 2 of its decision.

[20] The General Division decision does not state what legal test it applied to arrive at its conclusion to summarily dismiss the appeal.

The General Division's Decision

[21] While the General Division did not state the legal test it applied, it did explain the basis upon which it summarily dismissed the appeal:

[13] In compliance with section 22 of the SST Regulations, the Appellant was given notice in writing of the intent to summarily dismiss the appeal and was allowed a reasonable period of time to make submissions.

[14] 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*.

[15] Based on the evidence on file, given that the Appellant is incarcerated, the Tribunal finds he is not entitled to receive payment of the OAS pension for the months of his incarceration, with the exception of the month of incarceration and the month of release, as provided by subsections 5(3) and 8(2.1) of the *OAS Act*.

[16] Further, payment of the Appellant's OAS pension that was suspended by virtue of subsection 5(3) of the *OAS Act* shall resume in respect of the month in which he is released but only after he notifies the Minister in writing before or after his release as provided by section 9.2 of the *OAS Act*.

[17] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

[22] Because the General Division member did not identify the legal test applicable to a summary dismissal and did not apply that legal test to the facts, the General Division decision is based on an error of law.

[23] The legal test applicable to a summary dismissal is the first question that needs to be answered. The question of whether there was an error of law (or another type of error) in the Respondent's decision on the specific issues would follow.

[24] Given the error of law regarding the preliminary question of the legal test applicable to summary dismissals, the Appeal Division is required to make its own analysis and to decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division, or confirm, reverse or modify the decision: *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, at paragraph 8, and subsection 59(1) of the DESD Act.

Application of Legal Test for Summary Dismissal

[25] Although the General Division erred by neither identifying nor applying the applicable legal test, paragraphs 13 to 17 of the General Division decision are correct, and I agree with the findings stated in them.

[26] Although “no reasonable chance of success” was not further defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act, the Tribunal notes that it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.

[27] There appear to be three lines of cases in previous Appeal Division decisions on appeals of summary dismissals by the General Division, namely:

- a) AD-13-825 (*J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD715), AD-14-131 (*C.D. v. Canada Employment Insurance Commission*, 2015 SSTAD594), AD-14-310 (*M.C. v. Canada Employment Insurance Commission*, 2015 SSTAD237), and AD-15-74 (*J.C. v. Minister of Employment and Social Development*, 2015 SSTAD596). The following legal test was applied: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1, and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.
- b) AD-15-236 (*C.S. v. Minister of Employment and Social Development*, 2015 SSTAD 974), AD-15-297 (*A.P. v. Minister of Employment and Social Development*, 2015 SSTAD973), and AD-15-401 (*A.A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178). The Appeal Division applied a differently articulated legal test: Whether there is a “triable issue” and whether there is any merit to the claim using the language of “utterly hopeless” and “weak” case in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not “manifestly clear,” then the

matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary dismissal, as it necessarily involves assessing the merits of the case, examining the evidence and assigning weight to it.

- c) AD-15-216 (*K.B. v. Minister of Employment and Social Development*, 2015 SSTAD 929). The Appeal Division did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[28] I find that the application of the two tests cited in paragraph 27 of this decision leads to the same result in the present case—the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a “weak” case but rather an “utterly hopeless” one, as it does not involve assessing the merits of the case or examining the evidence.

[29] Neither the General Division nor the Appeal Division of the Tribunal can vary the eligibility requirements under the OAS Act, no matter what the circumstances may be.

[30] The Appellant’s main argument is that it is unfair that his OAS pension has been suspended because he is incarcerated, when he asserts that he has never physically harmed anyone and that he was wrongfully convicted.

[31] The operation of subsection 5(3) of the OAS Act is determinative of this appeal. For this appeal to have a reasonable chance of success (or any chance of success), the Appellant needs to be able to establish that he is not serving in a penitentiary by virtue of any Act of Parliament and that he is not serving a prison term that exceeds 90 days.

[32] It is clear from the record that the Appellant is incarcerated due to a sentence of imprisonment in a federal penitentiary. The Appellant does not dispute these facts.

[33] After reviewing the Appellant’s notice of appeal, his submissions, the General Division’s record, its decision, and the Appeal Division’s previous decisions relating to summary dismissals, and after applying the legal test applicable to a summary dismissal, I hereby dismiss the appeal.

CONCLUSION

[34] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division