



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *F. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 274

Tribunal File Number: AD-16-889

BETWEEN:

F. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 12, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for the Old Age Security (OAS) pension in November 2014 and the Respondent approved the application effective December 2013. The Appellant made a request for reconsideration. The Respondent advised him, by letter dated June 22, 2015, that the initial decision was being maintained.

[2] The Appellant had previously applied for an OAS pension in March 2011, and the Respondent had requested more documentation to support his application. Having not received the requested documents, the Respondent advised that the review of this file had stopped and that the Appellant would have to reapply if he wanted to receive an OAS pension. The Appellant did not seek a reconsideration of that decision.

[3] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) in July 2015. He requested that the Tribunal allow his appeal because he first applied for an OAS pension in March 2011 and that he be paid retroactively to his first application.

[4] On May 31, 2016, the General Division dismissed the appeal summarily on the basis that the Appellant had received the maximum retroactivity permitted under the OAS Act.

[5] The Appellant filed an application for leave to appeal to the Tribunal's Appeal Division on June 30, 2016. His reasons for appeal can be summarized as follows:

- a) He filed an application for an OAS pension in March 2011 and was asked to submit documents and information.
- b) He complied with as much information and documentation as he could.
- c) That application was closed due to insufficient information, and he asked to have it reopened but that request was denied; therefore, he had to reapply.
- d) It is unfair that the date of his first application was ignored.

e) He is entitled to benefits from age 65, starting in March 2011.

[6] The Respondent did not file submissions before the Appeal Division.

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

- a) the issue under appeal is not complex;
- b) 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

[8] 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

[9] The Appellant is appealing a decision dated May 1, 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.

[10] 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*.

[11] 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.

[12] The relevant provisions are subsections 8(1) and (2) of the OAS Act and subsection 5(2) of the OAS Regulations.

Legal Test for Summary Dismissal

[13] 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.

[14] 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.

[15] 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.

[16] 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.

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

[18] 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

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

[15] The right of appeal to the Tribunal from decisions made pursuant to the OAS Act must be expressly given by statute. The Tribunal cannot consider an appeal except where there has been a request for reconsideration followed by a reconsideration decision made under section 27.1 of the OAS Act (*Canada (Attorney-General) v. Bannerman* 2003 FCT 208).

[16] It appears that the Appellant did not request reconsideration of the April 2012 decision to stop review of his March 2011 application. Such a request would have had to have been made to the Respondent within 90 days. There is no reconsideration decision in the file pursuant to any such request. The Tribunal does not have jurisdiction to review the Respondent's actions in cancelling the March 2011 application.

[17] The reconsideration decision that is before this Tribunal is the one dated June 22, 2015, regarding the Appellant's November 2014 application. The only issue is whether the Appellant's appeal of the effective date of payment following approval of the November 2014 application has a reasonable chance of success.

[18] The OAS Act sets out the effective dates for approval of an application for an OAS pension, as described above. They apply to the Appellant's situation as follows:

- a) The date that is one year before the day the Appellant's application was received was November 5, 2013.
- b) The day the Appellant turned 65 was March 21, 2011.
- c) The day the Appellant qualified for the pension under the OAS Act was March 21, 2011.
- d) The Appellant specified in writing that he wanted his pension to start as soon as he qualified or as of March 2011.

[19] The latest of those dates is November 5, 2013. In accordance with subsection 8(2) of the OAS Act and subsection 5(2) of the Regulations, the effective date of approval of the Appellant's application was November 5, 2013.

[20] According to subsection 8(1) of the OAS Act, payment of the pension started as of December 2013, the month after the application was deemed to have been approved.

[21] The Appellant has received the maximum retroactivity permitted by the OAS Act.

[22] 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. The Tribunal cannot use the principles of equity or consider extenuating circumstances, including any of those put forward by the Appellant, to grant more retroactivity of the OAS pension than is prescribed by the OAS Act.

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

[20] 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.

[21] 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 in law (or another type of error) in the Respondent's decision on the specific issues would follow.

[22] Given the General Division's error of law on the preliminary question of the legal test applicable to summary dismissals, the Appeal Division is required to make its own analysis and 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

[23] Although the General Division erred by neither identifying nor applying the applicable legal test, paragraphs 15 to 22 of the General Division decision are correct, and I agree with the findings stated in them.

[24] The Appellant takes issue with paragraph 10 of the General Division decision, which is related to the findings in paragraph 16. He argues that the Respondent never told him that they would stop the review of the 2011 application or that he had 90 days to ask for a reconsideration of that decision. However, the decision letter of April 2012 states that the Respondent had stopped the review of his file and that he had 90 days to ask for a reconsideration of that decision (see GD2-60).

[25] 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, it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.

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

- a) *J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD715, *C.D. v. Canada Employment Insurance Commission*, 2015 SSTAD594, *M.C. v. Canada Employment Insurance Commission*, 2015 SSTAD237, *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 c. 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). In these decisions, 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). In this decision, the Appeal Division did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[27] I find that the application of the two tests cited in paragraphs 26 a) and b) 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.

[28] Neither the General Division nor the Appeal Division of the Tribunal can consider an appeal except where there has been a request for reconsideration followed by a reconsideration decision, no matter what the circumstances may be.

[29] The Appellant’s main argument is that it is unfair that his OAS pension application in 2011 was closed and that he reapplied in 2014 because the Respondent refused to reopen the 2011 application. Unfortunately, the Appellant did not request a reconsideration of the decision to stop the review of that application. He was advised of this decision in a letter dated April 23, 2012, and that letter stated that if he disagreed with the decision, he would have 90 days to request reconsideration. The General Division found that he did not seek reconsideration of the April 2012 decision. Indeed, no request for reconsideration of that decision is in the appeal record.

[30] The only reconsideration decision that the General Division could review is the one related to the Appellant’s 2014 application.

[31] The operation of subsections 8(1) and 8(2) of the OAS Act and subsection 5(2) of the OAS Regulations are determinative of this appeal.

[32] The Appellant has received the maximum retroactivity possible pursuant to the OAS Act.

[33] After reviewing the Appellant's notice of appeal and submissions, the General Division's record and decision, 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