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

Citation: *S. G. v. Minister of Employment and Social Development,* 2017 SSTADIS 487

Tribunal File Number: AD-16-1261

BETWEEN:

S. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: September 26, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 19, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Applicant's appeal in part. It found that:

a) The Applicant resided in Canada from September 14, 1994, to July 9, 2004, for a period of nine years and 299 days; he resumed residence here on February 28, 2006, and he had 10 years of residence 66 days later. Therefore, he met the residence requirements and qualified for a partial Old Age Security (OAS) pension of 10/40ths and a Guaranteed Income Supplement (GIS) on May 5, 2006.

b) He ceased to reside in Canada on July 1, 2006. Therefore, his OAS pension and GIS were payable to him up to and including January 2007.

c) He resumed residence in Canada on April 4, 2010, and he has continued to reside here since then and has not been absent for more than six months. Therefore, his OAS pension and GIS are payable to him as of that date.

[2] The Applicant filed an application for leave to appeal (Application) on November 3, 2016. He sent correspondence to the Tribunal in December 2016 and in January 2017 to supplement the information he had previously provided.

[3] On July 18, 2017, the Tribunal asked the Respondent for submissions on whether leave to appeal should be granted or refused.

[4] The Respondent filed submissions on August 18, 2017.

[5] The Applicant filed correspondence, which was received by the Tribunal on August 26, September 5, September 14, and September 15, 2017, in response to the Respondent's submissions.

ISSUE

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

THE LAW

[7] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant. Moreover, "The Appeal Division may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant."

[8] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[9] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[10] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[11] The Applicant's reasons for appeal can be summarized as follows:

a) The periods of absence from Canada determined by the General Division are wrong and the General Division had no basis or evidence to rely upon for these conclusions. In

particular, the absence from Canada noted in the period from July 1, 2006, to April 4, 2010, is "completely wrong."

b) The General Division "failed to submit any evidence that proves that the Appellants were absence [*sic*] from Canada for more than 6 months in … period from July 01, 2006 to April 04, 2010."

c) The Applicant is "considered residence [*sic*] for the years 2006, 2007, 2008, 2009 and 2010."

d) The Respondent had previously investigated the Applicant and had rendered decisions in August 2002, February 2007 and June 2010. The Applicant supplied all documentation asked of him.

e) The actions of the Respondent were wrong in many ways:

   1. The Respondent did not reference documents GD10-819 to 821.

   2. It is not legal to threaten or suspend the Applicant's pension.

   3. It was not fair, legal or ethical to request documentation in June 2012 for the period from September 1994 to June 2012.

   4. The Respondent did not call the Applicant before suspending his pension.

f) The General Division ignored the Applicant's period of residency in the United States.

g) The Applicant's OAS pension and GIS were suspended from April 2007 to July 2007, from May 2008 to May 2010, and from January 2013 to October 2016. It is illegal to cut a Canadian citizen's pension.

h) The Applicant has abided by the regulation not to be absent from Canada for more than six months.

i) The Applicant has personal property, social ties, bank accounts and credit cards, health insurance and a telephone in Canada.

j) The Applicant challenges anyone to prove that he and his wife were absent from Canada for more than six months at any time in any calendar year.

k) The Applicant was investigated a third time and this affected the lives of two senior citizens (the Applicant and his wife). This is not legal or ethical. They lived for six years without their pensions and had to deplete their savings.

l) His benefits should be reinstated.

[12] The Respondent's submissions can be summarized as follows:

a) The Applicant has been granted all the benefits to which he is entitled under the OAS Act.

b) He has not established a ground of appeal under subsection 58(1) of the DESD Act that has a reasonable chance of success.

c) A reasonable chance of success may be established by identifying an error of law or an error of significant fact.

d) The Applicant, in his Application, "is merely stating the same arguments he put forward before the General Division, which were that the investigation and suspension of his OAS pension by the Minister was illegal and that he was a resident of Canada entitled to an OAS pension."

e) The Applicant is attempting to have his case re-litigated on the same basis as that was before the General Division and is asking to have the evidence re-weighed, which is not the role of the Appeal Division.

ANALYSIS

[13] The Applicant had applied for the OAS pension in April 2006. The Respondent approved payment of a partial pension of 10/40ths effective May 2005. The Applicant applied for a GIS and was approved for the period July 2006 to June 2007.

[14] The Applicant's wife applied for an OAS benefit in December 2006, which was approved in February 2007 retroactive to July 2006. This was converted to an OAS pension effective September 2006, the month after she turned 65.

[15] The Applicant's OAS benefits and those of his wife were suspended in April 2007. They were reinstated on July 16, 2007, with payment retroactive to April 2007. The Applicant provided proof that he and his wife departed from Canada on January 20, 2007, and returned on June 6, 2007.

[16] The Applicant's benefits were suspended in May 2008 (as well as his wife's), because the Respondent had concluded, after an investigation, that the Applicant and his wife did not have sufficient residence in Canada to qualify for OAS benefits.

[17] The Applicant requested reconsideration of this decision and questioned why his five years of residence in the United States had not been taken into account. On June 21, 2010, the Respondent issued a reconsideration decision, which reinstated the Applicant's benefits as of May 2005 and the Applicant was paid arrears for June 2008 to June 2010.

[18] A second residency review was initiated (by the Respondent) in November 2011. In December 2012, the Respondent advised the Applicant that his OAS benefits would be suspended as of January 2013. The Respondent had determined that the Applicant was ineligible for benefits received from May 2005 to December 2012. The Applicant wrote letters requesting reinstatement of his benefits. He appealed to the Office of the Commission of Review Tribunals and then to the Federal Court of Canada. The Federal Court proceedings were determined to be premature. The Applicant appealed to the Federal Court of Appeal and that appeal was dismissed as follows:

> The issues the appellants raised before us, particularly that there was no legislative authority permitting the Minister and the department to reinvestigate them and that there was no new evidence that could justify reversing the decision issued in June 2010, can be decided by the administrative tribunal in the context of the statutory appeal.

[19] The Respondent issued a reconsideration decision on April 15, 2014, which is the subject of this appeal. The reconsideration decision maintained the Respondent's decision that

the Appellant resided in Canada from September 1994 until July 2004, when he became "a resident of another county who visits Canada periodically, rather than a resident of Canada who visits abroad." The periods of presence in Canada after July 2004 could not be considered as residence for OAS purposes.

[20] The issues before the General Division were:

a) whether the Applicant was resident in Canada after July 2004; and

b) whether the Respondent had the authority to reinvestigate the issue of the Applicant's residency after its reconsideration decision of June 21, 2010.

[21] It determined that the Respondent has the power to begin a new investigation and to make a different determination for the entire period since September 1994 and that the Respondent's investigation and decision(s) after its June 2010 decision are permitted by the legislation.

[22] It also determined that:

a) The Applicant resided in Canada from September 14, 1994, to July 9, 2004, for a period of nine years and 299 days; he resumed residence here on February 28, 2006, and he had 10 years of residence 66 days later. Therefore, he met the residence requirements and qualified for a partial OAS pension of 10/40ths and a GIS on May 5, 2006.

b) He ceased to reside in Canada on July 1, 2006. Therefore, his OAS pension and GIS were payable to him up to and including January 2007.

c) He resumed residence in Canada on April 4, 2010, and he has continued to reside here since then and has not been absent for more than six months. Therefore, his OAS pension and GIS are payable to him as of that date.

d) Consequently, the Applicant was not resident in Canada from July 1, 2006, to April 4, 2010, and he was not eligible for OAS benefits corresponding to this period (the "relevant period").

[23] The General Division reviewed the evidence and the parties' submissions. It rendered a written decision that was understandable, that was sufficiently detailed and that provided a logical basis for the decision. The General Division weighed the evidence and gave reasons for its analysis of the evidence and the law. These are the General Division's proper roles.

[24] In the Application, enclosed documents and supplementary documents submitted to the Appeal Division, the Applicant argues that he remained a resident of Canada in the relevant period and, therefore, he is eligible for OAS benefits in that period.

[25] The General Division stated the correct legislative basis and legal tests. It found that the Applicant ceased to reside in Canada on July 9, 2004, resumed residence in Canada on February 28, 2006, and then ceased to reside in Canada from July1, 2006, until April 4, 2010, when he resumed residence in Canada.

[26] During the relevant period, the General Division found that "the only documented evidence that he was in Canada was for one month in December 2006 to January 2007; for about six weeks in mid-2007; for about 10 weeks from December 2007 to February 21, 2008; for one month in August and September 2008; and for two months in June and July 2009."

[27] For the most part, the Application repeats the Applicant's submissions before the General Division (that he has remained a resident of Canada and that the Respondent has acted unfairly towards him). The General Division decision mentions many of the arguments set out in paragraph 11 above.

[28] The Applicant also repeated his argument that his period of residency in the United States was ignored. However, the General Division discussed this issue at paragraphs 96 to 98 of its decision. The Applicant's residency in the United States was not ignored. It was found to result in "no quarters of coverage that can be used to increase his eligibility" under the OAS Act.

[29] The Applicant has also argued that neither the Respondent nor the Tribunal can "prove that they were absent from Canada for more than 6 months at any time in any calendar year." The General Division correctly stated that the onus lies on the Applicant to establish that he meets the eligibility requirements for OAS benefits. The Respondent is not required to seek

evidence on his behalf and is not required to prove that he was absent from Canada for more than six months in a calendar year.

[30] As to the Applicant's argument that the General Division did not consider evidence that was before it, the General Division did review and consider the evidence before it. The General Division noted (at paragraph 27) that the record contained "approximately 1200 pages of evidence and submissions" and that it had "reviewed both files [the Applicant's and his wife's] carefully and considered all of the evidence, including that which is not specifically mentioned in this decision."

[31] In addition, the evidence before the General Division was summarized in paragraphs 27 to 72 of the decision and reference was made to the evidence in the "Analysis" section of that decision. In paragraphs 104 to 115, the General Division applied the law to the facts in this matter and made findings on the Applicant's residency from September 1994 forward.

[32] I note that the General Division found that the Applicant gave conflicting information and that these inconsistencies are relevant to the question of his credibility. The General Division concluded that the Applicant was not being dishonest or disingenuous and that the inconsistencies did not lead to a conclusion that the Applicant was not being truthful. However, it could not ignore the Applicant's carelessness in providing information and inability to recall details. Therefore, the General Division found that "while the Tribunal accepted most of the evidence as credible, where dates were in issue the Tribunal looked to other forms of evidence to support the testimony."

[33] The determination of a witness' credibility and the credibility of the evidence he or she gives lies with the General Division member and not with the Appeal Division.

[34] Once leave to appeal has been granted, the Appeal Division's role is to determine whether the General Division has made a reviewable error set out in subsection 58(1) of the DESD Act and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not the Appeal Division's role to rehear the case *de novo*. It is in this context that the Appeal Division must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[35] I have read and carefully considered the General Division decision and the record. There is no suggestion that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact that the General Division, in coming to its decision, may have made in a perverse or capricious manner or without regard for the material before it.

[36] I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[37] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division