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

Citation: *P. W. v. Minister of Employment and Social Development,* 2017 SSTGDIS 154

Tribunal File Number: GP-16-733

BETWEEN:

P. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Jane Galbraith

HEARD ON: October 10, 2017

DATE OF DECISION: October 12, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for an *Old Age Security* (OAS) pension on September 26, 2014. The Appellant was approved for 9/40th of a pension done under the Agreement on Social Security between Canada and the United States. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) as she believed that her time working for the Canadian Embassy should be counted when determining the amount of her OAS pension.

[2] To be eligible for an OAS pension, the Appellant must meet the requirements that are set out in the OAS. More specifically, the Appellant must be found to have resided in Canada for at least 10 years after the age of 18 to qualify for a partial OAS pension. When an Appellant no longer is residing in Canada, the minimum residence period is 20 years.

[3] The OAS Regulations defines residence and states that a person resides in Canada if he makes his home and ordinarily lives in any part of Canada. The regulations make a distinction between the concepts of residence and presence.

[4] The hearing of this appeal was by teleconference for the following reasons:

- Videoconferencing is not available within a reasonable distance of the Appellant's home.
- The issues under appeal are complex.
- There are gaps in the information in the file and/or a need for clarification.
- 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.

[5] The following people attended the hearing:

P. W. - the Appellant

[6] The Tribunal has decided that the Appellant is not entitled to an increase in her pension under the *Old Age Security Act* (OASA). It was determined that she has not provided evidence to establish that she had additional periods of residence in Canada that would increase her partial OAS pension. The reasons are set out below.

EVIDENCE

[7] The Appellant was born in Canada on June 30, 1949 and lived in Canada until June 3, 1977 when she moved to the United States.

[8] In the Notice of Appeal the Appellant stated that the procedures for departing the country were not established 40 years ago. She reported that she has never applied for permanent residency and it was always her intention to return to Canada. She also notes she has familial ties to Canada and has maintained a bank account. (GD1)

[9] The Appellant wrote to the Respondent in September 2015 indicating that she had not been given credit for the period of time she spent working for the Government of Canada in Washington, D.C. She has been employed there continuously since May 2004. The Embassy is considered Canadian soil and therefore should count as residency. She also noted that she paid taxes in Canada. (GD1-16)

[10] The Appellant confirmed at the hearing that the dates of when she lived in Canada and the United States were correct.

[11] The Appellant was married in Canada in June 1977 and moved to the United States where her husband was living. She started working for a newspaper in September 1977. The US Social Security certified coverage record indicates she had worked in the third quarter of 1977, confirming the Appellant's recollection. (GD2-13)

[12] The Appellant worked for several publications and then in 2004 she started working for the Canadian Embassy. She is still working in the United States for the Permanent Mission of Canada to the Organization of American States. Her duties include administrative and managerial responsibilities as a program assistant.

[13] The Appellant reports she was given advice about her OAS pension from the head of the benefits department in the Canadian Embassy. She states that she realizes that the advice she received was erroneous.

[14] If the Appellant was aware of the requirements she indicated that she would have moved back to Canada. She believed that while working for the Embassy she was in essence on Canadian soil and therefore a resident. She files Canadian taxes each year, as her employer is the Canadian Government.

SUBMISSIONS

[15] The Appellant submitted that she qualifies for additional years of residence that should count towards her OAS pension because:

a) The Appellant's husband had no problem receiving his OAS pension and he was working in the United States.

b) When she left 40 years ago this was before the Internet and personal computers. She was not aware of the requirements for an OAS pension.

c) It was always her intention to return to Canada. She never applied for permanent residency in the United States and continued to pay Canadian taxes.

d) She was provided advice from the head of the benefits department at the Embassy which was incorrect.

[16] The Respondent submitted in writing that the Appellant does not qualify for additional years of residence that should count towards her OAS pension because:

a) The Appellant moved to the United States in June 1977 and her employment with the Canadian Embassy did not begin until 2004.

b) Article V of the Canada-United States Agreement on Social Security requires that the Appellant must have been sent by her Canadian employer to work in the United States.

c) Section 22 of the OAS Regulations states that the Appellant must have been a resident of Canada immediately prior to the employment with the Canadian Government.

ANALYSIS

[17] The Tribunal found the Appellant to be a credible witness. She was honest and forthright in delivering her testimony and answering questions under oath.

[18] Subsection 3(2) of the OAS Act provides that a partial pension is payable to an applicant who has attained sixty-five years of age and has resided in Canada for an aggregate period of at least ten years, but less than forty years, after attaining eighteen years of age.

> Subsection 3(3) of the OAS Act provides that the partial pension is calculated on the basis of 1/40th for each full year of residence in Canada after age eighteen.
>
> A partial OAS pension is pay able to an individual in the circumstances set out in section 3 (2) of the OAS Act:
>
> 3(2) subject to this act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and
>
> (a) Has attained 65 years of age; and
> (b) has resided in Canada after attaining 18 years of age and prior to the date on which that persons application is approved for an aggregate period of at least 10 years but less than 40 years and, where that aggregate period is less than 20 years, was resident in Canada on the date preceding the date on which that person's application is approved.

[19] The Appellant was approved to receive her OAS pension while living in the United States. To allow the pension to be portable when not living in Canada she met that eligibility due to the agreement with the United States. The US Social Security certified coverage record indicates she had started working in the third quarter of 1977. (GD2-13) The periods she lived and worked in the United States assisted her to meet the eligibility but the amount of pension payable to the Appellant is based on the years she met the definition of residence as outlined in the *OAS Regulations*.

[20] The definition of "residence" is outlined in the following legislation from the *OAS Regulations Section 20-21. (1):*

> 20. (1) To enable the Minister to determine a person's eligibility in respect of residence In Canada, the person or someone acting on the person's behalf shall provide a statement giving full particulars of all periods of residence in Canada and of all absences from Canada that are relevant to that eligibility.
>
> 21. (1) For the purposes of the Act and these Regulations,
>
> > *(a)* a person resides In Canada if he makes his home and ordinarily lives in any part of Canada; and
> >
> > *(b)* a person is present in Canada when he is physically present in any part of Canada.
>
> Any interval of absence from Canada of a person resident in Canada that is
>
> > (a) of a temporary natruer and does not exceed one year,
> >
> > (b) for the purpose of attending a school or university, or
> >
> > (c) specified in subsection (5)
>
> shall be deemed not to have interrupted that person’s residence or presence in Canada.

[21] The *Old Age Security Regulations*, Section 21(5), states:

> (5) The absences from Canada referred to in paragraph 21 (4)(c) of a persona residing in Canada are absences under the following circumstances:
>
> > (b) while that person was employed or engaged out of Canada
> >
> > (i) by the Government of Canada or of the government or a municipal corporation of any province,
> > (ii) in the performance of services in another country under a development or assistance program that is sponsored or operated in that country by the

Government of Canada or of a province or by a non-profit Canadian agency.

(iii) As a member of the Canadian Armed Forces, pursuant to and in connection with the requirements of his duties

(iv) In work for Canada connected with the prosecution of any war,

(v) As a member of the armed forces of any ally of Canada during any war,

(vi) As a missionary with any religious group or organization

(vii) As a worker in lumbering, harvesting, fishing or other seasonal employment,

(viii) As a transport worker on trains, aircraft, ships or buses running between Canada and points outside Canada or other similar employment, or

(ix) As an employee, a member or an officer of an international charitable organization,

if he returned to Canada within six months of the end of his employment or engagement out of Canada or he attained, while employed or engaged out of Canada, an age at which he was eligible to be paid a pension under the Act.

[22] The *Old Age Security Regulations*, Section 22(1), Legal Residence, states:

For the purposes of subsections 4(1), 19(2) and 21(2) of the Act, legal residence with respect to a person described in any of those subsections, means that, on the day specified in paragraph (a) or (b) of those subsections, that person

(a) is or was lawfully in Canada pursuant to the immigration laws of Canada in force on that day;

(b) is or was a resident of Canada and is or was absent from Canada, but

(i) is deemed, pursuant to subsection 21(4) or (5) or under the terms of an agreement entered into under subsection 40(1) of the Act, not to have interrupted the person's residence in Canada during that absence, and

(ii) was lawfully in Canada pursuant to the immigration laws of Canada immediately prior to the commencement of the absence; or

(c) is not or was not resident of Canada but is deemed, pursuant to subsection 21(3) or under the terms of an agreement entered into under subsection 40 (1) of the Act, to be or to have been resident in Canada.

[23] The Appellant had lived in the United States and was making her home there prior to starting to work in the United States. She moved to the United States to live with her husband after they married in June 1997. She started working shortly after for a news publication.

[24] The Appellant started working for the Canadian Embassy in 2004, which was many years after leaving Canada.

[25] Article V(1) of the Canada/U.S. Agreement states that an employed person will be covered under the legislation of one country only, and this will be the country in which the work is performed. :

Article (V)

(1) Except as otherwise provided in this Article, an employed person who works in the territory of one of the Contracting States shall, in respect of that work, be subject to the laws of only that Contracting State.

[26] However, the determination of residency (the factual question of whether a person makes her home and ordinarily lives in Canada) "must be made having regard to all the circumstances and not merely the intention of the appellant" as indicated in *Kiefer* v. *Canada (Attorney General),* 2008 FC 786)

[27] The Tribunal found the Appellant's statement that it was always her intention to return to Canada to be credible. She reported that she paid taxes in Canada and had not applied for permanent residence in the United States. The Tribunal does not doubt this intention.

[28] However the Appellant's intention in this case is not the issue and all of the circumstances must be reviewed. It is clear to the Tribunal from the documents and the

Appellant's oral evidence that she has been living and working in the United States since June 3, 1977. She has made her home and has ordinarily been living in the United States since 1977.

[29] The necessity of having regard to all relevant facts, and not to treat a single factor as conclusive in determining residence, has been reinforced in other decisions of the Federal Court, which is binding on this Tribunal. The Tribunal notes *Minister of Human Resources Development v. Ding* (2005) FC 76 where is states:

> It is quite a well settled principle in dealing with the question of residence that it is a question of fact and consequently that the facts in each case must be examined closely to see whether they are covered by the very diverse and varying elements of the terms and words 'ordinarily resident' or 'resident'. It is not as in the law of domicile, the place of a person's origin or the place to which he intends to return.

[30] *Gumboc v. Canada (Attorney General)*, 2014 FC 185 confirms for the Tribunal Subsection 21(5.3) of the OAS *Regulations* and that Article V(1) of the Canada/U.S. Agreement states that an employed person will be covered under the legislation of one country only, and this will be the country in which the work is performed. It states:

> [52] Read together, these provisions confirm that while working the the U.S., the applicant cannot argue for the purposes of the OAS to be a Canadian resident, regardless of any ties maintained to Canada. Put simply, because he is working in the U.S. and is subject to its social security legislation, Mr. Gumboc is deemed to be a non-resident of Canada.

[31] The Tribunal notes that the Appellant reports she received erroneous advice from the head of benefits at the Canadian Embassy.

[32] The Tribunal finds it does not have the authority to exercise any form of equitable power or consider extraneous factors, nor does the Tribunal have jurisdiction to deal with administrative errors or erroneous advice given by the Department or any other government organization.

[33] The Tribunal cannot address why another person was eligible for any benefit. The issue before them relates only to the Appellant. The decision is made with the information relating to this case only.

[34] 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 and Article V(1) of the Canada- United States Agreement on Social Security. The Tribunal cannot use the principles of equity or consider extenuating circumstances to grant additional residence.

[35] The Tribunal finds that the Appellant has not satisfied the Tribunal that on a balance of probabilities that she qualifies for additional years of residence under subsection 21 and 22 of the OAS Act and Article V(1) of the Canada-United States Agreement on Social Security.

CONCLUSION

[36] The appeal is dismissed.

Jane Galbraith
Member, General Division - Income Security