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

Citation: *I. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 156

Tribunal File Number: GP-17-872

BETWEEN:

I. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: John Eberhard

HEARD ON: October 5, 2017

DATE OF DECISION: October 16, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

I. S., the Appellant

BACKGROUND

[1] I. S., the Appellant, reached the age of 65 on September 19, 2012 and applied for the Old Age Security (OAS) pension. It was on that date that she qualified for the pension. She filed a duplicate application on January 16, 2015. It was approved. She received 11 months of retroactive payments.

[2] The Respondent takes the position that when the pension was approved; it was done in accordance with the *Old Age Security Act* (OASA) Subsections 8(1) and 8(2) which provides for the commencement of an OAS pension (OASP) for payment in February 2014, 12 months before the date of application.

[3] The Appellant believes she should receive her benefit retroactive to the date when she first qualified. The Respondent states that the issue before the Tribunal is whether the Appellant is entitled to a retroactive OASP benefit for an application that was received well after she first qualified. This appeal is the result.

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

a) The Appellant will be the only party attending the hearing.
b) The issues under appeal are not complex.

LAW

[5] Subsections 8(1) and 8(2) of the OAS Act provide for the commencement of an OAS pension.

> **8.(1)** Payment of pension to any person shall commence in the first month after the application therefor has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulations.

> 8.(2) Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of:
>
> > (a) a day one year before the day on which the application was received, and
> >
> > (b) the day on which the applicant attained the age of sixty-five years, as may be prescribed by regulation.

EVIDENCE

The Evidence of the Appellant is

[6] The Appellant turned 65 on Sept 19, 2012. She filled out the Application for the Pension on line. She printed the Application form at her office. Then she took the Application to the Canada Service Centre (CSC) offices at X X in X. She presented her Application to a Service Agent and was informed that she could opt to delay receiving the OASP until such time that she was no longer employed. She thought that it was a good idea as she could receive the money when she really needed it.

[7] The Appellant testified that when she presented her completed application (GD2-30) dated October 24, 2012 she told the agent, based on his statements, that she would wait to receive her benefits until after she retired. The agent handed the application back to her. She states that at no point was she instructed to send in her application, so she took it home and put it in a file.

[8] When she visited the same CSC offices in January 2015 to "officially request payment" of her OASP, another CSC Agent took her updated Application (GD2-18) and inputted it into his computer. He informed her that she would be receiving approximately $560/mo. When she enquired about her retroactive payments: "he regretted to inform me that I was not entitled to receive those monies because I failed to submit my Application Form back in October 2012. I sat there stunned".

[9] She called the CSC offices in March 2015 to enquire about her retroactive payments. The Agent informed her that she was eligible to receive retroactive pension monies for the period of February 2014 to March 2015. This is not what the Service Agent had told her in January 2015.

She was very relieved to be able to recoup some of the monies as she was living on her credit cards. She asked for reconsideration by letter on April 14, 2015. She was told by a CSC representative that it would take up to seventeen (17) weeks to make a decision regarding her case. In fact, it took ninety-one (91) weeks. She patiently waited. Her request was denied. She appealed.

[10] After she received the unhappy news and an eleven month retroactive cheque in February based on her approved application dated January 1, 2015, she mailed the original (2012) application to the CSC office on April 14, 2015. It is of interest to note that the answer to question #10 in both applications was answered this way:

When do you want your pension to start? Answer: As soon as I qualify

[11] She asserted that she should not be penalized because she was given erroneous information from a Service Canada Agent - not only once, but twice. As a result she missed out on receiving OAS payments for a total of 16 months which cost her almost $9000 (Oct 2012 to January 2014). She humbly suggested that she is a fairly intelligent, active person currently seeking gainful employment and in no way mentally deficient so that she would misunderstand the information she was given by the CSC agents.

[12] [Tribunal's note: her calculation is out by one month. She would have been entitled to 15 months additional OASP had the first application been approved]

The Evidence of the Respondent is:

[13] The Appellant reached the age of 65 on September 19, 2012, having been born on September 19, 1947 and applied for the OAS pension on January 16, 2015. In accordance with subsection 8(2) of the OAS Act, the earliest date the application can be approved is February 2014, 12 months before the date of application. Therefore, in accordance with subsection 8(1), the earliest month the OAS pension can be paid is February 2014 which is the first month following the approval date.

SUBMISSIONS

[14] The Appellant submits that:

a) she was given the wrong instructions by an employee at the CSC offices which caused her to hold on to her application for her OAS payments for which she was eligible as of October 2012. She asserts that it was logical for her to apply for OAS as she had been working hard for years to make ends meet.

b) responsibility has to be taken for not giving accurate information, as she would not have a reason to question the veracity of it considering that it was coming from CSC office employees themselves.

c) this is a serious breach and it is unfair to be penalized for it. She had every intention to apply for it back in 2012. Someone dropped the ball and it was not her. She believes it is real shame for her to be in this situation whereby she is being refused monies that she is 100% entitled to.

d) the Tribunal should ignore the legislation in favour of the fairness in recognizing a mistake made by a government employee.

[15] The Respondent submits that the appeal be dismissed because:

a) the Appellant's request to receive additional OASP payments pursuant to the OASA cannot succeed as subsection 8(2) limits the retroactive amount of the pension payable to 11 months prior to a successful application for the pension.

b) neither the Respondent nor the Tribunal may award further payments of the OASP on compassionate grounds or where the OASA does not permit such payments.

c) the Federal Court has provided the jurisprudent authority to be followed by the Tribunal in circumstances such as these. The Appellant is in receipt of the maximum retroactive amount of OASP allowed under the OASA.

ISSUE

[16] The issue before the Tribunal in this appeal is whether the Appellant met the requirements to qualify for the OASP prior to February 2014.

ANALYSIS

Burden of Proof

[17] The burden of proof rests on the Appellant to establish entitlement to an OAS pension (*De Carolis v. Canada (Attorney General*), 2013 FC 366).

[18] The Tribunal accepts the evidence of the history of the application process and OASP payments to the Appellant that reveal information about her OASP entitlement. I accept the credible and believable evidence of the testimony of the Appellant.

Application of Case Law

[19] It is most unfortunate that the Appellant came to be under the belief that she did not have to file her application in 2012, for whatever reason. These unfortunate circumstances have occurred before and the courts have dealt with appeals based on what seems like an unfair result arising from the wording of the law created by legislation. Some examples might be helpful to the Appellant as she reflects on the public need for a uniform approach to legislative interpretation.

[20] *Canada (MHRD) v. Esler*, 2004 FC 1567 at paragraphs 32 – 34 was an application for judicial review from the decision of the Canada Pension Plan, Old Age Security Review Tribunal. Esler reached the age of 65 in 1995, at which time she qualified for Old Age Security. However, she did not submit an application for those benefits until 2001. She was awarded benefits retroactively for one year. She appealed. The Review Tribunal reasoned that denying benefits which had accrued was unfair and allowed the appeal and granted further retroactive payments. The Crown applied for judicial review of the Review Tribunal's decision. The Federal Count (in a decision which is binding on this Tribunal) allowed the appeal from that Tribunal. The matter was referred back to a differently constituted panel for reconsideration. The Court stated that the OASA specifically stated that retroactive pension benefits were limited to a one-year period before an application was made. The Review Tribunal had no inherent equitable jurisdiction that allowed it to ignore the clear legislative provision. By granting retroactive benefits beyond the statutorily allowable period the Review Tribunal acted beyond its statutory jurisdiction.

[21] In the Federal Court in the case of *Canada (Procureur General) v. Vinet-Proulx*, 2007 FC 99 at paragraphs 8, 12, 14 and 16, the Attorney General of Canada asked the Federal Court to set aside the decision dated November 9, 2005, of the Office of the Commissioner of Review Tribunals (the "Review Tribunal") declaring that Ms. Vinet-Proulx is entitled to Old Age Security benefits from July 2002. According to the evidence, Ms. Vinet-Proulx reached the age of 65 years on June 10, 2002. She made an initial application for an old age pension in

February or March 2001, by letter. At that time, she was advised by the Department of Human Resources Development that her application was premature, since she had not yet reached 65 years of age. In December 2001, she received the documentation required to apply for her Old Age Security benefits. She then gave this documentation to her accountant, who promised to look into things, but did nothing. She received no pension and when she discovered that the application had not been processed made another application that was approved in 2004 stating she would receive her benefits retroactively from May 2003 (the Respondent's initial decision). Searches of the Department archives were apparently made in June and August 2004. These searches showed that there was only one application for benefits in Ms. Vinet-Proulx's file. This was the application signed on April 13, 2004, and received on April 14, 2004. No other computer entry concerning an application received before April 2004 could be tracked down in the Department's systems. The Respondent's decision had been upheld. Ms. Vinet-Proulx appealed the decision to the Review Tribunal. The Review Tribunal heard the appeal and decided to allow it. The Review Tribunal was of the opinion that the testimonies of Ms. Vinet-Proulx and her accountant were credible and concluded that they had completed and sent in the application for Old Age Security benefits by regular mail in March or April 2003. The Review Tribunal also determined that Ms. Vinet-Proulx had done what she had to do to make an application for benefits. Thus, a posted letter had to be presumed to have been received by its addressee. The Tribunal concluded that Ms. Vinet-Proulx met all the entitlement conditions for Old Age Security benefits and had thus been entitled to receive them as of July 2002, not May 2003, as the Respondent had previously decided. The Court had to determine if the Review Tribunal exceeded its jurisdiction or otherwise erred in law. The court allowed the application for judicial review. The decision of the Review Tribunal was set aside noting that:

> "As may be seen, the Review Tribunal is a statutory Tribunal whose jurisdiction and authority are set out in particular in subsection 27.1(1) and in section 28 of the Act, as well as in sections 82 and 84 of the CPP. Accordingly, the Review Tribunal does not have any jurisdiction in equity and may not, for example, order the Respondent to make an ex gratia payment---"

[22] As found by the Federal Court in these two decisions regarding the former Review Tribunal (now replaced by the SST's General Division) the Tribunal is a pure creature of statute and as such, does not have inherent equitable jurisdiction which would allow it to ignore the

clear legislative provision contained in section 11 of the OASA nor can it use fairness as a ground to grant retroactive benefits in excess of the statutory limit allowed by the OASA.

[23] A distinction from this line of reasoning is found in the Federal Court case of *Myrna Larmet* (2012 FC 1406). The factual basis for the decision is important in making the distinction. Ms. Larmet applied for OAS benefits in September 2007, well in advance of her eligibility date. She was mistaken about when she would qualify. Instead of requesting benefits at the earliest opportunity (i.e. age 65) she requested that payments commence in January 2009, one year after her actual date of eligibility. This was an honest error based on a belief that OAS was not payable before retirement. She did not appreciate her mistake until she was advised by her accountant that she was entitled to OAS upon reaching the age of 65 regardless of her employment status. Ms. Larmet and her accountant asked the Minister to correct her application and to pay OAS benefits back to her 65th birthday. The Minister refused. Ms. Larmet appealed to the Review Tribunal and lost. The Tribunal observed that it has no inherent equitable jurisdiction and because there is no provision in the Old Age Security Act, RSC 1985, c O-9 (OAS Act), or regulations that expressly permits such a retroactive claim after benefits are paid. It made reference to s 5.1(1) of the OASA which provides for an applicant to withdraw an application for a pension by giving a written notice of their withdrawal to the Minister at any time before payment of the pension commences. The effect of withdrawal being that if an application for a pension is withdrawn under subsection (1), the withdrawn application shall not after that time be used for the purpose of determining the applicant's eligibility for a pension. Section 5.(1) was referred to. It provides that the Minister's approval shall be effective on the latest of

> (c) the day on which the application was received,
>
> (d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and
>
> (e) the date specified in writing by the applicant.

[24] The distinction between these facts and the ones before this Member is that the Appellant in this case did not "withdraw" her application because it was tendered but never retained by the CSC agent. The agent had given it back to her. That application was never presented again to

the CSC until after she had begun to receive payments on her January 1, 2015 application. However, the *Larmet* decision has some application.

[25] As noted in the judgment, reference to the Tribunal decision from which the appeal arose, Hon. R.L. Barnes referred to a basic rule of legal interpretation that a "purposive approach must be utilized when interpreting the legislation involved". In addition, when there is any uncertainty, that uncertainty should be resolved in a manner that is most beneficial to the applicant. The uncertainty in that case arose from an examination of the ambiguity of the wording of the section dealing with a withdrawal of the application. Here, the uncertainty is related to an interpretation of the wording: "--- day on which the application was received".

[26] There, Ms. Larmet qualified in February 2008. She made a good faith mistake. Since she was employed, she thought that she would not qualify until January 2009, and this was her initial request in the application submitted in October 2007. She subsequently (in March 2009) discovered her error, and wrote to the Minister requesting that her eligibility date be changed to her actual eligibility date. The court went on to note that 5.1(2) states that a withdrawn application cannot be used for the purpose of determining the applicant's eligibility, and that an application can only be withdrawn prior to benefits becoming payable. Nowhere in the Act or the regulations does it state that the application shall be used to determine the applicant's eligibility:

> "The warning set out in Field 10 of the application is not reflected or rooted in the law. ---- I am of the view that if the law does not expressly preclude relief being granted to Ms. Larmet, then that relief should be extended to her. "

[27] The Court noted that the dissenting Member of the Review Tribunal found that because these statutory provisions do not expressly preclude a right to amend an application, a statutory ambiguity arose. Here, there is no issue related to statutory interpretation of the Section 8.(2)(a). The Tribunal accepts the evidence of the Appellant that she attended and presented her application to the CSC in 2012, shortly after she qualified for the pension. It was never formally withdrawn pursuant to section 5.1(2). It was tendered and received by an agent, then given back to the Appellant on her understanding that her pension would be retroactive for payment when she retired and resubmitted the application. The legislation calls for the approval of the

application to be effective as of a day one year before the day on which the *application was received* (my emphasis).

[28] Ms. Larmet distinguished her situation from that described in *Canada v Esler* where a claim to more than one year of retroactive OAS benefits was rejected. Said Hon. R.L. Barnes:

> There is arguable merit to Ms. Larmet's criticism of the Tribunal's majority decision. If one views the statutory provisions relied upon by the Tribunal in the context of the full legislative text and in a purposive way the resulting ambiguity is difficult to ignore. It would have been a simple task to draft a provision that expressly excluded a claim to retroactive benefits in circumstances like these. Instead, subsection 8(2) of the *OAS Act* allows an applicant to claim up to one year of retroactive benefits where a late application is made by mistake or otherwise. There is no apparent rationale for treating Ms. Larmet's claim to retroactive benefits differently from a late application on the basis of a similar misunderstanding.

[29] Here, the fact that the Appellant's 2012 application was "received" by the CSC agent and dated October 24, 2012 and returned, not because it was deficient, but because, following their conversation, she decided to delay the receipt of benefits from her date of entitlement to a date following her retirement. This could be considered a mistake that can be rectified. It is not possible to say that it was a mistake of the Appellant and not the agent. To deprive her of her request in that application to receive the benefit "as soon as I qualify" would be to accept that she was actually giving up her benefits until after her retirement. That was not her intention nor could it be inferred was the intention of the Agent in returning her application on that first visit to the CSC.

[30] This Tribunal agrees with the Federal Court in *Larmet* when it states:

> The Tribunal was correct that it enjoys no inherent authority to authorize a benefit that an applicant is not entitled to receive. Notwithstanding this view, the Tribunal seems to have been preoccupied with Ms. Larmet's failure to inform herself about her eligibility date. But if the Tribunal has no equitable authority to provide a remedy in a situation of an obvious mistake, and if the legislation does bar a claim to retroactive benefits, Ms. Larmet's conduct was irrelevant.

[31] Similarly, the conduct of the Appellant here was innocent and irrelevant to the application of the purpose of the legislation. The legislation does not call for an application to be "filed" or "documented" or entered into the elaborate data base-system maintained by the Respondent:

only “received”. The OASA does not define receipt when it easily might have done so. The Act does not expressly preclude a benefit from resulting in these unique circumstances.

[32] I agree with the reasoning of Barnes, J. who opined that Parliament was concerned that individuals receiving OAS benefits not be pushed into a higher taxation bracket by virtue of the receipt of those benefits. He noted that presumably the same concern was the rationale behind subsection 9.1 of the OASA which allows a person to suspend the payment of benefits: “One might think that if these provisions were intended to bar retroactive recovery in some situations, to the prejudice of an otherwise entitled applicant, some reference to that purpose would have been made” (in the legislation).

[33] Part 3 of the OAS regulations deal with the concept of the “receipt of an application” in the context of monthly allowances. Limitations are found in Section 6(a) which states that no allowance may be paid under this section to the spouse or common-law partner of a pensioner pursuant to an application therefor for: (a) any month that is more than 11 months before the month in which the application is received *or is deemed to have been made*. There is no similar provision relating to an application for an OASP. If there was, this Tribunal would have “deemed” the application to have been received and deemed to have been made on October 24, 2012.

CONCLUSION

[34] This Tribunal enjoys no inherent authority to authorize a benefit that an applicant is not entitled to receive. The interpretation of section 8.(2)(a) wording, “a day one year before the day on which the application was received” is plain and unequivocal. I find that the 2012 application (eventually approved by way of a 2015 duplicate application) was “received” by the respondent in 2012. A purposive approach must be utilized when interpreting the legislation involved. In addition, when there is any uncertainty, that uncertainty should be resolved in a manner that is most beneficial to the applicant.

[35] There is no issue of credibility that has to be decided. The facts are what they are. The Appellant is asking this Tribunal to find that there should be an exception to the OASA that would permit benefits that extend beyond the legislation that limits the retroactive amount of

the pension payable to 11 months before the month in which the 2015 application was received. The finding of this Tribunal is not recognition of any exception to the Act but on the unusual facts of the case allowing her to fall within the general purpose parameters of the legislation, liberally interpreted, for her benefit.

[36] This Tribunal is bound by decisions of the Federal Court. I have found the very unique facts of this case can take the benefit of the policy considerations in the *Larmet* decision in preference to *Esler* and *Vinet-Proulx.* The Tribunal recognizes the month of October 2012 as the month in which the application was received by the Respondent.

[37] The appeal is allowed.

John Eberhard
Member, General Division - Income Security