



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: J. S. v. Minister of Employment and Social Development, 2017 SSTGDIS 162

Tribunal File Number: GP-16-2356

BETWEEN:

**J. S.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Shannon Russell

DATE OF DECISION: October 31, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Appellant is a 65 year old woman whose husband passed away in August 2009. She applied for an Allowance for the Survivor in January 2014. The Respondent approved the application and awarded the Appellant benefits retroactive to February 2013. The Respondent maintained its decision at the reconsideration level of adjudication. The Appellant appealed the Respondent's reconsideration decision to the Social Security Tribunal (SST or Tribunal).

[2] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if satisfied that it has no reasonable chance of success (*Miter v. Canada (A.G.)*, 2017 FC 262).

[3] The Tribunal has decided, for the reasons set out herein, that this appeal has no reasonable chance of success.

### EVIDENCE

[4] The Appellant applied for an Allowance for the Survivor in January 2014, and in her application she reported that her husband passed away in August 2009 (GD2-28 to GD2-31).

[5] By letter dated September 4, 2014, the Respondent informed the Appellant that her application had been approved and that she was eligible for the benefit effective February 2013 (GD2-36 to GD2-38).

[6] On October 27, 2014, the Appellant wrote to the Respondent and stated that she wanted to have the effective date of her benefit changed from February 2013 to October 2012, being the month following her 60<sup>th</sup> birthday. She explained that prior to her 60<sup>th</sup> birthday, on the advice of the estate lawyer, she contacted Service Canada for the purpose of determining what benefits she was eligible for, given that her husband had passed away and she was about to turn 60. She said she was not informed that she could apply for the Allowance for the Survivor and that this incomplete and misinformation constitutes erroneous advice (GD2-24 to GD2-25).

[7] By letter dated March 29, 2016, the Respondent informed the Appellant that it had reconsidered its decision regarding the effective date of the Allowance for the Survivor and had decided to maintain the original effective date of February 2013. The Respondent explained that its decision was in accordance with subsection 21(9) of the OAS Act which states that the Allowance for the Survivor cannot be paid for any month more than 11 months before the month the application is received. The Appellant's application was received in January 31, 2014 and she was awarded benefits retroactive to February 2013. With respect to the Appellant's argument of having received erroneous advice, the Respondent explained that it had thoroughly reviewed this allegation and had issued a separate decision to the Appellant setting out its reasons for decision (GD2-11 to GD2-12).

[8] The Respondent's erroneous advice decision is included in the evidence and it is also dated March 29, 2016 (the same date as the reconsideration decision). In this decision, the Respondent determined that the Appellant had not been denied benefits as a result of erroneous advice and the Respondent explained that if the Appellant disagreed with the decision she could seek judicial review as described in section 18.1 of the *Federal Courts Act* (GD2-13 to GD2-14).

[9] The Appellant appealed the Respondent's reconsideration decision to the SST and in her Notice of Appeal she recounted the circumstances that gave rise to her erroneous advice argument. In a nutshell, she explained that she did not apply for the Allowance for the Survivor sooner because when she asked Service Canada about her eligibility for benefits she was not informed of the full benefits she should be receiving (GD6-1 to GD6-8).

[10] On September 21, 2017, the Tribunal issued an Intention to Summarily Dismiss the appeal and the Tribunal provided reasons for why the appeal does not have a reasonable chance of success.

[11] The Appellant filed written submissions with the Tribunal on October 27, 2017 and in her submissions she explained the circumstances giving rise to her erroneous advice argument (GD5-1 to GD5-4).

## **SUBMISSIONS**

[12] The Appellant submitted that she should receive the Allowance for the Survivor benefits retroactive to October 2012 (being the month following her 60<sup>th</sup> birthday) because when she initially contacted Service Canada about her eligibility for benefits she was not informed of her eligibility for the Allowance for the Survivor. Had she been informed of her eligibility for this benefit she would have made the application for the benefit within the appropriate time frame.

[13] The Respondent submitted that it calculated the effective date of the Appellant's benefit in accordance with subsection 21(9) of the OAS Act. With respect to the Appellant's erroneous advice argument, the Respondent investigated the matter and issued a separate decision to the Appellant in respect of that argument.

## **ANALYSIS**

### Statutory Limit on Retroactive Payment of Benefits

[14] Subsection 21(9) of the OAS Act states that the Allowance for the Survivor is not payable for any month more than 11 months before the month in which the application was received. The Appellant's application was signed by the Appellant and received by the Respondent in January 2014. The Respondent awarded payment of the benefit retroactive to February 2013, which is 11 months before January 2014. The Appellant was, therefore, awarded benefits in accordance with subsection 21(9) of the OAS Act.

[15] The Tribunal cannot amend or ignore the statutory limit on retroactive payment of a benefit. 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 does not have the jurisdiction to render decisions on grounds of fairness, compassion or extenuating circumstances.

### Erroneous Advice

[16] The Appellant submits that her application for the Allowance for the Survivor was not made sooner because when she initially contacted Service Canada to enquire into her eligibility for benefits she was not informed that she was eligible for the Allowance for the Survivor. She

submits that had she been informed of her eligibility for this benefit she would have made the application within the appropriate time frame.

[17] The provision in the OAS Act that deals with erroneous advice and/or administrative error is section 32. This provision states that where the Minister is satisfied that, as a result of erroneous advice or administrative error, in the administration of the OAS Act, any person has been denied a benefit, or a portion of a benefit, to which that person would have been entitled under the Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in had the erroneous advice not been given or the administrative error not been made.

[18] Investigations under section 32 of the OAS Act are conducted by the Respondent and not by the Tribunal. The Tribunal does not have the jurisdiction to investigate allegations of erroneous advice or administrative error and the Tribunal has no jurisdiction to entertain appeals from decisions of the Respondent made under section 32 of the OAS Act (*Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278).

[19] The Respondent has investigated the Appellant's erroneous advice argument and the Respondent determined that Appellant had not been denied benefits as a result of erroneous advice. The Respondent's erroneous advice decision is not a decision that can be appealed to the Tribunal. As explained in the Respondent's erroneous advice decision, if the Appellant is dissatisfied with the Respondent's decision under section 32 of the OAS Act her recourse is to make an application to the Federal Court to have the Respondent's decision judicially reviewed.

#### **Does the Appeal Have a Reasonable Chance of Success?**

[20] The Tribunal finds that the appeal does not give rise to a reasonable chance of success. The Tribunal does not have jurisdiction to consider the Appellant's erroneous advice argument, regardless of how compelling her argument may be. While the Tribunal does have jurisdiction to review the Respondent's calculation of the effective date of payment to ensure it complies with the statutory provisions in the OAS Act, the evidence indicates that the Appellant's effective date of payment was calculated in accordance with subsection 21(9) of the OAS Act.

**CONCLUSION**

[21] The appeal is summarily dismissed.

Shannon Russell  
Member, General Division - Income Security