



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. A. I.*, 2018 SST 131

Tribunal File Number: AD-17-460

BETWEEN:

Minister of Employment and Social Development

Appellant

and

A. I.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 6, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] This is an appeal of the General Division's decision rendered on March 17, 2017. The Appellant submits that the General Division erred in determining that the Respondent was entitled to an increase in payments of a monthly Old Age Security pension, based on subsequent years of Canadian residence, and that he was entitled to a reinstatement of the Guaranteed Income Supplement for the years 2002 to 2013.

[3] I granted leave to appeal on November 17, 2017, on the basis that the General Division may have failed to consider whether subsection 3(5) of the *Old Age Security Act* applied in the Respondent's circumstances. I found it unnecessary to address any other alleged errors.¹ I also allowed for substitutional service on the Respondent and directed that a copy of my leave to appeal decision be served on the Respondent's last-known permanent address. The Social Security Tribunal served the leave to appeal decision on the Respondent but the envelope was returned unopened.

ISSUES

[4] The issues before me are as follows:

Issue 1: In determining that the Respondent was entitled to a recalculation of his partial Old Age Security pension, did the General Division fail to consider and apply subsection 3(5) of the *Old Age Security Act*?

Issue 2: Did the General Division base its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, regarding the Respondent's residency between June 2002 and October 2010?

¹ *Mette v. Canada (Attorney General)*, 2016 FCA 276.

GROUNDS OF APPEAL

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[6] The Appellant submits that the General Division made several errors of law and based its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

Issue 1: In determining that the Respondent was entitled to a recalculation of his partial Old Age Security pension, did the General Division fail to consider and apply subsection 3(5) of the *Old Age Security Act*?

[7] The Respondent has been receiving a partial Old Age Security pension since May 1996. In the proceedings before the General Division, the Respondent argued against any “claw back” of his Old Age Security pension, as he claimed that he and his spouse had been resident in Canada since 2002 and that they had no other sources of income.

[8] The General Division concluded that the Respondent was resident in Canada between June 19, 2002 and October 1, 2010, and thereafter. The General Division found that the Respondent was entitled to a recalculation of his partial Old Age Security pension, based on these subsequent years of residency. It also directed the Appellant to recalculate the amount of the Old Age Security pension payable to the Respondent.

[9] The Appellant submits that the General Division erred in finding that the Respondent could increase the monthly amount of his Old Age Security pension with subsequent years of residence. The Appellant argues that subsection 3(5) of the *Old Age Security Act* precludes a pensioner from relying on subsequent periods of residence in Canada to increase the monthly amount of an Old Age Security pension. The subsection states that once a person's application for a partial monthly pension has been approved, the amount of monthly pension payable to that person may not be increased on the basis of subsequent periods of residence in Canada.

[10] Although the General Division referred to subsection 3(5) of the *Old Age Security Act*, it does not appear to have considered and applied the subsection to the Respondent's circumstances, as otherwise it would have concluded that there was no basis to recalculate the Respondent's monthly Old Age Security pension.

[11] Furthermore, this matter was not properly before the General Division. The Respondent was appealing the Appellant's reconsideration decision of August 27, 2015.² The Appellant's reconsideration decision related only to the calculation of the Guaranteed Income Supplement under the *Old Age Security Act*. There was no issue regarding the calculation of the monthly Old Age Security pension. Accordingly, the General Division exceeded its jurisdiction when it determined that the Respondent was entitled to a recalculation of his partial pension.

Issue 2: Did the General Division base its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?

[12] The Respondent had been receiving the Guaranteed Income Supplement until it was suspended in March 2013. The Appellant determined that the Appellant had left the country for more than six months between June 2002 and October 2010, effectively resulting in an overpayment for the period between January 2003 and September 2010. In the proceedings before the General Division, the Respondent disputed that any overpayment of the Guaranteed Income Supplement was payable, as he maintained that he was resident in Canada between

² See GD2-282 to 284.

June 2002 and October 2010 and that he was married between October 2010 and February 2013.

[13] As noted above, the General Division concluded that the Respondent was resident in Canada between June 19, 2002 and October 1, 2010, and thereafter. The General Division also determined that the Respondent remained married between 2010 and 2013 and that he had never been “single” for the purposes of calculating the Guaranteed Income Supplement.

[14] The Appellant submits that the General Division erred in finding that the Respondent was resident in Canada between June 2002 and October 2010 and that he was therefore entitled to the Guaranteed Income Supplement during this period. The Appellant argues that, in accepting the Respondent’s *viva voce* evidence, the General Division ignored the documentary evidence altogether.

[15] The Appellant notes that the General Division accepted the Respondent’s testimony, despite the fact that he has dementia and despite the Respondent’s own admission — corroborated by his spouse — that he has a poor memory and is unable to recall key dates and issues.³ The Appellant argues that the Respondent demonstrated confusion and a “reduced ability to respond” during the hearing before the General Division.⁴ Indeed, the Respondent’s spouse testified on several occasions that the Respondent did not understand the question, and she thereby proceeded to respond on his behalf. Given the Respondent’s medical condition and the witnesses’ testimony regarding the Respondent’s dementia and his poor memory, the Appellant asserts that it was unreasonable for the General Division to have relied exclusively upon the Respondent’s oral evidence and that of his spouse, without any consideration for some of the documentary evidence before it.

[16] Even so, the Appellant contends that the documentary evidence prepared by the Respondent was inconsistent. For instance, the Appellant claims that the Respondent provided conflicting periods when he was out of the country, ranging from between four and

³ Timestamps of the audio recording of the hearing before the General Division: at approximately 18:41 to 19:10; 25:30; 30:40; 51:25; 1:09:11; 1:13:33; and 1:23:57.

⁴ Timestamps of the audio recording of the hearing before the General Division: at approximately 14:52; 16:00; 25:30; 27:54; 32:40 and 38:03.

seven months.⁵ I note that the Respondent also indicated that he usually returned to Canada “within two to four months.”⁶

[17] The Appellant claims that the Respondent also provided conflicting dates of departures from and arrivals to Canada. In one questionnaire,⁷ the Appellant was unable to recall when he left Canada, though provided this in another questionnaire,⁸ along with the dates of return, as follows:

Departure from Canada	Return to Canada
June 21, 2001	November 15, 2002
July 3, 2003	November 18, 2003
July 15, 2004	November 29, 2004
January 18, 2006	June 1, 2006
February 24, 2008	June 23, 2008
July 30, 2008	August 19, 2008
June 30, 2010	October 1, 2010

[18] I do not find this to be conflicting information. Clearly, the Respondent initially had been unable to provide dates of departure, but he subsequently provided them. That does not represent conflicting information. As well, the Respondent appears to have provided consistent return dates to Canada and the return dates were confirmed with the Canada Border Services Agency.⁹

⁵ GD2-382 — the Respondent reported that while he travelled to Cyprus frequently, it was always for less than six months; GD2-383 — the Respondent reported that his trips were always for four months or less. He also declared that he had never been out of the country for more than six months; GD3-17 and GD2-335—the Respondent reported that each separate trip lasted from 16 days to five months maximum.

⁶ See GD2-586.

⁷ See GD2-410 and GD2-585.

⁸ See GD2-431 and GD2-433

⁹ See GD2-501.

[19] However, the information conflicted with other documents that the Respondent provided or, at the very least, was incomplete. For instance, in another questionnaire, the Respondent indicated that he left Canada in mid-November 2005 and that he intended on returning in April 2006.¹⁰ Yet, the Respondent did not disclose the mid-November 2005 departure date in his other questionnaires.¹¹ Similarly, in his declaration dated May 29, 2012, the Respondent disclosed that, in the previous five years, he had visited Cyprus only once, between July 2009 and October 2009.¹² The Respondent may have confused the 2010 dates with 2009, but even so, it serves to illustrate that the Respondent's declarations and questionnaires were not wholly reliable.

[20] I note also that, throughout the hearing file, there are references that the Respondent was unable to recall dates.¹³

[21] The Appellant also relied on portions of an investigator's report¹⁴ in arguing that the Respondent provided conflicting dates, but the dates were compiled from the Respondent's health and banking records, rather than from the Respondent directly.

[22] Even so, the investigator found that the banking records¹⁵ suggested that there was banking activity outside Canada from October 1, 2006 to June 20/23, 2008, and October 1/19, 2008 to September 30, 2010. The Respondent had not disclosed these absences from Canada in his questionnaires.¹⁶

[23] Health Insurance BC wrote to the Respondent on May 16, 2013, confirming that he had medical coverage from January 1, 2004 to April 30, 2007 and from November 1, 1998 to July 31, 2002,¹⁷ although there was no accompanying printout indicating what dates the Respondent might have accessed health care services.

¹⁰ See GD2-340 and GD2-342.

¹¹ See GD2-41 and GD2-585 or GD2-431 and GD2-433.

¹² See GD2-391 to 393.

¹³ For instance, see GD2-581 and 586.

¹⁴ See GD2-383 to 384.

¹⁵ See GD2-383 and GD2-604. For bank printouts, see GD2-478 to GD2-484.

¹⁶ See GD2-410/585 and GD2-431/433.

¹⁷ See GD2-423.

[24] The Ontario Ministry of Health provided the claims records from January 1, 2007 to December 31, 2010, showing that the Respondent had regularly accessed health care services from October 9, 2010 to December 27, 2010. The Ministry's records suggest that the Respondent did not access any health services between January 1, 2007 and October 9, 2010.

[25] The investigator reviewed the Respondent's Canadian, British and Cypriot passports and concluded that he had not been a resident of Canada from June 19, 2002 to October 1, 2010.¹⁸

[26] The Appellant argues that the best and most reliable evidence relating to the Respondent's residency was in the contemporaneous material from third parties. The Appellant notes that there were bank statements, medical claims history printouts, passports showing various dates of entry, and the Canada Border Services entry points. The Appellant asserts that these documents represented the "best evidence" regarding the Respondent's residency, but it claims that the General Division not only failed to assign any weight to this evidence, but it failed to address it altogether, despite its probative value. The Appellant argues that had the General Division reviewed this evidence, it would have determined that the Respondent was in Canada for only limited periods of time, as follows:

- February 2, 2004 to March 22, 2004 (one and a half months)
- December 3, 2004 to February 16, 2005 (two and a half months)
- June 2, 2006 to August 31, 2006 (two months)
- June 24, 2006 to August 5, 2008 (14 months)
- October 1, 2010, onward

[27] The Appellant argues that the General Division erred in accepting that the Respondent remained a resident of Canada, even when he was in Cyprus for more than six months to care for his sister and to wind up her estate. The Appellant argues that the Respondent's excuse for remaining outside of Canada was irrelevant to the residency question and that it was

¹⁸ See GD2-382 to GD2-385.

insufficient to retain residency by merely maintaining a presence in Canada. The Appellant argues that the General Division should have been guided by section 21 of the *Old Age Security Regulations*, *De Carolis v. Canada (Attorney General)*, 2013 FC 366, and the documentary evidence, in determining whether the Respondent was resident in Canada.

[28] For the most part, the General Division relied on the witnesses' oral testimony in determining whether the Respondent could be found resident in Canada, notwithstanding the documentary evidence before it. The General Division was entitled to accept the Respondent's oral evidence and that of his spouse, but in the face of his dementia and inability to recall key dates and times, this should have led the General Division to corroborate the oral evidence with the documentary evidence.

[29] There was no mention of any of the banking or health records, despite the fact that the General Division was aware of the Appellant's submissions regarding the banking records and its own summary of the health and banking records. The General Division accepted the Respondent's oral evidence that, apart from one occasion, he was never outside Canada for more than six months. However, the General Division did not explain — one way or the other — the discrepancies with the banking and health records that suggested that the Respondent had indeed been away from Canada for considerably longer than six months, from October 1, 2006 to June 20/23, 2008, and October 1/19, 2008 to September 30, 2010.

[30] Given the contradictory evidence, the General Division's reasons were deficient as they did not enable me to understand how it arrived at its decision. It is unclear on what basis the General Division preferred the oral testimony over the documentary evidence. The General Division simply did not address the documentary evidence, as to whether it accepted or rejected it outright.

What is the appropriate disposition of this matter under subsection 59(1) of the DESDA?

[31] In summary, the responses to the issues above are as follows:

Issue 1: In determining that the Respondent was entitled to a recalculation of his partial Old Age Security pension, did the General Division fail to consider and apply subsection 3(5) of the *Old Age Security Act*?

Response: Yes.

Issue 2: Did the General Division base its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, regarding the Respondent's residency between June 2002 and October 2010?

Response: Yes, although one could also characterize this as a matter of inadequate reasons.

[32] Having found that the General Division erred on both issues, I must determine the appropriate disposition for this matter. On the first issue, I would allow the appeal and apply subsection 3(5) of the *Old Age Security Act*, such that there is no need or any basis to recalculate the Respondent's partial Old Age Security pension. The monthly amount shall remain as it had been, subject of course to any annual adjustments provided for under the *Old Age Security Act*.

[33] On the second issue, seemingly there is no justification to return this matter to the General Division for a redetermination, given my comments regarding the reliability of the Respondent's oral testimony and that of his witness. There was documentary evidence before the General Division that suggested that the Respondent was absent from Canada for considerably lengthier periods than he and his spouse had been able to recall.

[34] However, I am exceedingly mindful that this appeal is being determined without notice to the Respondent, despite multiple attempts to serve him at his last-known permanent address. It would have been unduly onerous and costly had either the Tribunal or the

Appellant conducted a skip trace on the Respondent to locate his whereabouts, given his transient past.

[35] I am aware that I can rely on section 6 of the *Social Security Tribunal Regulations*, which requires that parties file with the Tribunal a notice of any change in their contact information without delay, as a basis to dispose of this matter. If a party fails to comply with the section, the Tribunal may proceed to hear a matter in the party's absence. Yet, if I should render the decision that the General Division should have given on the second issue, it will likely have a substantial impact on the Respondent, in that he will be required to repay a significant overpayment of a Guaranteed Income Supplement, despite not having had any notice of the appeal or any opportunity to respond to it.

[36] Accordingly, I am returning this matter to the General Division for a redetermination — on the second issue only.

[37] For greater certainty, in the interim, the Appellant's reconsideration decision shall be restored and the Appellant may seek immediate repayment of the Guaranteed Income Supplement from the Respondent. This will have the result of effectively giving notice to the Respondent of these proceedings and of the appeal before the General Division and should then prompt the Respondent to contact the Appellant. At that point, the Respondent should then provide his updated contact information to the Tribunal so that it can thereby serve him with a copy of this decision, along with a copy of my leave to appeal decision and any materials that have been filed by the Appellant.

[38] The Respondent will have his opportunity before the General Division to adduce any additional evidence — including any documentary evidence — to respond to the residency question and to the banking and health records, the passport entries and the investigator's review and report.

[39] When scheduling a hearing, the General Division might wish to consider allowing a reasonable period of time to elapse, to provide the Appellant with an opportunity to initiate steps against the Respondent for repayment of the Guaranteed Income Supplement, and to

provide the Respondent with an opportunity to file his updated contact information with the Tribunal.

CONCLUSION

[40] As set out above, the appeal is allowed as follows:

Issue 1: subsection 3(5) of the *Old Age Security Act* applies such that there shall be no recalculation of the Respondent’s partial Old Age Security pension; and

Issue 2: the matter is returned to the General Division for a redetermination on the issue of whether the Respondent was resident in Canada between June 2002 and October 2010.

[41] In the interim, the reconsideration decision is restored.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	Penny Brady (counsel), Representative for the Appellant