



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. S. v Minister of Employment and Social Development*, 2018 SST 1350

Tribunal File Number: GP-17-1794

BETWEEN:

R. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Susan Smith

Claimant represented by: S. S.

Videoconference hearing on: November 7, 2018

Date of decision: December 7, 2018

DECISION

[1] The appeal is denied.

OVERVIEW

[2] The Claimant was born in India and first arrived in Canada in December 2000. In 2013, he applied for an Old Age Security (OAS) pension, on the basis that he had accumulated 10 years of residence in Canada. A few months later, he also applied for the Guaranteed Income Supplement (GIS).

[3] On his OAS application the Claimant indicated that since his arrival under permanent resident status in December 2000 he had two periods of absence greater than six months when he had extended visits in India: November 30, 2001 to June 26, 2003; and April 23, 2010 to May 23, 2011. The Minister approved the Claimant's application for OAS in December 2013. His residency was calculated excluding the time in India that exceeded six months and considered his residency resumed immediately upon returning to Canada after each of the extended absences. In conclusion the Claimant qualified for a partial pension of 10/40th.

[4] In December 2015 the Minister reassessed the Claimant's eligibility and determined he did not have the requisite ten years of residency to qualify for a partial OAS pension and assessed an overpayment of combined OAS and GIS in the amount of \$29,037.06. The Minister maintained the decision upon reconsideration and the Claimant appealed the decision to the Social Security Tribunal.

ISSUES

[5] Did the Claimant reside in Canada for at least 10 years after age 18 and before the day on which his application was approved?

[6] Does the Minister have the authority to reassess the Claimant's eligibility once an application for OAS is granted and payments commenced?

ANALYSIS

[7] To qualify to receive a partial OAS pension an applicant must show on a balance of probability that: they are at least 65 years old; have legal resident status in Canada; and made their home and ordinarily resided in Canada for at least ten years prior to the day their application is approved. If the applicant has resided in Canada for less than 20 years they must also show they were a resident of Canada the day before their application is approved.¹

[8] The OAS Regulations distinguish between the concepts of residency in Canada and presence in Canada. A person resides in Canada if he makes his home and ordinarily lives in any part of Canada. A person is present in Canada when he is physically present in any part of Canada.²

[9] Residency is a factual issue that requires an examination of the whole context of the individual under scrutiny. There are a number of factors that are relevant to determining whether a person makes their home in and ordinarily lives in Canada, for example in the Claimant's case: social ties both in Canada and in India; regularity and length of stay both in Canada and in India; and whether mode of living is deep rooted and settled, among other factors.³

[10] I must consider all of the evidence and circumstances to determine the Claimant's periods of residency within Canada, beginning with his first entry in December 2000, to the time his application for OAS pension was approved in December 2013, and any periods of residency after his application was approved. A review of the Claimant's travel history, his oral testimony, his passports, and his travel history from Canada Border Services Agency (CBSA) show the following travel to date:⁴

Dates	Country	Duration of Stay (days)
December 22, 2000 to November 30, 2001	Canada	11 months, 8 days (343)
November 30, 2001 to June 26, 2003	India	18 months, 26 days (572)

¹ Subsection 3(2) and section 4 of the OAS Act

² Paragraphs 21(1)(a) and 21(1)(b) of the OAS Regulations

³ *Canada (MHRD) v. Ding*, 2005 FC 76

⁴ CBSA records show road crossings between Canada and the US by commercial vehicle 2006-2008 not included

June 26, 2003 to December 5, 2005	Canada	29 months, 9 days (894)
December 5, 2005 to April 21, 2006	India	4 months, 16 days (137)
April 21, 2006 to October 24, 2008	Canada	30 months, 3 days (917)
October 24, 2008 to March 24, 2009	India	5 months (151)
March 24, 2009 to November 21, 2009	Canada	7 months, 27 days (242)
November 21, 2009 to February 15, 2010	India	2 months, 25 days (86)
February 15, 2010 to April 23, 2010	Canada	2 months, 8 days (67)
April 23, 2010 to May 23, 2011	India	13 months (396)
May 23, 2011 to August 21, 2011	Canada	2 months, 29 days (90)
August 21, 2011 to February 17, 2012	India	5 months, 27 days (179)
February 17, 2012 to October 31, 2012	Canada	8 months, 14 days (257)
October 31, 2012 to April 23, 2013	India	5 months, 23 days (174)
April 23, 2013 to August 31, 2013	Canada	4 months, 8 days (130)
August 31, 2013 to October 12, 2013	USA	1 month, 12 days (42)
October 12, 2013 to December 11, 2013	Canada	1 month 29 days (60)
December 11, 2013 to May 28, 2014	India	5 months 17 days (169)
May 28, 2014 to November 8, 2014	Canada	5 months, 11 days (165)
November 8, 2014 to May 5, 2015	India	5 months, 27 days (181)
May 5, 2015 to October 10, 2015	Canada	5 months, 5 days (158)
October 10, 2015 to April 9, 2016	India	5 months, 29 days (183)
April 9, 2016 to October 12, 2016	Canada	6 months, 3 days (186)
October 12, 2016 to November 22, 2016	India	1 month, 10 days (41)
November 22, 2016 to July 17, 2017	Canada	6 months, 26 days (207)

July 17, 2017 to September 21, 2017	India	2 months, 4 days (66)
September 21, 2017 to present	Canada	13 months, 16 days (412)

[11] The Respondent received the Claimant's application for OAS on June 5, 2013 and he requested that his pension begin as soon as he qualifies.⁵ The Respondent received the Claimant's application for GIS on November 26, 2013.⁶ December 20, 2013 the Claimant's application for OAS was approved effective August 2013 for a partial 10/40th pension.⁷ On December 20, 2013, the Claimant's GIS application was approved effective August 2013.⁸

[12] When the Minister first assessed the Claimant's application for OAS he was given credit from December 22, 2000 to November 30, 2001; June 26, 2003 to April 23, 2010; May 23, 2011 to August 31, 2013.⁹ The Claimant had credit for 3667 days ending August 31, 2013 to allow for his 10/40th partial pension, having met the threshold of 10 years during the month of August 2013.

[13] December 9, 2015, the Respondent wrote to the Claimant to inform him that his eligibility for OAS and GIS had been reassessed and they had determined he was not eligible for a partial pension because he did not have at least ten years of residence in Canada. He was assessed an overpayment for OAS and GIS benefits received August 2013 to December 2015 inclusive, for a total overpayment of \$29,037.06.¹⁰ The reasons given were that the Claimant had only been a resident of Canada for three brief periods totaling less than four years and that other periods in Canada were presence only, and not residence.

[14] The Claimant requested reconsideration on two grounds. Firstly, he disagreed with periods he was found to be absent when he was out of the country only briefly, and secondly, he requested that his period of absence April 2010 to May 2011, be considered on compassionate grounds not to have interrupted his residency.¹¹ The Minister reconsidered the Claimant's eligibility on the basis of additional information the Claimant provided in support of his

⁵ GD2-5-8, OAS

⁶ GD2-9-11, GIS

⁷ GD2-13-15, OAS

⁸ GD2-44-46, GIS

⁹ GD2-16

¹⁰ GD2-48-49

¹¹ GD2-60-61, May 25, 2016

reconsideration request and determined that, although he was present in Canada for an extended period prior to April 23, 2010, with only intermittent travel to India, the frequency and length of presence and of absences in Canada showed the Claimant maintained greater ties to India than to Canada and that he had accumulated presence in Canada of approximately seven years.¹²

Not all of the Claimant's periods of presence in Canada can be considered as periods of residency

[15] The Claimant submitted his application for an OAS pension claiming that he became a resident of Canada in December 2000. During the hearing the Claimant testified that when he first came to Canada in December 2000 with a permanent resident visa, he was on extended leave from his position as a X. He stated that in November 2001 he returned home to India because he was still employed and he had taken one year leave for extended vacation. He returned to his position as expected after his year of vacation leave and then retired and returned to Canada in June 2003 with the intention of remaining in Canada.

[16] The earliest the Claimant can be considered to have established permanent residency in Canada is June 26, 2003. The Claimant's period in Canada from December 2000 to November 2001 can only be considered as presence, and not residence. The reason is that the Claimant had not prepared to leave India for more than an extended period of visitation. He continued to be under a contract of employment as a X and he was on one year vacation leave from his position. He continued to maintain a residence in India. The family home in India remains to this day and is now occupied by his youngest son and his aging mother. The ancestral home also includes farm land which is now tended by his youngest son.

[17] When the Claimant came to Canada in December 2000 he had been granted a permanent resident's visa and he was sponsored by his daughter. However, the granting of permanent resident's status is just one step in establishing permanent residency. He may well have had a clear intention to become a permanent resident of Canada in the future but he was not prepared to permanently settle in Canada at that time. He had not tied up his personal affairs in India. He had requested only temporary leave and he intended to return to India to return to his

¹² GD2-151-152, May 25, 2017

employment as a X. He testified that he did return as a X in 2001 and, at age fifty-five, he retired from his position and returned to Canada in 2003.

The Claimant became a resident of Canada June 26, 2003

[18] The Claimant has demonstrated that he became a resident of Canada June 26, 2003. He testified that his wife accompanied him when he came to live in Canada. He took many steps to establish his permanent home in Canada. He worked, filed tax returns, and paid into Canada Pension Plan. He had three years of steady earnings 2006 through 2008. His CBSA record shows that the Claimant operated a commercial vehicle crossing between the US and Canada on a regular basis from August 2006 until June 2008, inclusive.¹³ The Claimant qualified to become a Canadian Citizen in October 2008.¹⁴

[19] The Claimant has three adult children. His eldest is a daughter and she lived in Canada when the Claimant obtained his permanent resident's visa but later moved to the US where she lives with her husband. His second child is a son who lives in Ontario. His youngest is a son who continues to live in India. When the Claimant moved to Canada his aging parents were both still living.

[20] I am satisfied by the evidence presented that the Claimant became a resident of Canada on June 26, 2003.

The Claimant's residency was interrupted by his absence beginning April 23, 2010 and thereafter he demonstrated greater ties to India than to Canada

[21] The Claimant's frequency and duration of absence from Canada began to change in late 2009. His absences began demonstrating he may have greater ties to India than to Canada in November 2009 when he visited India for 86 days and returned to Canada for just 67 days before returning again to India for a period of 396 days and exceeding one year of absence. The OAS Regulations state that any interval of absence from Canada of a person resident in Canada that is of a temporary nature and does not exceed one year shall be deemed not to have interrupted that

¹³ GD2-70-71

¹⁴ GD2-213

person's residence in Canada.¹⁵ It does not necessarily follow that an absence of more than one year does interrupt residency. It is necessary to assess all of the circumstances surrounding the absence.

[22] The Claimant testified that he had returned to India on a frequent basis because his aging parents were unwell and required help. When he stayed in India for over a year from April 2010 to May 2011 he stated that his father was ill because he was bothered by stomach problems. He returned to Canada May 23, 2011 and was here for 90 days when he went back to India because his father had been diagnosed with cancer in the interim and his condition was terminal. His father passed away in August 2011, shortly after the Claimant arrived back in India. He stayed in India for another 179 days.

[23] From 2003 when the Claimant moved to Canada until the present his wife has spent extended periods of time in India caring for the Claimant's elderly mother. It should be noted the Claimant testified that his wife did also obtain Canadian citizenship. The Claimant made statements July 7, 2015¹⁶, September 23, 2015¹⁷ and February 13, 2017¹⁸ indicating his wife remained in India. The travel documents he submitted from October 2008 to September 2016, totalling 13 trips, do not indicate his wife accompanied him.¹⁹ The Claimant testified that his wife returned to Canada with him September 2017 and their youngest son and his new wife are now responsible to care for the Claimant's elderly mother.

[24] From November 21, 2009 until February 17, 2012 the Claimant spent a total of 661 days in India and 157 days in Canada. The Claimant testified extensively that he is both culturally and morally obliged to care for his aging parents. He stated that his wife remained behind in India for much of the time he was in Canada because his mother required care. The description of the mode of living provided by the Claimant shows that the mode of living, whether in Canada or in India, is much the same. In both countries there is a family home fully equipped and fully furnished that is occupied year round by family member and where the Claimant is welcome and

¹⁵ Paragraph 21(4)(a) of the OAS Regulations

¹⁶ GD2-87

¹⁷ GD2-62

¹⁸ GD2-77

¹⁹ GD2-361-384

accommodated with his own room. When he travels between countries, whether for short or long term stays, he takes only his clothing and personal items.

[25] The Claimant stated that he is expected to care for his parents as long as they are alive and his children bear a similar responsibility toward him. The Claimant's cultural and moral obligation toward his parents was an anticipated reason for him to leave Canada at all times from his first arrival. I find that the Claimant has maintained an equal connection to India and to Canada since November 2009. That being the case periods of residency versus presence in each country can only be determined by length and frequency of stay in either country. I find that his residency status changed April 23, 2010, and interrupted his residency in Canada. I base this determination not solely on his absence from Canada of 396 days, but also his increased frequency of travel to India together with brevity of stay in Canada both before and after his 396 day absence, as well as his description of his duties to family.

[26] The Claimant ceased to be a resident of Canada April 23, 2010, and was no longer a resident until at least February 2012. I find the evidence demonstrates the Claimant was a resident of Canada from June 26, 2003 until April 23, 2010, for a total of 2,370 days.

The Claimant did not acquire ten years of residence in Canada by December 2013 when his OAS pension was approved

[27] I find that based on all of the evidence the Claimant has failed to demonstrate that he accumulated at least ten years of residence in Canada by December 2013 when his partial 10/40th was approved and, as such, he was not entitled to receive OAS and GIS benefits from December 2013, when he was granted retroactive payments beginning August 2013.

The Minister has broad powers to reassess eligibility once an application for OAS is granted and payments commenced

[28] The Claimant and his designated representative referred to a recent SST Appeal Division (AD) decision.²⁰ They urged me to follow the AD decision which, according to their

²⁰ *B.R. v Minister of Employment and Social Development, 2018 SST 844*

interpretation, determines that the Minister does not have the power to reassess eligibility to an OAS pension once granted, and to grant this appeal on that basis.

[29] I have carefully reviewed the AD decision. I see that the facts are not different in substance and the Claimant's case cannot logically be distinguished based on the facts from the AD decision. I am not bound by decisions of the SST AD, though there are compelling reasons for the Tribunal not to contradict itself. However, I am not compelled to follow the rationale of the AD decision and I am unable, in good conscience, to adopt the reasoning set out because I find an alternate interpretation of the law to be more persuasive.

[30] The AD adjudicator determined that once the Minister has granted an application for OAS pension, absent any fraudulent or misleading information on the part of the applicant, the Minister cannot later reassess eligibility, stop making payments to a recipient that does not qualify to receive the benefit, and assess an overpayment. I strongly disagree.

[31] The Claimant received a benefit to which he was not entitled because the Minister determined he was eligible. He did not make any false or misleading statements. There is no evidence and no allegation of fraudulent intent. The main issue the Minister had to determine in this case is the same issue the Minister had to determine in the AD case, being whether an extended absence interrupted residency such that the Claimant did not qualify for the benefit received at the relevant time. Both questions are to be determined based on the facts and in both cases the Minister made a determination that changed later based on facts that were discoverable at the time of the initial decision.

The AD decision the Claimant relies upon has not swayed my decision as I disagree with the reasoning followed

[32] The AD adjudicator determined that the powers granted in section 23 of the OAS Regulations are extraordinary and this determination is a key element to the conclusion reached. I do not agree the powers are extraordinary. In my opinion they are necessary.

[33] The broad powers afforded the Minister help to balance the goals of honoring the altruist nature of OAS benefits conferring legislation, by avoiding undue delay in processing applications with the need to safeguard the OAS purse strings by denying payment of benefits to

those not entitled. They are necessary to safe guard the importance of the OAS Act being construed liberally as the Federal Court has indicated it should.²¹ The significant and avoidable stress to pensioners in delays to facilitate the exhaustive scrutiny of every application that would be necessary if, once granted, eligibility could not be reassessed in future, would be unconscionable.

[34] The legislation dealing with suspension of a benefit, or cessation of a benefit, presume a benefit was payable to the recipient in the first place. In cases where a recipient did not qualify to receive the benefit in the first place is quite different. In the case of the Claimant, in hindsight, the benefit was not payable at all when payments began as he had not yet acquired the minimum requirement of ten years residency to qualify for a partial OAS pension. His benefit was “suspended” during the investigation in keeping with the OAS regulations.²² Upon conclusion of the investigation the benefit can no longer be considered to have been either “suspended” or “ceased”. Payments were simply stopped because the Minister determined the Claimant did not then and had not previously qualified to receive the benefit at all.

[35] In my opinion reference to CPP and the powers it affords the Minister is not helpful to support the AD adjudicator’s limited view of the powers the Minister has under section 23 of the OAS regulations because regaining capacity for gainful occupation is very different from establishing the requisite period of residency to qualify for an OAS pension. It is important to note the distinction between the application processes in CPP disability benefits and an OAS pension. The lengthy process involved in the granting of a disability pension under the CPP requires that an application be supported by objective medical evidence and determined by a qualified medical adjudicator sets disability benefits apart from OAS benefits. The impact of the difference in what is required to qualify for a disability pension compared to an OAS pension is recognised in the CPP legislation that requires the Minister to bear the burden of proof before a disability pension, once granted, can be ceased. The Minister must show on a balance of probability that the recipient is no longer disabled by their medical condition. It is reasonable after the thorough scrutiny inherent in qualifying for a CPP disability pension that the Minister should not be permitted to reverse the decision to grant a disability pension.

²¹ *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466 at para 28

²² Section 26 of the OAS Regulations

[36] The AD adjudicator concedes at paragraph 81 that in cases of new facts or fraud the Minister has the power under section 23 of the OAS Regulations to cancel an OAS benefit and demand repayment of monies paid out. However, the AD adjudicator determined the powers the Minister has to reassess are limited to cases where there is fraud, intention to mislead, or discovery of new facts not previously discoverable. I respectfully disagree with this limited interpretation of the powers afforded the Minister.

[37] The AD decision rightly acknowledges that preventing the hardship that may arise from assessing overpayments against the aging recipients of OAS benefits should be avoided wherever possible. However, the Minister has the discretionary power in cases where repayment would cause undue hardship to the debtor, or where erroneous advice or administrative error caused the overpayment, to remit all or any portion of the amount of excess of benefit payment.²³ This is precisely the proper remedy for a Claimant to request in a case where the Minister has approved an OAS pension that should not have been approved. I can think of no clearer example of an administrative error or a cause of undue hardship than the granting of a pension to one who does not qualify because they have not resided in Canada for at least ten years.

[38] I am not compelled to follow the reasoning in the AD decision and I find that the Minister's power to reassess eligibility is broad and extends to cases where there is no suggestion of fraud or misrepresentation.

CONCLUSION

[39] The Claimant did not achieve ten years of residency by December 2013 and therefor did not become eligible to receive a 10/40th OAS pension and GIS. The Minister has the power to reassess eligibility. The overpayment assessed by the Minister is a debt due to Her Majesty and the amount of overpayment is recoverable in accordance with the OAS Act²⁴.

[40] The appeal is denied.

Susan Smith
Member, General Division - Income Security

²³ Paragraphs 37(4)(c) & (d) of the OAS Act

²⁴ Subsections 37(1) & (2) of the OAS Act