



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: S. J. v Minister of Employment and Social Development, 2019 SST 403

Tribunal File Number: GP-17-3115

BETWEEN:

S. J.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Patrick O'Neil

Date of decision: March 4, 2019

DECISION

[1] The Claimant is not entitled to an *Old Age Security* (OAS) pension greater than 17/40th of a full OAS pension effective September 2013.

OVERVIEW

[2] The Minister received the Claimant's application for the OAS pension on September 18, 2012¹. The Minister allowed the application initially and on reconsideration. The Minister determined the Claimant was entitled to a partial OAS pension of 17/40th of a full OAS pension effective September 2013. The Claimant appealed the reconsideration decision to the Social Security Tribunal submitting he was entitled to a partial pension greater than 17/40th of a full OAS pension.

[3] To qualify for a partial OAS pension, an applicant must have attained sixty-five years of age and resided in Canada for an aggregate period of at least ten years, but less than forty years, after attaining eighteen years of age². The Claimant was born in the United States (U.S.) on August X, 1948. He attained sixty-five years of age on August X, 2013.

[4] The amount of a partial pension is calculated on the basis of 1/40th of a full pension for each full year of residence in Canada after age eighteen³.

ISSUE(S)

[5] Is the Claimant entitled to a partial OAS pension greater than 17/40th of a full OAS pension?

ANALYSIS

The Claimant is not entitled to a partial OAS pension greater than 17/40th of a full OAS pension.

¹ GD2 pages 83-87

² Paragraph 3(2) *Old Age Security Act* (OASA)

³ Paragraph 3(3) OASA

[6] In order to enable the Minister to determine a person's eligibility in respect of residence in Canada, the person shall provide a statement giving full particulars of all periods of residence in Canada, and all absences from Canada that are relevant to that eligibility⁴.

[7] The OAS pension application requires an Applicant to list all places lived from age eighteen to the present, both inside and outside of Canada, and to provide *proof of residence history*.

[8] For the purposes of the OASA and the OAS Regulations, a person resides in Canada if he makes his home and ordinarily lives in any part of Canada, and a person is present in Canada when he is physically present in any part of Canada⁵.

[9] The Minister, at any time before or after approval of an application, may require the applicant to make available further information or evidence regarding the eligibility of the applicant for a benefit⁶.

[10] The Minister requested additional information and documentation from the Claimant as to his residence in Canada, which the Claimant was unable to provide. His responses were contradictory. The Claimant's inability to provide complete and accurate information and documentation as to his aggregate years of residence in Canada is understandable in that he has cerebral palsy and suffers from a seizure disorder which results in cognitive issues⁷ and memory loss⁸.

[11] The Claimant's CPP Contributions Statement dated August 16, 2013 shows substantial earnings and contributions to the CPP in 1972 to 1987, inclusive, and in 1993, being in seventeen years⁹. The Claimant's U.S. Social Security Certified Coverage Record dated August 14, 2013¹⁰ shows contributions to the U.S. Social Security system in 1982, and in 1988 to 1997, inclusive, and confirms the Claimant was a government employee in the U.S. from 1998 to 2008, inclusive.

⁴ Paragraph 20(1) OAS Regulations

⁵ Paragraph 21(1) OAS Regulations

⁶ Paragraph 23(1) OAS Regulations

⁷ GD2 page 211

⁸ GD2 page 175

⁹ GD2 page 10

¹⁰ GD2 pages 6-7

[12] The Claimant noted in a letter dated February 24, 2018¹¹, he taught school in California almost every day from 1990 to 2008, inclusive. He noted in a letter to the Minister dated December 22, 2013¹² his wife filed divorce papers against him in 1992, and their marriage ended in divorce in 2000. The Claimant noted in another letter to the Tribunal also dated February 24, 2018¹³ he purchased a residence in B.C. in 1996, but as he could not obtain work in B.C, he returned to California to teach, and did not return to Canada until January 1, 2009. The Claimant permitted his former wife and adopted children to remain in the home in B.C., while he lived and worked in California. The Claimant paid the taxes and expenses on the home notwithstanding the separation and divorce. He sold the house in February 2012. When he returned to Canada in January 2009 to prepare the house for sale, the house was vacant.

[13] A telephone call record dated June 4, 2015¹⁴ confirms the Minister spoke with the Claimant's mother at the Claimant's request and with his consent. She said the Claimant lived with her in California, and is incapable of handling his affairs. She reported the Claimant worked in Colorado for a year in the 1980s. When told the Claimant contributed to the U.S. Social Security System in 1981 and 1982, she said that would be when he was in Colorado. The Claimant's mother confirmed her son sold a home in British Columbia in 2012. She reported neither she nor her son are able to provide any other documentation to support her son's residence in Canada.

[14] The Minister approved the Claimant's application for a partial OAS pension of 17/40th of a full OAS pension. The Minister determined the Claimant was resident in Canada from January 1, 1972 to September 30, 1981, from January 1, 1983 to December 31, 1987, and from January 1, 2009 to February 27, 2012, being seventeen years, ten months, and twenty-five days¹⁵. The Claimant of course does not dispute he resided in Canada during the periods determined by the Minister, being an aggregate period of seventeen years, ten months, and twenty-five days. I must decide if it is more likely than not the Claimant resided in Canada for a period greater than determined by the Minister.

¹¹ GD3 pages 13-14

¹² GD2 pages 137-139

¹³ GD3 pages 3-7

¹⁴ GD2 pages 81-82

¹⁵ GD2 pages 77-80

[15] The evidence of the Claimant is to the effect he taught school in California almost every school day from 1990 to 2008. That evidence is substantially consistent with his U.S. Social Security Certified Coverage Record, which confirms contributions to the U.S. Social Security system from 1988 to 1998. The Coverage Record also confirms he was a government employee from 1998 to 2008, the period during which he noted he worked as a teacher with a school district that did not require contributions to the U.S. Social Security System. The Claimant's CPP Contributions statement shows no contributions to the CPP subsequent to 1987, save in 1993, being consistent with the Claimant's evidence he worked in California as a teacher during the years he contributed to the U.S. Social Security system which includes 1993.

[16] Canada and the United States (U.S.) are parties to an agreement (Agreement) that provides *inter alia* an employed person who works in Canada or the U.S. shall be subject to the laws of only the country in which the work is performed¹⁶.

[17] Where, by virtue of an Agreement, a person is subject to the legislation of a country other than Canada, that person shall for the purposes of the OAS Act and OAS Regulations, be deemed not resident in Canada¹⁷.

[18] The Federal Court determined that paragraph 21(5.3) of the OAS Regulations and Article V(1) of the Canada-U.S. Social Security Agreement when read together confirm a Claimant cannot, for the purposes of the OAS, argue to be a Canadian resident while working in the U.S., notwithstanding any ties maintained to Canada. He is deemed a non-resident of Canada¹⁸.

[19] I am required to follow decisions of the Federal Court, and must apply the provisions of the Agreement, the OAS Act, and OAS Regulations. I find the Claimant owned a home in British Columbia during the years 1988 to 2008, a period when he contributed to the U.S. Social Security system, and/or while a government employee in a school district that did not require contributions to the U.S. Social Security system. He is deemed to be a non-resident of Canada, notwithstanding he maintained a home and paid the expenses of the home where his former wife and adopted children resided. I make this determination based not only on the provisions of the

¹⁶ U.S.-Canadian Social Security Agreement: Article V(1)

¹⁷ Paragraph 21(5.3) OAS Regulations

¹⁸ Gumboc v. Canada (A.G.), 2014 FC 185

Canada-U.S. Social Security Agreement, the OAS Act and Regulations, and the noted Federal Court Decision which deem the Claimant a non-resident of Canada during those years, but also on the fact he lived and worked in California during those years. The Claimant is also deemed a non-resident of Canada for three months in 1981 and all of 1982, as he contributed to the U.S. Social Security system during that period, and lived and worked in Colorado.

[20] The onus is on the Claimant to establish on the balance of probabilities his entitlement to an OAS pension¹⁹. Residence is a factual issue that requires an examination of the whole context of the individual under scrutiny²⁰. Several factors are to be considered in determining whether the residence requirements of the OAS Act have been met, including ties to another country²¹. Ownership of residential property in Canada is not synonymous with residence in Canada. I find the Claimant has provided little, if any, evidence of the common indicia of residence, the factors referred to in the Ding decision, to establish he made her home and ordinarily lived in Canada during periods other than as determined by the Minister. I find the Claimant failed to establish he resided in Canada for an aggregate period more than the seventeen years, ten months, twenty-five days after attaining eighteen years of age as determined by the Minister.

[21] I find the Claimant resided in Canada from January 1, 1972 to September 30, 1981, from January 1, 1983 to December 31, 1987, and from January 1, 2009 to February 27, 2012, being an aggregate period of seventeen years, ten months, twenty-five days. I find the Claimant is not entitled to a partial OAS pension greater than 17/40th of a full OAS pension.

CONCLUSION

[22] The appeal is dismissed.

Patrick O'Neil
Member, General Division - Income Security

¹⁹ De Carolis v. Canada (Attorney General), 2013 FC 366

²⁰ De Bustamante v. Canada (Attorney General), 2008 FC 1111

²¹ Canada (MHRD) v. Ding, 2005 FC 76