



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *D. G. v Minister of Employment and Social Development*, 2019 SST 1360

Tribunal File Number: GP-18-518

BETWEEN:

D. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Antoinette Cardillo

DATE OF DECISION: October 24, 2019

DECISION

I find that the Appellant is entitled to receive OAS benefits from September 2017 to November 2017 because he was not incarcerated within the meaning of section 5(3) of the *Old Age Security Act* (OAS Act) during that period.

OVERVIEW

[1] The Respondent received the Appellant's application for an Old Age Security (OAS) pension on April 10, 2009.¹ The Respondent approved his application and granted him a full pension as of June 2009, the month after he turned 65. On September 22, 2017, the Respondent informed the Appellant that his OAS pension benefits would be suspended as of September 2017 because he was incarcerated. The Appellant requested a reconsideration of the decision. The Respondent upheld its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

THE LAW

[2] The OAS Act was amended so that, as of January 1, 2011, the OAS pension, the Guaranteed Income Supplement, and the Allowance are no longer paid during periods of incarceration. Section 5(3) of the OAS Act states the following:

Incarcerated persons

5(3) No pension may be paid in respect of a period of incarceration—exclusive of the first month of that period—to a person who is subject to a sentence of imprisonment:

(a) that is to be served in a penitentiary by virtue of any Act of Parliament; or

(b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered

¹ GD2-20.

into an agreement under section 41 of the *Department of Employment and Social Development Act*.

ISSUE

[3] I must determine whether the Appellant is entitled to an OAS pension from September 2017 to May 2018.

ANALYSIS

[4] The Respondent received the Appellant's OAS pension application in 2009, and it was approved with benefits beginning in June 2009.

[5] According to a June 26, 2019, letter from the Correctional Service of Canada (CSC),² the Appellant's file between January 2008 and October 2018 is summarized as follows:

- Incarceration from January 1, 2008, to December 17, 2008;
- Incarceration from March 15, 2011, to March 29, 2012;
- Incarceration from June 18, 2013, to November 24, 2014;
- Statutory release (end of day parole) on May 5, 2017;
- Suspension of statutory release (not revoked) on August 2, 2017;
- Revocation of statutory release on November 7, 2017;
- Release on day parole (halfway house) on May 30, 2018; and
- Statutory release (end of day parole) on October 22, 2018.

[6] According to the Respondent, the Appellant was incarcerated again on August 2, 2017. On September 22, 2017, the Respondent informed the Appellant of its decision to suspend OAS pension benefits as of September 2017. On November 7, 2017, the Parole Board of Canada (PBC) revoked his parole, which ended his conditional release. That meant he remained incarcerated in a federal institution.

² GD4-7.

[7] According to the Appellant,³ his parole had been suspended effective August 2, 2017, for the proceedings. A suspension is not a revocation, and the PBC could have released the Appellant at any time. He was not convicted during that period.

[8] The OAS Act states that payment of benefits is interrupted for people who serve (1) a sentence of imprisonment in a federal penitentiary, or (2) a sentence of imprisonment of more than 90 days in a provincial prison.

[9] The first condition to meet for section 5(3) of the OAS Act to apply is that a person must serve a sentence of imprisonment in a federal penitentiary. Based on the evidence, the Appellant was detained in a federal penitentiary as of August 2, 2017, after his statutory release was suspended. His statutory release was revoked on November 7, 2017.

[10] It follows that the Appellant was not serving a sentence of imprisonment when his statutory release was suspended in August 2017, even though he was detained in a federal penitentiary.

[11] Based on the evidence submitted by the Appellant in his June 27, 2019, letter⁴ and the June 26, 2019, letter from the CSC,⁵ the Appellant was not sentenced to imprisonment during the proceedings after his statutory release was suspended.

[12] The second condition to meet for section 5(3) of the OAS Act to apply is that a person must serve a sentence of imprisonment of more than 90 days in a provincial prison. Based on the evidence, the Appellant was not serving a sentence of more than 90 days in a provincial prison.

[13] As stated, the Respondent submits that the Appellant is not entitled to an OAS pension between September 2017 and May 2018 because the evidence and the legislation are clear. Based on section 5(3) of the OAS Act, the OAS pension must be suspended because the Appellant was incarcerated.

³ GD3-4.

⁴ GD4-1.

⁵ GD4-7.

[14] However, being incarcerated does not mean that section 5(3) of the OAS Act applies automatically. According to the OAS Act, a person must serve a sentence of imprisonment in a federal penitentiary or of more than 90 days in a provincial prison, which the Appellant does not appear to have done.

[15] The evidence does not allow the determination that section 5(3) of the OAS Act applies to these proceedings because the Appellant was not incarcerated but detained in a federal penitentiary after his statutory release was suspended in August 2017 until November 2017, when his statutory release was revoked. He then remained incarcerated in a federal penitentiary until May 2018 when he obtained day parole (halfway house) and a statutory release on October 22, 2018.

[16] Consequently, I accept the evidence the Appellant submitted that he was not incarcerated according to section 5(3) of the OAS Act but that his statutory release had been suspended between August 2017 and November 2017.

[17] I determine that the Appellant is entitled to receive OAS pension benefits from September 2017 to November 2017.

CONCLUSION

[18] The appeal is allowed in part.

Antoinette Cardillo
Member, General Division – Income Security