Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. R. v Minister of Employment and Social Development*, 2020 SST 93

Tribunal File Number: AD-19-351

BETWEEN:

M. R.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 9, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed

OVERVIEW

[2] The Claimant was born in 1932 and immigrated to Canada from Germany in 1952. He worked as a missionary for many years and lived outside Canada for prolonged periods.

[3] In November 1998, he applied for an Old Age Security (OAS) pension. In his application, he disclosed that he had worked in Europe on behalf of X for 32 years. He also declared that he had returned to Canada for his retirement as of November 1997, although he did leave open the possibility that he might embark on "future missionary stays of more than six months abroad."[1]

[4] The Minister approved the Claimant's OAS application at the full rate, effective January 1998. The Minister later approved the Claimant for the Guaranteed Income Supplement (GIS), an additional benefit paid to low-income OAS pension recipients who reside in Canada.

[5] In February 2013, the Minister opened an investigation into the Claimant's continued eligibility for the two benefits. In April 2015, the Minister confirmed the Claimant's OAS eligibility but suspended his GIS payments after determining that he had not resided in Canada since 1997. The Minister assessed an overpayment of approximately $121,000.

[6] The Claimant appealed this decision to the Tribunal. The Tribunal's General Division held an oral hearing and dismissed the appeal, agreeing with the Minister that the Claimant had not been resident in Canada since 1997.

[7] The Claimant then requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division had committed various errors in rendering its decision. In May

[1] GD2-5.

2019, the Appeal Division granted leave to appeal, finding a reasonable chance of success for at least one of the Claimant's arguments.

[8] Since neither party insisted on an oral hearing, I conducted this hearing by way of documentary review. Now, having reviewed the record and considered the parties' written submissions, I have concluded that none of the Claimant's reasons for appealing justify overturning the General Division's decision.

ISSUES

[9] According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division:

(i) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(ii) erred in law, whether or not the error appears on the face of the record; or

(iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[10] In this appeal, I must answer the following questions:

Issue 1: Did the General make a jurisdictional error by failing to consider the Minister's authority to change its initial GIS entitlement decision?

Issue 2: Did the General Division base its decision on an erroneous finding that the Claimant lacked strong ties to Canada?

ANALYSIS

Issue 1: Did the General Division make a jurisdictional error by failing to consider the Minister's authority to change its initial GIS entitlement decision?

I. The General Division considered the Minister's authority to cancel the Claimant's GIS

[11] It is clear from the Claimant's leave to appeal submissions that he is challenging the Minister's ability to reverse its decision to grant him the GIS. He claims that, after he began

receiving GIS payments in October 1998, he annually notified the Minister that he would be out of the country for missionary work for part of each year. He argues that the Minister should not be permitted to change its decision years later.

[12] When it allowed leave to appeal last May, the Appeal Division thought there was an arguable case that the General Division had looked only at the Claimant's Canadian residence, without considering whether the Minister had the power to cut off his benefits in the first place. Now that I have examined the Claimant's argument in detail, I find it less than convincing.

[13] In its decision, the General Division articulated what it believed were the relevant issues,[2] but none of them explicitly addressed the Minister's authority to reconsider a Claimant's eligibility for OAS benefits. Nevertheless, I am satisfied that the General Division did, in fact, address this issue under the heading "What is the impact of that finding on the overpayment claimed by the Minister?"

[14] In three paragraphs, the General Division explained that, having found the Claimant ineligible for the GIS from October 1998 to the present, he remained responsible for the overpayment demanded by the Minister. For this proposition, the General Division cited sections 37(1) and (2) of the *Old Age Security Act* (OASA), which state that OAS recipients must repay any benefits that they might have received in error.

[15] The General Division also considered the Claimant's argument that, since the Minister did not seriously investigate his residence for more than 15 years, it should not have been permitted to change its position on his GIS entitlement. In rejecting this argument, the General Division cited section 23 of the *Old Age Security Regulations* (OASR), which authorize the Minister to investigate and reassesses a person's eligibility for an OAS benefit.

[16] What the General Division did not do is mention section 11(7) of the OASA, which prohibits GIS payments to a pensioner who leaves or ceases to reside in Canada. Even so, it is clear that the General Division's analysis correctly assumes that living abroad would disqualify the Claimant from continuing to receive the GIS.

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[2] General Division decision, paras 7-9.

II. The General Division did not err in law when it found that the Minister had the authority to cancel the Claimant's GIS and assess an overpayment

[17] Section 11(2) of the OASA permits payment, subject to financial need, of a GIS to pensioners who make an annual application. Under sections 11(7)(c) and (d), no GIS may be paid to a pensioner who is absent from, or ceases to reside in, Canada for six consecutive months. Section 37 of the OASA and section 23 of the OASR give the Minister what appear to be broad powers to require, at any time, that OAS pension recipients provide evidence of their eligibility to receive that pension. If the Minister determines that a person has received a pension to which they were not entitled, those payments become a debt to Her Majesty and are recoverable.

[18] The General Division assessed the available evidence and found that the Claimant was not a resident of Canada after November 1997 or at any time afterwards. It implicitly relied on section 11(7)(d) of the OASA to find that the Claimant had never been entitled to any of the GIS payments that he had received from November 1998 to April 2015. It recognized Minister's authority under section 23(1) of the OASR to investigate the Claimant's ties to Canada, and it endorsed the Minister's demand for repayment of benefits totalling $121,000. I do not see how the General Division committed an error of law by arriving at these conclusions.

III. B.R. v Canada addressed a different set of facts

[19] Although neither the General Division nor the parties referred to it, I would be remiss if I did not address *B.R. v Canada*,[3] a recent Appeal Division case that also involved a claimant who, after being initially approved for OAS benefits, saw them "clawed back" when the Minister reversed its prior position and determined that Canadian residence had not been established. After engaging in a careful exercise in statutory interpretation, my Appeal Division colleague concluded that the Minister has limited scope to revisit OAS eligibility once it approves an application. Decisions by Appeal Division members do not bind their colleagues, but all of us strive to make decisions that are consistent with one another, even if achieving that ideal is not always possible.

[3] *B.R. v Canada (Minister of Employment and Social Development)*, 2018 SST 844.

[20] That said, I note significant differences between the underlying facts of this case and *B.R.* Here, the Claimant's entitlement to the OAS pension has been established and is not at issue. The Minister concedes that, as a missionary working abroad, the Claimant was a Canadian resident when he turned 65.[4]

[21] In *B.R.*, by contrast, the claimant's eligibility for *both* the OAS pension and the GIS were at issue. The Appeal Division focused on the former—in particular, the Minister's claim that it had the power to retrospectively revoke its prior OAS pension, based on essentially the same information that was available when the application was originally approved. However, presumably because the OAS pension is a prerequisite to the GIS, the Appeal Division did not specifically address the Minister's power to revisit its decisions about the latter benefit.

[22] This matters because the OAS pension and the GIS are different from each other. The first is a lifetime benefit, initiated by a single application, that is primarily concerned with the claimant's past residence. The second is a temporary benefit, renewable by means of an annual application, that is primarily concerned with the claimant's current residence.

[23] *B.R.* seeks to prohibit the Minister from changing a previous eligibility decision by launching an investigation years after an OAS approval and asking questions about the recipient's place of residence that it could have just as easily asked at the time of application. To be sure, *B.R.* does contemplate some circumstances in which the Minister might be permitted to reassess pensioners' ongoing eligibility for benefits—for instance, where they made fraudulent misrepresentations on their applications or interrupted their Canadian residence the day after the initial decision.[5] As it happens, I think that the Claimant's case falls under that second category.

[24] The General Division found that, after retiring from his missionary work in 1997, the Claimant never re-established residence in Canada. Indeed, the General Division's assessment of the available evidence suggests that the Claimant alighted briefly in Canada in November 1997 and then left permanently for Europe. None of this affected his entitlement to the OAS pension, but it also meant that he was never eligible for the GIS.

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[4] As per section 20(5) of the OASR.
[5] *B.R.* para 77.

[25] When it approved that first GIS application, the Minister essentially took it on faith that, having arrived back in Canada, the Claimant was in the process of re-establishing ties in this country and would remain here for the long term. The Minister was undoubtedly influenced by the Claimant's statements that he had a home in X and that he intended to retire in Canada.[6] The Minister continued to rely on this information, as well as the Claimant's subsequent GIS application forms, when it renewed his GIS every year for the following 17 years. Although none of those subsequent GIS application forms were on file, it seems likely that they, like the original OAS application, bore a Canadian address. It is also possible the Claimant failed to declare, as required by the forms, his extended absences from Canada. If so, then the Claimant may have misrepresented his place of residence. One can criticize the Minister for assuming that the Claimant continued to live in Canada, but it is not reasonable to expect an organization, even one with the Minister's resources, to conduct an annual in-depth investigation into every GIS recipient's place of residence for that year. This stands in contrast with an OAS application, which requires the Minister to make a one-time assessment of whether a claimant was resident in Canada for anywhere between 10 and 40 years.

Issue 2: Did the General Division base its decision on an erroneous finding of fact that the Claimant lacked strong ties to Canada?

I. The General Division did not commit an error when it considered the evidence

[26] Much of the Claimant's submissions suggest that he is essentially seeking new hearing on the substance of his claim that he has been a resident of Canada since 1997. I cannot fulfill this request, given the constraints of section 58(1) of the DESDA, which only permit the Appeal Division to consider whether the General Division committed an error that falls within one of three precisely defined categories. Those constraints effectively bar the Appeal Division from assessing the merits of evidence that the General Division has already considered. In short, an appeal to the Appeal Division is not designed to be a "redo" of the General Division hearing.

[27] The General Division dismissed the Claimant's appeal because it found little evidence that he had resided in Canada after his retirement. The General Division found that the Claimant had only been present in Canada on two brief occasions after November 1997. The

[6] Claimant's application for OAS benefits dated November 30, 1998, GD2-3.

evidence showed that the Claimant did little to re-establish residence in Canada other than set up a bank account and file annual tax returns through his bookkeeper. The General Division assessed this evidence in light of the factors outlined in the *Ding* case[7] and concluded that the Claimant's home was outside of Canada for the last 20 years. The General Division, in its role as finder of fact, is entitled to some leeway in how it assesses evidence, and I see no reason to interfere with its conclusion in this instance.

II. The Appeal Division cannot consider new evidence

[28] The Claimant also enclosed new information with his leave to appeal application that was prepared after the General Division released its decision. I am unable to consider these documents, which include expired passports and driver's licenses because, as noted, the DESDA does not allow the Appeal Division to hear arguments on the merits of disability. Once a hearing is concluded, there is a very limited basis on which any new or additional information can be raised, although a claimant does have the option of making an application to the General Division to rescind or amend its decision.[8]

CONCLUSION

[29] For the reasons discussed above, the Claimant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds of appeal listed in section 58(1) of the DESDA.

[30] The appeal is therefore dismissed.

Member, Appeal Division

METHOD OF PROCEEDING:	Hearing based on the documentary record

[7] *Canada v Ding*, 2005 FC 76 .
[8] A claimant seeking to rescind or amend a decision of the General Division must comply with the requirements set out in s 66 of the DESDA and ss 45 and 46 of the *Social Security Tribunal Regulations*, which impose strict deadlines and require an Claimant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercise of reasonable diligence.

APPEARANCES:	M. R., Appellant, self-represented Tiffany Glover, representative for the Respondent