



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. M. v Minister of Employment and Social Development*, 2020 SST 632

Tribunal File Number: GP-19-1375

BETWEEN:

C. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Decision on the record: June 25, 2020

DECISION

[1] The Claimant is not entitled to the *Guaranteed Income Supplement* (GIS) for the period from September 2017 up to and including December 2018. He is entitled to the GIS for the period from January to June 2019.

PRELIMINARY MATTERS

Form of hearing

[2] The hearing of this appeal by teleconference was scheduled for May 25, 2020. The Claimant did not express a preference for the form of hearing. On May 2, 2020, the Claimant asked for an adjournment until Canada was back to normal from COVID-19. He explained that he was hard of hearing. In addition, he was afraid that the presence of an interpreter would jeopardize his already poor health. He then stated that it was better to go ahead with the teleconference in his absence.¹

[3] On May 7, 2020, the Social Security Tribunal (Tribunal) sent the Claimant an email² acknowledging his concerns and asking whether his hearing difficulties prevented him from participating in a hearing by telephone. If not, he should know that the interpreter would also be participating by telephone, so that there would be no danger of infection. In addition, if he wanted to go ahead with the hearing, the Tribunal asked to be advised what language the interpreter should be able to speak.³ The Tribunal asked that the Claimant respond to the email by May 12, 2020. He did not respond to this email. I attended at the time scheduled for the hearing in case the Claimant appeared, but he did not.

[4] The Tribunal also tried to contact the Claimant by telephone, leaving voicemail messages for the Claimant on May 7 and June 5, 2020. There was no response to the voicemails.

[5] Given that the Claimant failed to appear at the hearing, I decided to write a decision on the record.⁴ In doing so, I took into account that the Claimant had asked that his appeal be expedited

¹ GD8-2

² The Tribunal has the Claimant's consent to communicate by email.

³ GD9-1

⁴ My authority to do so is found in section 12 of the Tribunal's *Regulations*.

for financial reasons. I also considered that, with his language difficulties, he would likely be unable to reply by questions and answers. Further, I am aware of my responsibility to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.⁵

Jurisdiction

The 2017 application for the GIS

[6] The Minister submits that the issue is whether the Claimant is entitled to the GIS as early as February 2018, one year prior to the date of his January 2019 application for the July 2018 to June 2019 payment period (the second application). This suggests I have the authority only to make a decision on the second application. However, I believe that I also have the authority to consider the Claimant's 2017 application for the GIS for the period July 2017 to June 2018 (the first application).

[7] The Minister received the first application in July 2017. In April 2018, the Minister denied the application based on a finding that the Claimant was not resident in Canada from July 2017 to June 2018. The Minister advised the Claimant that he had 90 days to request reconsideration.⁶ In April 2019, the Claimant challenged the Minister's determination.⁷ The Minister might have been expected to treat this as a late request for reconsideration and take the appropriate steps.⁸ However, the Minister did nothing.

[8] The Claimant continued to object to the Minister's determination regarding his 2017 application. In August 2019, he did so in his Notice of Appeal.⁹ In December 2019, he raised the matter again in correspondence to the Tribunal.¹⁰

[9] The Minister denied the second application initially. The denial letter stated that the GIS is suspended after six months' absence from Canada. A visit or visits to Canada are not considered

⁵ Paragraph 3(1)(a) of the *Social Security Tribunal Regulations*

⁶ GD3-7

⁷ GD2-98

⁸ There is a 90-day time limit for requesting reconsideration. This may be waived under certain circumstances if the reconsideration request is made less than 365 days after the initial determination: subsection 27.1(1) of the OAS Act, section 29.1 of the OAS *Regulations*

⁹ GD1-2

¹⁰ GD3-4

as residence in Canada.¹¹ In the August 2019 reconsideration decision, the Minister stated: “we maintain our original decision regarding your [GIS].” The Minister explained that for the period January 14, 2017 to January 21, 2019, the Claimant was in Canada only twice and for less than a month each time. This could be interpreted to mean that the Minister was dealing with the 2017 application as well as the 2018 application. The Minister determined that the Claimant was not resident in Canada from January 2017 to January 2019.

[10] My jurisdiction is based on the contents of the reconsideration decision.¹² In determining my authority to consider the Claimant’s application for the period July 2017 to June 2018, I am guided by a recent Federal Court decision.¹³ The judge in that case found that a matter not explicitly covered in the reconsideration decision may be considered at the General Division level under certain circumstances: where the reconsideration decision is unclear; where the Claimant is self-represented; where the issues are essentially the same; where the issues covered closely related time periods; and where the Claimant’s understanding is that both time periods will be considered. All of those factors are present here. In addition, the Claimant is not fluent in English and requested an interpreter for the hearing. I find that I have jurisdiction to consider the Claimant’s 2017 GIS application.

The period from January to June 2019

[11] I also find I have the authority to consider the period from January to June 2019. The reconsideration decision did not deal with this issue. It only considered the period from July 2018 to January 2019. However, the Claimant’s application was for the period July 2018 to June 2019. In addition, in its submissions the Minister conceded that the Claimant was resident in Canada from January to June 2019.

¹¹ GD2-94

¹² Subsection 28(1) of the OAS Act; *Canada (A.G.) v. Bannerman*, 2003 FCT 208

¹³ *Fu v. Canada (A.G.)*, 2019 FC 527

OVERVIEW

[12] The Claimant was born in Vietnam in August 1952. He began living in Canada in 1975 and became a Canadian citizen in 1980.¹⁴ He worked as an electrical engineer. He also opened and ran two video stores in Vancouver.¹⁵

[13] Beginning in July 2015, the Claimant was in Vietnam for the following periods: July 31, 2015 to July 22, 2016; August 23, 2016 to June 21, 2017; July 15 to December 25, 2017; January 20 to July 18, 2018; and July 27, 2018 to January 21, 2019.¹⁶ He explained that he spent lengthy periods in Vietnam because the cost of living was cheaper there than in Canada.¹⁷

[14] Shortly after his return to Canada in January 2019, the Claimant was hospitalized for three days with congestive heart failure, coronary artery disease, and chronic obstructive pulmonary disease.¹⁸ Medical documents show that he needed long-term follow-up afterwards with specialists in Vancouver.¹⁹ In July 2019, he stated that he would not live outside Canada again.²⁰ There is no evidence that he has left Canada since then.

[15] The Claimant's entitlement to a full OAS pension is not in dispute. In April 2018, the Minister approved a full OAS pension effective September 2017, the month after the Claimant's 65th birthday. The amount of the OAS pension was based on 40 years of residence in Canada. The Claimant only became potentially eligible for the GIS as of September 2017, when he became eligible for the OAS pension.

THE POSITIONS OF THE PARTIES

[16] The Claimant believes that he is entitled to the GIS beginning September 2017, when he began receiving the OAS pension. He relies on a provision of the OAS Act stating that a pensioner is not entitled to the GIS if they are absent from Canada for more than six months.²¹

¹⁴ GD2-25; GD1-10

¹⁵ GD1-13

¹⁶ GD1-17-18; GD2-48

¹⁷ GD2-39

¹⁸ GD1-28

¹⁹ GD1-27 ff.

²⁰ GD2-22

²¹ Paragraph 11(7) (c) of the OAS Act

The Claimant states that after his retirement in August 2017, he was never out of Canada for more than six months.

[17] The Minister takes the position that the Claimant was not resident in Canada from January 2017 to January 2019. Between January 2017 and January 2019, the Claimant returned to Canada twice, for less than a month on each visit. He was therefore not resident in Canada during this period.²² The Minister relies on a provision of the OAS Act that states that a pensioner is not entitled to the GIS if they stopped residing in Canada for a period of at least six months, either before or after becoming a pensioner.²³

ISSUE

[18] Was the Claimant resident in Canada during the period September 2017 to June 2019?

ANALYSIS

The Test for Eligibility for GIS payments

[19] For the purposes of the OAS Act, a person resides in Canada if they make their home and ordinarily live in any part of Canada. A person is present in Canada when they are physically present in any part of Canada.²⁴

[20] The question of residency is a factual one that requires consideration of many factors, including but not limited to the following: personal property, social ties, other ties (such as medical coverage, driver's licence, and tax records), ties in another country, and whether the person's mode of living in Canada is deep rooted and settled.²⁵

[21] The onus is on the Claimant to establish his period of residency in Canada.²⁶

[22] The Claimant's intentions are a legitimate factor to consider, but are not determinative of the issue before me.²⁷

²² The Minister failed to consider the three weeks the Claimant was in Canada in the summer of 2017.

²³ Paragraph 11(7) (d) of the OAS Act

²⁴ Paragraphs 21(1)(a) and (b) of the OAS Regulations

²⁵ *Minister of Human Resources Development v. Ding*, 2005 FC 76; *Bustamante v. Canada (A.G.)*, 2008 FC 1111

²⁶ *De Carolis v. Canada (A.G.)*, 2013 FC 366

The Claimant was not resident in Canada from September 2017 to January 2019

[23] I find that the relevant provision of the OAS Act is the one stating that a pensioner is not entitled to the GIS if they stopped residing in Canada for a period of at least six months, either before or after becoming a pensioner.²⁸

[24] In support of his claim to have been resident in Canada from September 2017 to January 2019, the Claimant provided the following information:

- His only citizenship is Canadian;²⁹
- He has been a Canadian citizen since 1980;³⁰
- He was not allowed to stay in Vietnam for more than a year at a time;³¹
- He filed income tax returns in Canada for 2017 and 2018;³²
- British Columbia drivers' licence (2015-2020);³³
- British Columbia Services Card, which covers health services (2015-2020);³⁴
- Family doctor in Canada;³⁵
- His home address since 2014 was at his daughter's house in Coquitlam. Her address was on his 2017 and 2018 tax returns and on his 2017 OAS application;³⁶
- One of his sons lives in England. The Claimant did not say where his other two children live; and
- In January 2019 he moved to rental accommodation in Vancouver for medical reasons.³⁷

[25] From September 2017 to January 2019, the Claimant had significant ties in Canada. His ties of citizenship were stronger to Canada than to Vietnam. He had family ties in Canada – he

²⁷ *Duncan v. Canada (Attorney General)*, 2013 FC 319; *Minister of Human Resources Development v. Ding*, 2005 FC 76

²⁸ Paragraph 11(7) (d) of the OAS Act

²⁹ GD1-5

³⁰ GD2-33

³¹ GD2-39, October 2017

³² GD1-21 ff.

³³ GD1-34

³⁴ GD1-34

³⁵ GD2-39

³⁶ GD1-21; GD2-7, 23

³⁷ GD2-107; GD1-13

has a daughter here and listed her home as his residence. He retained his British Columbia driver's licence and health insurance card.

[26] Unfortunately, the file does not contain sufficient information for me to determine the strength of his ties to Vietnam. The Claimant provided no information about his living circumstances in Vietnam from September 2017 to January 2019. He did not provide details of whether he lived in a fixed location in Vietnam, whether he had bank accounts or health coverage there, or whether he had a driver's licence in Vietnam. He did report that he had ties of friendship and family in Vietnam, and had visited there often.³⁸ In addition, in July 2019, the Claimant stated that he had sponsored his wife under "family spouse sponsorship" and therefore must be preparing for residence in Canada.³⁹ He did not say when he had married, what the nationality of his wife was, or when he applied for sponsorship for her.

[27] The Claimant stated that "the reason for these periods in Vietnam [September 2017 to January 2019] is because the cost of living is very low." He could not survive in Canada on the OAS pension without help from his children. He did not apply for welfare in Canada because the stipend is not enough to live on.⁴⁰ However, the legislation does not exempt people from its residency requirements because of financial considerations. Nor does the law permit an exemption from its provisions because, as the Claimant explained, he was unaware that prolonged stays out of Canada would jeopardize his entitlement to the GIS.⁴¹

[28] When the Claimant left Canada in July 2017, it may be that he intended to return eventually on a permanent basis. However, his intentions are only one factor for me to consider.⁴²

[29] Whatever his intentions, he spent only about 11 weeks in Canada in the approximately three and a half years between July 2015 and January 2019. I cannot reconcile this travel history with a finding that he was ordinarily resident in Canada from September 2017 to January 2019.

³⁸ GD2-39

³⁹ GD2-22

⁴⁰ GD2-39

⁴¹ GD2-39

⁴² *Canada (MHRD) v. Ding*, 2005 FC 76; *Singer v. Canada (A.G)*, 2010 FC 607

[30] I find that the Claimant has failed to establish that it is more likely than not that he was ordinarily resident in Canada from September 2017 to January 2019. I therefore find that he is not entitled to the GIS from September 2017 up to and including December 2018.

The Claimant is entitled to the GIS from January to June 2019

[31] The Minister's submissions accepted the Claimant's position that he returned to live in Canada in January 2019.

[32] In support of this, the Claimant provided an airline ticket to Canada dated January 21, 2019. He also supplied the following information from 2019: an address in Vancouver, banking information; car insurance; and medical reports.⁴³

[33] I am satisfied that the Claimant established that it is more likely than not that he resided in Canada from January to June 2019. I therefore find that he is entitled to the GIS for this period.

Advice given by the Minister's staff at Service Canada

[34] The Claimant submits that he made every effort to comply with the OAS Act but was misled or underserved by staff at Service Canada. He met Service Canada officers at least six times. They told him there was a limit to the amount of time he could spend out of the country: five months and thirty days. In addition, he relied on a sign at the Service Canada Centre in Coquitlam reminding snowbirds that there was a five and a half month time limit for being out of the country.⁴⁴ He also submitted a photocopy of a Government of Canada brochure reminding him to inform Service Canada if he left Canada for more than six months.⁴⁵ Further, he had telephoned the OAS/GIS team officers in Victoria four times, but they never returned his calls.⁴⁶

[35] I am sympathetic to the Claimant's position. However, I do not have the authority to make decisions on questions of erroneous advice or administrative error. Such matters must be decided by the Minister. Under the OAS Act, the Minister has a discretionary power when satisfied that a person has been denied a benefit or portion of a benefit as a result of erroneous advice or

⁴³ GD1-1, 14, 28-ff.; GD2-103

⁴⁴ GD3-4

⁴⁵ GD1-19

⁴⁶ GD3-6

administrative error.⁴⁷ It is open to the Claimant to ask the Minister to look into his claim of erroneous advice or administrative error and make a decision on it. If the Claimant is dissatisfied with such a decision, he can apply to the Federal Court for judicial review of the Minister's decision.⁴⁸

CONCLUSION

[36] The Claimant is not entitled to the GIS for the period from September 2017 to December 2018. He is entitled to the GIS for the period from January to June 2019.

[37] The appeal is allowed in part.

Carol Wilton
Member, General Division - Income Security

⁴⁷ Section 32 of the OAS Act

⁴⁸ *Canada (MHRD) v. Tucker*, 2003 FCA 278; *Canada (A.G.) v. Vinet-Proulx*, 2007 FC 99