



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SA v Minister of Employment and Social Development*, 2021 SST 509

Tribunal File Number: GP-19-1612

BETWEEN:

S. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant: Self-represented

Minister represented by: Ian McRobbie

Teleconference hearing on: April 6, 2021

Date of decision: July 21, 2021

DECISION

[1] The Minister has the authority to reassess the Claimant's eligibility for the OAS pension and the GIS benefits under the *Old Age Security* (OAS) Act.

[2] The Claimant is entitled to a partial 32/40th of a full OAS pension. She was overpaid 8/40^{ths} of a full pension from May 2013 to March 2017. She has been underpaid 5/40^{ths} of a full pension since March 2017.

[3] The Claimant's marital status for the *Guaranteed Income Supplement* (GIS) was married – not separated. She was not entitled to GIS benefits. She was overpaid \$10,070.27 for GIS.

OVERVIEW

[4] The Claimant was born in India on April 28, 1948. She came to Canada in May 1971. In February 1981, she married B. K. Both she and B. K. worked for X. In 1994, B. K. accepted a temporary assignment for X in Michigan. He moved to X and rented an apartment. In October 1998, the Claimant obtained a U.S. permanent resident card (Green Card).¹ In 2000, B. K. accepted a permanent position with X U.S. He moved to X and purchased a condominium. In April 2004, the Claimant became a U.S. citizen.

[5] In August 2012, the Claimant applied for the OAS pension. The Minister approved her application with a full pension of 40/40^{ths} effective May 2013, the month after she turned 65.² In March 2013, she applied for the GIS. She stated that she and B. K. had been separated since January 1994.³ The Minister approved her application with benefits effective May 2013 under the marital status of "single."⁴

[6] In 2015, the Minister began a marital status review of the Claimant's GIS benefits because there was a discrepancy between what she told the Canada Revenue Agency (CRA) and what she told Service Canada about her marital status.⁵ In March 2016, the Minister suspended

¹ A permanent resident card allows a person to live and work permanently in the U.S. It is often referred to as a Green Card.

² GD2-5 to 8

³ GD2-11 to 12

⁴ GD2-14

⁵ GD2-16

payment of the Claimant's GIS benefits.⁶ In February 2017, the Minister found that the Claimant was ineligible for the GIS benefits because she and B. K. were not separated. Her eligibility for the benefit had been based on her income alone as opposed to her and B. K.'s combined income.⁷ She had been overpaid \$10,070.27 for GIS from May 2013 to March 2016.⁸

[7] In April 2017, the Minister recalculated the Claimant's OAS pension. It determined that she had ceased to reside in Canada in October 1998, when she obtained permanent resident status in the U.S. As a result, she was entitled to only 27/40th of the full pension based on her having resided in Canada from May 1971 to October 1998. In addition to the GIS overpayment, she had received an OAS overpayment of \$8,603 from May 2013 to March 2017.⁹

[8] The Claimant requested the Minister reconsider its decisions.¹⁰ The Minister denied the Claimant's requests for reconsideration.¹¹ The Claimant appealed to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTER

[9] Prior to the hearing, I asked both parties to file submissions as to whether the legal principles set out in the B.R.¹², J.A.¹³, and M.R.¹⁴ decisions are applicable to this appeal. These are all decisions of the Appeal Division of this Tribunal. B.R. decided that the Minister does not have the jurisdiction to change its initial decision about a claimant's eligibility for the OAS pension. The J.A. decision agreed with B.R. The M.R. decision decided that B.R. does not apply to decisions about eligibility for the GIS and, accordingly, the Minister has the jurisdiction to change its initial decision granting a claimant GIS benefits. Both parties filed submissions.¹⁵

The Claimant's position

⁶ GD2-179

⁷ Although there is no evidence as to her husband's income, the Claimant acknowledged that their combined income is above the amount for her to qualify for GIS: May 2016 interview, GD2-186,

⁸ GD2-200 to 201

⁹ GD2-210 to 211

¹⁰ GD2-215 to 217 and GD2-223 to 232.

¹¹ GD2-326 to 328.

¹² *B.R. v Minister of Employment and Social Development*, 2018 SST 844.

¹³ *Minister of Employment and Social Development v J.A.*, 2020 SST 414

¹⁴ *M.R. v. Minister of Employment and Social Development*, 2020 SST 93

¹⁵ The Claimant's submissions are at GD10 and GD12. The Minister's submissions are at GD11.

[10] The Claimant submits that the Minister does not have the power to reassess its initial eligibility decisions granting her a full OAS pension and the GIS benefit. In any case, she submits that she has resided in Canada continuously since May 1971. She is entitled to a full OAS pension since she had resided in Canada for more than 40 years as of April 27, 2013.¹⁶ She also submits that she was entitled to the GIS benefits under the single marital status. This was because she and B. K. separated in January 2004.

The Minister's position

[11] The Minister submits that it has the power to reassess the Claimant's eligibility for both her OAS pension and GIS benefit. This is because the B.R. decision is based on a flawed interpretation of the relevant provisions of the OAS Act and regulations. Alternatively, even if B.R. is followed, it does not apply in this case because the Claimant obtained her benefits by providing the Minister with false statements about her residence history. Further, B.R. does not limit the Minister's authority to reassess its decisions regarding the Claimant's eligibility for the GIS benefit.

[12] The Minister does not dispute that the Claimant started to reside in Canada in May 1971. However, its position is that she ceased to reside in Canada in October 1998. As a result, she was entitled to only a partial OAS pension of 27/40^{ths} of the full pension. This was because she had only 27 years of residence in Canada as of April 27, 2013. Further, the Claimant was not entitled to the GIS for two reasons. First, she did not reside in Canada after October 1998. Second, she was not entitled to GIS under the single marital status because she and B. K. were not separated.

ISSUES

1. Does the Minister have the authority to reassess the Claimant's eligibility for a full OAS pension and GIS benefits under the OAS Act?
2. If it generally does not, does it have the authority to do so if the Claimant obtained her benefits by providing false statements?
3. If so, did the Claimant obtain her OAS pension and/or her GIS benefits by providing false statements?

¹⁶ Her period of residence is calculated up until April 27, 2013 because this was the day before she turned 65.

4. If the Minister has the authority to reassess the Claimant's eligibility for the OAS pension how many years of residence in Canada did she have as of April 27, 2013?
5. If the Claimant did not have 40 years of residence in Canada, did she qualify for the full OAS pension under the provisions of paragraph 3(1)(b) of the OAS Act?¹⁷
6. If the Minister has the authority to reassess the Claimant's eligibility for GIS, did her marital status change from married to separated, and if so, as of what date?

ANALYSIS

The Minister has the authority to reassess the Claimant's eligibility for OAS benefits

[13] The Supreme Court of Canada has adopted the modern approach to statutory interpretation as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁸

[14] The Court also relied on section 10 of the Interpretation Act which provided that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".¹⁹

[15] I am not following the B.R. and J.A. decisions because they fail to apply the modern approach to statutory interpretation. B.R. analyzed sections of the Act in isolation and did not consider the purpose and object of the legislation as a whole.²⁰ It did not pay sufficient attention to the scheme of the Act, its object, and the intention of the legislature. It did not place enough emphasis on the importance of OAS benefits being paid only to those who meet the residency and/other eligibility requirements. J.A. adopted the reasoning in B.R. I do not have to consider M.R. since I am not following B.R.

The purpose of the OAS Act is to pay benefits based on residence in Canada

¹⁷ This is referred to as the "3-for-1 Rule." *Stachowski v. Canada (A.G.)*, 2005 FC 1435, para 12

¹⁸ *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, para 21

¹⁹ *Rizzo*, para 22

²⁰ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, paras 46 to 48

[16] The Minister submitted an expert report from Elizabeth Charron, a senior legislative officer for Old Age Security Policy and Legislation at Employment and Social Development Canada (the Ministry).²¹

[17] I find that Ms. Charron is an expert on the history and evolution of the OAS Act and Regulations.²² Accordingly, I have admitted her report, which deals with the legislative history and purpose of section 23 of the OAS Regulations. Her report assisted me in applying the modern approach to statutory interpretation.

[18] The OAS Act was introduced in 1952. Its main purpose is to lessen poverty for seniors age 65 and older.²³ It primarily provides benefits to persons living in Canada during their retirement. It focuses on those who have lived in Canada for a significant period and so have an attachment to this country.²⁴

[19] The Federal Court of Canada has recognized the importance of residence to the OAS Act. It said "...it cannot be ignored that the OAS Act provides benefits, first and foremost, to residents of Canada ... the legislative scheme appears focused on the provision of benefits to persons living their retirements in Canada. It is only through the operation of specific added provisions that non- residents obtain even a partial OAS pension."²⁵ The Federal Court also recognized this was Parliament's intention. In describing the changes to the OAS Act that introduced the current residence requirements, it said, "[t]he right to a pension was to be linked mainly to years of residence in Canada after age 18."²⁶

²¹ The expert report is at pages GD11-806 to 840

²² Ms. Charron's curriculum vitae is at pages GD11-1642 to 1643. She has over 30 years' experience working for the Ministry and its predecessor ministries. Her experience includes working as a senior policy adviser since June 2007, as a program adviser from 2002 to 2007, as a senior delivery agent from 1997 to 2002, as a reassessment supervisor in 1996, as a reassessment analyst from 1996 to 1997, and as a work-processing clerk from 1992 to 1996.

²³ Expert report, GD11-812, paras 1 and 2

²⁴ Expert report, GD11-817, para 3

²⁵ *Canada (Minister of Human Resources Development) v. Stiel*, 2006 FC 466 at paragraph 29.

²⁶ *Singer v Attorney General of Canada* 2000 FC 607 at paragraph 25.

The power to reassess is critical to the scheme of the OAS Act

[20] From the beginning, the government recognized that any old age assistance program that derived its funds from general revenues would require investigation and inquiry.²⁷ Since the start of the OAS program, the government has sought to maintain a balance between paying benefits to seniors in a timely manner and its responsibility to taxpayers. This is illustrated in an excerpt of a response given by the Honourable Paul Martin Sr., Minister of Health and Welfare, during the second reading of the Bill to provide for the OAS Act in November 1951. He was asked what constituted sufficient evidence to establish the age eligibility. He responded “it is clearly my duty to make sure that those who are qualified get the pension and, the implication was and quite properly so, that the man or woman who is not entitled, cannot legitimately, in the name of good government, be given a pension which the Act does not provide for.”²⁸

[21] Section 23 of the Old Age Security Regulations (Regulations) allows the Minister to review eligibility and seek additional evidence at any time before or after the approval of the benefit to confirm eligibility. It has been a part of the legislation since the start of the OAS program in 1952. It allows the Minister to take a risk-based approach and give the applicant the benefit of the doubt. The Minister can pay benefits to seniors in a timely manner. At the same time, the legislation provides a means of reassessment. This means the Minister can confirm that entitlement (or not) and remain accountable to taxpayers.²⁹

[22] The investigative authority under s.23 allows the Minister to reassess an individual’s eligibility in cases where new information surfaces, or where errors, misrepresentation or even fraud has occurred. This reassessment is not limited to periods after an application has been approved. Under this provision, information assessed during the initial review is also subject to reassessment at a later date.³⁰

²⁷ Report of the Joint Committee of the Senate and House of Commons on Old Age Security, June 28, 1950, GD11-1064

²⁸ Expert report, GD11-833; House of Commons Debates, November 1, 1951, GD11-351

²⁹ Expert report, GD11-813, para 6

³⁰ Expert report, GD11-834

[23] The Minister uses a risk-based approach to ensure that it processes benefit applications rapidly and issues payments quickly. Straightforward applications are given the benefit of the doubt. Government resources are focused on files with contradictory information and those with complex residence histories. This approach is based on the premise that the Minister can go back and review files later to confirm eligibility.³¹

[24] Overpayments happen when the government decides that an individual was not eligible for all the benefits already paid to them. Once the OAS account is adjusted to reflect the new decision, an overpayment is established. This is an accounting measure and is separate from the issue of debt recovery.³²

[25] Recovery of an overpayment is a discretionary power of the Minister. This means the Minister has the discretion to consider the financial circumstances of each debtor on a case-by-case basis. The purpose of this is to ensure that recovery of the debt does not place debtors in a situation of undue hardship. Based on financial information provided by the debtor, the Minister may reduce a monthly recovery rate or may remit (forgive) all or part of the overpayment.³³

The scheme of the OAS Act and Regulations

[26] Sections 23 and 26 of the Regulations give the Minister the authority to reassess a claimant's initial eligibility for a benefit, decide that it should not have been paid, and suspend payment. Section 34 of the Act authorizes those regulations. Sections 5(1) and 37(1) and (2) of the Act give the Minister the authority to demand repayment of monies that it should not have paid. Section 37(4) allows the Minister to cancel all or part of an overpayment in case of undue hardship.

[27] These provisions provide a legislative framework to ensure that beneficiaries are only receiving benefits to which they are entitled.³⁴ They achieve the purpose and objective of the OAS Act – to provide people 65 and over with an income to help reduce poverty in that age group based on residence in Canada.

³¹ Expert report, GD11-814, para 9

³² Expert report, GD11-814, para 10

³³ Expert report, GD11-814, para 11

³⁴ Expert Report, GD11-834

Sections 23 and 26 of the Regulations give the Minister authority to reassess its initial eligibility decisions

[28] Section 23 of the Regulations gives the Minister the power to investigate and assess the eligibility of a claimant to a benefit at any time. It provides that the Minister may, at any time before or after, the approval of an application, require a claimant to make available further information or evidence regarding the eligibility of the claimant for the benefit. It also provides that the Minister may at any time investigate the eligibility of a person to receive a benefit. Section 26 of the Regulations states that the Minister shall suspend the payment of any benefit where it appears that the beneficiary is ineligible for payment of the benefit.

[29] Section 34 of the Act authorizes these sections. It generally allows regulations for carrying the purposes and provisions of the Act into effect. Section 34(f) allows regulations that set out the information and evidence that beneficiaries have to make available. Section 34(j) allows regulations that provide for the suspension of payment of a benefit during an investigation into the eligibility of a beneficiary.

Sections 5(1) and 37 of the OAS Act give the Minister authority to demand repayment

[30] Sections 5(1) and 37(1) and 37(2) of the OAS Act give the Minister the authority to reassess its initial eligibility decisions. They also give it authority to demand repayment of monies that a claimant should not have received.

[31] Section 5(1) of the OAS Act says no pension may be paid to any person unless:

- the person is qualified under section 3(1) or (2) (the age and residence requirements),
- the person has applied for the pension, and
- the application has been approved.

[32] All three requirements must be satisfied. This prohibits paying a pension to a person who is not qualified, even if the Minister approved their application.

[33] Sections 37(1) and (2) of the OAS Act provide that a person has to return a benefit they have received if they are not entitled to it. It does not exempt payments that are made after the Minister approved their application.

[34] A person is not entitled to receive a pension if the law says it cannot be paid to them. If someone receives an OAS pension, or in this case, a full OAS pension for which they did not qualify, they have to pay back the overpayment. Similarly, if a person receives a GIS benefit for which they did not qualify, they have to pay back the overpayment.

Section 37(4) of the Act addresses undue hardship

[35] The Minister acknowledges that demanding repayment of an overpayment may result in financial hardship. However, this is dealt with by section 37(4) of the Act. This section gives the Minister the power to cancel all or part of the overpayment in cases of undue hardship. This does not give the Minister an unfettered discretion. The Minister must exercise this power judicially. If the Minister does not do so, the Federal Court will set aside the decision.³⁵

My Findings

[36] I find that the Minister has the authority to change its initial eligibility decisions with respect to both OAS pensions and GIS benefits.

[37] I have looked at the words of the OAS Act in their entire context and in their grammatical and ordinary sense. I have also considered whether my interpretation of the words fits with the object and scheme of the act, and with Parliament's intention.³⁶

[38] I have interpreted the regulations in a manner that furthers the purpose of the enabling statute as a whole. I have read them in the context of the entirety of the regulations and the enabling act. The intent of the statute governs the intent of the regulations.³⁷

[39] Since I have decided that the Minister has the authority to change its initial eligibility decisions, I must decide whether the Claimant was eligible to receive a full OAS pension. I must also decide whether she was eligible to receive the GIS benefit.

³⁵ Minister's submissions, GD11-24, paras 64 to 65; *Canada (A.G.) v Uppal*, 2008 FCA 388

³⁶ I have to a large extent adopted the analysis in the General Division decision in *K.B v Minister of Employment and Social Development*, 2021 SST 268, paras 42 to 64. Although that decision is not binding, I find it persuasive.

³⁷ *Bristol-Myers Squibb Co. v Canada (Attorney General)*, 2005 SCC 26 at para 38,

OAS analysis

[40] A full OAS pension is paid to individuals who have resided in Canada for at least 40 years after the age of 18.³⁸ If a person has not resided in Canada for at least 40 years, the legislation provides for the possibility of a partial pension. To be eligible for a partial pension, a person must have resided in Canada for at least ten years.³⁹ The amount of their partial pension bears the same relation to the full monthly pension as their period of residence does to 40 years. The amount is rounded down to the lower multiple of a year.⁴⁰ So, for example, if a person resided in Canada after the age of 18 for ten years and nine months (and also meets the other eligibility requirements), then the person will be eligible for a partial OAS pension of 10/40^{ths}.

[41] The OAS Regulations distinguish between the concepts of residency in Canada and presence in Canada. A person resides in Canada if they make their home and ordinarily live in any part of Canada.⁴¹ A person is present in Canada when they are physically present in any part of Canada.⁴²

[42] The Minister does not dispute that the Claimant resided in Canada from May 1971 to October 1998. However, it disputes that she resided in Canada after that.

[43] I must decide if the Claimant resided in Canada during the disputed period.

[44] I must weigh all the facts of the case and the Claimant's circumstances. The Claimant's intention to live in Canada is not enough on its own to show residence. The determination of residency is a factual issue that requires an examination of all of the circumstances.

[45] I must consider a number of factors when determining if a person makes their home and ordinarily lives in Canada. These factors include:⁴³

³⁸ Subparagraph 3(1)(c)(iii) of the OAS Act

³⁹ Paragraph 3((2)(b) of the OAS Act.

⁴⁰ Sections 3(3) and (4) of the OAS Act

⁴¹ Paragraph 21(1)(a) of the OAS Regulations

⁴² Paragraph 21(1)(b) of the OAS Regulations

⁴³ *Canada (MHRD) v Ding*, 2005 FC 76 and *Duncan v Canada (AG)*, 2013 FC 319.

- Ties in form of personal property (i.e. house, business, furniture, automobile, bank account, credit card);
- Social ties in Canada (i.e. membership with organizations or associations or professional memberships);
- Other ties in Canada (i.e. hospital and medical insurance coverage, driver's license, rental, lease, loan or mortgage agreement, property tax statements, electoral voter's list, life insurance policies, contracts, public records, immigration and passport records, provincial social services records, public and private pension plan records, federal and provincial income tax records);
- Ties in another country;
- Regularity and length of stay in Canada and the frequency and length of absences from Canada; and
- The person's mode of living (i.e. whether her living in Canada is substantially deep rooted and settled)

October 1998 to April 2004

[46] The Claimant testified that she suffered serious injuries in a 1993 car accident. She was on sick leave for about six months. She then returned to work on modified duties and hours. She remained in Canada after B. K.'s transfer to the U.S. in 1994. In April 1996, she went back on sick leave. She underwent a 7-year rehabilitation program. She went for rehabilitation three times a week. She also went to medical appointments. She has not worked since April 1996. In October 1998, she obtained permanent residence status in the U.S. In April 2001, she resigned from X because her rehabilitation program ended. In April 2004, she became a U.S. citizen.

[47] The Minister submits that the Claimant could not have resided in Canada during this period. This is because she became a naturalized U.S. citizen in April 2004. To do this she must have resided in the U.S. for five years prior to the naturalization date. The requirements state an applicant for citizenship must have been a permanent resident for five years without leaving the U.S. for trips of six months or longer before approval of the application.⁴⁴ Since the Claimant was a permanent resident of the U.S. during this time, she could not have resided in Canada.⁴⁵

⁴⁴ GD2-335.

⁴⁵ Minister's submissions, GD11-30, para 84

[48] The Claimant stated that she did not visit B. K. while he was in X from January 1994 to April 1996. At first, he visited her about every four to six weeks for a weekend. After a year, they did not see each other for about a year. In April 1996, B. K. started a permanent job with X U.S. He moved to X, Michigan, and purchased an apartment there. The Claimant signed for the mortgage. She went to the U.S. only once until 2000. This was in 1996 or 1997 - she went to X for an interview for her Green Card. In October 1998, she received a Green Card in the mail. She only visited the U.S. once in 2001 - she flew to X for the wedding of a member of her husband's family.

[49] In 2002, she started a pattern of winter travelling to X. In November or December, she travels to X. She stays at B. K.'s apartment. In April, she goes back to her house in X. B. K. drives her back and forth. He visits her about every four to six week while she in X.

[50] If the Claimant's oral evidence is accepted, she did not reside in the U.S. during this period. Up to 2000, she had only gone to the U.S. on one occasion. She only went once in 2001. Starting in 2002, she was in the U.S. only from November/December to April.

[51] However, in order to obtain U.S. citizenship the Claimant had to represent to the U.S. government that as of April 2004, she had been a permanent resident of the U.S. for five years without leaving the U.S. for trips or six months or longer. The Claimant should not be allowed to accept the benefit of this representation, namely, U.S. citizenship, while denying its accuracy for the purpose of obtaining benefits under the OAS Act.

[52] Significantly, in her notice of appeal the Claimant stated she was not claiming that she resided in Canada from October 1998 to April 2004.⁴⁶ In addition, in her October 2018 questionnaire, she was asked how she proved her U.S. residency prior to her application for U.S. residency. She answered, that she had a permanent resident card and did not leave the U.S. for six months or longer.⁴⁷

[53] I find that the Claimant was not a resident of Canada from October 1998 to April 2004.

⁴⁶ GD1-1

⁴⁷ GD2-241, 245

April 2004 to April 2013

[54] The Minister submits that the evidence does not establish that the Claimant resumed residence in Canada after April 2004. She had stronger ties to the U.S. than to Canada. Although she owned a home in Canada this is not in itself sufficient to establish that she resided in Canada.⁴⁸

[55] The Claimant states that she has resided in Canada continuously since May 1971. Since 2002, she has travelled to and from the U.S. only during the winter months. She has lived at her home in X from April to November of each year.

[56] The Canadian Border Services Agency (CBSA) records show the Claimant's entries to Canada from December 2002 to October 2015.⁴⁹ The U.S. Customs and Border Protection (CBA) records show her entries to the U.S. between November 2001 and May 2019.⁵⁰ The Minister calculated that CBSA records show 162 entries to Canada from December 2002 to October 2015 and that the CBA records show 320 entries to the U.S. from November 2001 to May 2019.⁵¹ On each of the Canadian entries, the Claimant was likely travelling from X to her home in X or travelling from X to the Casino in X. On each of the U.S. entries, the Claimant was likely travelling to X from her home in X or returning to X after going to the Casino in X.

[57] The CBA records conflict with the Claimant's oral evidence that she had a pattern of spending only winter months (November to April) in X. They show she entered the U.S. numerous times between May and October. This suggests that the Claimant was travelling to X during those months. Significantly, in 2007 and 2009 there are entries from May to September, in 2010 from May to August, in 2011 to 2015 from May to September, and in 2016 from June to September. I have set out her entries to the U.S. during these months in the appendix to this decision.

⁴⁸ Minister's submissions, GD11-30, para 85

⁴⁹ GD2-155 to 162

⁵⁰ GD2-298 to 305

⁵¹ Minister's submissions, GD-3, paras 43, 44

[58] Considering the CBA entries, I do not accept the Claimant's evidence that she travelled to X only during the winter months. She travelled there on frequent occasions throughout the entire year. This is consistent with her statement in item 22 of the November 2015 questionnaire. She stated that she makes short trips to her husband's apartment "almost every month of the year."⁵² She repeated this in her January 2016 interview.⁵³

[59] I now turn to the factors set out in paragraph 45, above.

Lifestyle and ties in Canada and U.S.⁵⁴

[60] The Claimant owns and lives in a house while in Canada. She knows her neighbours and has friends in Canada. She lives in her husband's apartment while in the U.S. She has no friends in X. She does not own any property in the U.S. She signed the mortgage on her husband's apartment. She has no relatives other than her husband in the U.S. She has a brother in Ontario. She is a Canadian citizen and has a Canadian passport. She is a U.S. citizen and has a U.S. passport. She has an Ontario driver's license. She also has a Michigan driver's license. She owned a car in Ontario until 2011. She has never owned a car in the U.S.

[61] She worked in Canada. She has never worked in the U.S. She files income tax returns in Canada. Her husband files a joint income tax return in the U.S. She has medical coverage both in Canada and in the U.S. She has two bank accounts in Canada. She has a joint account with her husband in the U.S. She has Canadian credit cards. She has no U.S. credit cards. She receives a Canada Pension Plan retirement pension and OAS benefits. She also receives U.S. Social Security benefits.

Regularity and length of stays in Canada and the U.S

[62] Usually the country where the Claimant spends the greater amount of time is a significant factor. In this case, it is impossible to determine whether she spends more time in the U.S. or

⁵² GD2-133

⁵³ GD2-167

⁵⁴ I have grouped the first four factors in para 45 together

Canada. In view of this, I am proceeding on the basis that since April 2004, she has spent an equal amount of time in each country.

Mode of living and roots in Canada and the U.S

[63] The Claimant has deep rooted and settled ties both to Canada and to the U.S. Her most significant tie to the U.S. is her husband. Her most significant tie to Canada is her home in X.

[64] I find that the Claimant's ties to, and time in, each country have been relatively equal since April 2004.

[65] The Minister submits that a person can only be considered a resident of one country at a time. However, it does not provide any statutory or case authority for this. In a non-binding decision, a member of the Appeal Division (AD) of this Tribunal disagreed. She stated that it might be an error of law to conclude that a person can only reside in one country for OAS purposes. The primary consideration is a weighing of the factors set out in paragraph 45, above.⁵⁵

[66] Although I am not bound by the AD decision, I find it helpful. After April 2004, the Claimant spent equal time in Canada and the U.S. In addition, she had a deep rooted and settled connection as well as equal ties to both countries. I find that it is more likely than not that the Claimant's residence alternated between Canada and the U.S.

[67] I have considered paragraph 21(4)(a) of the OAS Regulations. Under that provision, any interval of absence from Canada of a temporary nature that does not exceed one year considered not to have interrupted a person's residence in Canada. I do not consider this provision applicable. This is because the Claimant's pattern of absences since April 2004 was not "of a temporary nature." A temporary absence is one that is meant to last for only a limited time. Although the Claimant's absences were for a limited time in each year, the pattern of absences was for an indefinite time.

[68] The Claimant is entitled to credit for an additional period of residence for six months of each year from April 2004 to April 2013 – an additional 4 ½ years of residence. The Minister

⁵⁵ *A.D. v. Minister of Employment and Social Development*, 2015 SSTAD 1267, para 11

acknowledged that the Claimant was entitled to 27 years and 6 months of residence until April 2013 (May 1971 to October 1998). With the additional 4 ½ years, she is entitled to 32 years.

[69] She is entitled to a partial pension of 32/40^{ths} of a full pension.

The Claimant is not entitled to a full pension

[70] Since the Claimant does not have 40 years of residence in Canada, to qualify for a full OAS pension she must:

1. have been 25 years old and resided in Canada on July 1, 1977;
2. be sixty five years old; and
3. have resided in Canada for ten years immediately preceding the day her application was approved, *or* been present in Canada for a combined period at least equal to three times her combined period of absence from Canada during the ten years prior to her application being approved, *and* resided in Canada for at least one year immediately proceeding the day on which the Minister approved her application.⁵⁶ (emphasis added)

[71] The Claimant has satisfied the first two conditions. However, based on my findings, she has not satisfied the third condition. This is because she was not a resident of Canada for at least one year immediately preceding that day the Minister approved her application – she was a resident for only about six months of that year.

[72] I find that the Claimant is not entitled to a full OAS pension.

GIS analysis

[73] The GIS is a benefit for pensioners with a low income. The OAS Act provides for the GIS.⁵⁷ To be eligible for the GIS, a person has to be receiving a pension under the OAS Act.⁵⁸ Their income also has to be below the limits set by the Minister.⁵⁹

⁵⁶ Paragraph 3(1)(b) of the OAS Act

⁵⁷ Section 11 of the OAS Act

⁵⁸ Section 11 of the OAS Act.

⁵⁹ Section 10 of the OAS Act

[74] The amount of GIS that a person is entitled to depends upon their relationship status. If they have a spouse, the Minister combines their income to determine if they are entitled to GIS. An applicant for the GIS is required to report whether they have a spouse. The Minister will not consider the application until their spouse files a statement of income.⁶⁰

[75] In her August 2012 OAS application, the Claimant recorded her marital status as married. She did not indicate that she was separated.⁶¹ However, in her February 2013 GIS application, she recorded that she and B. K. had been separated since January 2004. In her August 2013 renewal application, she recorded that they had been “involuntarily separated” since January 2004.⁶²

[76] I asked the Claimant why she indicated that she and B. K. were separated. She told me that this was because they had been living in separate homes in different countries. However, a couple remains married and not legally separated if they exhibit behaviour, which is more consistent with marriage than separation. A couple need not physically cohabit for a marriage to survive.⁶³

[77] The Claimant and B. K. continued to exhibit behaviour that was more consistent with marriage than separation. She frequently visited him in X and stayed at his apartment. He visited her in X and stayed at her house. He drove her back and forth between X and X. They went together to the X casino for concerts. They stayed usually for two nights in the same hotel room. They did not tell anyone that they were separated. They never consulted a lawyer or considered the financial implications of being separated. B. K. is still the beneficiary under her will. B. K. filed a joint tax return in the U.S. In 2001 (seven years after the Claimant states they separated), they flew together to attend a family wedding in X. To the best of the Claimant’s knowledge, neither of them has been in a romantic relationship with another person.

⁶⁰ Sections 12(6)(b) and 15 of the OAS Act: *Quesnel v Canada Attorney General*, 2011 FCA 128

⁶¹ GD2-6

⁶² GD2-11, 12

⁶³ B-74059 v. MSD; B-74060 v. MSD (2004) RT. This is a decision by a Review Tribunal of the Office of the Commissioner of Review Tribunals, the predecessor tribunal to the Social Security Tribunal. It is cited in the Annotated Canada Pension Plan and Old Age Security Act, 19th edition, at page 692. Although this decision is not binding, I find it persuasive.

[78] I find that the Claimant and B. K. continued to live together in marriage like relationship. Her proper marital status for GIS purposes was married - not separated. Even though the Minister asked her to do so, the Claimant did not file B. K.'s income tax returns. She acknowledged that his income would put their combined income above the threshold for entitlement to GIS benefits.⁶⁴

[79] I find that the Claimant was not entitled to GIS because her benefits were based on just her income, and not her and B.K.'s combined income.

Summary of Findings

Issue 1: Does the Minister have the authority to reassess the Claimant's eligibility for benefits under the OAS Act.

Answer: Yes it does. Both with respect to Claimant's OAS pension and her GIS benefit.

Issue 2: If it generally does not, does it have the authority to do so if the Claimant obtained her benefits by providing false statements?

Answer: Need not answer since Minister has general authority to reassess.

Issue 3: If it generally does not, does it have the authority to do so if the Claimant obtained her benefits by providing false statements?

Answer: Need not answer since Minister has general authority to reassess.

Issue 4: If so, did the Claimant obtain her OAS pension and/or her GIS benefits by providing false statements?

Answer: Need not answer. Is irrelevant because Minister has general authority to reassess.

Issue 5: How many years of residence in Canada did the Claimant have as of April 27, 2013?

Answer: She had 32 years of residence. She is entitled to a partial pension of 32/40^{ths} of a full pension. She was overpaid 8/40^{ths} of a full pension from May 2013 to March 2017. She has been underpaid 5/40^{ths} of a full pension since March 2017.

⁶⁴ May 2016 interview notes, GD2-184

Issue 6: If the Claimant did not have 40 years of residence in Canada, did she qualify for the full OAS pension under the provisions of paragraph 3(1)(b) of the OAS Act?

Answer: No. She did not qualify for a full pension because she was not a resident of Canada for at least one year immediately preceding the date the Minister approved her OAS application.

Issue 7: Did the Claimant's marital status change from married to separated, and if so, as of what date?

Answer: No. Her marital status continued to be married and not separated. She was not entitled to GIS benefits. She has been overpaid \$10,070.27 for GIS.

CONCLUSION

[80] The appeal is allowed in part.

Raymond Raphael
Member, General Division - Income Security

APPENDIX

ENTRIES TO U.S. BETWEEN MAY AND SEPTEMBER

<i>Dates of entry to U.S. from May to September</i>	<i>Border Crossing</i>	
2004 (one entry)		
June 15/04	Detroit, Windsor tunnel	This is the crossing closest to the X Casino. ⁶⁵ The Claimant likely used this crossing when returning to X from the X Casino.
2006 (three entries)		
September 13/06	Detroit, Windsor tunnel	
September 21/06	Detroit, Windsor tunnel	
September 26/06	Detroit, Windsor tunnel	
2007 (ten entries)		
May 3/07	Detroit, Windsor tunnel	
May 5/07	Detroit, Windsor tunnel	
May 8/07	Detroit, Windsor tunnel	
May 12/07	Detroit, Windsor tunnel	

⁶⁵ Minister's submissions: GD3-11, para 43.

May 19/07	Detroit, Windsor tunnel	
July 15/07	Detroit, Windsor tunnel	
July 19/07	Detroit, Windsor tunnel	
Sept 8/07	Detroit, Windsor tunnel	
Sept 9/07	Detroit, Windsor tunnel	
Sept 13/07	Detroit, Windsor tunnel	
2008 (two entries)		
May 18/08	Detroit, Windsor tunnel	
Sept 21/08	Detroit, Windsor tunnel	
2009 (seven entries)		
May 9/09	Detroit, Windsor tunnel	
May 23/09	Detroit, Windsor tunnel	
May 30/09	Detroit, Windsor tunnel	
July 19/09	Detroit, Windsor tunnel	
Aug 23/09	Detroit, Windsor tunnel	
Sept 26/09	Detroit, Windsor tunnel	
Sept 27/09	Detroit, Windsor tunnel	
2010 (five entries)		
May 16/10	Detroit, Windsor tunnel	

June 27/10	Detroit, Windsor tunnel	
July 24/10	Detroit, Windsor tunnel	
Aug 9/10	Detroit, Windsor tunnel	
Aug 11/10	Detroit, Windsor tunnel	
2011 (six entries)		
May 10/11	Niagara Falls, Rainbow Bridge	This is the crossing closest to X. ⁶⁶ The Claimant likely used this crossing when travelling from X to X
May 13/11	CBP-Port Huron, Blue Water Bridge	This is located between the four crossing sites, but is closer to X than X. ⁶⁷
June 19/11	Detroit, Windsor tunnel	
Sept 4/11	Detroit, Windsor tunnel	
Sept 12/11	Detroit, Windsor tunnel	
Sept 27/11	Niagara Falls, Rainbow Bridge	
2012 (ten entries)		
May 13/12	Detroit, Windsor tunnel	
May 21/12	Detroit, Windsor tunnel	

⁶⁶ Minister's submissions, GD3-11, para 44

⁶⁷ Minister's submissions, GD3-11, para 44

June 17/12	Detroit, Windsor tunnel	
June 23/12	Detroit, Windsor tunnel	
June 28/12	Detroit, Windsor tunnel	
July 29/12	Niagara Falls, Rainbow Bridge	
Sept 6/12	Detroit, Windsor tunnel	
Sept 17/12	Niagara Falls, Rainbow Bridge	
Sept 25/12	Detroit, Windsor tunnel	
Sept 29/12	Detroit, Windsor tunnel	
2013 (21 entries)		
May 9/13	Detroit, Windsor tunnel	
May 13/13	Detroit, Windsor tunnel	
June 18/13	Detroit, Windsor tunnel	
June 21/13	Detroit, Windsor tunnel	
June 25/13	Detroit, Windsor tunnel	
July 6/13	Detroit, Windsor tunnel	
July 18/13	Detroit, Windsor tunnel	
July 21/13	Detroit, Windsor tunnel	
July 26/13	Detroit, Windsor tunnel	
July 28/13	Detroit, Windsor tunnel	

July 31/13	Detroit, Windsor tunnel	
Aug 8/13	Detroit, Windsor tunnel	
Aug 13/13	Detroit, Windsor tunnel	
Aug 20/13	Detroit, Windsor tunnel	
Sept 5/13	Detroit, Windsor tunnel	
Sept 8/13	Detroit, Windsor tunnel	
Sept 15/13	Detroit, Windsor tunnel	
Sept 8/13	Detroit, Windsor tunnel	
Sept 15/13	Detroit, Windsor tunnel	
Set 22/13	Niagara Falls, Rainbow Bridge	
Sept 30/13	Detroit, Windsor tunnel	
2014 (11 entries)	Detroit, Windsor tunnel	
May 11/14	Niagara Falls, Rainbow Bridge	
May 15/14	Detroit, Windsor tunnel	
May 19/14	Detroit, Windsor tunnel	
May 30/14	Detroit, Windsor tunnel	
June 4/14	Niagara Falls, Rainbow Bridge	
July 7/14	Detroit, Windsor tunnel	

July 21/14	Detroit, Windsor tunnel	
Aug 12/14	Detroit, Windsor tunnel	
Aug 21/14	Detroit, Windsor tunnel	
Sept 21/14	Detroit, Windsor tunnel	
Sept 29/14	Detroit, Windsor tunnel	
2015 (11 entries)	Detroit, Windsor tunnel	
May 1/15	Niagara Falls, Rainbow Bridge	
May 10/15	Detroit, Windsor tunnel	
May 17/15	Detroit, Windsor tunnel	
June 15/15	Detroit, Windsor tunnel	
June 18/15	Niagara Falls, Rainbow Bridge	
June 23/15	Detroit, Windsor tunnel	
July 3/15	Niagara Falls, Rainbow Bridge	
July 13/15	Detroit, Windsor tunnel	
Aug 10/15	Detroit, Windsor tunnel	
Aug 23/15	Detroit, Windsor tunnel	
Sept 12/15	Detroit, Windsor tunnel	
2016 (eight entries)	Detroit, Windsor tunnel	

June 6/16	Detroit, Windsor tunnel	
June 29/16	Detroit, Windsor tunnel	
July 24/16	Detroit, Windsor tunnel	
Aug 1/16	Detroit, Windsor tunnel	
Aug 7/16	Detroit, Windsor tunnel	
Aug 22/16	Detroit, Windsor tunnel	
Sept 1/16	Detroit, Windsor tunnel	
Sept 8/16	Detroit, Windsor tunnel	
2018 (five entries)	Detroit, Windsor tunnel	
May 13/18	CBP-Port Huron, Blue Water Bridge	
June 27/18	Detroit, Windsor tunnel	
Aug 5/18	Detroit, Windsor tunnel	
Aug 20/18	Detroit, Windsor tunnel	
Sept 8/18	Detroit, Windsor tunnel	
2019: records end in May 2019	Detroit, Windsor tunnel	
May 2/19	Detroit, Windsor tunnel	