



Citation: *AM v Minister of Employment and Social Development*, 2022 SST 97

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. M.
Representative: J. M.

Respondent: Minister of Employment and Social Development
Representative: Rebekah Ferriss

Decision under appeal: General Division decision dated November 23, 2021
(GP-20-1554)

Tribunal member: Neil Nawaz

Form of hearing: On the record
Decision date: February 23, 2022

File number: AD-22-11

Decision

[1] Leave to appeal is granted and the appeal is allowed. The General Division made an error when it found that the Appellant did not become a Canadian resident until February 2013. It also erred when it found that the Appellant was not permitted to change the start date of his Old Age Security (OAS) pension. The Appellant is entitled to a partial OAS pension at a rate of 11/40, effective May 2019.

Background

[2] The Appellant is 74 years old. He was born in India and entered Canada for the first time in April 2008. He became a permanent resident in February 2013 and applied for an OAS pension in May 2017. In his application, the Appellant ticked a box indicating that he wanted his pension to start “as soon as I qualify,” rather than at some other date.

[3] In August 2019, the Minister, through her Service Canada arm, approved the Appellant for a partial OAS pension at a rate of 3/40 of the full pension. This approval was based on a finding that the Appellant had resided in Canada from February 2013 to May 2016, combined with his nine years of Indian pension contributions as recognized by the Canada-India Social Security Agreement. The pension’s start date was June 2016—11 months before the application date and the maximum retroactive payment allowed by the law.

[4] The Appellant thought he was entitled to a higher pension. He asked Service Canada to reconsider its decision. In September 2020, Service Canada redetermined the Appellant’s Canadian residence period and increased his pension rate to 8/40 while keeping the start date at June 2016.

[5] The Appellant appealed Service Canada’s reconsideration decision to the Social Security Tribunal’s General Division. The General Division held a hearing by teleconference and dismissed the appeal. It found that the Appellant did not become a Canadian resident until February 2013. The General Division also found that it was too

late for the Appellant to amend his pension's start date. As a result, the General Division awarded the Appellant a pension at 3/40, effective June 2016.

[6] The Appellant then asked the Appeal Division for permission to appeal. He insisted that he was entitled to a higher pension. He argued that, if he had known Service Canada would take three years to decide his pension entitlement, he would never have asked to have his pension start as soon as he was eligible. Instead, he would have delayed his pension start date as long as possible for the purpose of accumulating additional years of Canadian residence.

[7] I scheduled a settlement conference to see if there was common ground on which the parties might reach an agreement. The parties did reach an agreement, and its terms were read into the record at the end of the settlement conference.¹ The parties have asked me to prepare a decision that reflects that agreement.

Agreement

[8] At the settlement conference, the Minister's representative conceded that the General Division's decision contained errors of law. She offered him a partial OAS pension at a rate of 11/40 commencing May 2019. The Appellant accepted the offer.

Analysis

[9] For the following reasons, I accept the parties' agreement.

The General Division erred when it found that the Appellant was not a resident from April 2008 to February 2013

[10] In its decision, the General Division wrote examined the five years that the Appellant spent in Canada on visitor's visas:

The Appellant had only minimal administrative ties with private institutions in Canada, such as bank accounts, few investments and a credit card. This

¹ Recording from settlement conference held on February 16, 2022.

will change when the appellant will be landed on February 13th, 2013 and be granted permanent residence in Canada.²

However, the evidence shows that the Appellant opened several accounts—chequing, investment, credit card—with Canadian banks after he arrived in this country in April 2008. He maintained these accounts after he became a permanent resident (PR) in February 2013. Contrary to the General Division’s assertion, the Appellant’s financial ties to Canada did not significantly deepen after he acquired PR status.

General Division erred when it found that the Appellant could not request a change in the effective date of his application

[11] Under the *Old Age Security Act* (OASA), payment of a pension commences the month after it has been approved.³ In its decision, the General Division found that, if the Appellant wanted to change the start date of his OAS pension, he would have to cancel his existing application and reapply. The General Division also found that, since the Minister approved his pension in August 2019, the Appellant could cancel it no later than March 31, 2019.⁴ Since the Appellant failed to do so, according to the General Division, he was stuck with a pension having an effective date of June 2016—11 months before his application.

[12] At the General Division, the Appellant argued that his pension never formally “started” because he never accepted the Minister’s initial determination that he was entitled to a pension of only 3/40. The Appellant similarly insisted that he never accepted the Minister’s decision to award him a pension at 8/40 on reconsideration.

[13] I agree with the Appellant. As long as the Minister continued to investigate and assess the Appellant’s claim for benefits, his application cannot be said to have been approved or his pension “started,” even if it had been tentatively placed in pay. The Appellant disputed the Minister’s assessment of the amount of his partial OAS pension at all points up to the settlement conference before this Tribunal. Not only that, the

² General Division decision, paragraph 72.

³ OASA, section 8.

⁴ Under sections 9.3(1) and (2) of the OASA and sections 26.1(1) and (2) of the *OAS Regulations*, an OAS pension application cannot be cancelled if the request is made more than six months after payment of the pension began.

Appellant explicitly took issue with the pension's effective date, requesting in writing that the Minister to move it up from June 2016.⁵

[14] In its decision, the General Division assigned the Appellant's written request little significance because, it said, the Minister was still investigating the file and was under no obligation to specifically answer each communication from the Appellant.⁶ In my view, this got it precisely backwards. The General Division should have assigned the written request significance **precisely because** the Minister was still investigating the file, and its decision was not yet final. The General Division also adopted an excessively literal reading of the OASA's eligibility and payment provisions without considering important contextual factors, such as:

- the length of time it took for the Minister to investigate the Appellant's Canadian residency—time that might otherwise have gone toward a longer period of residence and a higher OAS payment; and
- the likelihood that the Appellant, as someone without legal training or experience in the intricacies of the OAS regime, would have appreciated the implications of ticking of a box labelled "As soon as I qualify" when he applied for the OAS pension.

Remedy

[15] When the General Division makes an error, the Appeal Division can fix it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.⁷

[16] The Tribunal is required to proceed as quickly as fairness permits. The parties agree that the Appellant is entitled to a partial OAS pension at rate of 11/40, and there is enough information on file to allow me to confirm that assessment for myself.

⁵ Appellant's questionnaire dated October 9, 2018, GD2-37.

⁶ General Division decision, paragraph 90.

⁷ DESDA, section 59(1).

[17] Having reviewed the case file, I am satisfied that the Appellant has been a resident, for OAS purposes, since April 2008. As of that date, the Appellant displayed a clear intention to settle in Canada. Both of his sons had been in Canada for several years, and they had already initiated the process to sponsor their parents. With no immediate family in India, the Appellant moved in with one of his sons and began spending a significant portion of his time in this country. He opened bank accounts, obtained private health insurance, and purchased a Canadian cell phone plan. There is nothing in the law that bars visitors from establishing Canadian residence for the purpose of qualifying for OAS benefits. In my view, the Appellant has had strong family and financial ties to this country since the time of his arrival.

Conclusion

[18] The appeal is allowed in accordance with the parties' agreement. The Appellant has been a resident of Canada since April 2008. He is entitled to a partial OAS pension at a rate of 11/40, effective May 2019.



Member, Appeal Division