



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *JE v Minister of Employment and Social Development*, 2020 SST 1257

Tribunal File Number: GP-20-601

BETWEEN:

**J. E.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Anne S. Clark

Teleconference hearing on: September 29, 2020

Date of decision: November 9, 2020

## DECISION

[1] I am allowing the Claimant's appeal. This is because the Minister does not have the authority to reassess its initial decisions to approve the Claimant's applications for the *Guaranteed Income Supplement* (GIS) for the period from April 2011 to August 2015.

## OVERVIEW

[2] The Claimant first applied for a GIS on December 10, 2010. At that time, he was separated from a previous spouse. He entered into an exclusive relationship with BD and considered her his life partner. The Claimant and BD did not live together full time. Circumstances disrupted their living arrangements at different times and they had to live apart. The Claimant's divorce from his previous spouse continued until 2013. In 2012, he lost his house and had to arrange alternate accommodations. In 2015, BD became very ill and had to move into long-term care. Over the years, the Claimant and BD were only able to live together part of the time.

[3] In 2018, following BD's death the Minister reviewed its previous decisions about the Claimant's entitlement to a GIS. The Minister changed the initial decision and decided the Claimant was not eligible for a GIS because he was not separated or single. The Minister calculated an overpayment of approximately \$6400.00.

[4] The Claimant requested the Minister reconsider the decision to revisit and change the previous decision about his entitlement to a GIS. On reconsideration the Minister decided the Claimant was:

- a) separated from his previous spouse when he first applied for GIS in December 2010,
- b) was separated from BD for reasons beyond their control after August 2015, and
- c) was in a common-law relationship with BD from April 2011 to August 2015.

[5] The Minister confirmed the decision to reassess the Claimant's eligibility for a GIS for the period April 2011 to August 2015 and calculated an overpayment of approximately

\$4,000.00. The Claimant appealed the Minister's reconsideration decision to the Social Security Tribunal.

## ISSUES

[6] Did the Minister have the authority to re-assess the Claimant's GIS eligibility for the period from April 2011 to August 2015?

## ANALYSIS

### *The Minister may not recover the Claimant's GIS payments from April 2011 to August 2015*

[7] The Claimant's eligibility for the GIS from April 2011 to August 2015 depended on his being in receipt of the OAS pension. The Claimant also needed to meet the income test and have been resident in Canada.<sup>1</sup> The facts that he satisfied the residency requirements and was in receipt of the OAS pension are not in issue.

[8] From approximately 2010 until 2018, the Claimant was in an exclusive relationship with BD. His personal life was changing and between 2011 and 2015 there were different times when they lived apart from each other. He cannot remember specific dates and cannot think of any evidence he could find that would prove when he did not live with BD.

[9] I asked the Claimant why he said he was single or separated in 2011 to 2015. He gave a very clear and credible explanation about why he was uncertain about how to describe his marital status. He explained that he did not intend to make a false statement or mislead anyone when he completed the forms for his GIS benefits. His only experience with federal agencies was when he completed his income tax returns. In his income tax returns he filed as a single person and he did the same for the OAS benefits. He did not mean to mislead, but he acknowledged he misunderstood the rules. I have no doubt the Claimant was obliged to learn about the rules that applied to his applications. However, I believe him when he says he thought he was giving honest and accurate information. In fact, it is possible he and BD were living apart when he applied for reasons beyond their control but he cannot find evidence to show that.

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<sup>1</sup> Subsections 11(7)(c) and (d) of the OAS Act

**The law does not give the Minister clear authority to change a previous decision**

[10] The OAS Act and *Regulations* apply to the GIS as well as the OAS pension. I do not find authority in either document for the Minister to overturn an initial decision on the Claimant's eligibility for the GIS.

[11] A recent decision of the Appeal Division (AD), *B.R. v. MESD* (the *B.R.* decision),<sup>2</sup> involved a claimant who initially received approval for the OAS. The Minister then reversed its position and stated that the claimant was not entitled to two years of benefits to which he had been found entitled in the initial eligibility decision. The Minister demanded repayment of the two years of benefits. The *B.R.* decision is not binding on me, but I find it persuasive.

[12] In considering the appeal in *B.R.*, the AD member conducted a careful review of the law.<sup>3</sup> He concluded that the OAS Act did not give the Minister authority to revisit a claimant's initial eligibility once an OAS application was approved:

- a) As social welfare legislation, the OAS regime should be interpreted liberally.<sup>4</sup>
- b) "The law favours finality, and pensioners legitimately expect that they can rely on the Minister's eligibility decision." If the Minister had the power to revisit the initial eligibility decision, it was reasonable to expect clear statutory language to that effect. Such clear statutory language, which is found in other benefits-conferring legislation, is absent from the provisions of the OAS Act and *Regulations*.<sup>5</sup>
- c) For example, the OAS Act does not give the Minister the authority to rescind or amend an initial eligibility decision based on "new facts" (facts that could not have been discovered at the time the Minister made its initial eligibility decision).<sup>6</sup>
- d) Further, the OAS Act does not give the Governor in Council the authority to create regulations that would allow the Minister to change previous eligibility decisions.<sup>7</sup>

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<sup>2</sup> *B.R. v. MESD*, 2018 SST 844; *M.B. v. MESD*, GP-19-281 (General Division). Neither of these decisions is binding on me.

<sup>3</sup> Especially section 23 of the OAS *Regulations*, section 37 of the OAS Act

<sup>4</sup> *B.R. v. MESD*, 2018 SST 844, at paras. 41-43

<sup>5</sup> *B.R. v. MESD*, 2018 SST 844, at para. 56-62

<sup>6</sup> *B.R. v. MESD*, 2018 SST 844, at para. 59

- e) In cases of fraud, the Minister's remedy is to pursue summary conviction or assess a financial penalty.<sup>8</sup>
- f) The Act allows for the possibility that a pensioner's eligibility for OAS or GIS benefits, or the amount of their benefits, might change over time.<sup>9</sup>

**The authority to investigate does not give authority to reassess**

[13] Section 23(1) of the OAS Regulations provides that the Minister may, at any time before or after the approval of an application require the applicant to make available, or allow to be made available, further information regarding the eligibility of the applicant. Section 23(2) of the OAS Regulations provides that the Minister may investigate at any time the eligibility of a person to receive a benefit.

[14] The fact Parliament gave the Minister broad powers to investigate, does not also give the authority to change an initial eligibility decision. Clear statutory language is necessary for the Minister to have that power. Investigatory powers are not powers to reassess. There are many reasons why the Minister may need such broad powers of investigation. These include:

- determining whether a beneficiary continues to be entitled to a benefit,<sup>10</sup>
- determining whether payment should be suspended,<sup>11</sup>
- determining whether a beneficiary has received a payment, or excess payment, to which they were not entitled,<sup>12</sup> and
- determining whether a penalty should be imposed on a person who knowing made a false or misleading statement in their application.<sup>13</sup>

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<sup>7</sup> Section 34(j) of the OAS Act

<sup>8</sup> Sections 44 and 44.1 of the OAS Act

<sup>9</sup> *B.R. v. MESD*, 2018 SST 844, at para. 55

<sup>10</sup> Sections 5(3), 14, 15 of the OAS Act

<sup>11</sup> Section 34(j) of the OAS Act

<sup>12</sup> Section 37(1) of the OAS Act

<sup>13</sup> Section 44.1(1) of the OAS Act

### **Reassessment without authority causes significant unfairness**

[15] The *B.R.* decision refers to the “significant unfairness and tremendous stress” that pensioners experience because of ministerial reassessments of entitlements under the OAS Act and *Regulations*. Ministerial requests for repayment – sometimes occurring years after the initial decision – can result in pensioners being liable to reimburse overpayments of \$100,000 or more.<sup>14</sup> At the hearing, the Claimant commented at length about how unfair it was to have his entitlement reassessed and to have the Minister deduct payments from his pension to repay the amount the Minister decided was overpaid. In his case the overpayment is not as extreme as noted in *B.R.* however, it was a significant and unexpected financial burden for him.

### **Evidence does not show fraud or intentional misrepresentation**

[16] The Minister submitted the Claimant “clearly” gave false and misleading statements. The Minister did not make or pursue allegations of fraud against the Claimant. In addition, I find information in the file fails to prove that the Claimant knowingly misrepresented his relationship with BD in communications with the Minister.

[17] The Claimant said he always intended to answer questions truthfully and he believed he was correct when he said he was separated or living as a single. With the passage of time and difficult personal circumstances it is not reasonable or fair to expect him to be able to find evidence to challenge the Minister’s decisions.

[18] *B.R.* spoke of cases where there may be alleged fraud or where a claimant knowingly gives false information or misleads the Minister. It is possible the Minister may have some recourse in cases such as those but that does not apply in this appeal. The Minister said the Claimant gave false or misleading information. The Minister did not submit evidence that the Claimant knowingly gave false or misleading information. The Minister could have pursued a claim that the Claimant knowingly gave false or misleading information. There is authority for the Minister to pursue remedy under the OAS Act.<sup>15</sup>

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<sup>14</sup> *B.R. v. MESD*, 2018 SST 844, at paras 78-80

<sup>15</sup> Sections 44 and 44.1(1) of the OAS Act

### **The Claimant was entitled to the GIS when the Minister approved his applications**

[19] The Minister has the authority to recover payment such as when the amount paid was incorrectly calculated or where the beneficiary had received payments after he was no longer entitled to benefits.<sup>16</sup>

[20] There is no evidence the Minister calculated the GIS incorrectly. The Claimant was entitled to receive the benefits once his application was allowed. This is true even if the Minister's initial approval was, with the benefit of hindsight, mistaken. This does not mean that the Minister can subsequently change the decision and recover payments from past years.

[21] The fact that entitlement to GIS benefits are reassessed each year does not mean the Claimant's entitlement for previous years remains open for review and change. When the Minister makes a decision about entitlement for a particular year it is final. The Minister can review the Claimant's information to determine entitlement for the next or subsequent period but the previous period or periods are final unless they are appealed or otherwise changed within the authority of the law.

[22] As noted in B.R., the law favours finality. It would not be fair for a pensioner's monthly income to be so uncertain. Pensioners could not rely on their incomes even after the Minister approves them. They can also be thrown into significant and unexpected debt. In addition, their monthly pensions can be reduced for years while the "debt" is repaid.

[23] One would expect clear authority in the legislation to allow the Minister to revisit and change eligibility decisions. The legislation and Regulations do not give clear authority for the Minister to change initial decisions even though the Minister may investigate entitlement to ongoing benefits. I do not suggest the Minister cannot decide entitlement to ongoing GIS benefits or take other action when a claimant knowingly makes false or misleading statements. None of those facts apply to this appeal and the Minister did not have the authority to reassess and change previous decisions about the Claimant's eligibility to a GIS from April 2011 to August 2015.

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<sup>16</sup> Section 37(2) of the OAS Act

## **CONCLUSION**

[24] The appeal is allowed.

Anne S. Clark  
Member, General Division - Income Security