



Citation: *AW v Minister of Employment and Social Development*, 2023 SST 47

**Social Security Tribunal of Canada  
General Division – Income Security Section**

**Decision**

**Appellant:** A. W.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development decision dated April 21, 2022 (issued by Service Canada)

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**Tribunal member:** Wayne van der Meide

**Type of hearing:** Teleconference

**Hearing date:** January 6, 2023

**Hearing participant:** Appellant

**Decision date:** January 18, 2023

**File number:** GP-22-1279

## Decision

[1] The appeal is dismissed.

[2] The Appellant is not entitled to have the Minister reconsider its decision to grant him an Old Age Security (OAS) pension in November 2015.

[3] The Minister **did not** exercise its discretion judicially when it refused the Appellant's reconsideration request. **However**, I cannot grant the Appellant an extension of time to request reconsideration of the Minister's decision.

## Overview

[4] The Appellant applied for an Old Age Security pension (OAS).<sup>1</sup> On November 6, 2015, he signed a form saying that he wanted to receive a partial pension at 2/40 starting August 2013.<sup>2</sup>

[5] In December 2021 the Appellant asked the Minister to reconsider its decision.<sup>3</sup> He said that he was given incorrect information before he made his decision to start receiving OAS.

[6] The Minister says that the Appellant's reconsideration request is late. The Minister refused to accept the reconsideration request.

[7] The Appellant appealed this decision to the Tribunal.

## What I must decide

[8] I must first decide whether the Appellant's reconsideration request was late.

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<sup>1</sup> See GD2-13 to GD2-17.

<sup>2</sup> See GD2-27.

<sup>3</sup> See GD2-5 to GD2-8.

[9] If it was late, then I must decide whether the Minister exercised its discretion judicially when it refused to give the Appellant more time to ask it to reconsider its decision.<sup>4</sup>

[10] If the Minister didn't exercise its discretion judicially, I will make the decision it should have made.

## **Reasons for my decision**

### **The Appellant's reconsideration request was late**

[11] The Appellant's reconsideration request was late.

[12] An appellant has 90 days to ask the Minister to reconsider a decision.<sup>5</sup>

[13] If the appellant waits more than 90 days, then their reconsideration request is considered late.

[14] The Appellant requested reconsideration more than six years after the Minister granted him a partial pension.

### **What I have to consider when a reconsideration request is late**

[15] The Minister can reconsider a decision even if the request is late. The law says that an appellant has to show two things:

- they have a reasonable explanation for why they are late
- they always intended to ask the Minister to reconsider its decision—this is called their “continuing intention”<sup>6</sup>

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<sup>4</sup> See *Canada (A.G.) v. Uppal*, 2008 FCA 388. When the Minister of Employment and Social Development (Minister) gives more time (or “a longer period” as the law words it) in this situation, that means it accepts to consider the late request.

<sup>5</sup> See s. 27.1 of the *Old Age Security Act*.

<sup>6</sup> See s. 27.1 of the *Old Age Security Act* and s. 29.1 of the *Old Age Security Regulations*.

[16] If the appellant asked the Minister to reconsider its decision more than 365 days after the Minister told them about it in writing, the law says that the appellant has to convince the Minister of two other things. The appellant also has to show that:

- their reconsideration request has a reasonable chance of success
- giving them more time would not be unfair to the Minister<sup>7</sup>

[17] Because the reconsideration request was made more than 365 days after the decision of the Minister, the Appellant has to meet **all** four factors.

### **The Minister must exercise its discretion judicially**

[18] The Minister's decision whether to allow a late reconsideration request is discretionary. Discretion is the power to decide whether to do something. The Minister has to exercise its discretion judicially.

[19] If the Minister has done one of the following, then it didn't exercise its discretion judicially:

- acted in bad faith
- acted for an improper purpose or motive
- considered an irrelevant factor
- ignored a relevant factor
- acted discriminatorily (unfairly)<sup>8</sup>

#### **– The Minister did not exercise its discretion judicially**

[20] The Minister did not exercise its discretion judicially when it decided not to allow the Appellant's reconsideration request because it did not consider relevant facts.

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<sup>7</sup> See s. 29.1(2) of the *Old Age Security Regulations*.

<sup>8</sup> See *Canada (Attorney General) v Purcell*, [1996] 1 FC 644.

[21] The Appellant does not claim that the Minister acted in bad faith, for an improper purpose or discriminatorily. There is no evidence of that either. Therefore, I will focus on whether the Minister considered an irrelevant factor or ignored a relevant one.

[22] The Minister said this: “We cannot consider your request for a reconsideration because the 90 days have passed.” The Minister’s file doesn’t include any other explanation of how it made this decision.

[23] The Minister explains why it made its decision in its submissions to the Tribunal.<sup>9</sup> There is no evidence that this was the analysis conducted when the Minister made its decision. Therefore, it is irrelevant to whether the decision was made properly.

### **I have to make my own decision about the four factors**

[24] Because the Minister did not make its decision properly, I have to make my own decision about whether the Appellant should be given more time to ask for reconsideration.

[25] I cannot extend the time to ask the Minister to reconsider its decision for two reasons:

- the Appellant does not have a reasonable explanation for the delay
- the application for reconsideration does not have a reasonable chance of success.

[26] Because the Appellant must meet all four factors, I will only focus on the two that he does not meet.

#### **– The explanation for the delay is not reasonable**

[27] The Appellant says that when he went to Service Canada in July 2013, he was told he could not get OAS until he lived in Canada for 10 years. So, when he did apply for OAS in March 2014, he thought he was applying for a retirement benefit.

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<sup>9</sup> See GD5.

[28] By December 2021 the Appellant says he had lived in Canada for 10 years. So, he called to ask why he was not getting an OAS pension. He says that it was only then he realized that he was receiving an OAS pension and not a retirement benefit.<sup>10</sup>

[29] I have some sympathy for the Appellant because:

- he believes he was given incorrect information.
- there was a gap of over two years between when he first asked about OAS benefits and a decision was made.
- his application was not straight forward because the Minister had to consider the social security agreement with the United States.
- he had only just moved to Canada and did not understand Canadian benefits.

[30] I make no finding about whether the Appellant was given incorrect information. But, I do believe that the Appellant misunderstood the situation. However, this misunderstanding, which is the explanation for the delay, isn't reasonable. The Appellant should have known that he was applying for and receiving OAS and not some other benefit.

[31] The form that he filled out clearly says it is an "Application for the Old Age Security Pension."<sup>11</sup>

[32] The form he signed in order to begin receiving OAS says: "I choose to receive a partial Old Age Security Pension of 2/40ths...starting in August 2013."<sup>12</sup>

[33] This form also says: "I clearly understand that if I choose to take a partial pension, my benefit will not increase regardless of any additional years that I may live in Canada."

[34] Although the Appellant has an explanation for the delay, it is not reasonable.

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<sup>10</sup> See GD2-6.

<sup>11</sup> See GD2-13 to GD2-17.

<sup>12</sup> See GD2-27.

– **The request for reconsideration doesn't have a reasonable chance of success**

[35] The Appellant wants his pension to be increased based on additional years of residency since it was approved. However, the law clearly says that once a person is approved for a pension, a pension **cannot** be increased because of additional time as a resident of Canada.<sup>13</sup>

[36] Therefore, the request for reconsideration does not have a reasonable chance of success.

## **Conclusion**

[37] The Minister didn't properly exercise its discretion when deciding whether to accept the appellant's late reconsideration request. However, I cannot extend the time for the appellant to ask for reconsideration.

[38] This means the appeal is dismissed.

Wayne van der Meide  
Member, General Division – Income Security Section

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<sup>13</sup> See subsection 3(5) of the *Old Age Security Act*.