



Citation: *VR v Minister of Employment and Social Development*, 2023 SST 136

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: V. R.
Representative: T. R.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated September 20, 2021
(issued by Service Canada)

Tribunal member: François Guérin

Type of hearing: Videoconference

Hearing date: January 26, 2023

Hearing participants: Appellant
Appellant's representative (his son)

Decision date: February 8, 2023

File number: GP-21-2514

Decision

[1] The appeal is dismissed.

[2] The Tribunal has no jurisdiction over the reimbursement of the overpayment.

Overview

[3] The Appellant applied for an Old Age Security pension (OAS) on July 12th, 2004.¹ The Respondent (also referred to as the Minister), approved his application and awarded him a full OAS pension of 40/40th.²

[4] On September 18th, 2020, the Minister recalculated the Appellant's period of residence in Canada and determined that he was a resident of Canada for a total of 20 years and 275 days until August 24th, 2001.³ ⁴ The Minister concluded that any period of time the Appellant spent in Canada on or after August 25th, 2001, was only presence in Canada and not residence.

[5] As a result, the Minister determined that the Appellant is only eligible to a partial OAS pension of 20/40th. This created an overpayment of \$41,978.55 for the period from June 2005 to June 2018.

[6] On November 16th, 2020, the Appellant asked for a reconsideration.⁵ On September 20th, 2021, the Minister maintained his decision after reconsideration.⁶

¹ GD2-8 to 11

² GD2-11

³ GD2-161 to 162

⁴ In his decision letter dated September 18th, 2018, the Minister used the date of August 21st, 2001, as a last date of residence in Canada. In his submission, the Minister submitted that "the Appellant is no longer a resident of Canada as of August 24th, 2001".⁴ In his Residence Calculation Sheet, the Minister included August 24th, 2001, in the residence calculation.⁴ The Tribunal will use the date of August 25th, 2001, as of the first date of non-residence to give the benefit of the doubt to the Appellant.

⁵ GD2-6 to 7

⁶ GD2-250 to 252

[7] The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).⁷

What is the Appellant's position?

[8] The Appellant submits that his OAS application was approved on December 10th, 2004, "in accordance with the law" as he stated, and that he travelled "in accordance with the law".⁸ The Appellant submits that the Minister waited for 13 years to notice the situation, that it is the Minister's "problem" and that the Minister should write off the overpayment.⁹ The Appellant submits that he is now 81 years old and that he only has his Canadian benefits and that he would ask that the debt be written off.¹⁰

[9] The Appellant submitted that he sent a letter to the Minister asking him to reduce his overpayment but has not received a response.¹¹

What is the Minister's position?

[10] The Minister argues that the Appellant only resided in Canada for a total of 20 years and 275 days and that he did not reside in Canada after August 24th, 2001. Therefore, he is only eligible for a partial OAS pension of 20/40th.¹² The Minister calculated an overpayment of \$41,978.55 for the period from June 2005 to June 2018.¹³

Matters I have to consider first

Interpreter present at the hearing

[11] A Croatian-language interpreter was present at the hearing. The Interpreter was affirmed accordingly. The appeal proceeded in English with Croatian interpretation.

⁷ GD1

⁸ GD1-4, section 6

⁹ GD2-6 to 7

¹⁰ GD1-4, section 6

¹¹ GD4-1

¹² GD3-8, paragraph 29

¹³ GD3-8, paragraph 30

The Minister wasn't at the hearing

[12] A hearing can go ahead without the Minister if the Tribunal is satisfied that the Minister received notice of the hearing.¹⁴ The Notice of Hearing was emailed to the Minister on December 28th, 2022, through the normal communication channel between the Tribunal and the Minister. Therefore, the Tribunal is satisfied that the Minister received notice of the hearing and the hearing took place as scheduled but without the Minister.

The Appellant had a representative at the hearing

[13] The Appellant's son, T. R., represented his father at the hearing. At first, he confirmed that he was going to act as a representative only. Later during the hearing, as he wanted to help his father, the Tribunal understood that he also wanted to testify as he has firsthand knowledge of the family's circumstances. He was affirmed accordingly. The Appellant was present during the whole hearing.

[14] The Tribunal reminded the parties that the nature of the hearing is informal.

Reasons for my decision

Who is entitled to an OAS pension?

[15] A partial pension may be paid to a pensioner. The pensioner must have attained sixty-five years of age and have resided in Canada for an aggregate period of at least 10 years after attaining eighteen years of age. If the pensioner is not a resident of Canada the day preceding the approval of a pension, this person must have resided in Canada for at least 20 years after attaining eighteen years of age.¹⁵

[16] For the purpose of the *OAS Act* and its regulations, a person resides in Canada if he makes his home and ordinarily lives in any part of Canada. This concept is different from presence in Canada. A person is present in Canada when he is physically present

¹⁴ *Social Security Tribunal Regulations*, section 12(1)

¹⁵ *Old Age Security Act*. Section 3(2)

in any part of Canada.¹⁶ A person can be present in Canada without being a resident of Canada.

[17] Residency is a factual issue that requires an examination of the whole context of the individual. The subjective intentions of the person are not decisive in determining residency. The *Ding*¹⁷ decision established a non-exhaustive list of factors the Tribunal can consider when determining residency:

- Ties in the form of personal property;
- Social ties;
- Other ties to Canada (medical coverage, driver's licence, rental lease, tax records, etc.);
- Ties in another country;
- Regularity and length of stays in Canada and the frequency and duration of absences from Canada;
- Lifestyle and mode of living of the person or is the person present in Canada significantly rooted in Canada to be considered a resident.¹⁸

[18] The Appellant must prove on the balance of probabilities that he resided in Canada during the relevant period.¹⁹

Reasons for my decision

[19] At the beginning of the hearing, the Tribunal wanted to clarify the Appellant's position through the interpreter. The Tribunal understands that the Appellant does not disagree with the Minister's conclusion about his periods of residence in Canada. The Tribunal understands that the Appellant's issue is about the Minister changing its initial

¹⁶ *Old Age Security Regulations*, Paragraph 21(1)

¹⁷ *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.

¹⁸ *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76

¹⁹ *De Carolis v Canada (AG)*, 2013 FC 366

decision, after approximately 13 years, on Canadian residence periods. This resulted in an overpayment. The Tribunal also understands that the Appellant does not have a lot of financial resources and that he is asking the Tribunal to use its discretion to reduce or erase his debt with the Minister and leave the OAS pension payment as it was initially. The Tribunal asked this question three times through the interpreter at the beginning of the hearing to make sure the Appellant understood and a fourth time at the end of the hearing. The Appellant confirmed that the Tribunal's understanding was correct.

[20] The Tribunal's understanding is further supported by an email sent by the Appellant to the Tribunal on December 9th, 2022, where the Appellant said he would not be submitting more documents and that Service Canada has not responded to his letter asking to lower the overpayment.²⁰

[21] Section 37(1) of the *OAS Act* states that the overpayment – whether it is a surplus or a benefit to which one is not entitled – must be returned immediately.

[22] At the hearing, the Appellant did not dispute the new calculation of residence made by the Minister to calculate the overpayment, however, the Appellant believes that the Minister cannot change his initial decision on his residence after 13 years.

[23] The Federal Court of Appeal recently issued a decision addressing this issue, the Minister's powers to reassess eligibility for OAS pensions and GIS benefits after its initial decision.²¹ This decision confirmed that the investigative authority under section 23 of the Regulations allows the Minister to reassess an individual's eligibility for benefits where, for example, new information surfaces, or where errors, misrepresentation or even fraud has occurred, ensuring that only those entitled to benefits actually receive them and that section 37 of the Act allows the Minister to recover benefits that were improperly paid to a claimant.

²⁰ GD4-1

²¹ Attorney General of Canada v Burke. 2022 FCA 44

[24] The Appellant argues that his financial resources are limited and so he would like the Tribunal to use its discretion and reduce or waive his debt, since repaying this debt would cause him financial hardship.

[25] The Federal Court of Appeal confirmed that the Minister has the right to recover any overpayment paid to persons eligible to receive an OAS pension regardless of the time that has elapsed since the date of the overpayment.²²

[26] As a legislative entity, the Tribunal has only the powers conferred on it by law. The Tribunal interprets and applies the provisions as set out in the *OAS Act*.

[27] The Minister submits that the Appellant was overpaid by \$41,978.55 for the period from June 2005 to June 2018. As of September 20th, 2021, the overpayment balance was \$31,939.43.²³

[28] The Appellant does not dispute the new calculation of residence made by the Minister to calculate the overpayment; however, the Appellant believes that the Minister cannot change his initial decision on his residence after 13 years. The appellant's grievance is that his financial resources are limited and that he would like the Tribunal to use its discretion to reduce or waive his debt, since repaying this debt would cause him financial hardship.

[29] The Tribunal does not have jurisdiction to decide the amount of the overpayment.²⁴ Only the Minister can decide the amount of the overpayment or an arrangement for its repayment. Therefore, the Tribunal does not have the power to write off a debt owed to the Minister.

[30] The Tribunal would like to remind the Appellant that if he thinks that the amount of this overpayment could cause him financial difficulties, he can ask the Minister to

²² Grenier v Canada (Human Resources Development). 2008 FCA 130

²³ GD2-251

²⁴ *Old Age Security Act*, section 37(2)

remit all or part of the amount. If such a request is unsuccessful, he can then seek judicial review of that decision.

Conclusion

[31] Although the Tribunal is sensitive to the Appellant's position and the fact that repaying this amount would cause him financial hardship given his limited means, I cannot give him what he wants. The Tribunal does not have the jurisdiction to forgive overpayments.

[32] The appeal is dismissed.

François Guérin
Member, General Division – Income Security Section