[TRANSLATION]

Citation: *CT v Minister of Employment and Social Development*, 2023 SST 2104

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	C. T.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated September 18, 2020 (issued by Service Canada)

Tribunal member:	François Guérin
Type of hearing:	Teleconference
Hearing date:	June 21, 2023
Hearing participants:	Appellant Appellant's witness/daughter
Decision date:	June 30, 2023
File number:	GP-21-2195

Decision

[1] The appeal is dismissed.

[2] The Appellant, C. T., wasn't the spouse or common-law partner of a pensioner who wasn't separated from the pensioner under the *Old Age Security Act* (OAS Act), since January 20, 2013.[1] So, she wasn't eligible for the Allowance (ALW) for the period from August 2015 to October 2018. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant was born on May 6, 1955, and applied for the ALW on August 28, 2015.[2] On her application, she indicated that she was married.[3] Her application was approved on December 17, 2015, and was effective retroactively to August 2015.[4]

[4] After a conversation between the Appellant and Service Canada (SC) on October 9, 2018,[5] the Respondent (Minister) started an investigation through its Integrity Services into the Appellant's marital status under the OAS Act. After this investigation, the Minister found that the Appellant had been separated since April 2013, and that she wasn't eligible for the ALW.[6]

[5] The Minister communicated its decision to the Appellant on June 9, 2020,[7] and is asking her to pay back $7,521.30 for the ALW for the period from August 2015 to October 2018.

[6] On August 24, 2020, the Appellant asked for that decision to be reconsidered[8] and on September 16, 2021, the Minister upheld its decision after reconsideration.[9] The

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[1] See GD8-2.
[2] See GD2-12 to GD2-17.
[3] See GD2-15, section 9.
[4] See GD2-19 to GD2-22.
[5] See GD2-18.
[6] See GD5-2, para 3.
[7] See GD2-23 and GD2-24.
[8] See GD2-28 and GD2-29.
[9] See GD2-60 and GD2-61.

Appellant appealed this decision to the Social Security Tribunal (Tribunal) on October 21, 2021.[10]

[7] The Appellant says that she separated from her ex-husband on September 1, 2017, when she physically moved out of the matrimonial home. Until that date, she still lived in the house, although she and her ex-husband had been sleeping in separate bedrooms since April 2013.

[8] The Minister says that the Appellant had been separated since April 4, 2013, and that she wasn't eligible for the ALW under the OAS Act. So, it is asking her to repay an ALW overpayment of $7,521.30 for the period from August 2015 to October 2018.

What the Appellant has to prove

[9] There is only one issue in this appeal—deciding whether the Appellant was the spouse or common-law partner of a pensioner who wasn't separated from the pensioner under the OAS Act for the period from August 2015 to October 2018, and, if so, establishing the dates of their relationship.

Matters I have to consider first

The Appellant asked for an adjournment (that the hearing be rescheduled)

[10] On June 8, 2023, the Appellant asked me to adjourn the hearing scheduled for June 20, 2023, because she had a medical appointment. I accepted this request and the new date, June 21, 2023, was discussed with her and she accepted it. The parties were informed of this new date in writing.

The Minister wasn't at the hearing

[11] A hearing can go ahead without the Minister if it got the notice of hearing.[11] I decided that the Minister got the notices of hearing because they were emailed to the Minister on March 23, 2023, for the initial hearing date, and on June 12, 2023, for the

[10] See GD1.
[11] This is explained in section 12 of the *Social Security Tribunal Regulations*.

rescheduled hearing date, through the usual channel of communication between the Tribunal and the Minister. The hearing went ahead as scheduled but without the Minister.

The Appellant was accompanied at the hearing

[12] The Appellant's daughter, K. M. O., was at the hearing as a witness and in support of her mother.[12] She was sworn in.

Reasons for my decision

– ACT AND REGULATIONS

[13] Section 19 of the OAS Act says that an allowance may be paid under the Act and its regulations.

[14] Section 19(1)(a) of the OAS Act says that, in the case of a spouse, the spouse cannot be separated from the pensioner.

[15] In this context, "cohabitation" is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof.[13] A decision from the Pension Appeals Board says that case law has defined a conjugal relationship as "a mutual intention to live together in a marriage-like relationship of some permanence."[14]

[16] Section 15(1) of the OAS Act says that the applicant must state whether they have a spouse or common-law partner under the OAS Act and its regulations.

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[12] See GD7-3 to GD7-5.
[13] See *Hodge v Canada*, 2004 SCC 65.
[14] See *MSD v Pratt*, 2006, CP 22323 (PAB).

– THE APPELLANT'S CREDIBILITY

[17] The Tribunal notes that the Appellant seems to be a credible person. She may sometimes forget details, but her answers were direct and she gave explanations without trying to avoid the questions.

[18] The Tribunal gives considerable weight to the testimony and explanations it received from the Appellant at the hearing.

– TESTIMONY

[19] In her testimony, the Appellant submitted that she separated from her ex-husband on September 1, 2017, when she left the matrimonial home on rue de la Chapelle to go live on her own. She still lives at this new place. She testified that this date is confirmed in an Affidavit to the Court of Queen's Bench of New Brunswick dated July 3, 2020.[15]

[20] The Appellant testified that her tax reports had been completed by her ex-sister-in-law's husband, an accountant, and doesn't know why she had indicated that she was separated on her tax returns from 2015 to 2018.[16] She also doesn't understand why she would have done that, since she and her ex-husband lived at the same address, though they were sleeping in separate bedrooms. She didn't question the accountant's work because he was a specialist. She believes, but isn't sure, that it was this accountant who also did her ex-husband's tax reports.

[21] The Tribunal submitted to the Appellant that the Minister reported that, according to her ex-husband's tax returns, he had declared himself "separated" since February 8, 2014.[17] The Appellant submitted that it seems that the accountant reported the same information for her and her ex-husband, but that they lived at the same address. The ex-husband apparently also changed his address to a new address in X, NB, with the

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[15] See GD2-29.
[16] See GD2-65 to GD2-80.
[17] See GD2-47.

Canada Revenue Agency (CRA) on April 3, 2014.[18] The Appellant testified that she doesn't know how to answer this question and that she isn't aware of that. The Tribunal accepts this statement.

[22] The Tribunal submitted to the Appellant that the Minister reported that, in a conversation between her and Service Canada on October 9, 2018, she told the Minister that she and her ex-husband had been separated for about three years, since about 2015.[19] She doesn't recall mentioning a period of three years and doesn't see why she would have said this. She confirms that she lived at this address with her ex-husband until September 1, 2017. Her ex-husband lived there until 2019 or 2020. She testified that they lived on different floors and didn't share rooms.

[23] The Tribunal submitted to the Appellant that the Minister reported that, during a conversation between a Service Canada investigator and her ex-husband, he said that he and the Appellant had been separated since April 4, 2013, but that he financially supported the Appellant until September 1, 2017. The ex-husband also said that this is why September 1, 2017, is the date on the divorce affidavit.[20] The Appellant testified that she wasn't aware of this conversation but that they had been sleeping in separate bedrooms since 2013. He lived in the basement and she lived upstairs.

[24] The Appellant testified that, since January 20, 2013, she and her ex-husband had been sleeping in separate bedrooms because of an irreconcilable situation, which made them live on two different floors of the same house.[21] She kicked him out of her room but could not kick him out of the house because the house belonged to him. The Appellant described this situation as [translation] "the breaking point." They could not live together anymore but could not part from the house for financial reasons. But, emotionally, it was over. They used the same kitchen but, as the Appellant described in her testimony, they [translation] "made it so [they] would not cross paths too much in the hallways." After 38 years of marriage, they had family, children in common, and family

[18] See GD2-47.
[19] See GD2-18.
[20] See GD2-29.
[21] See GD8-2.

gatherings continued. Some of her family was aware of the situation but, like she testified, she doesn't put her life up on Facebook.

[25] The Appellant testified that if her ex-husband had to get things from the floor where the Appellant lived, he would go when she wasn't there. They were avoiding each other. Since there was no domestic violence, she tolerated it. Her ex-husband was allowed to have girlfriends because he and the Appellant had been sleeping in separate bedrooms since 2013.

[26] Regarding the Statutory Declaration of Common-law Union that the Appellant's ex-husband signed on June 26, 2019, with a date of separation of April 4, 2013, the Appellant indicated that this was the date they began to sleep in separate bedrooms and that, to him, they were separated.

– ANALYSIS

Meaning of "separated"

[27] The OAS Act doesn't define "separated." It also doesn't use "living separate and apart." There aren't any court decisions that set out the factors to consider when deciding whether a married couple is separated under the OAS Act.[22]

[28] To decide what "separated" means in this appeal, I have to look at the ordinary sense of the word and think about how it fits in the purpose of the OAS and the intention of Parliament.[23]

[29] "Separated" is usually used to describe people or things that aren't together. But when we talk about married people being separated, it usually means more than that. It means they aren't together because at least one of them has decided that they don't want to live or be seen as a married couple anymore and has acted on that decision.

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[22] One decision talks about this, but it applied a provision in the *Old Age Security Regulations* that explains when parties are separated. This provision was repealed in 2000. See *Canada (Minister of Human Resources Development) v Néron*, 2004 FC 101.
[23] *Rizzo & Rizzo Shoes Lts (Re)*, 1998 CanLII 837 (SCC).

[30] I find that Parliament intended to treat common-law and married couples the same way. This means the factors that show two people have stopped being common-law partners are the same ones that show a married couple is separated.

[31] The OAS Act says that a common-law partner is "a person who is cohabiting with [an] individual in a conjugal relationship…."[24] By extension, spouses aren't separated if they are cohabiting in a conjugal relationship.

Meaning of "living in a conjugal relationship"

[32] The Pension Appeals Board's decision in *Betts v Shannon*[25] is often cited as a source of authority on this point. Although I am not bound by this decision, it adequately establishes the factors that have to be considered when determining whether an applicant is a common-law partner under the Act. Here are the factors with my findings in this case:

a) Financial Interdependence: There was financial interdependence until September 1, 2017, when the Appellant moved and took over her rent and related accounts on her own. The usual accounts for a house, water, electricity, etc. have not been changed. This factor may point to a conjugal relationship.

(b) Sexual relationship: the parties slept in separate bedrooms. The Appellant testified that she didn't have a sexual relationship with her ex-husband from January 20, 2013, until her move on September 1, 2017, so this doesn't point to a conjugal relationship.

(c) Shared residence: the parties slept in separate bedrooms though they shared a common address from January 20, 2013, to September 1, 2017. This is more like a roommate relationship. So, this doesn't point to a conjugal relationship.

[24] See section 2 of the OAS Act.
[25] *Betts v Shannon*, September 17, 2001, CP 11654.

d) Purchasing gifts on special occasions: Nothing in the testimony or documents submitted addresses this issue.

e) Shared household responsibilities: Each did their own thing from January 20, 2013. The Appellant testified that she wasn't there for him anymore after that date. Before that, he enjoyed the [translation] "best of both worlds," but after that, it was over. So, this doesn't point to a conjugal relationship.

(f) Shared use of property: The Appellant testified that if her ex-husband had to get things from the floor where the Appellant lived after January 20, 2013, he would go when she wasn't there. They avoided each other. So, this doesn't point to a conjugal relationship.

(g) Shared responsibility for raising children: The Appellant and her ex-husband didn't have young children anymore. So, this doesn't point to a conjugal relationship.

(h) Vacations together: There is nothing in the testimony or documents submitted to address this issue.

(i) Continued mutual dependency: Nothing in the testimony or documents submitted addresses this issue.

j) Beneficiary of will: Nothing in the testimony or documents submitted addresses this issue.

k) Beneficiary of insurance policy: Nothing in the testimony or documents submitted addresses this issue.

(l) Where clothing was kept: The parties slept in separate bedrooms. If her ex-husband had to get things from the floor where the Appellant lived after January 20, 2013, he would go when she wasn't there. They avoided each other. This doesn't point to a conjugal relationship.

(m) In the case of illness, who was caring for the ill spouse and who was aware of the other's medical needs? There is nothing in the testimony or documents before the Tribunal that deals with this issue.

n) Communication between the parties: The Appellant testified that she and her ex-husband [translation] "made it so [they] would not cross paths too much in the hallways." This doesn't point to a conjugal relationship.

(o) Public recognition: Some of the Appellant's family was aware of her situation (sleeping in separate bedrooms since 2013) with her ex-husband like she testified. But she didn't share it publicly. Also, the obituary for her ex-husband's mother from May 2014 mentioned a girlfriend of the ex-husband and referred to the Appellant as [translation] "the mother of his children."[26] So, this doesn't point to a conjugal relationship between the parties.

p) Attitude and behaviour of community members: Some of the Appellant's family was aware of her situation (sleeping in separate bedrooms since 2013) with her ex-husband like she testified. But she didn't share it publicly. So, this doesn't point to a conjugal relationship between the parties.

(q) Marital status in various documents: An Affidavit to the Court of Queen's Bench of New Brunswick dated July 3, 2020,[27] shows September 1, 2017, as the beginning of the period where the Appellant and her ex-husband separated. The Appellant declared herself to be "separated" on her tax returns from 2015 to 2018.[28] Her ex-husband declared himself to be "separated" since February 8, 2014.[29] So, this doesn't point to a conjugal relationship.

[26] See GD2-47.
[27] See GD2-29.
[28] See GD2-65 to GD2-80.
[29] See GD2-47.

(r) Funeral arrangements: There is nothing in the testimony or documents submitted to address this issue.

[33] As a legislative body, the Tribunal has only the powers that the law gives it. The Tribunal interprets and applies the provisions as they are set out in the OAS Act.

[34] The Tribunal gives considerable weight to the Appellant's testimony and considers it credible. The Tribunal also greatly sympathizes with the Appellant's particular circumstances.

[35] A decision of the Pension Appeals Board says case law has defined a conjugal relationship as "a mutual intention to live together in a marriage-like relationship of some permanence."[30] The OAS Act says that a common-law partner is "a person who is cohabiting with [an] individual in a conjugal relationship…."[31] By extension, spouses aren't separated if they are cohabiting in a conjugal relationship.

[36] It is clear to the Tribunal that, since January 20, 2013,[32] the Appellant and her ex-husband haven't been in a conjugal relationship. Given the credibility that the Tribunal gives the Appellant, the Tribunal accepts the date she gave—January 20, 2013—rather than the date her ex-husband gave of April 4, 2013, in his Statutory Declaration of Separation. The Appellant testified that she and her ex-husband separated because of an irreconcilable situation, with him downstairs and her upstairs, and that she and her ex-husband [translation] "made it so [they] would not cross paths too much in the hallways." Some of the Appellant's family were aware of their situation. The obituary for her ex-husband's mother from May 2014 refers to her ex-husband having a girlfriend and the Appellant is referred to as [translation] "the mother of his children."[33]

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[30] *MSD v Pratt*, 2006 CP 22323 (PAB).
[31] See section 2 of the OAS Act.
[32] See GD8-2.
[33] See GD2-47.

[37] A couple can cohabit even if they don't live under the same roof. They can also be separated even if they still live under the same roof.[34] Even though the Appellant and her ex-husband were married at the time and lived under the same roof until September 1, 2017, they weren't living in a conjugal relationship anymore under the OAS Act since January 20, 2013, because there was no longer "a mutual intention to live together in a marriage-like relationship of some permanence." On January 20, 2013,[35] they reached the point of no return. The Appellant described it as the date where they reached [translation] "the breaking point."

Conclusion

[38] Based on the parties' submissions and the Appellant's testimony that the Tribunal gives a lot of weight to, the Tribunal can only find that the Appellant was separated from her ex-husband, under the OAS Act, from January 20, 2013. So, she wasn't eligible for the Allowance benefits (ALW) for the period from August 2015 to October 2018.

[39] This means that the appeal is dismissed.

François Guérin
Member, General Division – Income Security Section

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[34] See *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65; and *Kombargi v Canada (Social Development)*, 2006 FC 1511.
[35] See *MSD v Pratt*, 2006 CP 22323 (PAB).