

Citation: *A. H. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 20

Appeal No: GT-117471

BETWEEN:

**A. H.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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

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SOCIAL SECURITY TRIBUNAL  
MEMBER: Virginia Saunders

HEARING DATE: February 18, 2015

TYPE OF HEARING: In person

DATE OF DECISION: March 11, 2015

## **DECISION**

[1] The Tribunal finds that the Appellant was not incapable of forming or expressing an intention to make an application for a Guaranteed Income Supplement (GIS) at any time. Her application was made in February 2011 and cannot be deemed to have been made at an earlier date. She has received the maximum retroactivity for GIS payment allowed by law.

## **INTRODUCTION**

[2] The Appellant was born on May 28, 1919. She turned 65 on May 28, 1984.

[3] The Appellant was in receipt of an *Old Age Security Act* (OAS) pension. She applied for a GIS in February 2011. The Respondent granted the application with an effective payment date of March 2010. The Appellant requested reconsideration of the effective payment date and the initial decision was upheld. She appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] The hearing of this appeal was by personal appearance for the reasons given in the Notice of Hearing dated July 23, 2014. The hearing was adjourned twice at the request of the Respondent.

[6] This appeal was heard at the same time as an appeal by the Estate of P. H. with respect to his GIS application. The Appellant and P. H. were married to each other. She is the executor of his Estate. The decisions appealed from are identical. Much of the evidence relied on by the parties in both appeals is duplicated in both files and is identical. The testimony given at the hearing was accepted as evidence for both appeals.

[7] B. H. is the daughter of the Appellant and P. H. She is the authorized representative of the Appellant and the Estate in their respective appeals. Her husband, C. J., is an authorized representative of the Estate in that proceeding. They appeared at the hearing in those capacities and as witnesses. A. H. is 95 years old and in poor health, and she did not attend.

[8] To avoid confusion, the Tribunal will refer to C. J. and the members of the H. family by their first names.

## **THE LAW**

[9] A GIS is payable to an OAS pension recipient who is a resident of Canada and who qualifies based on income. Subsection (11)(2) of the OAS Act provides that the GIS is not payable unless an application has been made and approved.

[10] Subsection 11(7) of the OAS Act provides that the GIS is not payable more than eleven months before the application is received or is deemed to have been made.

[11] Subsections 28.1(1) and (3) of the OAS Act state that:

(1) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person was incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(3) For the purposes of subsections (1) and (2), a period of incapacity must be a continuous period, except as otherwise prescribed.

## **ISSUE**

[12] In order for the Appellant to receive payment of the GIS before March 2010, the Tribunal must determine that she was incapable of forming or expressing an intention to make the application before the day on which it was actually made.

## **EVIDENCE**

[13] B. H. testified that she is the eldest daughter of P. H. and A. H. Her parents immigrated to Canada from the Netherlands in 1950 with their three children all under the age of three. They had little money and limited English. P. H. had progressive hearing loss caused by scar tissue from frequent hearing infections he had as a child. They spent their first winter doing farm work in New Brunswick, and then travelled by train to Vancouver.

[14] In 1953 P. H. and A. H. purchased acreage outside of Vancouver and started a greenhouse business. They had three more children. B. H. testified that her parents worked long, hard hours in a somewhat isolated setting. They had little time for socializing, and had no extended family. Their ability to socialize was also limited by A. H.'s shyness and P. H.'s continued hearing loss, which had progressed to total deafness by the time he was in his 60s. Eventually they acquired English language capability, including reading and writing skills, but they did not develop any friendships outside of the family.

[15] P. H. and A. H. relied on a chartered accountant to prepare any income tax returns, even for the many years in which their income consisted only of their OAS pensions, P. H.'s Canada Pension Plan (CPP) pension and a small amount of interest income. Although A. H. worked in the greenhouse business alongside P. H., all of the income was declared by him, as a consequence of which she made no CPP contributions and did not qualify for a CPP retirement pension. Apparently the accountant did not advise P. H. and A. H. that they might be eligible for GIS. Around 2010 they started using H&R Block for their taxes, but were still not informed.

[16] B. H. testified that her parents were extremely private, and that she and her siblings were not informed about anything regarding their personal or financial matters. Her mother would gather her parents' income tax information, and B. H. would drive her mother to the accountant, but she was not permitted to go inside. Clifford had offered many times to look after their taxes for them, and was turned down.

[17] B. H. testified that she stopped working in 1998 and took early retirement for medical reasons in 2000. This gave her more time to spend with her parents, and she began to visit them at least several times a week. She noticed that her mother needed help and support to deal with her father, who by that time had developed odd behaviour as well as memory and recognition problems.

[18] B. H. testified that she always drove both her parents to see their doctor, Dr. Metzak. A. H. would go in with P. H. for his appointments, but B. H. was usually not invited into the room. She testified that eventually she realized that her mother was not retaining any of the information she was being given, and she started calling Dr. Metzak later to make sure that everything was being understood. In retrospect, she realized how much her mother was struggling looking after her father and how she was trying to hide many of his problems as well as her own.

[19] On June 10, 2006 P. H. executed a General Power of Attorney authorizing A. H., B. H. and his son W. H. to "do on my behalf anything that I can lawfully do by an Attorney" and declaring that it "may be exercised during any subsequent mental infirmity on my part."

[20] B. H. testified that in June 2006 her father was in the hospital, recovering from surgery after a subdural hematoma. He was 92 years old. A hospital social worker was concerned that there were no instructions in place for burial and other matters, and insisted to A. H. that she should be named as P. H.'s Attorney. A. H. was reluctant, but the social worker continued to raise the topic and eventually convinced her. B. H. called a family acquaintance who was a notary public and had her come to the hospital with the required document. She testified that all concerned knew that P. H. did not have the mental capacity to execute a valid Power of Attorney, but that because there was no suspicion that anyone would use it to take advantage of P. H. the notary felt it was acceptable. B. H. was advised to tell her father "This

lady wants you to sign so Mom and I can look after your papers,” and she did so in Dutch. P. H. said “ok” and signed the document.

[21] B. H. testified that she believed that P. H.’s care became too much for A. H., and she “started to let go.” A. H. put his name on a waiting list for a care home in the summer of 2009. On her birthday in May 2010, P. H. was taken to the hospital because he had problems with his medication. From there he entered a care home in July 2010, and he remained there until he died in March 2014.

[22] B. H. testified that in about 2007 her mother had started hiding or losing bills and statements, and accounts were not being paid on time. She is not sure if A. H. was being secretive or was just forgetting where she put things. B. H. arranged to have all the utilities paid automatically. A. H. has a credit card but B. H. and her siblings make her purchases for her. Her parents’ pension cheques were deposited directly into their bank account.

[23] Bernadette stated that she feels that her father ought to have been in a nursing home much earlier than he was, but that she had organized things so that her mother could manage everything in their home with frequent assistance from her children and home care. She also feels that her mother should be in a care facility, but she continues to live in her own home.

[24] B. H. stated that her parents’ isolation, coupled with language issues and P. H.’s hearing and vision loss, meant that they were not engaged in the community and would not have learned about GIS entitlement through any friends, community groups or public notices or brochures.

[25] B. H. testified that her parents applied for GIS in February 2011 after she found a letter from Canada Revenue Agency containing information about it. Her mother had opened the letter but B. H. believes she did not process the information contained in it. B. H. submitted the application forms on behalf of her parents.

## **SUBMISSIONS**

[26] The Appellant submitted that her GIS application was delayed because of her incapacity. She submitted that her social isolation and lack of exposure to the media, as well as her inability to understand information contained in brochures that might have been mailed to her, meant that she was incapable of forming or expressing an intention to make a GIS application until one was actually made in February 2011. She further submitted that she relied on an accountant to look after taxation matters, and that she was never informed of possible GIS entitlement.

[27] The Respondent submitted that the OAS Act allows for a maximum of eleven months of retroactivity from the date the application is received from a pensioner; that the onus was on the Appellant to apply for the GIS; and that only in a situation of incapacity could more than eleven months of retroactivity be considered.

[28] The Respondent made no submissions on the issue of incapacity.

## **ANALYSIS**

[29] The Appellant's GIS was payable effective March 2010, the maximum retroactivity allowed by the legislation. Payment of the GIS any earlier than March 2010 is only possible if the Appellant is deemed to have applied at an earlier date. In order for that to happen, the Tribunal must find on a balance of probabilities that she was incapable of forming or expressing an intention to make the application before the day on which it was actually made, and that her period of incapacity was continuous.

[30] The test as to whether a person may claim incapacity pursuant to section 28.1 of the Act is the same as that applied under an identical provision in the CPP (*Attorney General of Canada v. Poon* 2009 FC 654).

[31] The capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of her world view does not indicate a lack of capacity (*Sedrak v. Minister of Social Development* 2008 FCA 86).

[32] The Appellant's activities during the alleged period of incapacity are relevant to the determination of the issue of whether or not she was able to form or express an intention to apply for benefits. The examination must be focused not on the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity of forming or expressing an intention to make an application (*Canada (Attorney General) v. Kirkland* 2008 FCA 144; *Canada (Attorney General) v. Danielson* 2008 FCA 144).

[33] There is no evidence that the Appellant was suffering from dementia or any other mental infirmity, other than possible forgetfulness. That in itself is not sufficient to support a finding that she lacked capacity as it is defined in the OAS Act. Nor is the evidence that she was socially isolated, perhaps not sophisticated in financial matters, and that English was not her first language. She was clearly able to manage family affairs for herself and for her husband even after his mental health deteriorated. She was named as one of his Attorneys in 2006. Regardless of the dubious legality of that document, it is evidence that those responsible for its execution were not concerned about her mental capacity at that time. At age 95 she continues to live by herself as she has done since her husband entered a nursing home in 2010.

[34] Lack of knowledge of entitlement to a benefit is not the same as a lack of capacity to form or express an intention to apply for it. Arguably the professional accountants relied on by the Appellant had a duty to inform her of the GIS, but that obligation did not extend to the Respondent. The Respondent has no legal obligation to inform potential claimants of the GIS (*Le Corre v. Canada (Department of Human Resources Development)* 2004 FC 155).



[35] While the Tribunal has sympathy for the Appellant, the legislation is clear that a GIS is not payable until an application has been made by or on behalf of a person. The OAS Act sets a clear limit on the amount of retroactivity that is available once an application is made

## **CONCLUSION**

[36] As there is no evidence of incapacity that supports an earlier deemed date of application, the appeal is dismissed.

*Virginia Saunders*  
Member, General Division