Citation: *The Estate of P. H. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 21

Appeal No: GT-117472

BETWEEN:

The Estate of P. H.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

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 incapable of forming or expressing an intention to make an application for a Guaranteed Income Supplement (GIS) in December 2002, and that he remained so until his death.

INTRODUCTION

[2] P. H. was born on March 9, 1914. He was the Appellant in this proceeding. He died on March 25, 2014 and the appeal was continued by his Estate.

[3] Mr. P. H. was in receipt of an *Old Age Security Act* (OAS) pension. He applied for a GIS in February 2011. The Respondent granted the application with an effective payment date of March 2010. Mr. P. H. requested reconsideration of the effective payment date and the initial decision was upheld. He 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] Mr. P. H.' widow, A H., is the executor of his Estate. She is 95 years old and in poor health, and she did not attend the hearing. B. H. is Mr. and Mrs. H.' daughter. She and her husband, C. J., are the authorized representatives of the Estate in this proceeding. They appeared at the hearing in that capacity and as witnesses.

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

EVIDENCE SUBMITTED AT THE HEARING

[8] The Appellant submitted the following documents at the hearing:

1) Exhibit A-1 contains opening remarks and comments prepared by the Appellant's representatives for them to read at the hearing.

2) Exhibit A-2 is a print-out of an internal email exchange between employees of the Respondent regarding the Appellant's file.

3) Exhibit A-3 is a copy of 12 pages of consult notes for P. H., which B. H. testified were made by his family physician, Dr. Metzak.

4) Exhibit A-4 is a summary of Dr. Metzak's consult notes prepared by B. H. and C. J.

[9] C. J. testified that Exhibits A-2 and A-3 were obtained by the Respondent, and were provided to the Appellant on January 28, 2015 after the Appellant requested them under the *Privacy Act*. He did not file them with the Tribunal immediately because he understood that it was past the filing deadline and believed he could request to submit them at the hearing.

[10] The Tribunal accepted these documents into evidence. Exhibit A-1 was simply a written version of the Appellant's oral submissions. Exhibits A-2 and A-3 were already in the Respondent's possession. Exhibit A-4 was prepared as an aid to highlight portions of Dr. Metzak's notes which the Appellant wished to emphasize at the hearing. Had the Respondent appeared at the hearing, it would have been given the opportunity to make submissions with respect to the admissibility and content of these documents, and to seek an adjournment if necessary to prepare a response. A party who chooses not to attend a hearing must be taken to have accepted the possibility that evidence and submissions will be made to which it will be unable to respond. Considering the content of these documents and where they came from, the Tribunal determined that procedural fairness would be best observed by accepting the documents and proceeding with the hearing as scheduled.

[11] It was apparent that settlement discussions took place between the parties in the months before the hearing. Although information about the discussions was contained in Exhibits A-1 and A-2, none of it was relevant to the issue before the Tribunal and the Tribunal did not consider it in reaching its decision.

THE LAW

[12] Under the OAS Act, a GIS is payable to an OAS pension recipient who is a resident of Canada and who qualifies based on income. The GIS is not payable unless an application has been made and approved. Because entitlement to the GIS is income- based, a person must apply each year to prove that he or she continues to be eligible; however, after the first application the Minister may waive the requirement for subsequent ones. This is generally done for recipients who file income tax returns, as their income level can be determined without an application being submitted.

[13] 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.

[14] 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

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

EVIDENCE

[16] This appeal was heard at the same time as an appeal by A. H. with respect to her own GIS application. 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.

[17] 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 oldest children, who were all under the age of three at that time. 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.

[18] 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.

[19] 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. Apparently this accountant did not advise them that they might be eligible for GIS. Around 2010 they started using H&R Block for their taxes, but were still not informed.

[20] C. J. testified that he met B. H. in 1995. Because of P. H.'s hearing loss, C. J. would generally communicate with him by writing down what he wanted to say. After two or three years of this, he noticed that P. H. struggled to comprehend what was written. It became extremely difficult to communicate with him in any other way.

[21] 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 such as rearranging the kitchen cupboards for no reason, leaving in the middle of conversations, speaking Dutch instead of English at inappropriate times and places, trying to shave with a razor that was not turned on, and starting conversations with complete strangers. He seemed comforted by repetition, and so he was kept occupied by family members filling the kitchen sink with clean dishes, which he would wash over and over again. B. H. recalled that her mother was concerned and thought that P. H. should perhaps be in Riverview Hospital, which at the time was a mental health facility.

[22] B. H. testified that she noticed her father's memory and recognition failing around this time. She would take him places that ought to have been familiar to him, but he would not remember them. When she and C. J. married in August 2000, P. H. did not comprehend what was happening at the wedding. A few weeks later, when they were driving with P. H., he thought he was in a taxi and that C. J. was the taxi driver. When they got a puppy in 2001, he thought it was a piglet such as he had when he was growing up. He had macular degeneration which had caused him to lose his drivers' licence in 1995. By 2000 it had advanced to the point where he could not read or watch television. The family resorted to communicating with him by hand signals, but he soon had difficulty understanding who they were, and he stopped communicating for the most part. B. H. testified that the combination of his declining mental functions, his deafness and his vision loss by this time meant that P. H. really did not know what was going on around him.

[23] 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. C. J. had offered many times to look after their taxes for them, and was turned down.

[24] 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 to look after her father and how she was trying to hide many of his problems as well as her own.

[25] 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."

[26] 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.

[27] After his surgery, P. H. began attending a seniors' day care program up to four days a week. B. H. was called frequently to come and pick him up because he was misbehaving. Eventually he was no longer allowed to attend because he became aggressive. P. H.'s care became too much for A. H. She 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.

[28] Dr. Metzak was P. H. and A. H.'s family doctor. His consult notes are difficult to read but they reveal that beginning in May 2001 memory concerns were discussed and P. H. began taking medication for it. He started with phosphatidylserine and progressed to Exelon, which was not tolerated, and then Aricept. A note dated November 5, 2003 states "responding well to Aricept." In August 2005 there is a reference to "Alzheimer" and a note that P. H. would be weaned off Aricept because of cost issues. In February 2006 Dr. Metzak noted "F/U Alzheimer no change since weaning off Aricept." (B. H. stated that later he was able to resume the Aricept because special funding was approved). Subsequent entries refer to Alzheimer's and dementia.

[29] B. H. testified that she was advised by Dr. Metzak that these medications would possibly slow the progress of dementia, but they would not reverse it or improve any of its symptoms. She stated that she believed the note of November 5, 2003 would only refer to the fact that her father did not appear to be experiencing side effects from the medication.

[30] Dr. Metzak completed a Declaration of Incapacity on October 31, 2013. It states that P. H.'s condition made him incapable of forming or expressing the intention to make an application, and that his incapacity began in December 2002 and was ongoing. The medical condition causing the incapacity was stated to be "Alzheimer's dementia. Noted to be problematic in 2002 but arose few years earlier with short term memory loss and increasing in severity over the years." Dr. Metzak stated that he was treating P. H. at the time the incapacity began.

[31] 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.

[32] B. H. 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 from home care. She also feels that her mother should be in a care facility, but she continues to live in her own home.

[33] 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. She stated as well that P. H.'s mental state would have prevented him from comprehending any such information in any event.

[34] 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

[35] The Appellant submitted that the GIS application was delayed because of the incapacity of P. H. The Appellant submitted that the Declaration of Incapacity is conclusive on the issue of incapacity and, if it is not, that further evidence submitted supports a finding that P. H. was incapable of forming or expressing an intention to make a GIS application in December 2002 and that his incapacity continued until his death.

[36] 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.

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

ANALYSIS

[38] P. H.'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 Tribunal finds on a balance of probabilities that P. H. was incapable of forming or expressing an intention to make the application before the day on which it was actually made, and that his period of incapacity was continuous. The maximum retroactivity would then be applied from the date his application is deemed to have been made.

[39] 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).

[40] 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 his world view does not indicate a lack of capacity (*Sedrak v. Minister of Social Development* 2008 FCA 86).

[41] The Appellant's activities during the alleged period of incapacity are relevant to the determination of the issue of whether or not he 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).

[42] There is sufficient evidence to find that, on balance, P. H. was incapable of forming or expressing an intention to make an application for the GIS on his own behalf in December 2002, and that this incapacity continued up to his death. In addition to the consult notes and the Declaration of Incapacity made by Dr. Metzak, the evidence of B. H. and C. J. supports a conclusion that P. H.'s mental capacity gradually deteriorated beginning in about 1998. It is difficult to identify a particular point at which someone in P. H.'s circumstances could be said to have become incapacitated. Dr. Metzak has placed it at December 2002, and the Tribunal accepts that date. By then, P. H. was regularly exhibiting behaviour and cognition issues that would not be found in a person who was sufficiently engaged with reality to be able to form or express the requisite intention.

[43] The fact that in December 2002 Dr. Metzak had not yet put the words "Alzheimer's" or "dementia" in his notes, and that P. H. was not on the highest doses of Aricept, receiving aggressive treatment, or in an institution, is not an indication that his mental infirmity was not a severe one at that time. He was by then in his late 80s. Declining capacity would not be unexpected and would not be treatable in any meaningful way. P. H. had sufficient support from his wife and his children to be able to remain in his home. He did not display harmful or aggressive behaviour when he was there. The evidence indicates that his family and his doctor accepted his decline as natural and managed with it for many years, but it does not diminish the fact that he was by December 2002 not capable of forming or expressing an intention to make an application for the GIS.

[44] The existence of the Power of Attorney raises two issues for the Tribunal. The first is whether it shows that, contrary to much of the evidence presented on this appeal, P. H.s' family believed he had sufficient mental capacity at that time to execute an important legal document. The second is whether, because any of the Attorneys named would have been authorized to apply for the GIS for P. H., the existence of the document negates any argument that he lacked capacity to do so after June 2006.

[45] With respect to the first issue, B. H. gave credible evidence as to how the Power of Attorney came to be executed. It does not conflict with the other evidence of the family's belief as to P. H.'s mental state at the time or earlier; in fact, it provides even more

evidence that they already believed he was incapable of looking after his affairs and they relied on the "professional" advice of the hospital social worker and the notary public that this was an acceptable method of dealing with the problem. The fact that P. H. answered "ok" to his daughter and signed the document is not an indication that he knew or understood what he was doing, or that he had the mental capacity to form or express an intention to make a GIS or any other application. Considered in light of the other evidence of his actions and abilities, P. H.'s assent to and signing of the Power of Attorney was nothing more than passive acceptance of a situation presented to him by someone he trusted.

[46] With respect to the second issue, the evidence is that the Power of Attorney was executed under some pressure and for a limited purpose. Although it purported to grant general powers to A. H., B. H. and W. H., there was never any intention that they would use them except to facilitate routine banking and other matters. Considering P. H.'s mental state at the time, it is highly questionable whether the document had any legal force. Furthermore, subsection 28.1(1) of the OAS Act applies when a person "was incapable of forming or expressing an intention to make an application on the person's own behalf." On plain reading this provision applies if a person lacks the capacity to make an application on his own behalf, regardless of whether or not others also have the capacity to apply for him.

[47] The Tribunal finds that P. H. was incapable of forming or expressing an intention to make a GIS application for a continuous period beginning in December 2002 and ending with his death on March 14, 2014.

[48] Subsection 28.1(2) of the OAS Act provides that an application is deemed 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 person's last relevant period of incapacity commenced, whichever is the later. In this case, the GIS could have commenced to have been paid in April 1979, one month after P. H. turned 65. His period of incapacity commenced later, in December 2002. Thus, his initial GIS application is deemed to have been made in December 2002. Subsequent applications, if required, are deemed to have

been made in the month preceding the first month in which the GIS for a particular payment period could have commenced to be paid.

CONCLUSION

[49] The appeal is allowed.

Virginia Saunders
Member, General Division