



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. D. v. Minister of Employment and Social Development*, 2017 SSTGDIS 151

Tribunal File Number: GP-17-903

BETWEEN:

S. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: October 12, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* ("CPP") Survivor's Pension on November 9, 2015. The Appellant claimed that she was entitled to a CPP Survivor's Pension because she was the spouse or common-law partner of the late D. F. (the "Contributor"), who passed away on January 1, 2013. The Respondent allowed the application but determined that payments would commence in December 2014. The Appellant requested a reconsideration from the Respondent and asked that the payments for the CPP Survivor's Pension be made retroactive for an additional 18 months. The Respondent upheld its original decision upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[2] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The issues under appeal are not complex.
- b) Credibility is not a prevailing issue.
- c) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.
- d) An oral hearing is not necessary to address the issues in this appeal.

[3] The Tribunal has decided that the Appellant is not entitled to additional retroactivity for her CPP Survivor's Pension, for the reasons set out below.

EVIDENCE

[4] The Appellant is now 57 years old. She was born in Guyana and immigrated to Canada in 1987. She completed high school in Guyana. After immigrating to Canada, her only employment was of a clerical nature.

[5] The Appellant had been in a common-law relationship with the Contributor for an extended period of time. They began living together on January 1, 2002. They were still living together when the Contributor passed away on January 1, 2013. There was evidence to support their ongoing common-law relationship, including the Appellant's status as "successor holder" on the Contributor's Tax-Free Savings Account.

[6] On January 16, 2013, the Appellant completed an application for a CPP Death Benefit in connection with the Contributor. The Respondent received the application on January 21, 2013. In her application, the Appellant confirmed her common-law status with the Contributor and identified herself as the Executor of the Contributor's Estate. She also said that the Contributor had left a will.

[7] The will apparently left all of the Contributor's Estate to the Appellant. Her Representative submitted that a proceeding challenging the will was commenced by the Contributor's niece, shortly after his death. The Appellant's Representative further submitted that the proceeding was settled at a mediation that took place in January 2015.

[8] The Appellant did not complete an application for a CPP Survivor's Pension until November 6, 2015. The application materials were received by the Respondent on November 9, 2015. In her application, the Appellant affirmed her common-law status with the Contributor from January 1, 2002 until his January 1, 2013 death. She also stated that she was not disabled.

[9] The Respondent granted the Appellant's application for a CPP Survivor's Pension, in connection with the death of the Contributor. However, the pension commencement date was set at December 2014. The Respondent stated that this was the earliest the pension could commence, given that the application was not received until November 9, 2015.

[10] In explaining the Appellant's delay in applying, her Representative submitted that she called the Respondent shortly after the Contributor's death and was sent an application for the CPP Survivor's Pension. However, as the Estate was in litigation at that time, she did not follow up on the matter and submit her application until the litigation was settled. It was also submitted that she did not know of the time limits for a CPP Survivor's Pension application and was concentrating her efforts on the proceeding brought by the Contributor's niece. The Appellant's

Representative further submitted that, after the resolution of the will challenge, he asked the Appellant whether she had made the application for a CPP Survivor's Pension. Upon learning that she had not, he advised her to do so immediately.

SUBMISSIONS

[11] The Appellant submitted that she qualifies for additional retroactivity for her CPP survivor's pension because:

- a) She has a limited education and has trouble communicating with others;
- b) She has difficulty understanding what people are trying to communicate to her and difficulty in communicating her responses;
- c) She was engaged in litigation concerning the Contributor's Estate and did not submit her application until after that litigation was resolved; and
- d) It would be unjust to deny her additional retroactivity.

[12] The Respondent submitted that the Appellant does not qualify for additional retroactivity for her CPP survivor's pension because:

- a) The commencement date cannot be made earlier than December 2014, as the maximum retroactivity has already been granted;
- b) The fact that the Contributor's Estate was in litigation did not prevent her from applying for a CPP Survivor's Pension; and
- c) The Tribunal is bound by the language of the *Canada Pension Plan* and does not have the authority to vary the legal requirements set out in the *Canada Pension Plan*.

ANALYSIS

[13] This appeal involves an assessment of whether the Appellant's Survivor's Pension could commence before December 2014, despite the maximum retroactivity provisions set out in s. 72 of the *Canada Pension Plan*.

[14] The Tribunal affirms that it is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the *Canada Pension Plan*. It cannot vary the legal requirements set out in that legislation, even if a particular outcome is characterized by a party as “unjust”.

[15] Subsection 72(1) of the *Canada Pension Plan* sets out when a CPP Survivor’s Pension can commence. While a pension could be paid as early as the month following the death of a contributor, there is also a limitation: in no case can a pension commence “earlier than the twelfth month preceding the month following the month in which the application was received”. In other words, for an application received in November 2015, a pension cannot commence earlier than December 2014. This maximum retroactivity was applied by the Respondent.

[16] There is no language in the *Canada Pension Plan* that provides an exception to the maximum retroactivity set out in s. 72(1). The only provisions that could potentially be of assistance are ss. 60(8) and (9) of the *Canada Pension Plan* (the “Incapacity Exceptions”). The Incapacity Exceptions could potentially assist the Appellant because they permit the Respondent to deem an earlier application date when the Appellant is found to be incapable on and/or prior to the date that the application was ultimately made.

[17] The potential application of the Incapacity Exceptions is triggered by the submission that the Appellant had difficulty communicating with others. The Tribunal will now consider whether either of the Incapacity Exceptions could actually assist her.

[18] Subsection 60(8) would apply when a claimant had been incapable of forming or expressing an intention to make an application on their own behalf on the day on which the application was actually made (emphasis added). The Tribunal observes that there is absolutely no objective evidence that the Appellant suffered from an incapacity of this nature when she eventually applied for the CPP Survivor’s Pension. Nor has it been suggested that, when she applied, she was lacking the capacity to form or express an intention to apply. In fact, she denied being disabled when she eventually applied. It is also notable that she also applied on her own behalf, after being reminded to do so by her Representative. As the Tribunal is persuaded that she had the requisite capacity on the date she applied, subsection 60(8) cannot assist the Appellant.

[19] Subsection 60(9) requires more detailed analysis, as it could apply if the incapacity no longer existed when the application was made but did exist in the past. Once again, the incapacity refers to the incapacity to form or express an intention to make the application. As noted above, it was submitted that the Appellant had difficulty communicating with others. It was also submitted that she had a limited education, difficulty understanding what people are trying to communicate to her, and difficulty in communicating her response.

[20] In *Canada (Attorney General) v. Danielson*, 2008 FCA 78, the Federal Court of Appeal confirmed that section 60 of the *Canada Pension Plan* does not require consideration of the capacity to make, prepare, process or complete an application, but only the capacity of forming or expressing an intention to make an application. The Court of Appeal also said that the claimant's activities during the potential period of incapacity may be relevant to cast light on the claimant's continuous incapacity and ought to be considered. In *Slater v. Canada (Attorney General)*, 2008 FCA 375, the Court of Appeal confirmed that it was necessary to look at both the medical evidence and the relevant activities of the individual concerned.

[21] Once again, there is no objective medical or non-medical evidence of the requisite incapacity. With respect to the principle articulated in *Danielson* and *Slater*, the Appellant's activities from the Contributor's death to the eventual date of application also do not support the kind of incapacity contemplated by s. 60(9). She cannot persuasively argue that she was incapable immediately after the death of the Contributor: she applied for the CPP Death Benefit within three weeks of the Contributor's death and therefore demonstrated the type of capacity needed to apply for a CPP Survivor's Pension. This far exceeds the capacity to merely form or express an intention to apply for such a pension.

[22] As Executor of the Contributor's Estate, the Appellant also participated in legal proceedings that concluded in January 2015. There has been no suggestion that she was incapable of fulfilling her duties of Executor. If she had at least that level of competence, the Tribunal is not persuaded that she was incapable of forming or expressing an intention to make an application for a CPP Survivor's Pension. The evidence supports the implication that she was capable of forming or expressing an intention to apply but chose not to do so until after the Estate litigation had been resolved.

[23] Given the Appellant's activities in the period preceding her eventual application for the CPP Survivor's Pension and the lack of objective evidence with respect to incapacity during that period, the Tribunal must conclude that the Appellant has not met the requirements of s. 60(9). This is consistent with the Federal Court's finding in *Canada (Attorney General) v. Hines*, 2016 FC 112: it is not enough for a claimant to allege that he was incapacitated, as there must be sufficient evidence to establish incapacity.

[24] It instead appears that the Appellant's failure to promptly apply for a CPP Survivor's Pension resulted from forgetting about applying for the pension, being unaware of the associated deadlines, and/or wishing to resolve the Estate litigation first. However, none of these assist her. It is not helpful to her that she may have been unaware of the deadlines associated with applying for a CPP Survivor's Pension. It is a long-standing legal principle that a person cannot avoid compliance with legislative provisions on the mere basis that they are unfamiliar with the legislation. The desire to resolve other litigation also does not constitute a justification under the *Canada Pension Plan*, nor does forgetting to apply.

[25] The Tribunal has found that the Appellant cannot avail herself of the Incapacity Exceptions in order to establish an earlier application date for the CPP Survivor's Pension. As the drafters of the *Canada Pension Plan* did not provide for a variance of the limitation clearly set out in s. 72(1), the Appellant's appeal cannot succeed.

CONCLUSION

[26] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security