



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. G. v Minister of Employment and Social Development*, 2017 SSTGDIS 214

Tribunal File Number: GP-17-364

BETWEEN:

J. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: John F. L. Rose

HEARD ON: October 3, 2017

DATE OF DECISION: October 23, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a Canada Pension Plan (CPP) Survivor's Benefits on February 5, 1997. The Respondent allowed the application effective March 1996. On September 22, 2015, the Appellant made a request for Survivor's Pension and Child(ren)'s Benefits. She was claiming a survivor's pension for a retroactive period from when her husband had died in November 1987 until she began receiving it. She was also claiming the children's benefits from November 1987 until June 1994. The Respondent denied both benefits initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The issue before the Tribunal is whether the Appellant was incapable of applying for these benefits prior to her February 1997 application.

THE LAW

[3] The legislation allows for retroactive consideration of an application for survivor's and children's benefits but that period is restricted to 11 months prior to the application date, unless the applicant can establish that she was incapable of forming or expressing an intention to do so prior to actually making the application.

[4] Paragraph 60(8)(9)(10) and (11) set out the incapacity provisions of the CPP as follows:

(8). 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 had been 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.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

- (a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
- (b) the person had ceased to be so incapable before that day, and
- (c) the application was made
 - i. within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or
 - ii. where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

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.

(10) For the purposes of subsection (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

(11) Subsections (8) to (10) apply only to individuals who were incapacitated on or after January 1, 1991.

[5] This appeal was heard by Teleconference for the following reasons:

- a) The issues under appeal are not complex;

- b) There are gaps in the information in the file and/or a need for clarification; and
- 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.

[6] The following people attended the hearing: The Appellant and her daughter, S. G., who appeared as a witness and representative.

EVIDENCE

Documentary Evidence

[7] The Appellant and her husband were married on December 6, 1964. A Certificate of Death filed confirmed that he had died on November 28, 1987.

[8] A note dated August 18, 2015 from Dr. Hugh J.M. Spicer of Trinidad stated that the Appellant had been a patient of his from when she was in her twenties and that she had suffered from depression from time to time which was not always responsive to treatment. GD2R-29

[9] The Appellant filed a Statutory Declaration dated April 29, 2016 in which she states that she and her husband remained married until his death. She also said that she went into a depression at the time and sought medical advice and treatment from a Dr. Valance Massiah until his death in June 2004. After this she was treated by Dr. Spicer until he stopped practising in 2014. She said that between 1987 and 2015 she was unable to formulate or express an intention to make an application for benefits and she had assistance from relatives. In 2015 she was advised she was fit to resume making independent decisions and therefore made a retroactive application.

[10] Following her application, Service Canada requested a Declaration of Incapacity, Physician's Report. The Appellant replied that she could not because Dr. Massiah had died and Dr. Spicer had retired.

[11] An unsigned letter from the Appellant's daughter dated June 1, 2015 indicated that at the time of her father's death her mother had experienced a mental breakdown and depression for many years.

[12] An email dated January 30, 2017 from a hospital in Trinidad indicated that they were attempting to locate the hospital records of the Appellant.

Witness Testimony

The Appellant's Daughter

[13] The Appellant's daughter told the Tribunal that she was just turning 13 when her father died. He had suffered from cancer for a couple of years and had been transferred to New York for treatment when he died. Her mother went into a severe depression and they moved to Trinidad for family support and about a month and one half later the Appellant was involved in a motor vehicle accident and suffered head and facial injuries. She was in the hospital for about a month and they stayed in Trinidad until they moved back to Canada some years later.

[14] She told the Tribunal that she had to help her mother a lot and they had assistance from family members. Her grandparents were keeping track of her medical condition and her aunt helped look after her. They had a nurse for about eight months to a year who would come to the home and a housekeeper for a number of years. Her mother went through years of counselling for her depression and therapy and surgeries. She recalls that her mother would sleep for hours, not talk or take care of herself. She had some uncontrollable shaking and was afraid of cars and has not driven since.

[15] She testified that the Appellant started talking and walking on her own about four or five months after the accident and she has improved a lot over the years but there are still some residual effects. Gradually over the years she was able to take care of her mom by herself and by the time she was 15 or 16 her mom was able to start taking care of her, for example, by being able to attend at her school and meet with her teachers. She is okay now and walking but at the time it was very difficult.

[16] She recalls that her mother was on medication but not sure what kind and the doctor would come and see her but in private. Her main physician was Dr. Messiah who has since passed away. Her mother did not have a doctor in Canada nor any treatment, but went back to Trinidad every six months to a year to see the doctor. She would stay about three months at a time.

[17] They came back to Canada in about 1993 when she was accepted into university but then she withdrew and started a few years later. She said that by 1993 her mother was much improved and stronger mentally and they lived with her brother. Life was pretty normal and her mother liked cooking and doing laundry and the normal household activities, but she never went back to work.

[18] She said that she tried to contact CPP several times but was told that her mother would have to apply and she could not get her mother to do so as she was not able to understand. In 1997 she helped her mother make the application for benefits but they were told she could not get retroactive benefits. They also made an application for child benefits and did she receive those up until she was 25.

Appellant's Testimony

[19] The Appellant told the Tribunal that following her husband's death she needed a lot of support and that's why she went to Trinidad and the reason she continued to go back. In 1997 her daughter applied on her behalf because she was in a state of deep depression and bedridden for a long time. She needed a lot of coaxing to get going and prayed a lot. By 2015 she was given a clean bill of health and felt she could apply on her own for the retroactive benefits. She had not applied for any other type of benefits over the years.

[20] While in Trinidad she was treated with Prozac and Paxil and lots of counselling. Sometimes she would go to the clinic and sometimes the doctor would come to the house. She said she stopped taking the medication in 1992 or 1993 as she was feeling better, but continued with the counselling. She stated that she did not have a doctor in Canada and felt comfortable with her doctor in Trinidad. She said that she felt well enough in Canada that she didn't need

treatment nor did she take any medication while in Canada. She said that she would go back to Trinidad every six months or so and someone would accompany her.

[21] She did not recall ever having a power of attorney after the accident but depended on her family. She said that she was coherent enough to know what was going on but they assisted her as necessary.

SUBMISSIONS

[22] The Appellant submitted that she qualifies for a Survivor's Pension and Child Benefits from November 1987 because:

- a) Her husband died in November 1987;
- b) She was incapable of applying at that time due to a motor vehicle accident and depression; and
- c) She became capable of doing so in 2015.

[23] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) Her husband died in November 1987 but her application was not received until February 5, 1997;
- b) Her benefits were allowed from the earliest possible date allowed under the legislation, being 11 months before the application was received; and
- c) There is no Declaration of Incapacity provided that would attest that she was incapacitated to apply at an earlier date.

ANALYSIS

[24] The Appellant submits that she was incapacitated following her husband's death and motor vehicle accident in 1987. While there is little medical evidence available, through no fault of her own, her daughter and the Appellant gave evidence of her injuries, limitations and

treatment after 1987. Pursuant to subsection 60(11) of the CPP, the incapacity provisions did not come into effect until January 1, 1991, and any period of incapacity prior to that date would not assist the Appellant.

[25] I was impressed with the testimony of both the Appellant and her daughter who tried their best to recall the Appellant's circumstances and condition so many years ago, however, there was some understandable confusion with some dates. What becomes clear to the Tribunal is that following her motor vehicle accident the Appellant underwent a period of physical incapacity which by 1990 had somewhat resolved. Her daughter gave evidence that she was walking after about four months and by the time she was 16 her mother was able to start looking after her and being involved in her school activities but that she was also suffering from depression during that period.

[26] If the Tribunal were to consider the Appellant incapable, as defined in the legislation, it could do so only from January 1, 1991 as provided for by subsection 60(11). For reasons that will become clear, it is not necessary for the Tribunal to make that determination.

[27] The real issue is whether the Tribunal can determine whether at some time after January 1, 1991 the Appellant was capable of forming or expressing an intention to make an application.

[28] While the evidence supports that she continued to suffer from depression, her testimony was that by the time she moved back to Canada in 1993 she felt well enough that she did not require medication and she did not seek any medical treatment in Canada for depression or any other conditions arising out of the motor vehicle accident. She was living with her children and involved in the household activities. The limited medical evidence that we have from Dr. Spicer indicates only that she had depression from time to time, which suggests that it was not continuous. He does not comment on any cognitive or physical disabilities. This evidence does not establish that she was incapable as defined in the legislation and the Tribunal finds that by 1993 when she returned to Canada she was capable of forming or expressing an intention to make an application.

[29] If the Tribunal was to consider her incapable from January 1, 1991, it would therefore find that incapacity had ended by 1993 when she moved back to Canada. Even if we take that

date to be latest possible being December 1993, paragraph 60(9) (c)(i) of the CPP would have required her to make her application within 12 months of that date, or by December 1994. As she did not make her original application until February 1997, the incapacity provisions of the CPP cannot assist her. The Tribunal notes that there was no medical evidence of any further incapacity after she moved back to Canada.

[30] In other words, even if the Appellant could prove that she was incapable as defined in the legislation, between 1987 and 1993, she would have had to make her application by December 1994 in order to benefit from the incapacity provisions and she did not do so. While sympathizing with the Appellant's circumstances, the Tribunal 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 CPP.

[31] As a result the Appellant is not entitled to retroactive survivor's benefits or the retroactive child's benefits.

CONCLUSION

[32] The appeal is dismissed.

John F. L. Rose
Member, General Division - Income Security