



Social Security Tribunal of Canada
Tribunal de la sécurité sociale du Canada

Citation: *The Estate of TS v Minister of Employment and Social Development*, 2021 SST 358

Tribunal File Number: GP-19-1860

BETWEEN:

The Estate of T. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Teleconference hearing on: October 30, 2020

Date of decision: January 19, 2021

DECISION

[1] The Estate of T. S. (Estate) is not entitled to greater retroactivity of the *Canada Pension Plan* (CPP) disability pension based on incapacity.

OVERVIEW

[2] T. S. (the deceased), first applied for CPP disability in September 2002 at the age of 47. He stated that he had been unable to work since April 2002 because of depression, stress, nerves, and alcohol abuse. The Minister denied the application at the initial level. There was no request for reconsideration.

[3] In January 2007, the Public Guardian and Trustee (PGT) became the deceased's statutory guardian of property.¹ In 2009 and 2012, the PGT applied for CPP disability on behalf of the deceased. Both times, the Minister denied the application at the initial level because there was no medical information to support a claim of disability. There was no request for reconsideration.

[4] On December 15, 2017, the PGT submitted the present application on behalf of the deceased. The Minister denied the application initially, again because there was no medical information. On January 30, 2018, the deceased passed away. In July 2018, his wife, R. S., who had been separated from the deceased for many years, was granted a Certificate of Appointment of Estate Trustee with a Will.² Based on medical information that she provided, the Minister initially granted CPP disability benefits to the Estate with maximum retroactivity, to September 2016. Payment started in January 2017.³ The Minister maintained this decision on reconsideration.

[5] R. S., representing the Estate, appealed the reconsideration decision to the Social Security Tribunal (Tribunal), stating that the deceased had lacked the capacity to form

¹ GD2-I-47

² GD2-I-13. R.S. testified as to the date of separation.

³ GD2-I-11. In October 2019, the Minister issued a retroactive payment to the Estate of \$14,443.40.

or express an intention to apply for CPP disability before the making of the December 2017 application.

[6] The Minister submitted that the evidence before the Tribunal did not show that the deceased met the CPP definition of incapacity.

ISSUES

[7] Was the deceased incapable of forming or expressing an intention to apply for a CPP disability pension between November 2006⁴ and December 2017?

[8] If so, when did his incapacity begin?

TEST FOR INCAPACITY

[9] To satisfy the test for incapacity, the Estate must establish that it is more likely than not that the deceased lacked the capacity to form or express an intention to apply for the benefit before the date the application was actually made.⁵

[10] If I find the deceased was incapable of forming or expressing an intention to apply for CPP disability for a period before the application was submitted in December 2017, I can deem that the application was made in the month that his period of incapacity began.⁶

[11] The period of incapacity must be continuous.⁷

[12] The claimed period of incapacity, according to R. S.'s testimony, began in 2007. That was when the PGT became the statutory guardian of property for the deceased. The claimed period of incapacity ended on December 15, 2017, when the Minister received the CPP disability application on behalf of the deceased.

⁴ A Declaration of Incapacity signed by Dr. Brian Baxter stated that the deceased's incapacity began in November 2006: GD1-9.

⁵ Subsections 60 (8) to 60(11) of the CPP

⁶ Subsection 60(8) of the CPP

⁷ Subsection 60(10) of the CPP

ANALYSIS

The evidence

[13] R. S. represented the Estate at the hearing. She testified that she married the deceased in 1976. In 1997, they moved to X from X. Even though they separated in 2001, she always kept in touch with the deceased. This was true even after he moved back to X, his hometown, by 2005.⁸

[14] In 2007 and after, R. S. would come from Toronto and visit the deceased once a month or so.⁹ He was living in a large residential facility in X called X. It provided him with meals and laundry service. On her visits, R. S. would stay in a hotel or with her niece. She bought food and clothes for the deceased. The PGT would pay for her expenses and her purchases on behalf of the deceased. When she was in X, she could not call the deceased because he had no phone. However, she would call X and speak to the medical office. If she couldn't visit, she would make sure some relative in the area did. The medical records from January 2018 show that she visited the deceased in hospital several times during the last month of his life. She also consulted with hospital staff about his care.¹⁰ She therefore had some knowledge of his health conditions.

[15] The appeal file contains medical records of the deceased from 1994 and 2001-2002,¹¹ some correspondence from his employer in 2002-2004,¹² and some further medical records from 2005-2006.¹³ There is a gap in the medical records from 2006 until January 2018. As the following pages show, the gap seems to be the result of the deceased rarely visiting the doctor during those years. In addition, he evidently did not require hospitalization with conditions related to alcohol consumption or for other reasons from 2006 to 2018.

⁸ A hospital report dated September 8, 2005, shows that he was living in X by then.

⁹ In January 2018, she told hospital staff that she visited the deceased "occasionally;" GD2-I-229.

¹⁰ She testified that from about 2006 she had power of attorney for personal care for the deceased. See also GD2-I-186. Hospital staff accepted that she held his power of attorney for personal care.

¹¹ GD2-I-87, GD3-1-105; GD2-II-246-280

¹² GD2-I-66-68

¹³ GD2-I-80-88

[16] The appeal file contains extensive medical evidence from January 2018. On January 1, 2018, the deceased went to hospital with a fractured leg. The fracture was the result of cancer that had spread from his lungs. He returned to X on January 17 after having a rod inserted in his thighbone.¹⁴ On January 19, 2018, staff at X found him on the floor, cold to the touch, and soaked in urine. He returned to hospital with a blocked artery and kidney trouble.¹⁵ He died less than two weeks later, on January 30, at the age of 62.

The evidence fails to show that the deceased lacked capacity under the CPP

[17] In October 2019, the Minister accepted that the deceased's medical conditions and resulting impairments prevented him from working by his minimum qualifying period of December 2004.¹⁶ The deceased's inability to work since then is not in question.

The deceased's medical history

[18] The medical evidence shows that the deceased suffered from chronic alcoholism and mild cognitive impairment.¹⁷ His medical records from the 1990s show a history of binge drinking and intermittent treatment.¹⁸ Beginning in August 2005, he spent five weeks in the X hospital following an alcohol-related seizure. For the first thirty-six hours, he required heavy intravenous sedation to keep him quiet. The tentative diagnosis was severe delirium tremens. He was very slowly weaned off tranquilizers (benzodiazepines) before discharge from hospital.¹⁹

[19] In October 2006, staff at the X hospital committed the deceased involuntarily because he was incapable of looking after himself. A psychiatrist in Ottawa completed a competency assessment. Doctors contacted the PGT because he could not manage his financial affairs. A doctor who examined him about two weeks after his admission found his thought process generally lucid and coherent. There was mild disorganization

¹⁴ GD2-II-35, 69

¹⁵ GD2-2-30, Ambulance report, January 19, 2018; GD2-I-69-71, Dr. J. Davies, January 20, 2018; GD2-1-77, Dr. K.C. Li, Jan 22, 2018;

¹⁶ GD2-I-61, 65

¹⁷ GD2-I-89

¹⁸ GD3-88

¹⁹ GD2-2-266 ff.; GD2-I-88, 89

and a lack of focus at times. He was having some trouble with memory and concentration. There were no perceptual abnormalities or psychosis.²⁰

[20] There is no evidence of the deceased being hospitalized after 2006. The January 1, 2018 admission report at the X hospital stated that he was last discharged from care in November 2006.²¹

[21] As evidence of the deceased's incapacity, R. S. testified as to the following:

- He used to steal liquor and get put in jail for sleeping in the park;
- He never wanted to go to the hospital. In about 2016, her family members took him to hospital twice for pain in his legs, but both times he left before receiving treatment; and
- The deceased had a beard to his waist. He lost all his teeth. He was reluctant to shower, though sometimes X staff forced him to wash.

[22] On the other hand, R. S. testified that the deceased at all relevant times had a bank account into which the PGT put money. He made frequent withdrawals from the account. He was able to come and go at X as he wished. Over the years, he had days when he was coherent. These activities do not show that he continuously lacked capacity as defined in the CPP.

[23] Further, the gap in the medical evidence from 2006 to 2018 means that there is not enough evidence for me to determine that the deceased's incapacity was continuous throughout that period. The evidence is also insufficient for me to determine during what periods he might or might not have had capacity.

The deceased's circumstances in January 2018

[24] The fact that from January 2007 the deceased was under the care of the PGT is not conclusive evidence of incapacity. As stated above, the CPP requires that a person be incapable of forming or expressing the intent to apply for a CPP disability pension. As the courts have stated, the provisions of the CPP are "precise and narrow."²² The

²⁰ GD2-I-80

²¹ GD2-2-36

²² *Canada (A.G.) v. Danielson, 2008 FCA 78*

courts also tell us that the intention to apply for benefits is not different from the capacity to form an intention with respect to other choices. Further, the activities of a deceased during a period of claimed incapacity may be relevant to their capacity status.²³

[25] As the Minister submitted, in the last month of his life the deceased engaged in a number of activities that indicated capacity. On January 1, 2018, he signed an informed consent to his leg surgery.²⁴ On January 2, 2018, he signed a form refusing treatment with a splint on his right leg.²⁵ Health professionals accepted his refusal to have a transfusion or use a catheter.²⁶ Hospital staff sometimes noted “cognitive delay,” but he was able to follow directions and answer questions.²⁷ These activities suggest that, a mere two weeks after the Minister received his CPP disability application, the deceased did not suffer from incapacity as defined in the CPP. This was in spite of the fact that he was very close to death.

[26] In pursuing this appeal, R. S. relied on the will that the deceased signed on January 13, 2018.²⁸ As the Minister submitted, the Ontario Superior Court of Justice confirmed the validity of this document by providing R. S. with a Certificate of Appointment of Estate Trustee with a Will. This means that the court certified the will as legitimate and binding. It creates a presumption that the deceased had testamentary capacity when he signed the will – that he knew the extent of his property and who would have claims on it after his death.

[27] It seems anomalous that R. S. would rely on a will signed by someone she submitted had lacked capacity for more than a decade before the date he signed it. At the hearing, she submitted that the deceased had not been drinking for almost two weeks because he had been in hospital. She stated that he had therefore regained capacity by the time he signed the will.

²³ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

²⁴ GD2-2-35

²⁵ GD2-I-175

²⁶ GD2-I-77, 126

²⁷ GD2-I-169; GD2-2-117

²⁸ She testified that he had been carrying the will around for years. However, he only signed it on January 13, 2018. She stated that she did not know anything about it until she found it in his room after his death.

[28] There is no medical evidence to support R. S.'s position that more than a decade of claimed incapacity can be reversed by thirteen days without alcohol. Moreover, while the deceased was on alcohol withdrawal protocols on January 2, 2018, by the next day he had near-normal scores on an Alcohol Withdrawal Assessment Scale.²⁹ His alcohol-related symptoms in 2018 were very different from those in 2005, when he spent five weeks in hospital recovering from an apparent alcohol-related seizure. It is reasonable to conclude that if he had testamentary capacity on January 13, 2018, he likely had the same capacity for some time before that. This would include a period of some time before mid-December 2017, the date of the final CPP application.

The Declaration of Incapacity

[29] In November 2019, R. S. submitted a Declaration of Incapacity (Declaration) signed by Dr. Brian Baxter in June 2019.³⁰ The explanation for incapacity was alcoholism and encephalopathy (a disease affecting the brain). The Declaration stated that the deceased's period of incapacity began in November 2006 and ceased on January 30, 2018 (the date of death). It also stated that Dr. Baxter was not treating the deceased at the time of his death.

[30] Dr. Baxter provided no medical records in support of his statement in the Declaration. R. S. testified that Dr. Baxter was the doctor at X. She was aware of his having treated the deceased on a couple of occasions when he had seizures. She was not aware of whether Dr. Baxter had treated the deceased on other occasions after 2006.³¹ I attach little weight to Dr. Baxter's Declaration because of the absence of supporting medical evidence. In addition, there is no evidence of the extent of Dr. Baxter's contact with the deceased from 2006 to 2018.

²⁹ GD2-2-38 ff. The scale records symptoms like nausea, vomiting, tremors, agitation, visual and auditory disturbances, tremors, and whether the person knows the date.

³⁰ GD1-9

³¹ GD2-2-57. The deceased stated in January 2018 that "he never follows up with any physicians."

My findings

[31] The evidence fails to show that it is more likely than not that the deceased lacked the capacity within the meaning of the CPP to form or express the intent to apply for a CPP disability pension from November 2006 to December 15, 2017.

CONCLUSION

[32] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security