

[TRANSLATION]

Citation: *M. M. v. Minister of Human Resources and Skills Development*, 2013 SSTGDIS 3

Appeal No: 122496

BETWEEN:

**M. M.**

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: Shane Parker

TYPE OF HEARING: Decision on the basis of the record

DATE OF DECISION: November 7, 2013

## **DECISION**

[1] The Tribunal finds that the Appellant's period of incapacity started in April 2008.

## **INTRODUCTION**

[2] The Appellant submitted an Old Age Security (OAS) application, which was stamped by the Respondent on April 15, 2009. The Respondent awarded him a full pension as of February 2010. The Appellant then submitted a Guaranteed Income Supplement (GIS) application on August 23, 2011. The Respondent granted him the benefit as of September 2010, 11 months before the date of his application (the initial decision). The Respondent received an incapacity form from the Appellant in April 2012. The Respondent found that the legislative provision on incapacity did not apply to the Appellant with respect to the GIS application and upheld its initial decision. The Appellant requested a reconsideration of this decision on December 19, 2011. In a letter dated August 27, 2012, the Respondent denied the request for reconsideration, and on September 18, 2012, the Appellant appealed from this decision to the Office of the Commissioner of Review Tribunals (the OCRT). On May 25, 2013, the Appellant submitted his Notice of Readiness to the Social Security Tribunal (the Tribunal). The Respondent submitted its Notice on August 9, 2013. The Notices of Readiness confirm that the parties have no additional documents or submissions to present to the Tribunal, aside from those accompanying the Notice or those that have already been presented to the Tribunal.

## **TYPE OF HEARING**

[3] For the following reasons, this appeal was decided on the basis of the record.

[4] The Tribunal is guided by the general provision in section 2 of the *Social Security Tribunal Regulations* (the Regulations), which reads as follows: "These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications."

[5] The Supreme Court of Canada has suggested that, at the heart of the issue of whether the failure to accord a hearing is inconsistent with participatory rights, it must be determined whether those whose interests were affected had a meaningful opportunity to present their case fully and fairly (*Baker* [1999] 2 S.C.R. 817, paragraph 30).

[6] In this decision, the Court stated that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved. “The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations” (*Baker* [1999] 2 S.C.R. 817, paragraph 33).

[7] Paragraph 28(a) of the Regulations enables the Tribunal to make a decision on the basis of the record, without delay.

[8] After reviewing the evidence and submissions presented by the parties to the appeal, the Tribunal decided to make a decision on the basis of the record.

[9] To make its decision, the Tribunal took into account the following factors:

- a) The cost-effectiveness and expediency of the hearing choice;
- b) The parties presented submissions and documents that enabled the Tribunal to decide on the issue.

## **APPLICABLE LAW**

[10] In this case, the relevant legislative provisions are the following.

[11] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 stipulates 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.

[12] The relevant provisions of the *Old Age Security Act* (the OAS Act) are the following:

### **Supplement payable**

**11.** (1) Subject to this Part and the regulations, for each month in any payment period, a monthly guaranteed income supplement may be paid to a pensioner.

### **Requirement for application**

(2) Subject to subsection (4), no supplement may be paid to a pensioner for a month in any payment period unless an application for payment of a supplement has been made by the pensioner and payment of the supplement for months in that year has been approved under this Part.

### **Limitations on payment of supplement**

(7) No supplement may be paid to a pensioner for

(a) any month that is more than eleven months before the month in which the application is received or is deemed to have been made or in which the requirement for an application has been waived, as the case may be;

### **Incapacity when application actually made**

**28.1** (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.

### **Where previous incapacity**

(2) 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 was 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 beginning on the day on which that person had ceased to be incapable and comprising 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 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.

### **Period of incapacity**

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

### **Application**

(4) This section applies only to persons who were incapacitated on or after January 1, 1995.

## **ISSUES**

[13] In this case, the Tribunal must decide on the following issues:

1. Was the Appellant incapable of forming or expressing an intention to make a GIS application before August 23, 2011?
2. If so, the Tribunal must determine the period of incapacity.

## **EVIDENCE**

[14] The Tribunal took the entire record into account. The following is a summary of the relevant evidence in this case.

[15] The Appellant was born in Canada on January 1, 1945. He has been blind since 1981. His OAS application was accepted at a rate of 40/40, and was payable as of February 2010. The Respondent received the Appellant's GIS application on August 23, 2011. The Respondent granted him the benefit, which was payable as of September 2010 (in other words, 11 months before the date of the application). On the incapacity form completed in March 2012, Dr. Grenier checked "NO" in response to the following question: [Translation] "Does or did the applicant's condition render him incapable of forming or expressing an intention to make an application?"

## **SUBMISSIONS**

[16] The Appellant contests the maximum retroactive period for the GIS payment of 11 months before the date of the application for the following reasons:

- a) His blindness prevented him from applying earlier;
- b) He relies on someone else to complete his tax returns, and that individual forgot to apply for the GIS on his behalf;
- c) He had no knowledge of the GIS before the date of the application as a result of his blindness.

[17] The Respondent made the two following submissions:

- a) The provisions for the maximum retroactive period for the GIS, namely, 11 months before the date of the application, were followed;
- b) The evidence provided does not show that the Appellant was incapable of forming or expressing an intention to make a GIS application before August 23, 2011. Therefore, the maximum retroactive period in this case is 11 months before the date of the application.

## ANALYSIS

### **Issue no. 1: Was the Appellant was incapable of forming or expressing an intention to make a GIS application before August 23, 2011?**

[18] The Appellant must establish, on a balance of probabilities, that he was incapable of forming or expressing an intention to make a GIS application before August 23, 2011.

[19] The Tribunal notes the statement made by the parties in their Notices of Readiness that they had no additional documents or submissions to present to the Tribunal. Consequently, the Tribunal relies on the documents and submissions that have already been presented.

[20] According to section 28.1 of the OAS Act, the issue is whether the person was incapable of forming or expressing an intention to make a benefit application. The incapacity must be continuous (*Canada (Attorney General) v. Poon*, 2009 FC 654).

[21] The Federal Court of Appeal stated that the activities and the medical documents can help the Tribunal determine whether an individual was incapable of forming or expressing an intention to make a benefit application (*Slater v. Canada (Attorney General)*, 2008 FCA 375). In this case, the most persuasive medical document is the incapacity form completed by Dr. Grenier. The doctor studied the main issue and answered “NO” to the question.

[22] The Tribunal notes the Appellant’s written statements. The fact that he relies on other people to complete his documents does not constitute an incapacity within the meaning of the OAS Act. On the contrary, it indicates that the Appellant is quite capable of forming or expressing an intention to make a benefit application. The Tribunal finds that the Appellant formed or expressed his intention to submit his OAS application. In addition, ignorance of rights does not fall under the definition of incapacity set out in the OAS Act.

[23] In conclusion, the Tribunal finds that the Appellant did not meet the incapacity criterion set out in the OAS Act and that the maximum retroactive period for his GIS is 11 months before the date of his application, in other words, as of September 2010.

[24] Since the first issue was decided in the negative, the Tribunal does not have to decide on the second issue.

## **CONCLUSION**

[25] The appeal is dismissed.

*Shane Parker*

Member, General Division