Citation: *A. M. v. Minister of Employment and Social Development*, 2014 SSTAD 314

Appeal No. AD-13-746

BETWEEN:

A. M.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: November 4, 2014

DECISION

[1] The Tribunal refuses Leave to Appeal.

BACKGROUND

[2] This Application is brought pursuant to ss. 56(2) of the *Department of Employment and Social Development Act, ("DESD Act*"). The Applicant seeks leave to appeal from the decision of the General Division issued August 21, 2013 summarily dismissing her appeal from a decision to deny her payment of Old Age Security, ("OAS"), benefits, retroactive to 1998.

[3] The General Division Member summarily dismissed the Appellant's appeal because she found that the appeal had no reasonable chance of success.

[4] The General Division Member found that section 8 of the OAS Act, which prescribes when the payment of an OAS pension commences, provides for a maximum retroactivity period of one year. The Member found as fact that the Appellant turned 65 years old in 1998 but did not apply for OAS benefits until February 23, 2011. The application was approved, with payment of pension commencing in March 2010, which is 11 months prior to the date the Application for OAS benefits was received. Accordingly, the General Division Member summarily dismissed the appeal.

[5] The Applicant contends that payment ought to commence one month after her 65th birthday, that is, in May 1998 and not in March 2010.

GROUNDS OF THE APPLICATION

[6] On her behalf, the Applicant's representative has put forward two grounds that in her view form the basis of the Application. They are,

(a) That pursuant to paragraph 58(1)(c) of the *Department of Employment and Social Development Act, ("DESD Act*"), the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

(b) During the period of the application (in 1998), the Applicant was incapable of forming or expressing an intention to make an application.

ISSUE

[7] (a) The Tribunal must decide whether the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

(b) The Tribunal must also decide whether the General Division erred in law by failing to consider whether during the period of the application, the Applicant was incapable of forming or expressing an intention to apply for OAS benefits.

THE LAW

The Appeal Process

[8] The applicable legislative provision is found in s. 56 of the DESD Act. Ss. 56(1) provides that the ability to bring an appeal to the Appeal Division is contingent upon the grant of leave to do so. Thus per ss. 56 (1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted."

[9] An exception to the requirement to obtain leave is contained in ss. 56(2) where the appeal is against summary dismissal by the General Division, namely, "despite subsection (1), no leave is necessary in the case of an appeal brought under subsection 53(3) (summary dismissal).

[10] With respect to the grounds of appeal, ss. 58(1) of the DESD Act sets out and limits the grounds of appeal as follows, that:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The Relevant OAS Act provisions

[11] The Applicant is relying on the third of the grounds of appeal set out in s. 58. She is also relying on s. 28.1 of the OAS Act, namely,

> 28.1 *Incapacity when application actually made* – (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 in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[12] Ss. 28.1 (4) prescribes that the section "applies only to persons who were incapacitated on or after January 1, 1995."

SUBMISSIONS

[13] The Applicant's representative submits that she has been "incapacitated" since 1998, the year she turned 65 years old. In the representative's submission the Applicant had been, since 1998, "incapable of forming or expressing an intention to make an application." As evidence of the Applicant's incapacity, her representative submits the Applicant,

a) Did not have the resources of this pension (the OAS pension) and did not know how to go about applying for it;

b) Has limited education and facility in English and, further, did not know about the OAS pension and was ignorant of how to apply for it.

c) Was misinformed about the OAS pension and relied on this misinformation to her detriment as she lacked the skills and resources to question the erroneous advice.

[14] The Respondent has not filed any written submissions.

ANALYSIS

a) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[15] Beyond the bald statement, the Applicant and her representative have not put forward any evidence that could establish that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, and thus was in error. Accordingly, the Tribunal finds that this ground of Appeal has not been made out.

b) The Applicant was incapable of forming or expressing an intention to make an application for OAS benefits prior to February 23, 2011.

[16] This question is a question of mixed fact and law, namely, whether the Applicant meets the definition of incapacity and, if the definition is met, whether and to what extent she is entitled to a further retroactive payment of OAS benefits. This is not a question that was squarely before the General Division, although the evidence on which the Applicant relies was in fact contained in documents that were before the General Division. Indeed, the only question that was before the General Division appeared to have been the issue of the Applicant's detrimental reliance on erroneous advice provided by Service Canada staff and Canadian Consular officials.

Erroneous advice

[17] The Applicant raised the issue of erroneous advice before the General Division, which dealt with and dismissed it. The Tribunal finds that the General Division's decision in regard to the issue of erroneous advice meets the *Dunsmuir* test for reasonableness. The

General Division reasons permit the Tribunal to understand why the General Division Member made her decision and to determine whether her conclusions were within the range of possible acceptable outcomes, which the tribunal so finds. (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190); N*ewfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

<u>Incapacity</u>

[18] With respect to the issue of the Applicant's capacity to form or express the intention to apply for an OAS benefit, the Tribunal notes that in *Canada (Attorney General) v. Poon, 2009 FC 654*, Beaudry, J. writing for the Court offered the following guidance on the interpretation and application of OAS s. 28.1. Beaudry, J. explained the interpretation to be given to the expression "incapable of forming or expressing an intention" thus,

> [29] The terms used in subsection 28.1(2) of the Act are not whether a person has been incapable of making an application, but rather whether a person is incapable of *forming or expressing an intention* to make an application. Furthermore, the incapacity must be continuous [subsection 28.1(3) of the Act; *Goodacre v. Canada (Minister of Human Resources Development), 2000 LNCPEN 19, Appeal No. CP07661, June 21, 2000 (P.A.B.)]*. The medical reports and the activities performed by the Respondent during the alleged period of incapacity are fundamental to a determination of incapacity.

[19] At paragraph 30 of the decision, Beaudry, J. went on to set out the considerations that should apply when OAS s. 28.1 is being interpreted, noting that

> [30] When interpreting section 28.1 of the Act, the question is not whether a person is capable of dealing with the consequences of an application, but rather whether that person was capable of forming an intention to apply or not [*Morrison v. Canada (Minister of Human Resources Development), 1997 LNCPEN 49, Appeal No. CP04182, May 4, 1997 (P.A.B.)]*.

[20] Beaudry, J. also indicated that the capacity of the applicant to form or to express the intent to apply for OAS benefits was a question of mixed fact and law and therefore reviewable on the standard of reasonableness. (para. 25.)

[21] In the instant case, the Applicant's representative stated the Applicant is incapacitated because of her lack of schooling, limited literacy in English, and lack of money and absence of prior knowledge about the OAS. Prior Review Tribunal case law does not support her position. Review Tribunals have always looked to a medical component as forming the basis of incapacity under s. 28.1. Thus, in *C-70042 v. MHRD (October 22, 2002) RT*, the Review Tribunal stated,

> "The capacity threshold should be set at a low level. It is not a matter of general, as opposed to specific, intent. Ignorance of the law and lack of knowledge about available benefits or about the right to apply is not lack of capacity to form an intention. Ability to perform the actions of day-to-day life is considered evidence of capacity to form and express an intention." Further, in *V-35107 v. MHRD (July 30, 1998) (RT)* the Review Tribunal stated, "A person cannot be considered incapable of forming or expressing the intention to apply for the sole reason that they did not know the law. In spite of mental health problems, including poor judgment, limited intelligence and weak education, the evidence must indicate a mental or physical problem so severe as to cause incapacity in the sense of the legislation."

[22] In this regard, these Review Tribunal decisions remain good law and while not binding upon this Tribunal, are of persuasive authority. However, more than these Review Tribunal decisions, the Tribunal places further reliance on the case law developed under ss.60(9) of the *Canada Pension Plan, ("CPP").*

[23] It was argued in *Poon* that the wording in OAS ss. 28.1(2) is identical to the wording of CPP ss. 60(9) and thus, by analogy, the legal test for both statutory provisions should be identical. Ss. 60(9) states,

> 60(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 in the month that the Minster considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[24] It is readily apparent that there are differences between the two legislative provisions. First, OAS s. 28.1 does not contemplate a situation where the application is made by the person themself; whereas CPP ss. 60(9) does contemplate the application being made either by the person or by someone on their behalf. Secondly, CPP ss. 60(9) speaks to a situation where the disability has ceased, while OAS s. 28.1 does not. These differences, notwithstanding, both provisions hinge on the similar question of capacity to "form or express an intention" to apply for benefits under the applicable legislation. It is this point and the discussion surrounding it that is relevant.

[25] With respect to the nature of CPP ss. 60(9), the Federal Court of Appeal in *Canada (Attorney General) v. Danielson, 2008 FCA 78* described the provision as, "precise and focused in that it does not require consideration of 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." Thus, "the activities of a claimant during the period between the claimed date of commencement of disability and the date of application may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered."

[26] In making this statement, the Federal Court of Appeal was echoing the position of the Pension Appeals Board, ("the PAB"), in *Morrison v. MHRD (1997), CP 4182 (PAB),* where the PAB stated, "the provisions of (CPP) s.60(8)-(11) are precise and narrow, rather than general or flexible. The issue of whether the Appellant was capable of forming or expressing an intention to make an application is a narrow question, but difficult to answer. The answer may involve expert medical opinion related, in particular, to the period between the claimed date of commencement of the disability and the date of eventual application for

disability benefits, and very important, the relevant activities of the individual concerned between the claimed date of commencement of the disability and the date of application which cast light on the capacity of the person concerned during the period of so "forming and expressing" the intent."

[27] The Applicant and her representative have put forward no medical opinion that could establish whether or not the Applicant was incapable of forming and expressing an intention to make an application for OAS benefits in 1998 and continuously until February 23, 2011. Neither have they furnished any evidence of her activities between the relevant period that could cast light on her capacity to form and express an intention to make an application for OAS benefits. However, in her letter dated January 12, 2012, the Applicant indicates that as far back as 1986, the Applicant and her husband approached a Canadian consulate for information on how to apply for an OAS pension. In 1986 the Applicant was 53 years old. The Tribunal finds that these actions belie the present claim that in 1998 the Applicant was "incapable of knowing of the Old Age Security Pension when she turned sixty-five years of age."

[28] Further, the Tribunal finds that by approaching a Canadian Consulate in 1986 to inquire about eligibility, it indicates that, by 1986 the Applicant had formed the requisite intention for the application for an OAS pension. The Tribunal finds that her actions undermine the Applicant's claim of being unable to form or express an intention to apply for an OAS pension in 1998.

[29] Additionally, the Tribunal finds that the absence of medical documentation relating to the period between the claimed date of commencement of the disability and the date of eventual application for disability benefits, which is clearly contemplated by the case law, undermines the Applicant's claim of incapacity. On the basis of the foregoing, the Tribunal finds the Applicant has failed to make out an arguable case.

[30] In light of the above analysis the Tribunal is satisfied that the General Division Member did not err in law when she made the decision to summarily dismiss the Appellant's appeal.

CONCLUSION

[31] The Application for Leave to Appeal is refused.

Hazelyn Ross

Member, Appeal Division