



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Minister of Employment and Social Development v. J. C.*, 2016 SSTADIS 492

Tribunal File Number: AD-16-869

BETWEEN:

Minister of Employment and Social Development

Applicant

and

J. C.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: December 20, 2016

REASONS AND DECISION

INTRODUCTION

[1] The General Division (GD) of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal. The GD found that

- a) The Respondent was unable to form or express an intention to make an application for an Old Age Security (OAS) pension before August 31, 2011; and
- b) The Respondent met the incapacity criterion set out in the *Old Age Security Act* (OAS Act), that he was unable to form or express an intention to make an application for benefits between 2001 and 2011 and that his incapacity was continuous until 2011.

History of the file

[2] The Applicant received an application for an OAS pension from the Respondent in August 2011.

[3] The Applicant granted the Respondent a full pension as of July 2010, i.e. 11 months before the date of his application.

[4] Through his representative, the Respondent sought reconsideration of this decision because of his inability to form or express an intention to make an application for the OAS pension before August 31, 2011. The Applicant maintained its original decision.

[5] The Respondent appealed this decision to the Office of the Commissioner of Review Tribunals (the "OCRT"), and its appeal was transferred to the Tribunal in April 2013.

[6] The GD hearing was held by teleconference on October 6, 2015. The GD rendered its decision on March 26, 2016.

[7] The Applicant filed an application for leave to appeal (Application) to the Appeal Division (AD) on June 27, 2016, within the prescribed time.

[8] In its Application the Applicant notes as follows:

- (a) The GD based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it;
- (b) With regard to the application of section 28.1 of the OAS Act, the claimant's period of incapacity must be continuous;
- (c) The Respondent applied for an OAS pension on his own behalf; he was capable of forming an intention to make an application on August 25, 2011;
- (d) Accordingly, subsections 28.1(2) and (3) of the OAS Act apply;
- (e) The onus of establishing incapacity under section 28.1 of the OAS Act lies with the person alleging it; and
- (f) There is persuasive evidence in the file that the Respondent formed an intention to engage in various activities and that he made decisions relating to other choices that arose for him, in particular during the period between his 65th birthday in May 2007 and before making his application for an OAS pension in August 2011. However, the GD did not take this evidence into consideration in its reasons.

[9] The Tribunal sent a copy of the Application to the Respondent and his representative by letter on July 4, 2016. The Respondent's representative did not receive it, and a second copy was sent to him. He received it on August 22, 2016.

ISSUE

[10] Does the appeal have a reasonable chance of success?

THE LAW AND ANALYSIS

[11] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* provide that “[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted” and that the Appeal Division “must either grant or refuse leave to appeal.”

[12] Subsection 58(2) of the *Department of Employment and Social Development Act* provides that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[13] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

- (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.

[14] The Tribunal grants leave to appeal if it is satisfied that an applicant has established at least one of the aforementioned grounds of appeal and that one of those grounds has a reasonable chance of success.

[15] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction or relating to a principle of natural justice the answer to which may justify setting aside the decision under review.

[16] The Applicant’s argument is based on the OAS Act, and on section 28.1 in particular.

[17] Subsections 28.1(1) to (4) of the OAS Act apply to applications for benefits where the individual’s capacity is in question.

[18] On August 25, 2011, the Respondent filed an application for an OAS pension on his own behalf. In September 2011, his application was approved (by the Applicant) and he was granted a full OAS pension starting in July 2010. The Respondent subsequently sought benefits

for the period from June 2007 (the month following his 65th birthday) until August 2010. This application was not approved.

[19] In October 2012, the Respondent authorized a legal representative to act with regard to his application for OAS benefits for the period from June 2007 until August 2010. He sought reconsideration of the case.

[20] Upon reconsideration, the Applicant maintained its decision and advised that [Translation] “the Department could not grant benefits ... prior to 11 months of receipt of the application.” The decision letter, dated January 22, 2013, explained that the claimant’s condition did not meet the definition of continuous incapacity within the meaning of section 28.1 of the OAS Act.

[21] The Respondent appealed this decision. The appeal was transferred to the Tribunal in April 2013. The Respondent was successful before the Tribunal’s GD.

[22] The GD’s decision notes in part as follows:

[Translation]

[13] The issue is to determine whether the appellant was unable to form or express an intention to make an application for an OAS pension between 2001 and 2011 under section 28.1 of the OAS Act. The incapacity must be continuous.

...

[17] The Tribunal therefore determines, on the basis of the evidence in the file and the testimony, that the appellant was unable to form or express an intention to make an application before August 31, 2011. More specifically, the Tribunal’s decision is based on the declaration of incapacity signed on October 20, 2011, by Dr. Groulx, which indicated that the appellant had been suffering from cognitive impairment since June 14, 2001, and from chronic depression associated with chronic alcoholism. Dr. Groulx had been treating the appellant since the beginning of his incapacity. In response to the question as to whether the applicant’s condition rendered him incapable of forming or expressing an intention to make an application, he replied that it did. He added that the appellant’s condition had improved in 2011 and that he was capable of making his application for benefits. According to the testimony of the appellant’s wife and son, it appears that the appellant’s activities between 2001 and 2011 were limited to being intoxicated, and that it was the appellant’s wife who took care of the family home, the finances and the appellant’s medication, with her son’s help, since the appellant was not managing anything and was not paying the mortgage or anything else. According to the testimony, the appellant was unable to manage his own or his family’s affairs, as of 2007 in particular.

[18] In conclusion, the Tribunal finds that the Appellant met the criterion of incapacity set out in the OAS Act, that he was unable to form or express an intention to make an application for benefits between 2001 and 2011 and that his incapacity was continuous until 2011.

[23] The Applicant cited the following cases: *Sedrak v. Canada*, 2008 FCA 86, *Canada v. Kirkland*, 2008 FCA 144, *Canada v. Danielson*, 2008 FCA 78, *Canada v. Y.C.*, CP26648, *J.F. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 34 and *Minister of Human Resources and Skills Development v. R.T.*, 2015 SSTAD 514. It argued that the fact that the Respondent had filed a pension application in August 2011 shows that he was capable within the meaning of the OAS Act. Furthermore, the file contained medical evidence from 2007 to 2011 of the Respondent's activities and his ability to relate his own condition to the various health professionals. However, there was absolutely no medical evidence in the file for a five-year period during the time in question. Therefore, the Respondent's incapacity was not continuous from May 2007 to August 2011.

[24] Alternatively, the Applicant maintains that the Respondent was sober in August 2008 and that, while incapacity was present in 2007, it ended in August 2008. To be subject to the application of subsection 28.1(2) of the OAS Act, he had to file his application by August 2009 at the latest, but he did not do so until August 2011.

[25] I note that the GD made no mention of the lack of medical evidence in the file for a number of years during the period in question or of the medical documentation in the file other than Dr. Groulx's declaration of incapacity of October 2011. Although the GD need not refer to every piece of evidence in the file, it is possible to conclude that there has been an error of fact when the decision-maker fails to mention and analyze significant evidence.

[26] I note also that the GD referred to the OAS Act and to *Slater v. Canada (Attorney General)*, 2008 FCA 375. However, the decision does not refer to the jurisprudence cited by the Applicant in the Application.

[27] After reviewing the appeal book, the GD's decision and the Applicant's arguments, I find as follows:

- a) The Applicant raised an issue relating to an error in law – application of the jurisprudence on incapacity and section 28.1 of the OAS Act – the answer to which may justify setting aside the decision under review; and
- b) The Applicant raised an issue relating to a finding of fact (made in a perverse or capricious manner or without regard for the material before it) the answer to which may justify setting aside the decision under review.

[28] The appeal has a reasonable chance of success with regard to an error in law, an error of fact or an error of mixed law and fact.

CONCLUSION

[29] Leave to appeal is granted.

[30] This decision granting leave to appeal does not presume the outcome of the appeal on the merits of the case.

[31] I invite the parties to make submissions on the following questions: whether a hearing is appropriate; if so, the form of hearing; and the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division