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

Citation: *T. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 488

Tribunal File Number: AD-16-959

BETWEEN:

T. C.

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 by: Neil Nawaz

Date of Decision: December 15, 2016

REASONS AND DECISION

DECISION

[1] Extension of time to appeal and leave to appeal are granted.

INTRODUCTION

[2] The Office of the Public Guardian and Trustee (Applicant or OPGT) seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal (SST) dated March 31, 2016, in which it found that its ward, T. C., was not incapacitated from applying for a Guaranteed Income Supplement (GIS) prior to March 2012.

[3] On July 21, 2016, beyond the required time restriction, the Applicant filed an application for leave to appeal with the Appeal Division (AD) of the SST, alleging various errors by the GD.

BACKGROUND

[4] Mrs. T. C., whose financial interests are represented by the OPGT, was born in September 1936 and reached the age 65 in September 2001. On March 6, 2012, the Applicant submitted to the Respondent two GIS applications on behalf of Mrs. T. C. for the payment periods of July 2010 to June 2011 and July 2011 to June 2012. On May 29, 2012, the Respondent approved the applications effective April 2011.

[5] In a letter dated June 6, 2012, the Applicant advised the Respondent that it had been appointed as Statutory Guardian of Property for Mrs. T. C. in April 2003, when she was found incapable of managing her finances, to August 2003 when private guardianship was granted to Mrs. T. C.'s spouse. The OPTG resumed guardianship effective March 28, 2011, and learned that Mrs. T. C. was last in pay for the GIS in June 2005. The Applicant asked the Respondent to reconsider its decision and award retroactive payment of the GIS for the period July 2005 to March 2011, as Mrs. T. C. was incapable of submitting an application for the GIS during that period.

[6] At the request of the Respondent, Bill Lim, a general practitioner, completed a Certificate of Incapability on June 30, 2012. He wrote that he had known Mrs. T. C. since March 2005 and did not consider her capable of managing her own affairs. He said her impairment, which he attributed to dementia, started on April 1, 2005, and he did not expect her condition to improve.

[7] In a letter dated July 27, 2012, the Respondent advised the OPGT that it had previously forwarded the wrong form for completion. The Respondent enclosed a Declaration of Incapacity, which Dr. Lim duly completed on August 16, 2012. In it, he wrote that Mrs. T. C.'s condition, which he described as "dementia – Alzheimer's," made her incapable of forming or expressing the intention to make an application. He noted that her incapacity began in 2010 and was ongoing.

[8] On March 5, 2013, Dr. Lim wrote a letter to the Respondent in which he summarized Mrs. T. C.'s medical history, noting that she had been admitted to the Mon Sheong Facility on March 31, 2005 with diagnoses of dementia, diabetes mellitus, depression, hypertension, renal impairment and coronary artery disease. Previously, Mrs. T. C. had been in another nursing home. On September 1, 2011, she was assessed by the Geriatric Mental Health Outreach Team and found to have impaired judgment and insight. Dr. Lim "deemed" Mrs. T. C. unable to manage her finances and her health care as of 2011, although he did not know the exact date the incapacity occurred.

[9] On March 14, 2013, the Respondent advised the Appellant that, having reconsidered the matter, it had decided to maintain its original decision concerning the effective date of Mrs. T. C.'s GIS benefits.

[10] In a letter dated April 9, 2013, the Applicant appealed the Respondent's reconsideration decision to the GD, claiming that Mrs. T. C.'s incapacity was proven in 2003 when she was deemed incapable of managing her property under section 16 of the *Substitute Decisions Act, 1992* (SDA).

[11] On March 31, 2016, the GD issued its decision to deny Mrs. T. C. further retroactive GIS benefits, citing insufficient evidence to show she was incapable of forming or expressing

an intention to make an application, as demanded under subsection 28.1(1) of the *Old Age Security Act* (OAS Act).

THE LAW

Old Age Security Act

[12] Subsection 11(2) of the OAS Act states that, unless the Minister has waived the requirement for an application, 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.

[13] Paragraph 11(7)(a) of the OAS Act states that no supplement may be paid to a pensioner for any month that is more than 11 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.

[14] Subsection 28.1(1) of the OAS Act states that 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. Subsection 28.1(3) of the OAS Act states that a period of incapacity must be continuous.

Department of Employment and Social Development Act

[15] Pursuant to paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal must be made to the AD within 90 days after the day on which the decision was communicated to the Applicant.

[16] The AD must consider and weigh the criteria as set out in case law. In *Canada (Minister of Human Resources Development) v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

(a) The Applicant must demonstrate a continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) The matter discloses an arguable case; and

(d) There is no prejudice to the other party in allowing the extension.

[17] The weight to be given to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada (Attorney General) v. Larkman.*[2]

[18] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted, and the AD must either grant or refuse leave to appeal.

[19] Subsection 58(1) of the DESDA sets out that the only grounds of appeal are the following:

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

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

(c) The General Decision 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.

[20] Subsection 58(2) of the DESDA provides that "leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success."

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[21] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] F.C.J. 1252. The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[22] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success.

ISSUES

[23] I must decide two questions: Should an extension of time to make the application for leave to appeal be granted? If so, does the appeal have a reasonable chance of success? Both questions turn on whether the Applicant has an arguable case.

SUBMISSIONS

[24] In its application requesting leave, received by the SST on July 21, 2016, the Applicant wrote that its office received the GD's decision on April 15, 2016. It was late in seeking appeal because the decision was not mailed to the attention of the Representative, and OPGT staff did not forward the Decision to the Representative until the end of the 90-day appeal period. As the instructions specified that the application for leave was to be sent to a post office box and mailing time counted within the 90-day period, it was not possible for it to be returned within that time frame. The Applicant asked that the AD consider the well-being of an incapable and vulnerable adult.

[25] The Applicant also alleged that the GD erred in:

- Misstating medical evidence provided by the Applicant's physician;
- Contradicting its own findings in respect of the evidence;
- Failing to take evidence into account in coming to its final conclusion;
- Relying on erroneous findings of fact in deciding how to weigh the evidence.

[26] The Applicant also alleged that the GD erred in law by misinterpreting section 16 of the SDA and its intersection with section 28.1 of the OAS Act.

ANALYSIS

[27] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the GD's decision was mailed to the OPGT in care of Karen Bowyer on April 1, 2016, and the Applicant indicated it was received on April 15, 2016. The Applicant submitted a leave to appeal application on July 21, 2016—97 days later.

[28] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[29] The record indicates that the Applicant responded to the GD's decision only seven days after 90-day deadline had elapsed. I am willing to give the Applicant the benefit of the doubt on this factor and find that she had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[30] The Applicant suggested that there was a delay in forwarding the GD's decision to the Applicant's representative, Jaël Marques de Souza, counsel to the OPGT. However, I note that Ms. Marques de Souza appears to be an employee of the OPGT and works from the same office to which the GD's decision was sent. I see no reason why the Applicant could not have sooner put the GD's decision into the hands of appropriate personnel.

Arguable Case

Misstating medical evidence

[31] The Applicant submits that the GD misstated evidence when it wrote at paragraph 38 of its decision:

> As an added complication, Dr. Lim reported in March 2013 that Mrs. T. C. "is deemed to be unable to manage her finances and her health care since 2011." This statement is

> difficult to reconcile with Dr. Lim's earlier report that Mrs. T. C. became incapacitated in 2010. Unfortunately, there are no other reports on file from Dr. Lim that clarify this apparent contradiction. As a result, the Tribunal is left to wonder whether Dr. Lim changed his opinion on incapacity between August 2012 (when he completed the Declaration of Incapacity) and March 2013 (when he wrote his letter).

[32] Dr. Lim's letter of March 5, 2013 states:

> [Mrs. T. C.] is deemed to be unable to manage her finances and her health care since 2011. There is no exact dates when these occurred. There is no information from her previous nursing home.

[33] The Applicant argues that this statement from Dr. Lim addressed the fact that he did not have access to the "exact dates" when Mrs. T. C. was found incapable and further explained that he did not have records from her previous nursing home. Although the GD referenced Dr. Lim's March 5, 2013 letter, it failed to take it into account in considering the two dates provided by Dr. Lim. The Applicant alleges that the GD relied on an erroneous finding that there were no other reports on file from Dr. Lim to clarify his apparently "contradictory" findings that Mrs. T. C. was incapacitated in first 2010, then 2011.

[34] Having reviewed the GD's decision against the supporting evidence, I see no arguable case on this ground. When paragraph 38 is read in conjunction with paragraph 37, it becomes apparent that it is part of a larger discussion in which the GD attempted to reconcile Dr. Lin's apparently inconsistent statements concerning the nature and duration of Mrs. T. C.'s incapacity. As noted in the decision, Dr. Lin variously listed the date of onset of incapacity as April 1, 2005 (in the June 30, 2012 Certificate of Incapability), 2010 (in the August 16, 2012 Declaration of Incapacity) and 2011 (in his March 5, 2013 handwritten letter). The Applicant denies there were "no other reports" to clarify the "apparent contradiction" between 2010 and 2011, pointing to a passage in the March 5, 2013 letter. However, in conceding there were "no exact dates" and "no information" from the previous nursing home, Dr. Lim did not resolve the inconsistency in dates; he merely explained it. The GD was within its authority to make a determination that Dr. Lin's evidence on this point was unreliable, and I see no reason to interfere where the GD provided considered reasons for this assessment.

Contradicting its own findings

[35] The Applicant alleges the GD contradicted itself by equating the capacity to make a decision about healthcare and property with intent to bring an application for benefits in one instance, yet relying on a distinction between the different types of capacity in coming to its final decision. At paragraph 37, the GD stated that Dr. Lim reported in the August 2012 Declaration of Incapacity that "the incapacity began in 2010." At paragraph 38, the GD stated that Dr. Lim reported in his March 2013 letter that Mrs. T. C. was "deemed to be unable to manage her finances and her healthcare since 2011," which it said was "difficult to reconcile with Dr. Lim's earlier report that Mrs. T. C. became incapacitated in 2010," leading to an "apparent contradiction."

[36] However, the August 2012 Declaration of Incapacity speaks to Mrs. T. C.'s inability to form or express an intention to make an application. In equating the capacity to make decisions about property or healthcare with the capacity to form or express an intention to make an application, the GD contradicted its own finding that the capacity to make decisions about property or healthcare is different from the capacity to form or express intent to bring an application. The GD relied on the distinction between capacity to form intent to apply for benefits and capacity to make decisions involving property in finding that there was insufficient evidence to demonstrate that Mrs. T. C. lacked the ability to form the intent to apply for benefits. However, unless both capacities speak to the capacity to form the intent of applying for benefits, then her finding that there is a contradiction between Dr. Lim's statements regarding Mrs. T. C.'s capacity in 2010 and 2011 is erroneous.

[37] I see at least a reasonable chance of success on this ground. The GD based its decision on purported inconsistencies in Dr. Lim's various determinations of incapacity onset, but that did not stop it from also positing an explanation, in paragraph 36, for the differing dates arising from the two definitions of incapacity that were in play:

> The issue of whether a person is incapable of managing her own affairs is not the same as whether a person is incapable of forming or expressing an intention to make an application. The two are no doubt related, but they are not the same. The ability to manage one's affairs is arguably much more encompassing than the ability to form or express an intention to make an application. This may explain why Dr. Lim felt that

> Mrs. T. C. was incapable of managing her affairs in 2005 but not incapable of forming or expressing an intention to make an application until sometime in 2010.

[38] I agree that Dr. Lim's statements about the date of onset of Mrs. T. C.'s incapacity were not necessarily inconsistent if, as was likely, her mental condition progressively deteriorated. As noted by the GD, an inability to express or form an intention to apply suggests a greater degree of incapacity than an inability to make decisions about property or healthcare. Mrs. T. C. might have had capacity to express or form an intention to apply in 2005 or prior to 2010 (while being still incapable of making decisions about property or healthcare at that time), but she might have lost the capacity to express or form an intention to apply by 2011. In such a scenario, all of Dr. Lim's statements about onset might have been true, but the GD apparently did not consider this possibility.

Accepting evidence yet failing account for it in conclusion

[39] The Applicant alleges that, despite impugning Dr. Lim's reports, it nevertheless accepted, in paragraph 36, his finding that Mrs. T. C. was incapable of managing her affairs in 2005 but not incapable of forming or expressing an intention to make an application until sometime in 2010.

[40] I see no arguable case on this round. A full reading of paragraph 36 indicates that the GD did not make a finding that Mrs. T. C. became incapable of forming or expressing an intention to make an application in sometime in 2010, but was merely relaying Dr. Lim's statements in an effort reconcile their purported contradictions.

Relying on erroneous findings of fact in weighing evidence

[41] The Applicant alleges that the GD, in paragraph 33 of its decision, unreasonably dismissed the capacity assessment, which found Mrs. T. C. incapable of making property decisions pursuant to the SDA. I have reviewed the document in question, a letter dated March 28, 2003 by Cynthia Turner, a social worker and professional capacity assessor and agree that the Applicant has an arguable case that the GD discounted this evidence in a perverse or capricious manner or without regard for the material before it.

[42] First, the Applicant denies that the capacity assessment was, as the GD put it, "not entered into evidence." While the Assessment Report, which is one part of a Capacity Assessment under section 16 of the SDA, was not submitted, the document that was made available was signed by the assessor and described the results of the two assessments she conducted.

[43] I see merit in this argument: Ms. Turner's letter stated that she found Mrs. T. C. incapable of managing property or making a long-term care admission and, while the Applicant did not enter into evidence the underlying report, that was no reason to dismiss the letter itself, which contained relevant and potentially significant information about the Applicant's mental state during the period, more than ten years ago, when she was said to have become incapable.

[44] Second, the Applicant objects to the GD's finding there was no other evidence on file to indicate Mrs. T. C. did not become incapacitated, as understood in section 28.1 of the OAS Act, until several years after the incapacity finding was made under the SDA, citing Dr. Lim's August 2012 report that she did not become incapacitated until 2010. The Applicant notes that the GD was aware that Dr. Lim, in his June 2012 Certificate of Incapability, had already stated that Mrs. T. C. was unable to "manage her own affairs" as of April 1, 2005, although he later acknowledged that the date of onset was not firm.

[45] Again, I see an arguable case here, although not for the reasons set out by the Applicant. Taking a broad view, the GD appears to have based the largest part of its decision to deny the Applicant's appeal on the fact that a medical professional never pronounced Mrs. T. C., using the precise language of section 28.1, "incapable of expressing or forming an intention to apply" for benefits until August 2012. Of course, a document describing her mental status in such specific terms was always going to be highly unlikely unless a claim under the OAS Act became contentious. In this case, relevant evidence of incapacity going back to the early 2000s exists, but it is fragmentary and retrospective, and if it does not contain language that matches the wording of the OAS Act, that is not reason enough to dismiss or severely discount it. While the GD describes Ms. Turner's assessment, made for the purposes of the SDA, as "relevant," it appears that it actually gave little consideration to how someone admitted to a long term care facility because she was unable to manage property or make healthcare decisions would be

capable of forming or expressing the requisite intent to apply. In the end, a case can be made that the GD's reasoning on this point was perilously close to circular, with the GD deciding not to give the Turner capacity assessment little weight simply because it was not another, preferred, evidence.

[46] Third, the Applicant disputes the GD's finding that there was no indication that Mrs. T. C. had been found incapable of making decisions about treatment. In fact, alleges the Applicant, the evidence includes a formal finding of incapacity to make long term care decisions dating back to 2003, and Dr. Lim's assessments deemed her unable to manage her healthcare.

[47] I see an arguable case on this point, as I agree that the wording of the Turner assessment might be construed to include healthcare decisions. As well, Dr. Lim's letter of March 5, 2013 indicates Mrs. T. C. was unable to manage her health as of 2011 and possibly before, although no evidence of an exact date of onset was available.

Summary

[48] The Applicant has persuaded me that it has a reasonable chance of success on appeal for two of the four grounds it claimed—that the GD contradicted its own findings and relied on erroneous findings of fact in weighing evidence.

Prejudice to the Other Party

[49] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

CONCLUSION

[50] As the Applicant has fulfilled three of four *Gattellaro* factors, I have determined that this is an appropriate case to allow an extension of time to appeal beyond the 90-day limitation pursuant to subsection 57(2) of the DESDA. While the Applicant's explanation for its delay in requesting an appeal stretched credulity, I did not doubt that it had a continuing intention to

pursue the appeal, nor did I believe any real harm would be caused to the Respondent in forgiving a short delay in filing the request for leave.

[51] However, the overriding factor was my judgment that the Applicant has an arguable case on appeal that the GD may have erred in determining that Mrs. T. C. lacked capacity, under section 28.1 of the OAS Act, to make a GIS application prior to March 2012.

[52] I invite the Respondent to submit its position on the merits of this appeal. The parties are also free to make submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

This decision granting leave in no way presumes the result of the appeal on the merits of the case.

Member, Appeal Division