



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. K. v. Minister of Employment and Social Development*, 2018 SST 1046

Tribunal File Number: GP-17-1151

BETWEEN:

R. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Patrick O'Neil

Claimant represented by: M. K.

In person hearing on: August 31, 2018

Date of decision: September 6, 2018

DECISION

[1] The Claimant is not entitled to greater retroactivity of Guaranteed Income Supplement (GIS) payments.

OVERVIEW

[2] The Minister received the Claimant's applications for GIS for the payment periods July 2011-June 2012, July 2012-June 2013, July 2013-June 2014, July 2014-June 2015, and July 2015-June 2016 on November 4, 2015. The Minister approved the Claimant's applications for the payment periods July 2014-June 2015, and July 2015-June 2016 effective December 2014, and denied the applications for the payment periods July 2011-June 2012, July 2012-June 2013, July 2013-June 2014, initially and upon reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal seeking retroactivity of GIS payments to July 2011 on the basis he was incapable of forming or expressing an intention to make applications for GIS before the day the applications were actually made.

[3] Once a person meets the eligibility requirements for the GIS, the *Old Age Security Act* (OASA) then set out rules for payment of the GIS. The maximum retroactivity of GIS payments is 11 months before the month the Respondent received the GIS application¹. The Minister's decision allowed the Claimant the maximum retroactivity of GIS permitted by the OASA.

[4] The OASA provides an exception to the maximum retroactivity rules respecting payment of benefits under the OASA². This provision allows an application to be deemed to have been made earlier than when it was actually made, provided it can be shown that the person to whom the application relates was incapable of forming or expressing an intention to make an application before the day the application was actually made. The period of incapacity must be a continuous period³.

¹ Subsection 11(7)(a) OASA

² Section 28.1 OASA

³ Subsection 28.1(3) OASA

ISSUE(S)

[5] Was the Claimant incapable of forming or expressing an intention to make an application for GIS before the day the applications were actually made?

[6] If so, when did his incapacity begin, and what additional period of retroactivity should be allowed?

ANALYSIS

Test for incapacity

[7] The capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The word capacity should not be given a meaning other than its ordinary meaning.⁴

[8] The legislative test is 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, quite simply, of forming or expressing an intention to make an application.⁵ 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 the Claimant's continuous incapacity to form or express the requisite intention and ought to be considered.

[9] The noted Federal Court of Appeal decisions involved the incapacity provisions of the *Canada Pension Plan (CPP)*⁶. The wording of Section 28.1 of the OASA is identical to the incapacity provisions of the CPP. The Federal Court determined the test for incapacity in the OASA is the same as the test in the CPP.⁷

⁴ *Sedrak v Canada (Social Development)*, 2008 FCA 86

⁵ *Canada (Attorney General) v Danielson*, 2008 FCA 78

⁶ Subsections 60(8)-60(10) CPP

⁷ *Attorney General of Canada v. Poom*, 2009 FC 654

The Claimant was not incapable of forming or expressing an intention to make an application for GIS before the day the applications were actually made.

[10] The Claimant, currently seventy-nine years old, has lived by himself since he and his wife divorced in 2002. He has entered into tenancy agreements and contracts with utility companies in his sole name, paid rent when due, and bills, including utility accounts when received, from his bank account since 2002. The Claimant said he has done his own shopping and cooking since 2002. He has his own bank account and is the only person who can write cheques or withdraw money from the account.

[11] The Claimant has had a driver's licence for many years prior to 2002, without any restrictions, continues to own his own car, which he drives the car every day. He was asked if he was concerned with heavy traffic in the Toronto area. He said he avoids expressways to get to his destination.

[12] The Claimant testified he is, and always has been, able to do everything by himself. In this regard, he has not given anyone power of attorney for his property or healthcare. He said he has not done so as he is, and always has been, able to make his own decisions regarding everyday activities including banking, payment of bills, and renewal of insurance, licence plates and driver's licence. The Claimant's daughter said her father has always been very independent and refuses to allow her to help him with his affairs.

[13] The Claimant said he didn't file his income tax returns for the years 2010-2014 on time with the result the GIS he received since 2008 stopped as of June 2011. The Claimant said he didn't file his tax returns as the accountant who had historically assisted with the preparation of his tax returns became too expensive.

[14] The Claimant in the Notice of Appeal to the Tribunal dated April 25, 2017⁸ indicated he disagreed with the Minister's decision as he was suffering from mental and physical impairments that affected his capacity at the time in question. He testified that he has never seen a mental healthcare provider, save his family physician, for any mental condition. In this regard, he has never seen or been treated by a psychologist, psychiatrist or counselor, or been admitted to

⁸ GD1 pages 4-6

hospital for any mental disorder. The Claimant said he has never taken medication for a mental disorder. He acknowledged he was sad for several years after he and his wife divorced in 2002.

[15] Ms. K., the Claimant's daughter, testified she and her sister have had close contact with the Claimant since he and their mother divorced in 2002. She said she has seen and/or talked to her father at least every second day since. She did not know the status of her father's GIS benefits until he showed her the reconsideration decision. She helped him complete the Notice of Appeal.

[16] Ms. K. said her father started showing signs of depression after his divorce in 2002. She said she and her sister thought their father was just sad because of the divorce. She said her father has had good days and bad days since 2002. In this regard, she noted he worked several years after he and her mother were divorced. The Claimant's daughters have never taken steps to acquire legal authority to manage their father's affairs, or have the Public Trustee appointed to do so, which I find tacit evidence they never considered their father incapable of forming an intention with respect to making choices including his financial affairs.

[17] The Claimant's daughter acknowledged her father has lived by himself and paid his own living expenses from his own bank account since 2002, and has not given anyone power of attorney for property or healthcare. She said the Claimant wants to do everything by himself, but needs help. In this regard, she noted she helps the Claimant fill out forms for renewal of documents including his driver's licence and licence plate renewals.

[18] Dr. Sasson, the Claimant's family physician since 1982, reported October 28, 2015⁹ the Claimant enjoyed excellent physical and mental health until 2010 when he developed depression which affected his memory and ability to focus and concentrate. He noted the Claimant was treated with antidepressants and made gradual improvement. In this regard, the Claimant and his daughter both testified the Claimant did not take the antidepressant medication prescribed by Dr. Sasson. Dr. Sasson reported the Claimant's symptoms have fully subsided and he was able to function normally in June/July 2014. Dr. Sasson requested the noted information be considered when evaluating the Claimant's ability to look after his affairs during the period 2010 to July 2015.

⁹ GD2 pages 24-25

[19] Dr. Sasson completed a Declaration of Incapacity dated September 7, 2016¹⁰. His diagnosis was depression. He noted the Claimant's condition made him incapable of forming or expressing the intention to make an application during the period March 26, 2010 until July 6, 2015.

[20] Dr. Sasson had completed a prior Declaration of Incapacity dated February 10, 2010¹¹ regarding the Claimant's April 2009 application for the OAS pension. He noted the Claimant's depression was chronic with recurrent acute episodes. This latter information is consistent with the evidence of the Claimant's daughter to the effect her father has had good days and bad days since he and his wife divorced in 2002.

[21] The onus is on the Claimant to prove on the balance of probabilities he was incapable of forming or expression to make applications for GIS before the day his applications were actually made. The Declaration of Incapacity completed by Dr. Sasson in 2016, which indicated the Claimant's condition made him incapable of forming or expressing an intention to make an application, is inconsistent with the evidence of the Claimant and his daughter. The evidence of the Claimant is to the effect he has always been able to manage his own affairs, including making decisions relating to accommodations, banking, shopping, working, paying rent, utilities, and other bills, and completing, albeit sometimes with assistance, documentation including renewal of driver's licences, licence plates, and insurance. I consider the fact that Dr. Sasson, the Claimant's long time family physician, has never taken action to restrict the Claimant's driving privileges evidence the Claimant was not incapable of making the multitude of complex decisions required to drive a car.

[22] The evidence of the Appellant's daughter is that the Claimant has had good and bad days since 2002. The evidence of Dr. Sasson is to the effect the Claimant's condition is chronic with recurrent acute episodes. I accept these statements as evidence the Claimant's incapacity, if any, has not been continuous. The activities of the Claimant during the period between the claimed date of commencement of disability and the date of the applications clearly demonstrates the Claimant had the capacity to make choices including significant financial decisions, and act on

¹⁰ GD2 page 37

¹¹ GD2 page 19

those decisions, which I find demonstrated a level of capacity beyond that which is necessary to form or express an intention to make an application.

[23] I find the evidence did not establish on the balance of probabilities the Claimant was incapable of forming or expressing an intention to make applications for the GIS before the day his applications were actually made.

[24] The Tribunal is created by legislation and, as such, I only have the powers granted to it by its governing statute. I am required to interpret and apply the provisions as set out in the OASA. I am bound by decisions of the Federal Court and the Federal Court of Appeal. I cannot use the principles of equity, or consider extenuating circumstances such as financial hardship, to grant more retroactivity of GIS than is prescribed by the OASA.

[25] I find the Minister has allowed the Claimant the maximum retroactivity of GIS permitted by the OASA.

CONCLUSION

[26] The appeal is dismissed.

Patrick O'Neil
Member, General Division - Income Security