



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. H. v Minister of Employment and Social Development*, 2018 SST 1246

Tribunal File Number: GP-17-2593

BETWEEN:

S. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Anne S. Clark

Teleconference hearing on: November 19, 2018

Date of decision: November 27, 2018

DECISION

[1] The Claimant is not entitled to have her Guaranteed Income Supplement (GIS) paid earlier than May 16, 2016.

OVERVIEW

[2] On May 16, 2016 the Minister received the Claimant's application under the *Old Age Security Act* (Act) for a GIS. The application was allowed and her payments began in June 2015, 11 months before the date she made her application.

[3] The Claimant requested her application be deemed to have been made earlier. She claimed she was incapacitated and could not apply earlier than May 2016. The Minister denied her request initially and on reconsideration. The Claimant appealed to the Social Security Tribunal (Tribunal).

[4] To be eligible to have her GIS payments begin earlier, the Claimant must prove on a balance of probabilities she was incapable of forming or expressing an intention to make an application before the date when she actually applied¹.

ISSUE

[5] Was the Claimant incapable of forming or expressing an intention to make an application for GIS payments before May 16, 2016?

ANALYSIS

Retroactive payments

[6] No retroactive GIS payments may be paid more than eleven months before the month in which the Minister receives the application unless the application date is deemed to have been earlier or the requirement for an application was otherwise waived².

¹ Section 28.1 *Old Age Security Act*

² Paragraph 11(7)(a) *Old Age Security Act*

[7] GIS payments are not automatic. The Claimant was required to apply and she did, on her own behalf, in May 2016. Her application could be deemed to have been made earlier if she proves she was incapable of forming or expressing the intention to apply before May 2016³.

[8] The Tribunal is created by legislation and, as such, only has the powers granted to it by the governing statutes. This means I am required to interpret and apply the provisions as they are set out in the legislation. I cannot change or disregard mandatory provisions under the law.

Test to prove incapacity under the Old Age Security Act

[9] When a person was incapable of forming or expressing an intention to make an application for a continuous period of time before the day the application was actually made, the Act allows the application date to be deemed to have been made earlier. Unfortunately, the evidence and the Claimant's testimony do not demonstrate that she met the definition of incapacity before she applied in May 2016.

[10] There is medical information on file describing the Claimant's various health conditions. The reports and tests do not answer the question of whether she had a continuous period of time when she was incapable of expressing or forming the intention to apply for GIS payments.

[11] The Claimant's family physician, Dr. Keutzer completed a Declaration of Incapacity dated September 16, 2016⁴. He reported the Claimant was incapable of forming or expressing the intention to make an application. He said her incapacity began in 2009 and was ongoing. In contrast to that opinion is the Claimant's testimony that, with family support and guidance she makes all decisions regarding her personal life. Also in contrast to the Declaration of Incapacity is the fact the Claimant completed her own application in May 2016⁵ and completed an unfiled application in July 2012⁶. Considering the fact that there is very little detail in the Declaration and no explanation regarding the Claimant's capacity I find it has very little weight especially when compared to the Claimant's documented actions and testimony.

³ Section 28.1 *Old Age Security Act*

⁴ GD2-13

⁵ GD2-229

⁶ GD2-223

Did the Claimant meet the definition of incapacity?

[12] The Claimant's description of her health conditions and her need for guidance and support from her family and friends does not prove she was incapable of forming or expressing the intention to apply for the GIS before May 2016.

[13] To determine whether the Claimant met the definition of incapacity I must consider her activities before the time when she applied (May 2016). The rules focus on whether a person can form or express an intention to make an application. They do not require the person to have the knowledge or capacity to complete or file the documents⁷.

[14] It is important to consider the medical evidence and activities of the Claimant during the relevant period to determine whether she lacked the capacity to form or express an intention to apply⁸. The capacity to form or express an intention to apply is not different from the capacity to make other choices. The fact that a particular choice may not present itself to a person because of his world view does not indicate the lack of capacity⁹.

[15] The Claimant submitted that her period of incapacity began in 2009 and she remains "fairly" incapacitated even now. She explained that she intended to apply in 2012. She does not remember completing the form although it is in her handwriting. She said she must have forgotten to send the document at that time. She believes that shows her incapacity at the time. The fact the Claimant obtained and completed the forms is evidence of her capacity to form and express the intention to apply. Forgetting to send the document is not, in and of itself, evidence of incapacity.

[16] The Claimant has not worked since 2011 due to very serious and debilitating conditions. She maintains control over her financial and other personal decisions although she finds she needs help sometimes to remember some things such as paying her bills. She relies on her sons, sister and friends to go to appointments and conduct her personal business. She is responsible for

⁷ *Canada (Attorney General) v. Danielson*, 2008 FCA 78

⁸ *Slater v. Canada (Attorney General)*, 2008 FCA 375

⁹ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

her own decisions. She sold her house around 2013 and bought a condominium. She lives alone and does her banking online. She gives medical consent for all of her procedures but finds it very difficult to depend on doctors for all of the information she needs to make her decisions. Therefore, she seeks guidance and input from her sons.

[17] The Claimant considers her present incapacity to be mainly due to pain and restricted use of her feet. She is limited in what she can do physically and she is forgetful. She takes care of her income tax return and in 2012 or 2013 she hired a professional to complete her outstanding returns. At that time she applied for and received a disability tax credit. She drives a vehicle but finds she must limit herself to short distances.

[18] The Claimant described very serious and, at times, devastating health conditions. She has and needs supportive care from her family and friends but continues to conduct her own business and make her own decisions. She did not describe, and evidence on file does not show, a period of time when she would have met the definition of incapacity within the meaning of the Act.

CONCLUSION

[19] The appeal is dismissed.

Anne S. Clark
Member, General Division - Income Security