



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *O. M. v Minister of Employment and Social Development*, 2018 SST 1351

Tribunal File Number: GP-18-1154

BETWEEN:

O. M.

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: J. M.

Teleconference hearing on: November 20, 2018

Date of decision: December 3, 2018

DECISION

[1] The Claimant is not entitled to greater retroactivity of the *Old Age Security* (OAS) pension and *Guaranteed Income Supplement* (GIS).

OVERVIEW

[2] The Minister received the Claimant's applications for the OAS pension and GIS on December 2, 2015, and May 4, 2016, respectively. The Minister approved the Claimant's OAS application initially and on reconsideration effective January 2015, and her GIS application initially and on reconsideration effective July 2015, being 11 months before the month the Claimant's OAS and GIS applications were received, respectively. The Claimant appealed the reconsideration decisions to the Social Security Tribunal seeking additional retroactivity of the OAS pension and GIS.

[3] To qualify for an OAS pension and GIS, the Claimant must meet the requirements set out in the *Old Age Security Act* (OASA). No OAS pension may be paid to a Claimant unless an application for payment has been made by the Claimant¹. No GIS may be paid to an OAS pensioner unless an application for payment has been made by the pensioner².

[4] Once a Claimant meets the eligibility requirements for the OAS pension and the GIS, the OASA and OAS Regulations set out rules for payment of the pension and GIS. The maximum retroactivity of OAS pension payments³ and GIS⁴ is 11 months before the month the Minister received the applications. The Minister's decisions allowed the Claimant the maximum retroactivity of OAS and GIS permitted by the OASA.

[5] The OASA provides an exception to the maximum retroactivity rules respecting payment of benefits under the OASA⁵. The provision allows an application for benefits to be deemed to have been made earlier than when actually made, provided the Minister is satisfied, on the basis of evidence provided, that the person was incapable of forming or expressing an intention to

¹ Paragraph 5(1) OASA

² Paragraph 11(2) OASA

³ Paragraphs 8(2) OASA and 5(2)(a) OAS Regulations

⁴ Paragraph 11(7)(a)

⁵ Section 28.1 OASA

make an application before the day on which the application was actually made. The period of incapacity must be a continuous period⁶.

ISSUE(S)

[6] Was the Claimant incapable of forming or expressing an intention to make applications for an OAS pension and GIS before the day the applications were actually made?

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

ANALYSIS

Test for incapacity

[8] 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.⁷

[9] 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.⁸

[10] 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 considered⁹.

[11] The noted Federal Court of Appeal decisions involved the incapacity provisions of the *Canada Pension Plan* (CPP)¹⁰. The wording of Section 28.1 of the OASA is identical to the

⁶ Subsection 28.1(3) OASA

⁷ *Sedrak v Canada (Social Development)*, 2008 FCA 86

⁸ *Canada (Attorney General) v Danielson*, 2008 FCA 78

⁹ *Canada (Attorney General) v. Kirkland*, 2008 FCA 144

¹⁰ Subsections 60(8)-60(10) CPP

incapacity provisions of the CPP. The Federal Court has determined the test for incapacity in the OASA is the same as the test in the CPP.¹¹

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

[12] The Claimant was born X¹² in the Province of Manitoba. She attained sixty-five years of age on October X, 2003. She applied for the OAS pension in December 2015 and for GIS in May 2016.

[13] The Claimant was not present at the hearing. E. M. (E.), the Claimant's brother and power of attorney was present and testified at the hearing. He said the Claimant moved from Manitoba to Toronto in the 1960s, and worked there several years. He noted she had regular contact with family in Manitoba until she stopped visiting in 1980. E. M. said she phoned family members in Manitoba now and then asking for money, but otherwise did not engage with family in Manitoba until she called him in the fall of 2015 and asked if he would bring her home to Winnipeg.

[14] E. M. said he went to Toronto, saw the Claimant walking on X Street, and brought her to his home in Winnipeg. Shortly thereafter he arranged for the Claimant to obtain medical treatment. He said she was diagnosed with advanced cancer in January 2016. E. M. said the Claimant told him she intended to apply for the OAS pension and GIS in 2005, but was not able to do so as she did not have a birth certificate. He said she had a baptismal certificate which contained several errors, including the year of her birth, which she told E. M. prevented her from obtaining her birth certificate from the Province of Manitoba. E. M. understands the Claimant did not make any further effort to obtain an OAS pension and/or GIS until she returned to Manitoba. E. M. said the Claimant was not in favour of making applications for OAS benefits. He said she angrily signed the application for the OAS pension in November 23, 2015.

[15] E. M. said the Claimant told him she hadn't seen a doctor for many years. A record search by a Winnipeg physician indicated the Claimant did not access the medical system in

¹¹ *Attorney General of Canada v. Poom*, 2009 FC 654

¹² GD1 page 15

Ontario prior to her return to Manitoba in the fall of 2015. E. M. testified he has no knowledge as to whether the Claimant was diagnosed or treated for any mental condition prior to returning to Winnipeg in the fall of 2015. He believes she must have been suffering from a mental illness during the period after she ceased almost all contact with her family in Winnipeg in 1980 and 2015 as she did not attend the funerals of her mother, brother, and sisters. Further, E. M. believes the Claimant must have been suffering mental incapacity during that period as he does not believe anyone would forego applying for pension benefits as soon as entitled.

[16] E. M. said he does not know where his sister lived for the past many years as she would not provide family with contact information. He believes she was homeless, but doesn't know when she became homeless. He said she occasionally visited cousins in Hamilton, but doesn't know how she traveled to Hamilton and back.

[17] E. M. was named an alternate attorney in the Claimant's power of attorney dated January 17, 2016¹³. A declaration by the lawyer who prepared and witnessed the Claimant's signature on the power of attorney declared in the Claimant was of sound mind, memory, and understanding when the power of attorney was signed¹⁴. The Claimant gave a subsequent power of attorney naming E. M. her principal attorney on July 19, 2016¹⁵. That power of attorney also was prepared and witnessed by a lawyer in Winnipeg who also was required to determine the Claimant was of sound mind, memory, and understanding when she signed that power of attorney. E. M. said it was the Claimant's decision to make the powers of attorney, and her decision as to who she wanted to be her attorney(s).

[18] Dr. Akra, oncologist, reported January 14, 2016¹⁶ no one was present that day when the Claimant was seen. He noted the Claimant appeared to have a good understanding of her illness, and provided informed consent to treatment. He indicated, as the Claimant had not been seen by a physician for an extended period of time, she has no identified past medical history. E. M. said he drove his sister to doctors' appointments, but generally was not present when she discussed her condition with her doctors.

¹³ GD2 pages 45-50

¹⁴ GD2 page 50

¹⁵ GD2 pages 9-15

¹⁶ GD2 pages 56-59

[19] Dr. Akra's progress note dated August 10, 2015¹⁷ reported the Claimant's comorbidity as dementia. He completed a Declaration of Incapacity dated January 4, 2018¹⁸. He declared the Claimant's condition did not make her incapable of forming or expressing the intention to make an application.

[20] The onus is on the Claimant to establish on a balance of probabilities that she was incapable of forming or expressing an intention to make the OAS pension and GIS applications before the applications were actually made. I find she has not met the required burden of proof. The evidence established she formed the intention to apply for the OAS pension benefits in 2005. There is no medical evidence she suffered from any mental illness, sought out medical treatment for any such illness, or was treated for any such condition during the period 2005 to 2015, or since. While the Claimant's inaction in not pursuing OAS benefits may be regarded as unusual, it is not evidence that she was incapable of forming or expressing an intention to make applications. Neither is the fact that she did not maintain significant contact with family members in Winnipeg, and chose to visit cousins in Hamilton. The failure to attend family funerals is not evidence of a mental incapacity.

[21] The Claimant executed powers of attorney in January 2016 and July 2016. Both powers of attorney were witnessed by lawyers. The affidavit of the lawyer, who was the subscribing witness to the power of attorney in January 2015, expressed her opinion the Claimant was of sound mind, memory, and understanding at that time. The lawyer who was a subscribing witness to the power of attorney executed in July 2016 was required to be of the same opinion before witnessing the document.

[22] The diagnosis of a mental illness does not render a Claimant incapable of forming or expressing an intention to make applications for OAS benefits. The doctor who diagnosed the Claimant as suffering from diagnosis, which he noted appeared to be of long standing, declared under oath in January 2018 that the Claimant's condition did not make her incapable of forming or expressing intention to make an application.

¹⁷ GD2 page 60

¹⁸ GD1 page 29

[23] The activities of the Claimant during the claimed date of disability and the date of the applications demonstrate the Claimant had the capacity to make choices, including calling family members for money, visiting family she chose to visit, giving instructions as to who she wanted to be her power of attorney, executing powers of attorneys, and forming an intention to apply for OAS benefits in 2005. I find such activities demonstrated a level of capacity beyond that necessary to form or express an intention to make applications for OAS benefits. 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 OAS pension and GIS before the day her applications were actually made.

[24] The Claimant's representative submitted the Claimant was denied retroactive benefits as a result of administrative error. She claimed the inability of the Claimant to acquire a birth certificate in 2005 was the result of errors made by a church official who completed the Claimant's baptismal certificate. She also claimed the Minister erred in not accepting the Claimant's powers of attorney on a timely basis, which resulted in some further delay in submitting applications.

[25] The OASA grants a discretionary power to the Minister where the Minister is satisfied a person has been denied a benefit or a portion of a benefit as a result of erroneous advice or administrative error in the administration of the OASA¹⁹. Federal Court decisions have consistently held the Tribunal does not have jurisdiction to set aside a discretionary decision of the Minister made under Section 32 of the OASA. Accordingly, I have no jurisdiction to set aside any administrative error which may have been made by the Minister. The remedy available to a Claimant, where erroneous advice or administrative error is claimed, is to apply to the Federal Court for judicial review of the Minister's decision. An error made by a church official is not an administrative error of the Minister.

[26] 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 set out in the OASA. I am bound by decisions of the Federal Court and the Federal Court of Appeal. I cannot use the

¹⁹ Section 32 OASA.

principles of equity, or consider extenuating circumstances such as financial hardship, to grant retroactive benefits in excess the statutory limits prescribed by the OASA.

[27] I find the Minister allowed the Claimant the maximum retroactivity of the OAS pension and GIS permitted by the OASA.

CONCLUSION

[28] The appeal is dismissed.

Patrick O'Neil
Member, General Division - Income Security