



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of G. S. v Minister of Employment and Social Development*, 2019 SST 1502

Tribunal File Number: GP-18-2485

BETWEEN:

The Estate of G. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Teleconference hearing on: December 9, 2019

Date of decision: December 31, 2019

DECISION

[1] The Claimant is the Estate of G. S. The Estate asked for the Guaranteed Income Supplement (“GIS”) from the beginning of July 2013 to the end of April 2015, due to the incapacity of G. S.

[2] The Claimant is not entitled to the GIS from the beginning of July 2013 to the end of April 2015. The Claimant cannot rely on the incapacity provisions in the *Old Age Security Act*. The filing of G. S.’s 2012 tax return in March 2016 does not create an additional GIS entitlement either, nor does the completion of the GIS renewal application in March 2016. This written decision explains why I am dismissing the appeal.

OVERVIEW

[3] G. S. was born in January 1920. She received an Old Age Security (“OAS”) pension until she died on April 1, 2016. She also received the GIS for many years, but these payments stopped at the end of June 2013. The GIS payments appear to have stopped because G. S. stopped filing regular tax returns after her 2011 return. G. S. was diagnosed with dementia in 2009, and Dr. Marinosyan (Family Physician) described her dementia as “severe” when Dr. Marinosyan assumed care for G. S. in March 2015.¹

[4] G. S.’s son E. S. filed her 2012 tax return in March 2016. E. S. had just realized that G. S. was no longer getting the GIS and had not filed a tax return since April 2012.² He blamed this on her dementia. After G. S.’s death on April 1, 2016, E. S. started to file her post-2012 tax returns. On April 5, 2016, the Minister received an application from E. S. to renew G. S.’s GIS payments. The Minister granted retroactive GIS payments from May 2015 to April 2016, but not from July 2013 to April 2015, citing an 11-month limit on posthumous applications. The Minister upheld that decision on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[5] Ontario’s Superior Court of Justice appointed E. S. as the Estate Trustee for G. S.’s Estate on October 25, 2016. I will refer to him as “E. S.” for the period before that appointment

¹ GD2-28

² GD4-1

and for the evidence he gave outside that role. E. S. attended the hearing and gave oral evidence, in addition to making written submissions.

ISSUES

[6] Is the Claimant entitled to an earlier application or renewal date for the GIS, due to G. S.'s incapacity?

[7] Does the filing of G. S.'s 2012 tax return in March 2016, or the completion of the GIS renewal application in March 2016, create an additional GIS entitlement?

ANALYSIS

[8] The OAS pension is paid to people who are at least 65 years old and meet certain minimum requirements set out in the *Old Age Security Act* (the "OAS Act"). The parties agree that G. S. met these requirements.

[9] The GIS is an additional benefit that is only payable to OAS pension recipients who have low income. However, the OAS Act says the GIS is only payable if the OAS pension recipient has applied for that payment year.³ The payment years run from July to June of the following year. There is an exception to this rule. The Minister *may* waive the annual application requirement for the GIS if an application was made for a previous payment period.⁴ The Minister appears to apply this exception if the recipient files annual tax returns with the Canada Revenue Agency ("CRA"). The Minister refers to this as the "GIS for Life" provision.⁵

[10] As G. S. filed timely tax returns with the CRA up to her 2011 tax return, she did not need to apply annually for the GIS. Filing her 2011 tax return entitled her to receive the GIS for the payment period from July 2012 to June 2013. However, as her 2012 tax return was not filed until March 2016, she stopped getting the GIS in July 2013. The Minister did not receive the application for the renewal of her GIS until April 5, 2016. This was four days after she died.⁶

³ See subsection 11(2) of the *Old Age Security Act*.

⁴ See subsection 11(4) of the *Old Age Security Act*.

⁵ GD3-6

⁶ GD2-7

E. S. later filed GIS Statements of Income for the years 2012 through 2015 with the Minister. He also eventually filed G. S.'s 2013 through 2016 tax returns with the CRA.⁷

[11] Based on the GIS renewal application, the GIS Statements of Income, and the tax returns, the Minister agreed that the Claimant was entitled to the GIS from May 2015 to April 2016. The Minister said that the earliest effective date of payment was May 2015, because the Minister received the GIS renewal application in April 2016 and there is a maximum retroactive GIS payment of 11 months for deceased OAS recipients.

[12] The Claimant does not seem to dispute the maximum retroactivity of 11 months. However, the Claimant says it is unfair that G. S.'s incapacity can't be considered after she has died. The Claimant says G. S. stopped filing her taxes because of severe dementia: if her condition had not been severe, she would have continued filing her tax returns and she would have continued receiving the GIS until April 2016.

[13] The Claimant also says the Minister failed to consider that G. S. filed her 2012 tax return before she died. The Claimant says the Minister incorrectly stated that the 2012 tax return was filed after she died.⁸ Accordingly, the Claimant says that G. S.'s GIS should be paid for the payment year from July 2013 to July 2014.

[14] I will now consider each of these arguments.

Is the Claimant entitled to an earlier application or renewal date for the GIS, due to G. S.'s incapacity?

[15] For the reasons that follow, the Claimant is not entitled to an earlier application or renewal date for the GIS.

[16] I agree that the GIS cannot be paid more than 11 months before the Minister receives the application. The OAS Act clearly says this.⁹ The Minister did not receive the GIS renewal application until April 5, 2016. This means the GIS cannot be paid for a period before May 2015.

⁷ GD2-3 to GD2-6, and GD1-11

⁸ The Minister makes this statement in paragraph 21 on page GD3-6.

⁹ See paragraph 11(7)(a) of the *Old Age Security Act*.

[17] However, given G. S.'s dementia, the Claimant wishes to apply the incapacity provisions contained in s. 28.1 of the OAS Act. These provisions can sometimes establish an application date that is before the application's receipt date. The Minister says the OAS Act's incapacity provisions can't be invoked after the death of the recipient. The Minister cites the 2001 Pension Appeals Board (the "Board") decision in the *Kirby* case.¹⁰

[18] Section 28.1 of the OAS Act applies when a benefit application is made "on behalf of a person [who had been] 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". This is the same language considered in *Kirby*, for an analogous provision in the *Canada Pension Plan* ("CPP").¹¹ In *Kirby*, the Board said the incapacity provisions contemplated the incapacitated person being alive at the time of the application.¹² I agree with this interpretation. As G. S. was not alive when the application was filed, the Claimant cannot apply s. 28.1 of the OAS Act.

[19] In *Kirby*, the Board also contrasted the incapacity provisions with an application made on behalf of a deceased person.¹³ Section 29 of the OAS Act deals with such applications. For OAS purposes, applications on behalf of a deceased person are considered to be made on the date that she died, as long as they are made within one year of her death.¹⁴ This means that the Claimant's application to renew the GIS benefit was made on April 1, 2016.

[20] In *Kirby*, the Board concluded that the incapacity provisions and the deceased applicant provisions were mutually exclusive. They applied to separate categories of claimants. One dealt with living but incapacitated contributors, while the other dealt with representatives of estates.¹⁵

[21] Finally, I find that this interpretation is consistent with the context of the relevant OAS Act provisions and the overall purpose of the legislation. As with the CPP, the OAS Act's

¹⁰ The formal name of this decision is *Minister of Human Resources Development v. Kirby*, (2001) CP 17189 ("Kirby"). While the Tribunal does not have to follow past decisions of the Board, they can still have persuasive value. The Board used to be responsible for appeals under the *Old Age Security Act* and the *Canada Pension Plan*, before the creation of the Social Security Tribunal.

¹¹ See s. 28.1(1) of the *Old Age Security Act* and s. 60(8) of the *Canada Pension Plan*.

¹² See *Kirby*, at paragraph 8.

¹³ These are in s. 60(2) of the *Canada Pension Plan*, where the language is almost identical to the wording of s. 29(1) of the *Old Age Security Act*.

¹⁴ See ss. 29(1) and 29(3) of the *Old Age Security Act*.

¹⁵ The opening words of the deceased applicant provisions of the OAS Act support this interpretation, as they apply "despite anything in this Act". See *Kirby*, at paragraph 8, and s. 29(1) of the *Old Age Security Act*.

primary intention is to grant payments to qualified people during their lifetime. It is not a vehicle for the accumulation of assets or the enhancement of estates.¹⁶ This is particularly true of the GIS, which is supposed to be payable to OAS recipients who have little or no other income.¹⁷

[22] Given this conclusion, I do not need to determine if (or when) G. S. fell under the incapacity provisions of the OAS Act. I will now consider two related issues in this appeal, which flow from the steps taken by E. S. and G. S. shortly before her death.

Does the filing of G. S.'s 2012 tax return in March 2016, or the completion of the GIS renewal application in March 2016, trigger an additional entitlement to the GIS?

[23] For the reasons that follow, neither of these events creates any additional GIS entitlement.

[24] I agree that the Minister was wrong to say that G. S.'s 2012 tax return was filed after she died.¹⁸ The CRA clearly received her 2012 tax return on March 9, 2016.¹⁹ This was before G. S. died. However, this does not necessarily mean that the Claimant can now rely on the incapacity provisions of the OAS Act or is entitled to additional GIS payments.

[25] As set out above, the Claimant can only take advantage of the incapacity provisions of the OAS Act if the application is made when the incapacitated person is still alive. The 2012 tax return was filed while G. S. was still alive, but filing a tax return is not the same thing as making an application for the GIS.

[26] According to the OAS Act, a person must make an application in order to receive the GIS. This applies to G. S. because any GIS application waiver ceased to apply when she stopped filing her tax returns after the 2011 tax year.²⁰

[27] The OAS Act specifically refers to making “an application for payment of a supplement”.²¹ I cannot characterize a 2012 tax return as “an application for payment of a

¹⁶ See *Kirby*, at paragraph 9.

¹⁷ See, generally, section 11 of the *Old Age Security Act*.

¹⁸ The Minister said this in paragraph 21 on page GD3-6.

¹⁹ See GD4-1 and GD6-7, for example.

²⁰ See ss. 11(2) and 11(4) of the *Old Age Security Act*.

²¹ Subsection 11(2) of the *Old Age Security Act*.

supplement”. Filing the 2012 tax return is not the same as making a GIS application because an application must be made to the Minister: the tax return was filed with the CRA, rather than the Minister. Shortly after filing the 2012 tax return, G. S. and E. S. completed a form called an “Application for Renewal of the GIS”.²² This is an example of what the OAS Act means when it refers to an “application for payment of a supplement”.

[28] This means the Claimant must rely on the Application for Renewal of the GIS document. That application appears to have been prepared before G. S. died. G. S.’s signature appears on the application, and E. S. signed and dated the application on March 14, 2016. However, the date written on the application is not necessarily the same as the date that the application is made. The *Old Age Security Regulations* (the “OAS Regulations”) specify when an application is considered to have been made.

[29] An application is made only when the Minister receives an application form completed by or on behalf of the applicant.²³ In this case, the Minister received it on April 5, 2016. This means that the application to renew G. S.’s GIS was not made until after G. S. had passed away. The Minister paid GIS to the Claimant retroactively for 11 months before the application date. This is the maximum amount payable under the law.

Additional Comments

[30] The circumstances surrounding this appeal are very sad. G. S. lived an independent and active life for many years. However, dementia took an increasingly heavy toll on her. Near the end of her life, she rarely left her apartment. If she did leave, she might not be able to find her way back. She had to wear a special “Medic Alert” bracelet. By 2015, she also had other medical conditions. In addition to advanced dementia, she had heart problems and difficulty eating. She had low blood pressure with recurrent falls. She had urinary infections and incontinence.²⁴ She suffered side effects from her medications.

[31] G. S. had many hospital admissions in the last year of her life. In December 2015, for example, she was in the hospital because of worsening confusion, poor appetite, and increased

²² GD2-7

²³ Subsection 3(2) of the *Old Age Security Regulations*.

²⁴ GD2-29 and GD2-31

drowsiness. By this time, she was confined to a wheelchair and had oral motor dysfunction. She also had thyroid problems. As she had difficulty swallowing, she was unable to take some of her medications. She had acute delirium.²⁵

[32] E. S. lived with G. S. and provided his mother with exceptional care. I have the highest regard for the efforts and sacrifices he made during those difficult times. However, I cannot make the order sought. I am constrained by the law set out above.

[33] The Tribunal is created by legislation. It only has the powers granted to it by its governing statute. As a Tribunal Member, I have to interpret and apply the provisions as they appear in the OAS Act and the OAS Regulations. I cannot waive or change them, even though they may seem unfair in a particular situation, nor can I unreasonably interpret the wording of the OAS Act or the OAS Regulations.²⁶ Although I have great sympathy for E. S., the appeal cannot succeed.

CONCLUSION

[34] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security

²⁵ GD2-32 to GD2-34

²⁶ See, generally, the Supreme Court of Canada's decision in *R. v. Conway*, 2010 SCC 22.