



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of GT v Minister of Employment and Social Development*, 2020 SST 986

Tribunal File Number: GP-19-618

BETWEEN:

The Estate of G. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: George Tsakalis

CLAIMANT REPRESENTED BY: Lawrence Peebles

DATE OF DECISION: October 27, 2020

DECISION

[1] The Claimant, the Estate of G. T., cannot receive an Old Age Security (OAS) benefit in this case. This decision explains why I am summarily dismissing this appeal.

OVERVIEW

[2] G. T. (the deceased) passed away on March 2, 2016. The Minister of Employment and Social Development (the Minister) received an OAS application from the deceased's wife on November 2, 2017.

[3] The Minister denied the OAS application because it received the application more than one year after the deceased passed away. The Claimant appealed the Minister's decision to the General Division of the Social Security Tribunal (the Tribunal).

[4] The Minister asked me to summarily dismiss this appeal because it has no reasonable chance of success.

[5] The Claimant argued that I should allow the appeal and award the estate an OAS pension because the deceased could not apply for a pension before he died. The deceased suffered from a debilitating and progressive neurological disorder. The Claimant also argued that the Minister should have automatically enrolled the deceased into the OAS benefit program.

PRELIMINARY MATTERS

[6] I sent the Claimant's representative a notice of intention to summarily dismiss the appeal on February 6, 2020. I gave the Claimant's representative until March 18, 2020 to provide submissions on why I should not summarily dismiss this appeal.¹

[7] I received submissions from the Claimant's representative on February 18, 2020.² The Claimant's representative asked for more time to complete submissions. I agreed to extend the deadline for submissions to June 30, 2020. I also advised that I wanted to hold a prehearing

¹ Subsection 22(1) of the *Social Security Tribunal Regulations* requires the Tribunal to give a claimant notice in writing and allow the claimant a reasonable period of time to make submissions before summarily dismissing an appeal.

² See GD4

conference with the Claimant and the Minister before June 30, 2020 to discuss issues arising from this appeal.³

[8] The prehearing conference proceeded on April 30, 2020 with the Claimant's representative. The Minister did not send a representative to the prehearing conference.

[9] We discussed procedural issues at the prehearing conference. The Claimant's representative is not a lawyer.

[10] The Supreme Court of Canada has endorsed the *Statement of Principles on Self-represented Litigants and Accused Persons* issued by the Canadian Judicial Council.⁴ These principles endorse case management activities, such as prehearing conferences, in order to protect the interests of persons who are not represented by legal counsel.

[11] We discussed the summary dismissal procedure at the prehearing conference. I advised the Claimant's representative that I might not hold a hearing if I was satisfied that the appeal had no reasonable chance of success after I reviewed his submissions.

[12] The Claimant's representative advised that he might need an extension of the June 30, 2020 deadline to deliver submission. I asked that the Claimant's representative deliver any time extension requests to the Tribunal by e-mail.⁵

[13] The Claimant's representative sent the Tribunal an e-mail on June 25, 2020 stating that he could not meet the June 30, 2020 submission deadline because of personal issues.⁶ I extended the submissions deadline to September 30, 2020.⁷

[14] The Tribunal did not receive further submissions from the Claimant. I am satisfied that I must summarily dismiss this appeal based on the information and documentation in the file.

³ See GD5

⁴ See *Pintea v. Johns*, 2017 SCC 23

⁵ See GD8

⁶ See GD9

⁷ See GD10

ANALYSIS

[15] I must summarily dismiss an appeal if it has no reasonable chance of success.⁸ An appeal has no reasonable chance of success where it is plain and obvious on the record that the appeal is bound to fail.⁹

I must summarily dismiss this appeal

[16] I must summarily dismiss this appeal because it has no reasonable chance of success. The Claimant did not apply for the OAS pension in time and the Minister had no obligation to automatically enroll the deceased into an OAS pension prior to his death.

The Claimant did not apply for the OAS pension in time

[17] The deceased was born in September 1948.¹⁰ He died on March 2, 2016.¹¹ The Minister received an OAS application from the deceased's wife on November 2, 2017, more than one year after the deceased passed away.¹²

[18] The OAS Act allows an individual's estate and others listed in section 29 of the *Act* to apply for an OAS pension if the deceased was eligible to receive OAS before they died.¹³ But they must apply for the benefit within one year of the individual's death.¹⁴

[19] The Claimant argued that the deceased was eligible for an OAS pension because he was older than 65 years of age at the time of his death. The deceased suffered from ill health and he did not know that he had to apply for OAS in order to receive the benefit. The deceased suffered from myotonic muscular dystrophy. His medical condition led to debilitating physical and mental dysfunction. The deceased could not handle his most basic needs during the last years of his life, let alone direct his mind to applying for OAS.¹⁵ The deceased's wife was preoccupied because she acted as the deceased's primary caregiver. The deceased's wife did not apply for

⁸ See subsection 53(1) *Department of Employment and Social Development Act*

⁹ See *The Estate of J.B. v. Minister of Employment and Social Development*, 2018 SST 564

¹⁰ See GD2-23

¹¹ See GD2-22

¹² See GD2-23-27

¹³ See *Canada (MHRD) v. Dublin (Estate)*, 2004 FC 1184

¹⁴ Subsection 29(1) OAS Act

¹⁵ See GD2-16

OAS within one year of his death because she had difficulty coping. She did not learn until June or July 2017 that the deceased did not apply for OAS. She eventually applied for OAS with her representative's assistance.¹⁶

[20] The Claimant argued that the deceased could not apply for an OAS pension because of his physical and mental incapacity.

[21] The OAS Act has an incapacity provision at section 28.1.¹⁷ The incapacity provision allows the Minister to deem an earlier application date if incapacity is established. In order to have incapacity under the OAS Act, the person must show that they were incapable of forming or expressing an intention to make an application on their own behalf on the day in which the application was actually made.

[22] The problem for the Claimant is that the incapacity provision in the OAS Act has been interpreted to mean that the incapacitated person has to be alive at the time of the application. The incapacity provision cannot be used after the recipient dies.¹⁸

[23] The Pension Appeals Board (PAB) in *Minister of Human Resources Development v. Kirby* interpreted the incapacity provision in the Canada Pension Plan (CPP). The incapacity provision in the CPP and the OAS Act are similar. The PAB in *Kirby* ruled that the incapacity provision contemplated the incapacitated person being alive at the time of the application.

[24] In *Kirby*, the PAB also contrasted the incapacity provision with applications made on behalf of deceased persons under the CPP. The PAB concluded that the incapacity provisions and the deceased application provisions applied to separate categories of claimants. The incapacity provisions dealt with living but incapacitated contributors. While the deceased application provisions dealt with estate representatives.¹⁹

¹⁶ See GD2-14

¹⁷ See section 28.1 OAS Act

¹⁸ See *Minister of Human Resources Development v. Kirby*, (July 18, 2001) CP 17189 (PAB). While the Tribunal does not have to follow past decisions of the Pension Appeals Board, they can still have persuasive value. The Board used to be responsible for appeals under the OAS Act and the Canada Pension before the creation of the Social Security Tribunal.

¹⁹

[25] I find that the PAB's interpretation of the incapacity and deceased applicant provisions in the CPP applies to the OAS Act.

[26] When I look at deceased applicant provision in the section 29 of the OAS Act it says that it applies "despite anything in this Act". This means that the one-year limit for applications made on behalf of a deceased under the OAS Act applies despite the incapacity provision in section 28.1. I find that the incapacity provision in section 28.1 of the OAS Act does not allow the family to get around the one-year time limit in section 29 of the OAS Act.

I do not have jurisdiction to award the Claimant benefits on compassionate grounds

[27] The Claimant and her representative argued that the law is unfair.²⁰ The deceased would have received an OAS pension had he been able to apply for one. The Claimant's wife also had significant personal problems after the death of her husband and could not apply earlier.

[28] The Tribunal is created by legislation and, as such, it only has the powers granted to it by its governing statute. The Tribunal must interpret and apply the provisions as they are set out in the OAS Act.²¹ I must follow the letter of the law. I cannot make decisions on compassionate grounds.²² I cannot award the Claimant an OAS pension in this case, even though I am tremendously sympathetic to her. I read the Claimant's submissions about the last years of the deceased's life and they were certainly difficult. I am also aware of her suffering after his passing. But the law is clear. The OAS application had to have been made within one year of the deceased's death and this did not happen. I do not have the authority to order the Minister to make a payment out of a sense of moral obligation when it has no legal obligation to do so.²³

The Minister did not automatically enroll the deceased into the OAS benefit program.

[29] The Minister did not automatically enroll the deceased into the OAS benefit program. This means that the deceased or someone on the deceased's behalf would have had to apply for OAS before he passed away in order to receive a pension.

²⁰ See GD4-1-3

²¹ See *R. v. Conway*, 2010 SCC 22

²² See *Canada (MSD) v. Kendall* (June 7, 2004), CP 21960 (PAB) and *S.S. v. Minister of Employment and Social Development*, 2018 SST 705

²³ See *Canada (MHRD) v. Dublin (Estate)*, 2006 FC 152

[30] The general rule is that claimants must apply for an OAS pension in order to receive one.²⁴ However, the OAS contains a provision that allows the Minister to waive the application requirement if the Minister is satisfied that a claimant is eligible for an OAS pension.²⁵

[31] The Claimant argued that the deceased should have automatically enrolled the deceased into the OAS benefit program. The Claimant also argued the deceased was eligible for an OAS pension because he had reached the age of 65 before he died.²⁶

[32] However, the OAS Act leaves it up to the Minister and **not the Tribunal** to decide whether to waive the application requirement.

[33] The Minister uses the following criteria to select individuals for possible automatic enrollment for the OAS pension. At the age of 64, these individuals must:

- Have a Canadian residential address
- Be in receipt of, or approved for, payment of CPP/Quebec Pension Plan (QPP) Retirement, Disability or Survivor Pension
- Have 40 or more years of CPP or QPP contributions; and
- Have tax filing data from the Canada Revenue Agency for each year from 1972, or later, up to the year prior to turning 65.²⁷

[34] However, the deceased did not have 40 years of CPP contributions. He had 35 years of CPP contributions and had received a CPP disability benefit for five years. This meant that he did not meet all the required criteria for automatic enrollment for the OAS pension.

²⁴ See subsection 5(1) OAS Act

²⁵ See subsection 5(4) OAS Act

²⁶ See GD1-3

²⁷ See GD3-4

CONCLUSION

[35] After reviewing the file, I agree with the Minister that I must summarily dismiss this appeal because it has no reasonable chance of success. It is plain and obvious on the record that this appeal is bound to fail.

[36] The appeal is summarily dismissed.

George Tsakalis
Member, General Division - Income Security