



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SL v Minister of Employment and Social Development and HL*, 2021 SST 415

Tribunal File Number: GP-20-958

BETWEEN:

S. L.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

H. L.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Teleconference hearing on: May 31, 2021

Date of decision: June 3, 2021

DECISION

[1] The Claimant is not entitled to the Guaranteed Income Supplement (“GIS”) from July 2017 to May 2018. The Tribunal does not have the authority to make a finding about erroneous advice from the Minister. However, the Claimant could still raise the erroneous advice issue directly with the Minister.

OVERVIEW

[2] The Claimant’s 65th birthday was in October 2014. She started receiving the Old Age Security (“OAS”) pension immediately afterward, but was still working as a secretary and receptionist. She thought she did not need to apply separately for the GIS, as she and her husband always filed their tax returns. Her husband, H. L., was diagnosed with high-risk prostate cancer in 2015. He has had many other health problems since then. The Claimant retired in June 2016, as she had to care for her husband. She also had some health problems of her own. Her husband’s intense care included specialized treatment in Germany.

[3] The Claimant did not file a GIS application or a statement of estimated income until May 2019. She was granted 11 months of retroactive GIS benefits, going back to June 2018. However, the Minister did not grant her GIS benefits from July 2017 to May 2018. The Minister said she had already been granted the maximum period of retroactive benefits, and upheld that decision on reconsideration. The Claimant appealed the decision to the Social Security Tribunal.

[4] The GIS is a monthly benefit payable to OAS pension recipients who have little or no other income. The GIS is based on combined household income.¹

PRELIMINARY MATTER

[5] The Claimant’s husband was listed as the Claimant’s representative and as an added party. However, I find that he was not acting as a legal representative. He has always assumed responsibility for the Claimant’s financial matters, and she also reported having some hearing

¹ See section 11 of the *Old Age Security Act*.

problems. She wanted her husband's help and support. Accordingly, I consider him to be an "administrative" representative only. I allowed him to give evidence at the hearing.

ISSUES

[6] Is the Claimant entitled to the GIS between July 2017 and May 2018?

[7] If not, what is the impact of the erroneous advice allegedly given by the Minister?

ANALYSIS

[8] The Claimant said her husband always handled their financial matters. She also said they always did everything together, and that she could not live without him. I accept that they are very devoted to each other. They appeared to have a caring and respectful marriage. I also accept that his cancer diagnosis became the focus of their lives.

[9] I see no evidence that the Claimant applied for the GIS before May 2019. The Claimant's husband said he thought it was automatic, because they filed annual tax returns. I will look at the Minister's apparent advice on this issue later. I will first decide whether the Claimant is entitled to the GIS before June 2018.

Is the Claimant entitled to the GIS between July 2017 and May 2018?

[10] According to the *Old Age Security Act* ("OAS Act"), retroactive GIS payments can only be made for 11 months before the Minister receives the GIS application.² As noted, I see no dispute that the Claimant's first GIS application was filed in May 2019. Accordingly, June 2018 is the earliest possible date she could get the GIS.

[11] The only exception to this rule is when the application date is adjusted because of incapacity. The incapacity must have delayed the application. The OAS Act is also clear that the person applying for the GIS must be the person with the incapacity.³ It is irrelevant that the Claimant's husband may have had no capacity before filing the GIS application in May 2019.

² See s. 11(7)(a) of the *Old Age Security Act*.

³ See s. 28.1(1) and (2) of the *Old Age Security Act*.

[12] However, I find that the Claimant had capacity before the GIS application was filed in May 2019. The definition of incapacity under the OAS Act is very strict. Incapacity requires more than just being unable to make an application. It does not matter if the person cannot deal with an application's consequences. The question is whether "the person was incapable of forming or expressing an intention to make an application" at the relevant time.⁴ Being unaware about the GIS requirements is not incapacity.⁵

[13] The Claimant worked until June 2016.⁶ She admitted that she performed the activities of daily life up to May 2019. However, she spent a lot of time thinking about which treatments would be best for her husband. She said she directed all her energy toward her husband's health care. This is fully understandable. Unfortunately, it does not establish incapacity. I must look at the Claimant's medical evidence as well as her relevant activities before her application date. Her capacity to form an intention to apply for benefits is not different from the capacity to form an intention about other choices she faced.⁷ Her involvement in making decisions about her husband's care shows that she had the capacity to "form or express an intention to make an application" for her GIS benefits.

[14] The Claimant provided evidence of her own medical problems. These had started by January 2016 and continuing through at least December 2018.⁸ The main problem appeared to be shoulder pain.⁹ She said her sleep was affected. It was also hard to concentrate. She eventually had to see a rheumatologist.¹⁰ As painful as this may have been, it does not meet the very strict definition of incapacity under the OAS Act. She was still making decisions about her husband's care. She gave support to him when they went to Germany for treatment in 2018. She still engaged in the activities of daily life.

[15] The Claimant did not file a Declaration of Incapacity. The Minister mentioned this document in the June 2020 reconsideration decision, and invited the Claimant to have her doctor

⁴ See *Canada (Attorney General) v. Poon*, 2009 FC 265, at paragraphs 29 and 30.

⁵ See, for example, the persuasive decision in *S.M. and V.M. v. Minister of Employment and Social Development*, 2015 SSTAD 984.

⁶ GD1-15

⁷ See *Slater v. Canada (Attorney General)*, 2008 FCA 375, [2009] SCCA 99.

⁸ GD2R-36 and GD2R-39.

⁹ See also GD2R-37 and GD2R-38.

¹⁰ GD2R-39

complete it if they believed she lacked capacity.¹¹ The Claimant admits receiving the June 2020 decision, but said the Declaration form was not included. While the Declaration form is not mandatory, the Claimant's other medical evidence is not sufficient to show incapacity.¹²

[16] The Claimant and her husband were credible witnesses. They asked the Tribunal to take a compassionate approach to her appeal.¹³ They referred to their "extenuating and unforeseen" circumstances. I agree that his cancer diagnosis was serious and unforeseen. It may well have interfered with their ability to pursue the GIS before they did. However, I do not have the authority to make decisions on a compassionate basis. The Tribunal is created by statute. I cannot use the principles of fairness to grant retroactive benefits beyond the statutory limit.¹⁴

[17] At the hearing, the Claimant's husband made repeated references to erroneous advice from the Minister in 2014 and 2015.¹⁵ He said the Minister's position after the Claimant applied for the GIS in May 2019 contradicted the Minister's earlier advice. I will now look at the erroneous advice issue, and whether the Tribunal can do anything about it.

What is the impact of the erroneous advice allegedly given by the Minister?

[18] The Claimant's husband said he was in contact with the Minister in 2014 and 2015. He said the Minister told him he did not need to provide estimated income information for the GIS: it would happen automatically each year when they filed their tax returns. The Claimant and her husband said they always filed their tax returns on time. However, in their later dealings with the Minister, they were told that their tax returns were not always reviewed automatically for GIS purposes. This caused a problem after the Claimant's retirement in 2016.¹⁶ The Claimant's husband also said that some of the Minister's advice to them only applied if they had full (40/40^{ths}) OAS pensions. Alas, they only had partial (23/40^{ths} and 24/40^{ths}) OAS pensions.

[19] The OAS Act contains a section dealing with erroneous advice by the Minister. This section could apply if the Minister's erroneous advice caused the Claimant to be denied a

¹¹ GD2R-15

¹² *Flaig v. Canada (Attorney General)*, 2017 FC 531.

¹³ See also GD1-10 (first unnumbered paragraph).

¹⁴ See *Canada (MHRD) v. Esler*, 2004 FC 1567.

¹⁵ See also GD1-10 (first numbered paragraph).

¹⁶ GD1-10 (first numbered paragraph).

benefit.¹⁷ Based on the evidence before me, the Claimant and her husband may have relied on advice received from the Minister in 2014 and 2015. They suggest that the Minister's advice put her in a worse position. Unfortunately, if the Claimant believes that she was worse off because of the Minister's advice, the Tribunal cannot help her. Allegations of erroneous advice must be pursued with the Minister. If the Claimant is not satisfied with the Minister's response, her only recourse is applying to the Federal Court for judicial review.¹⁸

[20] I sympathize with the Claimant's situation. She and her husband have been through a lot since his cancer diagnosis in 2015. They have been strong together despite facing many challenges. However, the OAS Act is very clear on the retroactivity of benefits. I cannot find that the Claimant met the strict definition of incapacity in the OAS Act. Nor do I have the jurisdiction to make findings about erroneous advice. If the Claimant still wants to pursue that argument, she will need to deal directly with the Minister again.

CONCLUSION

[21] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security

¹⁷ Section 32 of the *Old Age Security Act*.

¹⁸ See ss. 28(1) and 32 of the *Old Age Security Act*. See also *Canada (MHRD) v. Tucker*, 2003 FCA 278.