



Citation: *AM v Minister of Employment and Social Development*, 2021 SST 826

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. M.

Respondent: Minister of Employment and Social Development
Representative: Janice Gionet

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 25, 2019 (issued
by Service Canada)

Tribunal member: Pierre Vanderhout

Type of hearing: Teleconference

Hearing date: December 15, 2021

Hearing participants: Appellant
Appellant's spouse (assisting with submissions)
Respondent's representative

Decision date: December 23, 2021

File number: GP-21-251

Decision

[1] The appeal is dismissed.

[2] The Claimant, A. M., isn't eligible for the Guaranteed Income Supplement ("GIS") from September 2009 to December 2009. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is 77 years old. He applied for the Old Age Security ("OAS") pension in 2008. At that time, he said he wanted to apply for the GIS too. He was granted a full OAS pension, effective September 2009.

[4] The GIS is paid to low-income OAS pension recipients. The Minister eventually granted the GIS to the Claimant, starting in January 2010. However, the Claimant also wants the GIS from September 2009 to December 2009. The issue between the parties is when the Claimant applied for the GIS. The application date affects the start date of the GIS.

[5] The Claimant says he applied for the GIS in March 2010. To support this, he relies on a GIS application form dated March 20, 2010 (the "March 2010 Application").¹ He said he sent the March 2010 Application to the Minister. As 11 months of retroactive GIS payments can be made, he says the March 2010 Application entitles him to the GIS from September 2009 to December 2009.

[6] The Claimant also says he has serious health issues. These issues included an August 2009 heart attack that, for about a year, left him unable to apply for the GIS. Finally, he says he relied on the Minister's advice to not file another application for the GIS before December 2010.

[7] The Minister says the Claimant did not apply for the GIS until December 31, 2010 (the "December 2010 Application").² As up to 11 months of retroactive GIS payments

¹ GD7-1

² GD2-5

can be made, the Claimant was entitled to the GIS from January 2010. This means he already received the maximum benefit available to him. As for the March 2010 Application, the Minister says it has no record of receiving such an application. The Minister suggests that it wasn't sent. The Minister also denies that the Claimant was incapable of applying for the GIS at the relevant times.

What the Claimant must prove

[8] For the Claimant to succeed, he must prove the Minister received his GIS application before December 2010. In the alternative, he must prove a deemed application date before December 2010.

Reasons for my decision

[9] The Minister did not waive the requirement for the Claimant to file a GIS application. As a result, the Minister can't pay the GIS more than 11 months before receiving the application. In the alternative, the Minister can't pay the GIS more than 11 months before the deemed application date.³ I will first consider whether the Minister received the application before December 2010.

Did the Minister receive the Claimant's GIS application before December 2010?

[10] At the hearing, the Claimant said he did not file any GIS applications before March 2010. He did not produce a copy of the March 2010 Application until December 2020. He said he was unable to locate the document before then. He said he made a copy of the completed March 2010 Application before sending it to the Minister. However, until the copy was produced in December 2020, the Minister had no record of receiving the March 2010 Application.

[11] The *Old Age Security Act* ("OAS Act") requires a potential GIS recipient to make an application.⁴ The Minister must also receive the application, unless a deemed

³ S. 11(7)(a) of the *Old Age Security Act*.

⁴ S. 11(2) of the *Old Age Security Act*.

application date can be made out.⁵ In addition, the *Old Age Security Regulations* (“OAS Regulations”) say an application is only made “when an application form completed by or on behalf of an applicant is received by the Minister [emphasis added].”⁶ Accordingly, the Claimant must show that the Minister received the March 2010 Application at some point before December 2010. This is a significant burden, so I have carefully examined the March 2010 Application and the events surrounding its eventual production.

[12] The March 2010 Application has no date stamp. It is also somewhat confusing, as I see two different versions of some sections. Sections D and E are blank on the first page, but have handwritten content when they appear again on the second page. Ultimately, however, I don’t need to place any weight on the contents of the document.

[13] Given the essential nature of the March 2010 Application, I found it somewhat surprising that the Claimant did not produce it before December 2020. When asked about this at the hearing, he said he “had a lot of problems” and had to “rely on people for everything.” He said the document was hard to find and he had to go through a lot of things. He said he knew he had it, but “I just didn’t have help to find it.” He only found the document in December 2020. At the hearing, he said “I believe I mailed it in” to the proper address after completing it in March 2010. I don’t place too much weight on this statement. In 2015, for example, he said he had “no memory of the last few years.”⁷ In 2016, his common-law spouse commented on his poor memory and said that he had “been mentally incapable of knowing that he needs to complete forms.”⁸

[14] In December 2020, the Claimant claimed to have sent “many copies” of the March 2010 Application to the Minister.⁹ While it is plausible that the Minister received but then misplaced one copy of the March 2010 Application, it is much harder to accept that the Minister received and misplaced multiple copies of that document before December 2020. Considering the evidence, I am not persuaded that the Minister received the March 2010 Application before December 2010, or even before December

⁵ S. 11(7)(a) of the *Old Age Security Act*. The deemed application scenario is discussed later.

⁶ See s. 3(2) of the *Old Age Security Regulations*.

⁷ IS15-6

⁸ IS15-20

⁹ GD7-1

2020. The Claimant may have sent it (or may have intended to send it), but that is not enough to meet the statutory requirements.

[15] I'll now look at a GIS-related document filed by the Claimant in November 2009.

November 2009 Statement of Estimated Income

[16] The Claimant filed a Statement of Estimated Income (2008) on November 18, 2009 (the "November 2009 Statement").¹⁰ While this relates to the GIS, it is not an application for the GIS. The OAS Regulations say that "an application for a benefit shall be made on an application form."¹¹ The OAS Regulations also say an "application form" means "the form of application required by the Minister."¹² As a result, I cannot consider the November 2009 Statement to be an application for the GIS.

[17] The Claimant noted that the Minister appeared to "cancel" the November 2009 Statement on March 19, 2010. The Minister's notes also state that no denial letter or reconsideration information was sent.¹³ However, those steps would require the Claimant to make an application first. Furthermore, the Minister's letter of February 17, 2010, makes clear that the November 2009 Statement would be cancelled unless the Minister received a completed GIS application within 30 days. That letter also says that any GIS rights would be based on the subsequent application if the Claimant did not meet the 30-day deadline.¹⁴ The Minister's internal notes clearly state that it received nothing within 30 days, and the November 2009 Statement was cancelled.¹⁵

Does the Claimant have an earlier deemed application date, due to administrative error or erroneous advice by the Minister?

[18] The Claimant repeatedly said that the Minister has not properly handled his correspondence or requests in this matter. For example, he said the Minister "told me to

¹⁰ IS9-86 to IS9-87

¹¹ See s. 3(1) of the *Old Age Security Regulations*.

¹² See s. 2(1) of the *Old Age Security Regulations*.

¹³ IS8-50

¹⁴ GD2-4

¹⁵ IS15-12. See also the March 19, 2010, screen grab and notes at IS9-85.

wait” after he submitted the March 2010 Application. He also said they didn’t properly investigate that application. As a result, he said the Minister didn’t receive his GIS application until December 2010. If true, these allegations might establish that the Minister made an “administrative error” (“AE”) or gave “erroneous advice” (“EA”).

[19] The OAS Act explains what can happen in the event of AE or EA. If the Minister is satisfied that AE or EA occurred, and part of a benefit was denied as a result, the Minister must take remedial action. The remedial action must put the person back in the position they should have been in.¹⁶

[20] Although the Minister mentioned AE/EA internally in 2019¹⁷, I do not see any formal AE/EA decision. If the Minister did not make a formal AE/EA decision, the Claimant would have to specifically ask for this from the Minister. This is the Claimant’s responsibility. However, even if the Minister had made a decision on AE/EA, the Tribunal does not have the jurisdiction to intervene. In that case, the only remedy available to the Claimant would be to apply to the Federal Court for judicial review of the Minister’s decision.¹⁸

[21] Accordingly, I cannot find that the Claimant has an earlier deemed GIS application date, due to AE or EA by the Minister.

Was the Claimant’s GIS application delayed due to incapacity?

[22] The Claimant said he was unable to apply for the GIS earlier due to his disabling medical conditions. At the hearing, he said he had a heart attack in August 2009 and was not capable of applying for the GIS for about a year afterward. He could not talk, and his hands and legs were swollen. His common-law spouse said the heart attack left him disabled and unable to feed or clothe himself. She said he was mentally incapable of doing tasks or remembering everyday things. As noted, she said he had been

¹⁶ Section 32 of the *Old Age Security Act*.

¹⁷ See GD2-47 to GD2-49

¹⁸ See decisions such as *Canada (MHRD) v. Tucker*, 2003 FCA 278.

incapable of knowing that he needed to complete forms, and he also did not have the mental ability to complete them.¹⁹

[23] The Claimant's allegation of incapacity for a year after his August 2009 stroke is not consistent with his other statements. For example, it contradicts his allegation that he submitted the March 2010 Application in March 2010. Nonetheless, I will look at what the OAS Act says about incapacity and determine whether those provisions assist him.

[24] A GIS application can be backdated due to incapacity. The applicant must have been "incapable of forming or expressing an intention to make the application before the day on which the application was actually made."²⁰

[25] This is a very difficult threshold to meet. It requires far more than just having a disability or a medical condition. Assessing incapacity does not involve looking at the capacity to make, prepare, process or complete an application. A person could still have capacity under the OAS Act despite not being able to prepare an application. Instead, I must consider the capacity "to form or express an intention to make an application." To do this, I can look at the Claimant's activities during the claimed period of incapacity.²¹ As the Claimant alleges that an August 2009 stroke caused his incapacity, I will look at the period between August 1, 2009, and November 30, 2010 (the last day before December 2010).

Activities between August 2009 and November 2010

[26] Firstly, I note that the Claimant completed a Statement of Estimated Income on August 31, 2009.²² He saw Dr. Phan (Family Doctor) regularly from September 2009 to December 2010. In the following paragraphs, I will reference some of those appointments and some other activities.²³

¹⁹ IS15-20

²⁰ S. 28.1(2) of the *Old Age Security Act*.

²¹ *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

²² IS9-86

²³ IS15-31 to IS15-57

[27] The Claimant saw Dr. Phan on September 16, 2009, to discuss his August 2009 heart attack.²⁴ On October 7, 2009, the Claimant told Dr. Phan about additional investigations required by Dr. Lee.²⁵ The Claimant called the Minister on October 26, 2009, to point out that he had not yet received his September 2009 OAS payment.²⁶ He complained of a chronic rash on December 24, 2009.²⁷

[28] The Claimant continued seeing Dr. Phan regularly in 2010. On February 10, 2010, the Claimant said he was interested in Vitamin D and other herbal and mineral treatments.²⁸ On March 20, 2010, he signed the March 2010 Application.²⁹ On March 25, 2010, he told Dr. Phan he had to attend court the next day for a speeding ticket. He asked Dr. Phan to provide a note excusing him from the court date.³⁰

[29] On April 27, 2010, the Claimant told Dr. Phan his energy level was a little better.³¹ On May 18, 2010, he talked about shoulder pain from going down a water slide the day before. In late May and early June, he told Dr. Phan about the impact of recent shots.³² On June 22, 2010, he talked about some recent dyspnea.³³ On July 8, 2010, the Claimant called the Minister, as he had not yet received his June 2010 OAS and CPP payments.³⁴

[30] On August 10, 2010, the Claimant told Dr. Phan he found his cough annoying.³⁵ On September 15, 2010, he reported various concerns: this included some aches and tender muscles.³⁶ On October 7, 2010, the Claimant said he suffered a minor head injury when he hit his head on his car door. He had been driving the car and tried to get

²⁴ IS15-37

²⁵ IS15-38

²⁶ IS15-13

²⁷ IS15-41

²⁸ IS15-42

²⁹ GD7-12

³⁰ IS15-43

³¹ IS15-45

³² IS15-46 and IS15-47.

³³ IS15-48

³⁴ IS15-11

³⁵ IS15-53

³⁶ IS15-54

out quickly after seeing a dog run under his car.³⁷ He complained to Dr. Phan about related pain over the next several weeks.³⁸

[31] The Claimant's regular medical appointments, as well as his reports during those appointments, point to an ability to form or express an intention to do something. So does his periodic contact with the Minister and his engagement in activities such as driving and using a water slide. In 2018, the Federal Court noted that activities such as driving could be relevant for assessing capacity.³⁹

[32] Furthermore, the medical notes do not disclose any cognitive limitation that would have significantly interfered with that capacity. Nor did he appear to rely on others at his medical appointments. I don't see other evidence of incapacity, such as powers of attorney. His physical complaints, while concerning, do not establish incapacity. I find that the Claimant did not meet the OAS threshold of incapacity.

Declarations of Incapacity

[33] The Claimant also submitted some Declarations of Incapacity. While these forms aren't mandatory to prove incapacity⁴⁰, they can sometimes be helpful if completed by a medical professional with sufficient knowledge of the applicant's limitations. However, in this case, I do not find the forms helpful in establishing incapacity.

[34] For example, the July 25, 2016, Declaration was unsigned and had no doctor's name.⁴¹ At the hearing, the Claimant said the writing was Dr. Phan's, but he gave no explanation for the lack of a name or signature. Dr. Vale signed the July 8, 2016, Declaration. Dr. Vale said the Claimant had lacked capacity since 2007 due to rheumatoid arthritis.⁴² This conflicts with the Claimant's statement that he was incapable for "about a year" after his August 2009 heart attack. The Claimant also said at the

³⁷ IS15-55

³⁸ IS15-56 to IS15-57.

³⁹ *Grosvenor v. Canada (Attorney General)*, 2018 FC 36. The *Canada Pension Plan* has incapacity provisions that mirror those in the *Old Age Security Act*.

⁴⁰ See, for example, *J.N. v. Minister of Employment and Social Development*, 2018 SST 67.

⁴¹ IS15-17

⁴² IS15-23

hearing that he attended Dr. Vale's clinic perhaps three or four times over a period of 18 months. This attendance in 2015 and 2016 is not enough for Dr. Vale to declare the Claimant had lacked capacity since 2007.

[35] There seem to have been other Declarations. For example, Dr. Phan referred to making one in July 2015, although he also expressed concern about the alleged dates of incapacity.⁴³ However, even if those Declarations were strongly supportive, they would still not overcome the activities and capacities set out in the documents from September 2009 to December 2010.

Conclusion

[36] I find that the Claimant isn't eligible for the GIS between September 2009 and December 2009. He hasn't established an actual or deemed application date before December 2010. Nor does the Tribunal have the authority to order any remedy arising from any administrative error or erroneous advice by the Minister. The Claimant will have to pursue that directly with the Minister. If he has already pursued that with the Minister, his recourse would be to the Federal Court.

[37] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section

⁴³ IS15-115 and IS15-120.