Citation: ***D. D. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 35**

Date: April 27, 2015

File number: GT-122996

GENERAL DIVISION- Income Security Section

Between:

D. D.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Shane Parker, Member, General Division - Income Security Section

Heard In person on April 24, 2015, in Regina, Saskatchewan

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant
Carla Mitchell, representative of the Appellant
T. C., Appellant's daughter (support and witness)
J. L., Appellant's daughter and Power of Attorney (support and witness)

INTRODUCTION

[1] The Appellant's application for an Allowance for the Survivor under the *Old Age Security* pension (OAS) (ALWS) was date stamped by the Respondent on January 11, 2012. The Respondent allowed the application with payments at the rate of 40/40ths to start as of February 2011. The Appellant requested a reconsideration of this decision. On September 6, 2012 the Respondent maintained its initial decision. On October 17, 2012 the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT) seeking additional retroactivity of the pension.

[2] The appeal was transferred to the Social Security Tribunal of Canada (the Tribunal) in April 2013.

[3] The appeal was heard by personal appearance for the following reasons:

- The cost-effectiveness and expediency of the hearing choice;
- The requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] The Tribunal must decide whether the Appellant is entitled to greater retroactivity of the ALWS based on the incapacity exception under the OAS Act (OASA). In particular, the question is this: was she incapable of forming or expressing an intention to make an application for the ALWS before January 11, 2012?

THE LAW

[5] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[6] Part III and section 21 of the OAS Act (OASA) deal with the payment of the ALWS. It reads as follows:

> **Payment of allowance to survivors**
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> 21. (1) Subject to this Act and the regulations, for each month in any payment period, an allowance may be paid to a survivor who
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> (a) has attained sixty years of age but has not attained sixty-five years of age; a
>
> (b) has resided in Canada after attaining eighteen years of age and prior to the day on which their application is approved for an aggregate period of at least ten years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which their application is approved.

[7] Subsection 21(6) of the OASA provides that the ALWS may be paid commencing the month after the applicant becomes a survivor, or attains 60 years of age, whichever is later.

[8] Paragraph 21(9)(a) of the OASA limits the retroactive payment of the ALWS to eleven (11) months before the month in which the application is received.

[9] Section 28.1 of the OASA deals with the incapacity exception to the 11-month retroactivity rule under paragraph 21(9)(a). It provides, amongst other things, that the application date can be deemed to have occurred at the start of the incapacity period (or the month preceding the first month the benefit could have been paid, whichever is later) where the incapacity period is greater than one year, and the applicant applies within a year of regaining capacity. Section 28.1 is reproduced in its entirety here:

> 28.1 (1) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person was 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, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
>
> **Where previous incapacity**
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> (2) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that
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> a) the person was incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
> b) the person had ceased to be so incapable before that day, and
> c) the application was made
>
> i) within the period beginning on the day on which that person had ceased to be incapable and comprising the same number of days, not exceeding twelve months, as in the period of incapacity, or
> ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person ceased to be so incapable,
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> the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

Period of incapacity

(3) For the purposes of subsections (1) and (2), a period of incapacity must be a continuous period, except as otherwise prescribed.

Application

(4) This section applies only to persons who were incapacitated on or after January 1, 1995.

EVIDENCE

[10] The Appellant was married to her spouse when he died in February 2006. She applied for the ALWS in January 2012 and was awarded the full ALWS at 40/40 effective February 2011. She resided in Canada continuously since birth, and when she applied for the ALWS. She turned 60 in December 2007. (GT1-21 to 24)

[11] The Notice of Appeal stated that the Appellant experienced a very turbulent time from 2006 to 2009 following the death of her husband. During this time:

a) The Appellant underwent multiple changes in residence (5 moves in 2008 plus hospital admissions during this period);

b) The Appellant endured worsening medical conditions, including Multiple Sclerosis (MS) symptoms and an loss of ability to live independently;

c) The Appellant suffered severe anxiety and complicated grief reactions, and had many sessions with psychologists;

d) The Appellant was prescribed heavy doses of medications resulting in questionable cognitive function due to medication management;

e) The Appellant's adult children moved back to Saskatchewan to help her manage her personal affairs, including signing a Power of Attorney (POA) in May 2008;

f) The Appellant was admitted to a long term care facility in September 2008.

(GT1-08)

[12] An undated document filed with the Notice of Appeal stated that a doctor's opinion was that the Appellant lacked capacity to manage her financial affairs from the time of her husband's death to approximately the end of 2009, when her medication was better controlled. The document added that in 2009 the Appellant remained unaware of the ALWS benefit, and remained unaware until she read a news article about it in January 2012. She applied at that time. (GT1-09)

[13] Further detail regarding the above account of the Appellant's life and challenges was provided in C. Karcha (now Mitchell)'s letter dated March 12, 2012 (GT1-12 to 13). In particular, when the Appellant's daughter became Power of Attorney (POA) in May 2008, the Appellant was receiving the CPP Survivor benefit. But her POA did not understand that the Appellant was also eligible for the ALWS. Ms. Karcha (Mitchell), the Appellant's Medical Social Worker at the W. R. C. in Regina (X), offered the opinion that the Appellant was "unable to apply for the [ALWS] due to her difficulty coping with her husband's unexpected death and the exacerbation of her [MS] symptoms (*incapacitated from the period of time between 2006 until the end of 2009)."

[14] Ms. Mitchell (the Appellant's Social Worker at X since August 2012) stated at the hearing that a lawyer visited the Appellant's home in order for her to sign the POA. This was done without any cognitive testing of the Appellant.

[15] The physician's Declaration of Incapacity is found at GT1-30 of the hearing file. For the period of February 2006 to September 2009, Dr. S. Bester felt that the Appellant's condition made her incapable of forming or expressing the intention to make an application for benefits due to anxiety, depression, and MS. Dr. Bester indicated September 2009 as "the date the incapacity ceased." Dr. Bester signed the declaration on July 10, 2012. Above his signature are these words:

> "I hereby declare that, to the best of my knowledge and belief, all of the information contained in this "Declaration of Incapacity" is true and represents a complete and accurate description of the applicant's incapacitating condition."

[16] Dr. Bester assessed the Appellant during the period of February 2006 to September 2009. His September 2008 medical report confirming diagnoses of depression and progressive MS is found at GT1-31 to 32. In the assessment section of the report, it was noted that the Appellant's "most pressing concern" was leg cramps. Dr. Bester also suggested to the Appellant that she ask a family member to book an appointment for her at the breast screening program.

[17] Dr. Bester's March 15, 2012 Certificate of Incapability regarding the Appellant's financial affairs stated her impairment date began in 2008, due to MS, anxiety and depression. Otherwise, the Appellant was currently capable; for instance in answer to the question #7: whether the Appellant was currently considered capable of managing her own affairs, Dr. Bester answered in the affirmative. Dr. Bester had known the Appellant for 3.5 years by March 2012. (GT1-34).

[18] Ms. Mitchell told the Tribunal that February 2006 to September 2009 was a "crisis" period where the Appellant could not make any decisions. Afterwards, she has been able to co-decision make. Her decisions are done in conjunction with others such as her POA. She informed the Tribunal that there has not been a signed certificate of capability. The Appellant advised that since 2009 she has been able to make decisions regarding her recreational activities at X. She encourages other residents to participate in activities, and she "counsels" others who are in need of friendship. Ms. Mitchell informed that the Appellant's cognition-impairing medications (such as Oxycodone) were tapered down and eliminated as of 2009, when continued improvements have been witnessed since; however there have been sporadic lapses in judgment and memory, likely due to her MS.

[19] Ms. T. C. is a Registered Nurse, and has been employed at X since May 2014. She is also the Appellant's daughter. She and her family moved to X shortly after her father's death in February 2006 to support the Appellant. The Appellant's judgment was very impaired at that time. She was taking copious non-prescription medications and prescription medications, to treat her MS symptoms. The grief from the sudden loss of her spouse increased her need to numb pain. The Appellant overdosed on medication and was brought to hospital. Prior to

admission at X, she had moved on four occasions. Stress exacerbated her MS symptoms. Upon admission, she was deemed a Level 4 resident. Even to present, the Appellant's judgment has been impaired when it comes to financial matters. Such decisions are made as a family. The Appellant only independently manages $100 petty cash per month, which is problematic for her. She cannot make the money last the entire month, so her budgeting skills are quite questionable. After September 2009 the Appellant has not done much independent decision making aside from social and recreational matters. Decisions pertaining to finances, and health, are done jointly with the Appellant. Ms. T. C.'s view was that the family had to be involved in decisions relating to the Appellant's care from September 2009 to present.

[20] Ms. Mitchell added that decisions regarding medical treatment, such as X-rays and flu shots, increased the Appellant's anxiety; and the Appellant would refer the decision to her daughters. The members of the Appellant's care team would not be comfortable following direction given solely by the Appellant; they would consult her daughters, who have been readily available and reliable to advise the care team what to do.

[21] Ms. J. L. said the goal with the POA and since that time (2008) was to approach decisions regarding the Appellant jointly with her; however the reality has been that she (Ms. J. L.) and the family have made final decisions on most matters, including day to day decisions. Although her perceived goal of X is to restore independence to residents, the Appellant has not been able to independently make minor financial decisions, or more significant decisions regarding her care. She and the Appellant informed the Tribunal that the Appellant's memory was a big obstacle to her independence. She became easily stressed about minor financial decisions, which would trigger her MS symptoms.

[22] Ms. Mitchell informed that in 2009 the Appellant's cognition returned somewhat. She made improvements with her anxiety. When decisions (medical, financial) need to be made, her anxiety increases. She worries to the point of "being sick." The Appellant has learned some coping and management skills for her anxiety. Since 2009 She has made some improvements in independently doing activities of daily living; selecting meals and recreational programming; establishing a social network and promoting positive relationships with others; differentiating

between who is a friend, and who would not be a positive person in her life; and recalling to take her medications when involved in other activity (for instance if she is in the middle of a social situation, she would leave to go take her medications). The Appellant confirmed that she is aware of her scheduled medications. She is able to recognize bad side effects from medications and relay that information to her caregivers. Ms. Mitchell agreed with the Appellant's daughters that the Appellant remains dependent in terms of more complicated decisions such as finances, and pursuing government benefits.

[23] Ms. Mitchell was not confident that from 2009 to present the Appellant was able to understand government benefits and the need to apply. Ms. T. C. reiterated that the Appellant's anxiety level is so high that it impedes any decision making capacity for complicated matters, such as which therapies to pursue. Ms. T. C. added that she herself receives 5-6 phone calls per day from the Appellant that are repetitive in content, which suggested to her the Appellant's judgment and memory remained poor. These issues have existed from 2009 to present. Ms. T. C. has been able to monitor the Appellant daily since May 2014. The Appellant echoed that she sees her daughters regularly, and that she calls them incessantly despite how busy they are with their immediate families.

[24] The Appellant said she read about the ALWS in the newspaper, and thought she was a survivor, and made inquiries to Ms. Mitchell. The Appellant was curious why she was not informed about applying for it. There was a "coffee row" discussion about the benefit between the Appellant and another resident. The Appellant asked a nurse, who referred her to Ms. Mitchell.

[25] Pages GT3-2 to 14 of the hearing file contain multiple unsuccessful attempts by the Respondent to contact the Appellant. On October 13, 2010, for instance, Ms. J. L. provided an updated address to the Respondent. Ms. J. L. said she was handling the Appellant's finances at the time; and provided an updated address to the federal government. She added that there was no knowledge about benefits the Appellant could be applying for. Ms. Mitchell said that prior to the Appellant reading the article about the ALWS in January 2012, it was unlikely she could form or express the intention to apply for it. Her treatment was focused on anxiety management. Ms. T. C. added that the Appellant was not reading, or engaged in focusing on

anything in print between 2009 and 2012. During that period, she was very reactive to her immediate surroundings; she had no ability to generate that into an active thought process. The focus was on her coping with her symptoms, managing her anxiety and medications.

SUBMISSIONS

[26] The Appellant submitted that he should receive additional retroactivity of her ALWS for the period of January 2008 to January 2011 inclusive because:

(a) Due to exceptional circumstances beyond her control, the Appellant was unable to apply for the benefit in a timely manner. The Appellant suffers from Multiple Sclerosis and experienced a traumatic series of life events following the sudden death of her caregiver/husband (including hospital admissions, multiple moves, etc). Due to these unfortunate events; the application was overlooked […] (GT1-06);

(b) She became eligible for the ALWS in January 2008; however, neither she nor her family members received notification of such a benefit;

(c) Determining capacity is not a perfect science and it must be considered that the POA was signed under a great deal of personal stress;

(d) At the hearing, after all evidence was given, it was submitted that the Appellant has required a very structured and supportive environment at X in order to make any kind of decisions. Without these extensive supports, she would not have been able to independently form or express an intention to apply for the ALWS before January 2012. In summary she was not independently capable of forming or expressing an intention to apply for the ALWS before January 2012.

[27] The Respondent submitted that:

(a) In the circumstances, legislation limits retroactivity of ALWS payments to eleven months before the application for the benefit was received. As such, the Appellant was awarded the maximum retroactivity of her ALWS benefit as prescribed by law;

(b) Regarding incapacity, the physician's evidence was that the Appellant's incapacity period was from February 2006 to September 2009. If a person regains capacity, an application for an OAS benefit (like the ALWS) must be submitted within one year if the period of incapacity was greater than one year. In this case, the Appellant did not do so therefore she cannot benefit from the incapacity exception to the 11-month maximum retroactivity of her ALWS;

(c) Furthermore, by appointing her daughter as POA on May 20, 2008 the Appellant had capacity at the time the document was issued, and therefore would have been able to apply for the ALWS in 2008.

ANALYSIS

[28] Based on the Appellant's birthdate, the earliest she could have been eligible for ALWS benefits was January 2008. However, she did not apply until January 2012 due to her alleged incapacity to apply sooner. The Tribunal must examine whether she was incapacitated under section 28.1 of the OASA prior to January 2012 and, if so, the period of incapacity.

[29] In regards to section 28.1's identical provision under the Canada Pension Plan (section 60), the Federal Court of Appeal stated that the provision is precise and focused in that it does not require consideration of the capacity to make, prepare, process or complete an application for benefits, but only the capacity of forming or expressing an intention to make an application. The Court of Appeal added that the activities of a claimant during the period between the claimed date of commencement of the incapacity and the date of application may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention, and ought to be considered (*Canada (Attorney General) v. Danielson*, 2008 FCA 78)

[30] The Federal Court of Appeal stated that the capacity to form an intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices facing a claimant (*Canada (Attorney General) v. Kirkland*, 2008 CAF 144).

[31] In this appeal, the Tribunal found that Dr. Bester's evidence was deserving of the most weight. Dr. Bester's was the only evidence of a treating physician with direct knowledge

related to the issue at hand. Dr. Bester had known the Appellant since her admission to X in 2008. The hearing file also contained documentary evidence from Dr. Bester, particularly during the period of 2008 to 2012, which the Tribunal found insightful. The Declaration of Incapacity spoke directly to the issue before the Tribunal. Dr. Bester made it abundantly clear that the Appellant was "incapable of forming or expressing the intention to make an application" for benefits from February 2006 to September 2009. The Tribunal acknowledges Ms. Mitchell's comment that there has been no Declaration of Capacity; however Dr. Bester answered a clear question in the Declaration of Incapacity (question #3) in regards to when the incapacity ceased: September 2009. Dr. Bester made this declaration in 2012. When doing so he declared that the information was true, accurate and complete in regards to the Appellant's incapacitating condition. (GT1-30)

[32] As an aside, the Tribunal found it interesting that, according to Dr. Bester in 2008, the Appellant's most pressing concern was her leg cramps (not her cognition). Dr. Bester felt it appropriate to advise the Appellant to ask a family member to make an appointment at a specific clinic on her behalf (GT1-32). This evidence would suggest that, at the time, Dr. Bester deemed the Appellant (at least momentarily) capable of expressing specific instructions to others that they take steps in regards to her personal matters. This said, Dr. Bester's opinion regarding the issue before the Tribunal was more directly and conclusively expressed in the Declaration of Incapacity.

[33] The rest of the evidence, on balance, supported Dr. Bester's opinion that the Appellant's period of incapacity was from February 2006 to September 2009. Ms. Mitchell's March 2012 letter opined that the Appellant was "unable to apply for the [ALWS] due to her difficulty coping with her husband's unexpected death and the exacerbation of her [MS] symptoms (*incapacitated from the period of time between 2006 until the end of 2009)." (GT1-13) [emphasis added here]. At the hearing, Ms. Mitchell said that after the February 2006 to September 2009 "crisis" the Appellant has been able to co-decision make. Ms. Mitchell said that the Appellant's cognition returned somewhat in 2009. She made improvements with her anxiety. When more complicated and serious decisions (medical, financial) need to be made, her anxiety increases. She worries to the point of "being sick." Ms. T. C. reiterated that the Appellant's anxiety level is so high that it impedes any independent decision making capacity

for complicated matters, such as which therapies to pursue. Decisions pertaining to finances, and health, are done jointly with the Appellant. Ms. T. C.'s view was that the family had to be involved in decisions relating to the Appellant's care from September 2009 to present. However, the Appellant has learned some coping and management skills for her anxiety. In situations where her anxiety increased (such as decisions regarding her medical care), she had the capacity to refer the decision to her daughters. Ms. Mitchell also informed that since 2009 the Appellant has made other improvements, including differentiating between who is a friend, and who is not. The Appellant also confirmed that she had the presence of mind to excuse herself from social settings to take her medications according to an established schedule. She added that she is able to recognize bad side effects from medications and relay that information to her caregivers. Ms. Mitchell testified that since 2009, when the Appellant was no longer taking cognition-impairing medications, her lapses in judgment and memory were only sporadic.

[34] Ms. Mitchell agreed with the Appellant's daughters that the Appellant remains dependent in terms of more complicated decisions such as finances, and pursuing government benefits. And Ms. J. L. stated that the reality was that despite co-decision making objectives, final decisions regarding the Appellant's financial and medical matters were made by the family, and not the Appellant. However, the Tribunal was unconvinced that the Appellant was incapable of forming or expressing the intention to apply for the ALWS from September 2009 onward. The balance of the evidence before the Tribunal, particularly that of Dr. Bester, suggested otherwise; specifically, that her period of incapacity ceased in September 2009.

[35] Ms. Mitchell mentioned at the hearing that she was not confident that from 2009 to present the Appellant was able to understand government benefits and the need to apply. However, this opinion appeared to be in direct contrast to her opinion expressed in her March 2012 letter, again: the Appellant was "unable to apply for the [ALWS] due to her difficulty coping with her husband's unexpected death and the exacerbation of her [MS] symptoms (*incapacitated from the period of time between 2006 until the end of 2009)." (GT1-13).

[36] There was reference throughout this appeal to the lack of knowledge of the Appellant's entitlement to the ALWS before she applied in January 2012. However, ignorance of the law is no reason to award greater retroactivity of benefits. The Federal Court of Appeal's decision in *Sedrak v. Canada (Social Development)*, 2008 FCA 86 stands for the principle that where a particular choice does not suggest itself to an applicant because of lack of knowledge, it does not indicate a lack of capacity. Broadly speaking, ignorance of the law is not an excuse (see: *Canada (Attorney General) v. Hislop* [2007] 1 S.C.R. 429 at paragraph 103).

[37] When the Appellant learned of the ALWS in January 2012, she set the wheels in motion to apply for it.

[38] In summary, the Tribunal finds that the Appellant's period of incapacity was from February 2006 to September 2009. Thereafter she regained capacity. The legislation makes it clear that in order to benefit from the incapacity provision, to receive greater retroactivity of the ALWS, the Appellant would have had to apply for the benefit within 12 months of regaining capacity (OASA s. 28.1(2)(c)(i)). As such, she had until September 2010 to apply. She did not do so. Therefore she cannot receive greater than 11-months retroactivity, and her ALWS remains effective February 2011.

CONCLUSION

[39] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security