



Citation: *QI v Minister of Employment and Social Development*, 2023 SST 569

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: Q. I.

Respondent: Minister of Employment and Social Development

Representatives: Kristopher Dolenuk
Anita Hoffman

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated March 25, 2022 (issued by
Service Canada)

Tribunal member: James Beaton

Type of hearing: Videoconference

Hearing date: May 16, 2023

Hearing participants: Appellant
Respondent's representatives

Decision date: May 18, 2023

File number: GP-22-702

Decision

[1] The appeal is dismissed.

[2] The Appellant, Q. I., isn't entitled to a division of unadjusted pensionable earnings (DUPE), also known as a credit split. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant was born in Pakistan. She got married in Pakistan in 2004. In 2005, she and her husband moved to Canada. They had two children. The Appellant separated from her husband in February 2012. Her husband died on May 6, 2016, in Pakistan. She returned to Pakistan in June 2016. Following two years of litigation, she was able to get her husband's death certificate from her husband's parents. Then she returned to Canada.¹

[4] On January 11, 2019, the Appellant applied for a Canada Pension Plan disability pension. She based her application on depression, connective tissue disease, rheumatoid arthritis, lupus, and breast cancer.²

[5] On February 16, 2022, the Appellant applied for a DUPE.³ A DUPE is when the Canada Pension Plan credits earned by a married or common-law couple are divided between both contributors upon divorce or separation.

[6] The Minister of Employment and Social Development (Minister) refused her DUPE application because she applied more than three years after her husband died.

[7] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division. She says she applied late because she was incapacitated.

¹ See GD1-5 and GD2-7, 14 to 16, 20, and 21.

² See GD2-44 and 47.

³ See GD2-14.

[8] The Minister acknowledges that the Appellant was probably incapacitated when she was hospitalized for mental health issues. But she still didn't apply soon enough after she regained capacity.

[9] I agree with the Minister.

What the Appellant must prove

[10] The law says the surviving contributor from a marriage that ended with separation must make a DUPE application within three years of the other contributor's death.⁴ If they apply after three years, the application is late and must be denied.

[11] There is an exception called the incapacity rule. If the incapacity rule applies, a person's application is deemed (considered) to have been made earlier than it actually was. In that case, the application could be on time.

[12] To succeed in her appeal, the Appellant must prove that the incapacity rule applies to her. This means she must prove that she was incapable of forming or expressing an intention to make an application before February 2022. The period of incapacity must be continuous.⁵

[13] The Appellant must prove this on a balance of probabilities. This means she must prove it is more likely than not to be true.⁶

[14] The legal test for incapacity is strict. It isn't the same as the test for disability. A person with a disability may still be able to form or express the intention to apply for a benefit, including a DUPE. Under the test for incapacity, it doesn't matter whether the Appellant:

- knew that pension credits could be divided
- knew that she had to apply for a DUPE

⁴ See section 55.1(1)(b)(ii) of the *Canada Pension Plan*.

⁵ See section 55.3 of the *Canada Pension Plan*. See also *Hussein v Canada (Attorney General)*, 2016 FC 1417.

⁶ See *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

- thought about applying for a DUPE
- could make, prepare, process or complete an application by herself⁷

[15] This means it doesn't matter when the Appellant found out about credit splitting, when she got her husband's death certificate, or when she returned to Canada.

[16] The focus of the test is on the Appellant's capacity to form or express an intention to apply. This is generally no different than having the capacity to form or express an intention to make other decisions in life.⁸

Reasons for my decision

[17] I find that the Appellant's DUPE application was late. The Appellant has been incapacitated for temporary periods. But she didn't apply soon enough after her last period of incapacity ended. So the incapacity rule doesn't help her.

The Appellant's DUPE application was late

[18] The Appellant's DUPE application was late. Her husband died on May 6, 2016. So she had to apply before May 6, 2019. She didn't apply until February 16, 2022.

[19] The Appellant argues that the Minister should have considered her Canada Pension Plan disability pension application (received on January 11, 2019) as her DUPE application.

[20] I disagree with the Appellant. An application for a disability pension and an application for a DUPE are different.⁹

[21] Even if it were possible to apply for a DUPE by applying for a disability pension, there is nothing in the Appellant's disability pension application to indicate that she

⁷ See *Canada (Attorney General) v Danielson*, 2008 FCA 78; *Canada (Attorney General) v Hines*, 2016 FC 112; and *Maloshicky v Canada (Attorney General)*, 2018 FC 51.

⁸ See *Sedrak v Canada (Social Development)*, 2008 FCA 86; *Canada (Attorney General) v Kirkland*, 2008 FCA 144; and *Blue v Canada (Attorney General)*, 2021 FCA 211.

⁹ Section 52 of the *Canada Pension Plan Regulations* sets out what information is to be included in an application for a disability pension. Section 54 sets out additional information that may be required to support a DUPE application.

wanted a DUPE or could qualify for one. Under the heading “Dividing CPP contributions – Credit split provision,” the disability pension application form says:

If you have been separated, divorced or in a common-law relationship that ended, the CPP contributions you and your former spouse or common-law partner made to the CPP during the time you lived together could be combined and equally divided.

We will review the information you provide below and let you know if a credit split could help you qualify for a CPP disability benefit.

[22] The application form then asks the applicant to select their current status from these options:

- single
- married
- common-law
- separated
- divorced
- surviving spouse or common-law partner

[23] Instead of selecting one of these options, the Appellant wrote “widow.”

[24] The application then says: “If you are currently or have ever been separated, divorced or in a common-law relationship that ended, please provide us with the dates you started and stopped living with your former spouse or former common-law partner.”

[25] In the box for “Date you started to live with your former spouse or common-law partner,” the Appellant wrote December 15, 2004, and underneath “marriage date.” In the box for “Date of separation or end of common-law relationship,” the Appellant wrote May 6, 2016, and underneath “died on.”

[26] This information suggests that the Appellant was **not** separated or divorced, nor had she been separated or divorced before her husband died. So the Minister had no reason to believe that the Appellant wanted a DUPE or could qualify for one.

[27] Since the Appellant's application for a DUPE wasn't made until February 16, 2022, the only way it could be deemed on time is if the incapacity rule helps the Appellant. Next, I will explain why the incapacity rule doesn't help the Appellant.

The incapacity rule doesn't help the Appellant

[28] When I decide whether the incapacity rule applies, I must consider:

- the Appellant's evidence about the nature and extent of her physical and mental limitations
- any medical, psychological, and other evidence in support of her claim of incapacity
- evidence of activities in which she was engaged during the period of claimed incapacity
- the extent to which these activities cast light on her capacity to form or express an intention to apply for benefits during that period¹⁰

[29] I will consider these factors under the following headings:

- when the Appellant and her doctor say she was incapacitated
- the Appellant was incapacitated when she was hospitalized
- the Appellant's incapacity wasn't continuous
- the Appellant was last incapacitated from May 25, 2021, to July 7, 2021

– When the Appellant and her doctor say she was incapacitated

[30] The Appellant says she was incapacitated continuously from sometime in 2014 until December 31, 2021.¹¹

[31] Her family doctor, Dr. Bajwa, completed a Declaration of Incapacity form requested by the Minister. Dr. Bajwa said the Appellant had been incapacitated from April 3, 2014, to the present (that is, April 5, 2022, the day he signed the form). According to Dr. Bajwa, her mental incapacity wasn't continuous, but her physical

¹⁰ See *Blue v Canada (Attorney General)*, 2021 FCA 211.

¹¹ The Appellant said this at the hearing.

incapacity was. Her mental incapacity was caused by extreme depression requiring hospitalization and electroconvulsive therapy. Her physical incapacity was caused by connective tissue disorder.¹²

[32] Dr. Bajwa wrote that she had been treating the Appellant since her incapacity began. However, this disagrees with a medical report that Dr. Bajwa submitted one month earlier in support of the Appellant's disability pension application. In the medical report, Dr. Bajwa said she didn't start treating the Appellant's primary medical condition until August 2016—over two years after she said the Appellant became incapacitated.¹³

[33] Ultimately, what the Appellant and her doctor say isn't determinative. I must consider all of the evidence, especially the evidence about the period when the Appellant says she was incapacitated. The evidence shows that the Appellant **was** incapacitated when she was hospitalized.

– **The Appellant was incapacitated when she was hospitalized**

[34] The Appellant has been hospitalized multiple times for schizophrenia and depression, including:

- in July and August 2012
- sometime in 2013
- sometime in 2014
- in March and April 2019
- from May 25, 2021, to July 7, 2021¹⁴

[35] The Minister acknowledges that the Appellant was likely incapacitated during these periods. I agree. The evidence shows that, when hospitalized, the Appellant displayed psychotic and catatonic features (such as being unresponsive to what was happening around her). The Appellant testified that she would stop eating and talking. Social services took temporary custody of her children. Her bills were left unpaid.¹⁵ All of

¹² See GD1-14.

¹³ See GD4-1 to 9.

¹⁴ See GD1-17 to 32 and GD4-243 to 245.

¹⁵ See GD1-17 to 22 and the hearing recording.

this tells me that she was incapable of forming or expressing an intention to apply for a DUPE.

[36] However, the evidence also shows that the Appellant's incapacity wasn't continuous.

– The Appellant's incapacity wasn't continuous

[37] The Appellant's incapacity wasn't continuous. When the Appellant wasn't hospitalized:

- she travelled to Pakistan and engaged in litigation¹⁶
- she applied for other benefits without help from others
- she phoned Service Canada and answered phone calls from Service Canada on her own¹⁷
- she attended medical appointments on her own¹⁸
- she consented to medical treatment¹⁹
- she tried pursuing an aesthetician diploma²⁰
- she paid bills and did her own banking²¹

[38] I acknowledge that the Appellant had ongoing functional limitations throughout her claimed period of incapacity. She still has functional limitations. For example:

- she walks with a cane or uses a wheelchair
- she has trouble standing, kneeling, bending, twisting, reaching, pushing, pulling, lifting, carrying, and manipulating objects with her hands
- she has trouble completing tasks, adjusting to change, asking others for help, and managing stress and anxiety
- her memory and focus are poor

¹⁶ See GD1-5 and GD2-7.

¹⁷ See GD3; GD4-44 and 72; and the hearing recording.

¹⁸ The Appellant testified that someone would drive her to appointments, but they didn't actually sit in appointments with her and the doctor.

¹⁹ See, for example, GD4-88 to 90. See also GD4-254 to 256.

²⁰ See GD1-17 to 20.

²¹ See the hearing recording.

- she doesn't drive anymore, although she still has a driver's licence²²

[39] These limitations impacted the Appellant physically and mentally. But they don't show that she was incapable of forming or expressing an intention to apply for a DUPE.

[40] I also recognize that the Appellant is subject to a community treatment order under Alberta's *Mental Health Act*. But this doesn't mean she is incapacitated either. In August 2021, Dr. Muir (a psychiatrist) found that the Appellant had good insight and judgment. She was doing relatively well and following treatment. Despite this, Dr. Muir concluded that the Appellant "would likely benefit from being on a [community treatment order] in the long term" since her symptoms tended to worsen when a community treatment order wasn't in place.²³

[41] The terms of the community treatment order provide for someone to help the Appellant with showering, doing laundry, and preparing meals. Previously, someone also helped her take care of her children, although it is unclear whether this support was provided under the community treatment order. The Appellant's children are now 14 and 17 and don't require the same degree of care as when they were younger.²⁴

[42] These types of support don't indicate that the Appellant was incapable of forming or expressing an intention to apply for a DUPE. They aren't related to her ability to make decisions or communicate with other people.

[43] Lastly, the Appellant is getting chemotherapy treatment for breast cancer. She testified that she has had a double mastectomy and a hysterectomy as well. There is no evidence that these treatments would have made her incapable of forming or expressing an intention to apply for a DUPE. She tolerated chemotherapy well and continued to take care of her house and children during treatment.²⁵

²² See GD2-20 to 32 and 44 to 56, GD4-1 to 9, and the hearing recording.

²³ See GD1-17 to 20.

²⁴ See the hearing recording.

²⁵ See GD4-88 to 90.

– **The Appellant was last incapacitated from May 25, 2021, to July 7, 2021**

[44] The Appellant was last incapacitated from May 25, 2021, to July 7, 2021, when she was most-recently hospitalized.²⁶ This is a period of 44 days. The evidence supports on a balance of probabilities that she would have been capable of forming or expressing an intention to apply for a DUPE both before and after this period.

[45] The law says the Appellant must have applied within 44 days of regaining capacity.²⁷ So her deadline to apply was August 21, 2021. She didn't apply until February 16, 2022. Her application was late and the incapacity rule doesn't help her because she didn't apply soon enough after her last period of incapacity ended.

Conclusion

[46] The Appellant isn't entitled to a DUPE.

[47] This means the appeal is dismissed.

James Beaton
Member, General Division – Income Security Section

²⁶ See GD1-17 to 20.

²⁷ See section 55.3(2)(c)(i) of the *Canada Pension Plan*.