



Citation: *DS v Minister of Employment and Social Development*, 2023 SST 1090

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

## Decision

**Appellant:** D. S.  
**Representative:** J. S.  
**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated November 8, 2021 (issued  
by Service Canada)

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**Tribunal member:** Shannon Russell  
**Type of hearing:** Teleconference  
**Hearing date:** May 10, 2023  
**Hearing participants:** Appellant  
Appellant's representative  
**Decision date:** May 30, 2023  
**File number:** GP-22-1928

## Decision

[1] The appeal is dismissed.

[2] The Appellant, D. S., isn't eligible for Canada Pension Plan (CPP) disability benefits earlier than February 2020. This decision explains why I am dismissing the appeal.

## Overview

[3] The Appellant is a 54-year-old man whose childhood was filled with trauma.<sup>1</sup>

[4] As an adult, the Appellant married, had a child and worked for many years. He stopped working in 2014.<sup>2</sup> At that time he was working as a ready mix driver. He loaded and delivered concrete to work sites.

[5] The Appellant applied for disability benefits in January 2021. In his application, he said he can't work because of chronic pain, major depressive disorder, and generalized anxiety disorder.<sup>3</sup>

[6] The Minister denied the application.<sup>4</sup> The Appellant disagreed with the Minister's decision, and so he asked the Minister to reconsider.<sup>5</sup>

[7] The Minister reconsidered, and changed its decision. The Minister determined that the Appellant qualified for disability benefits because he proved his disability was severe and prolonged by December 31, 2017 (the date he met the contributory requirements). The Minister awarded benefits back to February 2020.<sup>6</sup>

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<sup>1</sup> Page IS1-2

<sup>2</sup> The Appellant's application for disability benefits says he stopped working in 2016 (page GD2-48). However, this appears to be a mistake. The Appellant told me at the hearing that he stopped working in 2014. Also, his Record of Earnings does not show employment earnings after 2014. See, for example, pages GD2-67 and GD2-70.

<sup>3</sup> Page GD2-38

<sup>4</sup> The Minister's initial decision is at page GD2-27.

<sup>5</sup> The Appellant's request for reconsideration is at pages GD2-117 to GD2-118.

<sup>6</sup> The Minister's decision letter is at page GD2-22.

[8] The Appellant wanted his benefits to start earlier than February 2020, and so he appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[9] In October 2022, a Tribunal Member determined that the Appellant's appeal was late. That member also denied the Appellant's request for an extension of time to appeal.

[10] The Appellant appealed the decision to the Tribunal's Appeal Division. The Appeal Division allowed the Appellant's appeal and returned the matter to the General Division for a hearing on the issue of whether the Appellant was incapable of forming or expressing an intention to apply for CPP disability benefits earlier than when he did.<sup>7</sup>

[11] The Appellant says that his disability benefits should have started earlier than February 2020 because he was incapacitated. If he'd known about the disability benefit sooner, he would not have been able to decide whether to apply for it. He would have asked his spouse to make the decision for him. His spouse makes all the decisions about their finances and their son.

[12] The Minister says that the Appellant received the most retroactivity that can be awarded under the legislation. The Minister also says that the Appellant was not incapable of forming or expressing the intent to make an application before the day his application was actually made. The evidence shows the Appellant made significant decisions during the period of claimed incapacity. For example, he consented to treatment, he asked for painkillers for shoulder pain, and he signed a Service Canada consent form and appeal documents.

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<sup>7</sup> The Appeal Division's decision is dated November 22, 2022.

## The Appellant is disabled

[13] There's no question that the Appellant has a disability and that he has been disabled for some time.

### What the law says about when disability payments start

[14] When a person's application for disability benefits is approved, there are limits on how far back payments can go. The CPP legislation says that the earliest a person can receive their benefits is 11 months before the date of application.<sup>8</sup>

[15] The Appellant received 11 months of retroactive payments. He applied for his disability benefits in January 2021, and he was awarded the benefits retroactive to February 2020.<sup>9</sup>

## Incapacity – What it is

[16] If a person's application for the benefits was delayed because of incapacity, then the person may be eligible for more than 11 months of retroactive benefits.

[17] Incapacity means that the person was **incapable of forming or expressing an intention** to make an application before the day on which the application was actually made.<sup>10</sup> A period of incapacity must be a **continuous** period.<sup>11</sup>

[18] The legal test for incapacity is strict. It isn't the same as the test for disability. Under the test for incapacity, it doesn't matter if the Appellant:<sup>12</sup>

- didn't know about the CPP disability benefits
- didn't know he had to apply for disability benefits

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<sup>8</sup> Paragraph 42(2)(b) and section 69 of the *Canada Pension Plan*.

<sup>9</sup> Pages GD2-18 and GD2-22.

<sup>10</sup> Subsections 60(8) and (9) of the *Canada Pension Plan*.

<sup>11</sup> Subsection 60(10) of the *Canada Pension Plan*.

<sup>12</sup> *Canada (Attorney General) v. Hines*, 2016 FC 112, *Canada (Attorney General) v. Danielson*, 2008 FCA 78, and *Canada (Attorney General) v. Poon*, 2009 FC 654

- couldn't fill out the application form by himself or
- couldn't deal with the consequences of applying for the benefits.

[19] 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.<sup>13</sup>

## **What the Appellant must prove**

[20] To be successful with his appeal, the Appellant needs to show that he was incapable of forming or expressing the intention to apply for benefits before January 2021.

## **Reasons for my decision**

[21] As I said before, the Appellant is disabled and is unable to work. However, there is a difference between being disabled and being incapacitated. I am unable to find that the Appellant is or was incapacitated.

### **The factors I must consider**

[22] When I am deciding if the Appellant met the incapacity test, I have to look at the following factors:<sup>14</sup>

- the Appellant's evidence about the nature and extent of his physical and mental limitations
- any medical, psychological or other evidence provided in support of the incapacity claim
- evidence of activities in which the Appellant may have been engaging during the period of claimed incapacity

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<sup>13</sup> *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.

<sup>14</sup> *Blue v. Canada (Attorney General)*, 2021 FCA 211.

- the extent to which these activities cast light on the Appellant's capacity to form or express an intention to apply for benefits during that period

### **What the Appellant and his spouse and his psychologist say about when the Appellant was incapacitated**

[23] The Appellant told me that he has been incapacitated continuously since 2014. He says he remains incapacitated today.

[24] The Appellant's spouse agrees that the Appellant has been incapacitated since at least 2014. She says that she has been the one who has made all of the decisions about things like finances and care for their son.

[25] The Appellant's psychologist (Dr. Coish) has not clearly defined the Appellant's period of incapacity. However, he implies that the Appellant has been incapacitated since at least March 2017.

[26] In his letter of March 2023, Dr. Coish said he first saw the Appellant in March 2017. At that time, the Appellant was acutely ill from a mental health perspective. Dr. Coish was able to determine from his initial sessions with the Appellant that he had been quite ill for some years. Dr. Coish concluded that the Appellant is incapacitated by the totality of his symptoms.<sup>15</sup>

### **The Appellant had the capacity to form or express an intention to apply for benefits**

[27] The evidence shows that the Appellant has been unable to work for quite some time.

[28] Despite having functional limitations that prevent him from working, the evidence doesn't show the Appellant was incapacitated. To say it differently, the evidence shows

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<sup>15</sup> Pages IS1-2 to IS1-3.

that the Appellant likely had the capacity to form or express an intention to apply for benefits. Here is why.

### **I – the Appellant applied for benefits during his claimed period of incapacity**

[29] The Appellant was, in fact, able to apply for disability benefits in January 2021. This is important for three reasons:

(a) the application was made within the period of claimed incapacity.

(b) the evidence doesn't show a significant change in the Appellant's functionality in or around January 2021, when his application was made.

(c) making an application for benefits is precisely what the test for incapacity is about. The Appellant may have had help making the application, but that doesn't matter. He signed the application in October 2020, showing an ability to form or express an intention to apply for benefits.<sup>16</sup>

### **II – the Appellant's family doctor hasn't said the Appellant is incapacitated**

[30] The Appellant's family doctor (Dr. Hussain) did not give evidence indicating that the Appellant would be unable to apply for a benefit. Dr. Hussain reported that the Appellant's mental health conditions result in irritability and lability.<sup>17</sup> He didn't go so far as to say, or even suggest, that the Appellant would be unable to form or express an intention to apply for benefits.

### **III – the Appellant hasn't needed a Power of Attorney (POA) to make decisions for him**

[31] The Appellant testified that he has not needed a POA to make decisions on his behalf. He explained that he's incapacitated "to a certain extent", but there are still

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<sup>16</sup> Pages GD2-52 and GD2-53.

<sup>17</sup> Page GD2-200.

things he can do. For example, he can clean his home and mow his lawn. He can also take out money from a bank machine, though he then gives his bank card to his spouse.

[32] Not having a POA is significant because it shows the Appellant was able to make decisions on his own. For example, he has made decisions about having medical tests and procedures done. He had imaging done of the cervical spine in October 2016.<sup>18</sup> He had imaging done of his right shoulder in November 2019 and March 2020.<sup>19</sup> He had hand surgery in early 2022, neck surgery in April 2022, and another hand surgery about four weeks before this hearing.<sup>20</sup> I don't have medical evidence suggesting that any of the Appellant's health care practitioners were concerned about the Appellant's capacity to consent to medical tests or procedures.

#### **IV – the Appellant's other activities are inconsistent with a finding of incapacity**

[33] Taken as a whole, the Appellant's other activities during his period of claimed incapacity are inconsistent with a finding of incapacity. Here are some examples:

- The Appellant said that after he stopped working, the forms for short and long-term disability were filled out by his spouse and doctor. However, when I asked him if he understood what the forms were about, he said he did. He added that he wasn't able to fill the forms out because his hands make it difficult to write. Again, the test for incapacity isn't about whether the Appellant could physically fill out forms.
- The Appellant told me that he has had a valid driver's license for many years. He also said that he continues to drive and he is an accomplished driver. The Appellant's continued ability to drive a motor vehicle is important because driving requires decision making and mental sharpness.

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<sup>18</sup> Page GD2-136.

<sup>19</sup> Pages GD2-137 and GD2-174

<sup>20</sup> Page GD3-1 and the Appellant's testimony.



- The Appellant provided care to his father before he died in March 2016. The Appellant was also his father's POA. As POA, the Appellant made decisions for his father while his father was in the hospital.
- The Appellant was also his mother's POA before she passed away in April 2018. She lived with the Appellant, and had Alzheimer's and physical limitations that made it difficult to walk. The POAs are significant as they show the Appellant had the legal authority and responsibility to make important decisions on behalf of other people.
- The Appellant's spouse began working outside of the home in 2016. When she was working, the Appellant cared for their son who was born in 2006.<sup>21</sup>
- The Appellant was the executor of his father's estate.
- During the period of claimed incapacity, the Appellant was able to discuss his medical conditions with doctors and explain his symptoms. For example, in March 2021, the Appellant told Dr. Roberts that he was having additional pain and swelling in his hands. He explained that this was making it difficult to perform his daily tasks.<sup>22</sup> The reports do not indicate that the Appellant had difficulty expressing his concerns or understanding the medical advice. In fact, the medical evidence suggests mental capacity. For example, Dr. Boodhun, Neurologist, wrote in December 2020 that on examination the Appellant was awake, alert, and oriented to time, place and person. Dr. Boodhan added that the Appellant's mental functions were normal.<sup>23</sup>
- The Appellant was able to provide written consent for Service Canada to obtain medical and other personal information about him.<sup>24</sup>

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<sup>21</sup> Page GD2-36 and the Appellant's testimony.

<sup>22</sup> Page GD2-122.

<sup>23</sup> Page GD2-13.

<sup>24</sup> Pages GD2-85 and GD2-195.

- The Appellant was able to sign his name to various appeal documents.<sup>25</sup> This shows an ability to express an intention to appeal an issue about his disability benefits. Even though this was after the Appellant applied for benefits in 2021, it is still relevant because the Appellant says that his incapacity has been continuous since 2014 and is ongoing.

### **V – Dr. Coish’s opinion about incapacity is not persuasive**

[34] Dr. Coish wrote a letter in October 2021 supporting the Appellant’s application for disability benefits. In that letter, Dr. Coish explained that the Appellant’s diagnoses result in cognitive decline, flashbacks of his childhood trauma which leads to emotional outburst, hypervigilance when it comes to his son’s safety, suicidal ideation, extremely poor memory and concentration, and very low frustration tolerance. Dr. Coish concluded by saying that the Appellant is markedly restricted in performing the mental functions necessary for everyday life 100% of the time.<sup>26</sup>

[35] In March 2023, Dr. Coish reported that the Appellant has intellectual disability (moderate), attention deficit hyperactivity disorder (ADHD), Post Traumatic Stress Disorder (PTSD), major depressive disorder, and generalized anxiety disorder. Dr. Coish said the Appellant is incapacitated from the totality of the symptoms from these diagnoses. He also said that the Appellant is not capable of managing his own affairs, and that the Appellant’s spouse is responsible for all things related to their finances.<sup>27</sup>

[36] Dr. Coish’s opinion about incapacity is not persuasive.

[37] Dr. Coish said in March 2023 that the Appellant’s symptoms from the diagnoses make him incapacitated. However, Dr. Coish did not identify what the symptoms are and he did not explain how the symptoms would make the Appellant incapable of forming or expressing an intention to apply for benefits.

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<sup>25</sup> The Appellant signed these documents in January 2022 and May 2022 (pages GD1-4 to GD1-6, GD2-10).

<sup>26</sup> Pages GD2-111 to GD2-112.

<sup>27</sup> Pages IS1-2 to IS1-5.

[38] Dr. Coish's earlier report of October 2021 identifies some functional limitations, such as extremely poor memory and concentration. However, that report was made in the context of supporting a finding of disability. As I said before, this appeal isn't about whether the Appellant is disabled. He clearly is. This appeal is about whether the Appellant was incapacitated. The functional limitations set out in Dr. Coish's report of October 2021 don't show the Appellant was or is incapacitated, especially in light of other evidence showing the Appellant's capacities for things like driving a motor vehicle, and carrying out the responsibilities of a POA and executor. Even the Appellant's own application for disability benefits says he has a "good" ability to decide between two options.<sup>28</sup>

## **Conclusion**

[39] The Appellant wasn't incapacitated and so he isn't eligible for disability benefits earlier than February 2020.

[40] This means the appeal is dismissed.

Shannon Russell  
Member, General Division – Income Security Section

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<sup>28</sup> Page GD2-45.