



Citation: *DP v Minister of Employment and Social Development*, 2022 SST 837

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

# Decision

**Appellant:** D. P.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated February 17, 2021 (issued  
by Service Canada)

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**Tribunal member:** Pierre Vanderhout

**Type of hearing:** Videoconference

**Hearing date:** August 2, 2022

**Hearing participants:** Appellant  
Interpreter

**Decision date:** August 10, 2022

**File number:** GP-21-1069

## Decision

[1] The appeal is allowed.

[2] The Appellant, D. P., is eligible for a Canada Pension Plan (“CPP”) disability pension. Payments start as of May 2019. This decision explains why I am allowing the appeal.

## Overview

[3] The Appellant is 57 years old. He most recently worked as a dishwasher in a restaurant, but stopped working in February 2020 because of his medical conditions. He has been deaf all his life. He originally learned sign language in his native Poland, but later came to Canada and has since learned American Sign Language (“ASL”). English is not his first language and reading is very hard for him. He cannot lip-read English, and can only lip-read a little bit of Polish. Since at least 2008, he has also suffered from vitamin B12 deficiency and lower leg neuropathy. These conditions cause leg pain, swelling, numbness, and an inability to stand or be active for long periods. In early 2020, he was diagnosed with diabetes. This is likely related to his leg symptoms.

[4] The Appellant applied for a CPP disability pension on April 3, 2020. The Minister of Employment and Social Development (“Minister”) refused his application. The Appellant appealed the Minister’s decision to the Tribunal.

[5] The Appellant says he wants to work despite his limitations. However, his latest work attempt failed because of his leg issues. He is also only capable of part-time work: his capacity is at most five hours/day and three days/week. Finally, his physical and communication limitations greatly restrict the types of work available to him. He says the combination of his medical conditions disables him, not just one of them.

[6] The Minister says the Appellant was not disabled by December 31, 2016 (the key date in this appeal). He attended school after that date, and did both paid and volunteer work. The Minister says his doctor believed he was capable of at least part-time work. The Appellant reported some strong functional abilities when he applied for a disability

pension. The Minister further notes his work history and extensive training, which gives him more work and training options. The Minister concludes he could do some type of work by the end of 2016. The Minister also suggests he did not pursue treatment with an “ENT” specialist.

## What the Appellant must prove

[7] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2016. This date is based on his CPP contributions.<sup>1</sup>

[8] The *Canada Pension Plan* defines “severe” and “prolonged.”

[9] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup>

[10] This means I must look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I must also look at his background (including his age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether his disability is severe. If the Appellant can regularly do some type of work from which he could earn a living, he isn’t entitled to a disability pension.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>3</sup>

[12] This means the Appellant’s disability can’t have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

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<sup>1</sup> Service Canada uses an appellant’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (“MQP”). The end of the coverage period is called the MQP date. See s. 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on pages GD2-80 to GD2-81.

<sup>2</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[13] The Appellant must prove he has a severe and prolonged disability. He must prove this on a balance of probabilities. This means he must show it is more likely than not that he is disabled.

## **Reasons for my decision**

[14] I find that the Appellant had a severe and prolonged disability as of July 2015. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

### **Was the Appellant's disability severe by December 31, 2016?**

[15] The Appellant's disability was severe by December 31, 2016. I reached this finding by considering several factors. I explain these factors below.

#### **– The Appellant's functional limitations affect his ability to work**

[16] The Appellant is deaf. He has diabetes. He also has an ongoing vitamin B12 deficiency and lower leg neuropathy.

[17] However, I can't focus on the Appellant's diagnoses.<sup>4</sup> Instead, I must focus on whether he had functional limitations that interfered with earning a living.<sup>5</sup> When I do this, I must look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected his ability to work.<sup>6</sup>

[18] I find that the Appellant has functional limitations that affected his ability to work.

#### **– What the Appellant says about his functional limitations**

[19] The Appellant says his medical conditions result in functional limitations that affect his ability to work. He says he has trouble standing. He can only walk for a short period. He needs to rest after any activity. He needs a balance of sitting and standing

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<sup>4</sup> See *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

<sup>5</sup> See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

<sup>6</sup> See *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

positions. Due to his diabetes, he sometimes gets headaches or gets very dizzy. His deafness stops him from communicating orally with others. As he can only communicate using his hands, he is greatly restricted in his ability to communicate. His weak background in written English further affects his ability to communicate. It is hard for him to interact without an ASL-English interpreter.

[20] While the Appellant described the above limitations at the hearing, I find that virtually all of them also applied by the end of 2016. His limitations relating to deafness clearly would have existed in 2016, and I see no reason to believe they were better at that time. At the hearing, he said he had leg pain and could not stand too long in 2016 either. The headaches and dizziness might not have been an issue in 2016, as he was only recently diagnosed with diabetes.

[21] When he applied for CPP disability benefits in early 2020, the Appellant also reported his ability to do the following activities as “poor”:<sup>7</sup>

- Stare at a computer screen for at least 20 minutes
- Carry grocery bags for 100 metres
- Drive a car
- Figure out what to do when stressed
- Answer the telephone

[22] The Appellant provided a résumé that summarized his prior work experience. His work history suggests that his deafness and limited English-language capacity limits him to certain roles such as cleaning, washing dishes, warehousing, and stocking shelves.<sup>8</sup> His physical limitations also prevent him from doing any sustained physical activity.

[23] I found the Appellant to be credible. He repeatedly showed frustration with not being active, particularly during the pandemic, and would prefer to be actively engaged in the world and with other people. This frustration came through very clearly, although he spoke through an interpreter.

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<sup>7</sup> GD2-65 to GD2-68

<sup>8</sup> GD2-115

[24] The Minister noted that the Appellant reported many “excellent” physical abilities when he applied for the CPP disability pension in April 2020. That application form appears to show some physical capacity that contradicts his other evidence. For example, he said his ability to remain on his feet for at least 20 minutes was “excellent”. He gave the same rating to walking 100 metres on flat ground. However, at the same time, he rated his ability to pick up two bags of groceries and walk 100 metres as “poor”.<sup>9</sup> On the same form, he also said neuropathic pain in his feet disabled him.<sup>10</sup>

[25] The Appellant completed this form only two days after Dr. Salem (Family Doctor) gave him a note to be off work for medical reasons.<sup>11</sup> The Appellant also stopped working permanently that month. I reconcile the apparent contradictions by noting that the Appellant has admitted some work capacity, but not enough to work more than 15 hours per week. Standing for 20 minutes at a time, or being able to walk 100 metres (but only without other tasks at the same time), doesn’t contradict that capacity.

– **What the medical evidence says about the Appellant’s functional limitations**

[26] The Appellant must provide some medical evidence to support that his functional limitations affected his ability to work by December 31, 2016.<sup>12</sup>

[27] The medical evidence supports what the Appellant says. His doctors repeatedly confirmed that he is deaf.<sup>13</sup> I fully accept that he has remained deaf since the earliest documents from 2008.<sup>14</sup> Dr. Salem (Family Doctor) added that he was unable to talk.<sup>15</sup> Dr. Salem also reported the Appellant’s frustration with his communication limits, and even noted impaired cognition resulting from his deafness.<sup>16</sup>

[28] Although I see some gaps in the medical evidence, his lower leg neuropathy and vitamin B12 deficiency have also been noted for many years. Dr. Hurtan noted the

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<sup>9</sup> GD2-65

<sup>10</sup> GD2-62

<sup>11</sup> GD1-10

<sup>12</sup> See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.

<sup>13</sup> See, for example, GD2-12, GD2-44 to GD2-48, GD2-107, GD2-114, and GD4-2.

<sup>14</sup> GD2-121. The 2008 date is crossed out on this document, but appears to be correct.

<sup>15</sup> GD2-47

<sup>16</sup> GD2-107

vitamin B12 problem in late 2008. Along with his lower leg issue, this was affirmed in early 2009.<sup>17</sup> Dr. Salem noted his foot pain in late 2018.<sup>18</sup> Dr. Salem confirmed ongoing vitamin B12 deficiency and associated leg issues in early 2019.<sup>19</sup> Dr. Salem again noted these ongoing conditions in January 2021 and June 2022. Dr. Salem added that his foot pain was managed with rest between standing and walking.<sup>20</sup>

[29] The medical evidence supports that the Appellant's deafness and physical limitations prevented him from doing jobs such as dishwashing and warehousing for any significant time. While the Minister correctly says the Appellant has some capacity for suitable work, the real issue is whether this capacity would let him earn a substantially gainful income. I will look at this later.

[30] Next, however, I will look at whether the Appellant has followed medical advice.

– **The Appellant has followed medical advice**

[31] To receive a disability pension, an appellant must follow medical advice.<sup>21</sup> If he doesn't, then he must have a reasonable explanation. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.<sup>22</sup>

[32] The Appellant has followed medical advice.<sup>23</sup> At the hearing, he said he tried the various treatments recommended to him. As noted, I found his evidence credible. He said he gets monthly injections of vitamin B12. Dr. Salem confirmed this in June 2022.<sup>24</sup> In February 2019, Dr. Salem said he followed the recommended treatment plan.<sup>25</sup> At the hearing, the Appellant said he had changed his diet since learning he had diabetes.

[33] I asked the Appellant about a January 2021 letter from Dr. Salem. In that letter, Dr. Salem said he made a referral to an ENT (ear, nose and throat) specialist, "but this

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<sup>17</sup> GD2-122 to GD2-123.

<sup>18</sup> GD2-47 and GD2-48.

<sup>19</sup> GD2-45 to GD2-47 and GD2-112.

<sup>20</sup> GD2-12 and GD4-2.

<sup>21</sup> See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

<sup>22</sup> See *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>23</sup> See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

<sup>24</sup> GD4-2

<sup>25</sup> GD2-108

wasn't followed through." I cannot tell who didn't follow through. The Appellant said he has never seen an ENT specialist. He sometimes sees an audiologist to check his hearing. He did that in 2019.<sup>26</sup>

[34] The Appellant also described difficulties in communicating with his treating doctors. Unless he has an English-ASL interpreter with him, there are often misunderstandings. His written communication in English is not strong, and it can also be difficult for an ASL speaker to formulate written English sentences that an English speaker without ASL can understand. ASL does not have the same syntax as English.

[35] However, even if the Appellant didn't attend an ENT appointment, I am not convinced that attending would have made a difference to his disability. He has been deaf since birth. It is highly unlikely that seeing an ENT specialist would have had a material effect on his total hearing loss. I further note that the Appellant has taken several courses to improve his ability to communicate.<sup>27</sup>

[36] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent him from earning a living at any type of work, not just his usual job.<sup>28</sup>

– **The Appellant can work in the real world**

[37] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language ability
- past work and life experience

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<sup>26</sup> In fact, I see a January 2019 audiology test the file: see GD2-113.

<sup>27</sup> GD2-116

<sup>28</sup> See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.



[38] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.<sup>29</sup>

[39] I find that the Appellant can work in the real world.

[40] The Appellant is 57 years old. He grew up in Poland and learned Polish Sign Language as a child. He says he did less than two years of secondary education, but later completed some college courses in Canada. He also completed a general machinist certificate and welding training, as part of an apprentice program in Poland. He later learned ASL, earned an English as a Second Language diploma, and finished a Deaf Literacy Program. His training includes a recent “WHMIS” course.<sup>30</sup>

[41] The Appellant’s work history includes a lengthy period as a restaurant janitor and kitchen helper. He has been a shipper and receiver, a grocery associate (cleaning and stocking), a dishwasher, and a warehouse worker. He also volunteered recently at a food bank, where he put potatoes into bags and weighed the bags.

[42] I asked the Appellant about his ability to work as a machinist or welder, as his apprentice program ended in Poland nearly 40 years ago. He said the Polish program was not accepted in Canada. He also said that his weak reading and English skills are a barrier to becoming qualified and finding work in Canada. I accept that his English skills are below what would be acceptable in a role involving any significant communication.

[43] The above factors, including the Appellant’s age, suggest that his real-world work options would be limited to roles he has already performed. This would include relatively physical jobs such as dishwashing, cleaning, and warehousing roles. However, I must also consider his medical limitations.

[44] The Appellant’s physical limitations, such as his inability to walk or stand for extended periods, further limit his ability to find and maintain work in the real world. He suggests that he would like to try sedentary (seated work), as that would address his

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<sup>29</sup> See *Villani v. Canada (Attorney General)*, 2001 FCA 248.

<sup>30</sup> GD2-71 and GD2-116. WHMIS stands for “Workplace Hazardous Materials Information System”.

issues with prolonged standing. However, he is not suited for sedentary work. He does not have the skills, education, or communication capacity to succeed at such work.

[45] I see repeated references to the Appellant's inability to work full-time. He was only able to work half-days in 2009.<sup>31</sup> While he could work full-time in a warehouse for a period starting in 2011, he said he had a doctor's note in 2013 limiting him to part-time work.<sup>32</sup> Dr. Salem said his work capacity was 15 hours per week in October 2018 and 12 hours per week of light duties in January 2021.<sup>33</sup> Dr. Salem also noted a "major or complete" work impairment in January 2019.<sup>34</sup>

[46] I conclude that the Appellant could work in the real world from at least the end of 2016 to the date of the hearing. However, he only had part-time capacity.

– **The Appellant tried to find and keep a suitable job**

[47] If the Appellant can work in the real world, he must show that he tried to find and keep a job. He must also show his efforts weren't successful because of his medical conditions.<sup>35</sup> Finding and keeping a job includes retraining or looking for a job he can do with his functional limitations.<sup>36</sup>

[48] The Appellant made efforts to work. These efforts show that his disability got in the way of earning a living.

[49] The Appellant's latest effort was washing dishes at a restaurant. This job suited him, as he had done it before and it did not have high communication demands. He started this job in June 2019. He stopped in February 2020. He earned \$15.00 per hour. He worked 3 days per week, on shifts of up to 6 hours, for a total of 16 hours per week.

[50] To wash dishes, he had to stand up for his entire shift. When he started in June 2019, he thought he could stand for 5 hours (3 days per week). However, he was no

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<sup>31</sup> GD2-119, GD2-120 and GD2-122.

<sup>32</sup> I did not see the note in the file: this is from the Appellant's oral evidence.

<sup>33</sup> GD2-12, GD2-48, and GD2-114.

<sup>34</sup> GD2-107

<sup>35</sup> See *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

<sup>36</sup> See *Janzen v. Canada (Attorney General)*, 2008 FCA 150.

longer capable of even this reduced workload by February 2020. He said the job was very busy: his legs hurt very much and he couldn't meet the demands. As noted, Dr. Salem further reduced his maximum capacity to 12 hours per week by January 2021.

[51] I accept that the Appellant's efforts to succeed at this work were genuine. I believe him when he says he does not want to be sitting around at home. He also did training and volunteer work (part-time) before taking on the dishwashing job.<sup>37</sup>

[52] I find that his disability was severe. The Appellant's efforts show that, as of July 2015, he could not regularly do any work from which he could earn a living. I will now explain how I arrived at that date.

[53] The Appellant stopped working in the X warehouse around mid-September 2014.<sup>38</sup> He said he could no longer work because of his leg pain. He also said he had problems with his supervisor, who put pressure on him and said he had to be faster. He had already switched to part-time hours. At the hearing, he said his work capacity around the end of 2016 would have been 15 hours per week. As his capacity remained at that level for several years afterward, and he was unable to work even part-time by September 2014, his work capacity from September 2014 onward was likely no more than 15 hours per week.

[54] Despite this, I must consider that the Appellant received regular Employment Insurance ("EI") benefits for roughly nine months after he stopped working at X. Receiving regular EI benefits requires a person to be "capable of and available for work."<sup>39</sup> I can't find that the Appellant was severely disabled while he was receiving regular EI benefits. Allowing for a brief waiting period before EI benefits started, I find that he would have been severely disabled at the beginning of July 2015.

[55] While the Appellant likely could work around 15 hours per week, I still find he was "incapable regularly of pursuing a substantially gainful occupation." This is because in

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<sup>37</sup> At various times between 2015 and 2018, he volunteered at a Food Bank, attended a Deaf Literacy Program, and did WHMIS training. I set out the details of these activities later in this decision.

<sup>38</sup> GD1-13 and GD2-117.

<sup>39</sup> See s. 18(1)(a) of the *Employment Insurance Act*.

June 2014 the law clarified what “substantially gainful” means. It refers to an occupation that pays at least the maximum annual amount a person could receive as a disability pension.<sup>40</sup> That amount would have been \$15,175.08 in 2015 and \$15,489.72 in 2016.

[56] The Appellant’s capacity of about 15 hours/week is critical. With at least two weeks of vacation, that makes a maximum of 750 hours per year. I note that he earned \$15.00 per hour as a dishwasher in 2019 and 2020. Even at that inflation-boosted wage, his earning capacity starting in 2015 would still only have been about \$11,250.00. This is well below the “substantially gainful” level. His hourly wage at X was likely not higher than \$15.00 per hour, as even his biggest earning year (2013) was only \$21,163.00 despite working full-time for a period.<sup>41</sup>

[57] Finally, I have considered that the Appellant attended school and volunteered after the end of 2016. He attended the Deaf Literacy Program at a local college from 2015 to 2017. He said he was there twice a week for two hours at a time. His June 2018 WHMIS training had about 6 or 7 days of instruction, spread out over a month. He said he volunteered at the Food Bank for 10 hours per week in 2018. None of these activities persuade me that he could sustain more than 15 hours per week in a competitive work setting. Nor do I think he could retrain enough to handle sedentary work. His language and communication skills require too much upgrading for that.

[58] As I have found that the Appellant had a severe disability by the end of 2016, I must now consider whether it was also prolonged by then.

### **Was the Appellant’s disability prolonged by the end of 2016?**

[59] The Appellant had a prolonged disability by the end of 2016.

[60] The Appellant has been deaf since birth. He has had a vitamin B12 deficiency and lower limb neuropathy since at least the beginning of 2009.<sup>42</sup> I find that he is disabled by the combined impact of these conditions. Accordingly, for the purposes of

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<sup>40</sup> See s. 68.1(1) of the *Canada Pension Plan Regulations*.

<sup>41</sup> GD2-81

<sup>42</sup> GD2-122

this appeal, his conditions began by January 2009. These conditions have continued since then, and they will more than likely continue indefinitely.<sup>43</sup>

[61] In February 2019, Dr. Salem said the Appellant had congenital hearing loss since birth. Dr. Salem said the duration of this condition was indefinite. His deafness was not expected to change or improve over time with treatment.<sup>44</sup>

[62] In January 2021, Dr. Salem affirmed the Appellant's diagnosis of congenital deafness. Dr. Salem also confirmed his related conditions of chronic neuropathic foot pain and vitamin B12 deficiency. Dr. Salem said the Appellant's disability was long term and his prognosis was "quite poor."<sup>45</sup>

[63] In June 2022, Dr. Salem once again confirmed the diagnoses of congenital deafness and chronic neuropathy that affected multiple nerves. He did not believe the Appellant was capable of working in the near future.<sup>46</sup>

[64] Also in June 2022, Dr. Salem noted that the Appellant had been receiving Vitamin B12 injections "with modest improvement."<sup>47</sup> However, Dr. Salem then went on to conclude that the Appellant wasn't capable of working in the near future. For this reason, I do not attach too much weight to the Appellant's apparent improvement. It is too small to affect a finding that his disability was prolonged.

[65] While I do not assign much weight to the Appellant's self-assessment, his evidence is also consistent with a prolonged disability. In his view, his condition is worse now than it was in 2016. He sometimes has dizzy spells and nausea now. These are worse when his diabetes is not controlled. He also gets bad headaches when his blood pressure is high. He says his high blood pressure is related to his diabetes. He does not yet need more invasive diabetes therapy such as insulin injections.

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<sup>43</sup> In the decision *Canada (Attorney General) v. Angell*, 2020 FC 1093, the Federal Court said that you have to show a severe and prolonged disability by the end of your minimum qualifying period and continuously after that. See also *Brennan v. Canada (Attorney General)*, 2011 FCA 318.

<sup>44</sup> GD2-105, GD2-106 and GD2-108.

<sup>45</sup> GD2-12

<sup>46</sup> GD4-2

<sup>47</sup> GD4-2

[66] I am therefore satisfied that the Appellant's disability is likely to be long continued and of indefinite duration. This means it is prolonged. I also find that his disability has been prolonged since at least July 2015 (when it became severe). His contributing conditions have existed since at least January 2009. He initially could still work full time, but he has not been able to do this for roughly nine years. For the last several years, he has had little improvement.

### **When payments start**

[67] The Appellant had a severe and prolonged disability in July 2015.

[68] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.<sup>48</sup> After that, there is a four-month waiting period before payments start.<sup>49</sup>

[69] The Minister received the Appellant's application in April 2020. That means he is considered to have become disabled in January 2019.

[70] His pension payments start as of May 2019.

### **Conclusion**

[71] I find that the Appellant is eligible for a CPP disability pension because his disability was severe and prolonged by the end of 2016.

[72] This means the appeal is allowed.

Pierre Vanderhout  
Member, General Division – Income Security Section

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<sup>48</sup> Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

<sup>49</sup> Section 69 of the *Canada Pension Plan* sets out this rule. This means payments can't start more than 11 months before the application date.