



Citation: *XJ v Minister of Employment and Social Development*, 2023 SST 23

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

# **Decision**

**Appellant:** X. J.

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

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

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**Tribunal member:** James Beaton

**Type of hearing:** Videoconference

**Hearing date:** January 5, 2023

**Hearing participants:** Appellant  
Appellant's witness

**Decision date:** January 11, 2023

**File number:** GP-21-2377

## Decision

[1] The appeal is dismissed.

[2] The Appellant, X. J., isn't entitled to payment of her Canada Pension Plan (CPP) disability pension before December 2019. This decision explains why I am dismissing the appeal.

## Overview

[3] The Appellant was in two motor vehicle accidents which caused severe injuries. In March 2014, she had emergency spinal decompression surgery. In January 2015, she was laid off from her job as a senior site manager in the resources industry. She hasn't worked since then.

[4] The Appellant applied for a CPP disability pension on November 27, 2020. She said she became disabled in March 2014.<sup>1</sup> The Minister of Employment and Social Development (Minister) approved her application with payments beginning as of December 2019. This was 11 months before she applied. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division (Tribunal) because she wanted her payments to begin earlier.

[5] The Minister says the law doesn't allow the Appellant's payments to begin earlier than 11 months before she applied. There is a possible exception to this called the "incapacity rule." But the Minister says the rule doesn't apply to the Appellant.<sup>2</sup>

[6] The Appellant says the rule does apply. She says she was incapable of forming or expressing an intention to apply for a disability pension from January 2016 until June 2020.<sup>3</sup> She chose these dates because January 2016 is when she started getting Employment Insurance sickness benefits, and June 2020 is when her daughter convinced her to apply for a CPP disability pension.<sup>4</sup>

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<sup>1</sup> The Appellant's application is at GD2-15 to 33 and 70 to 80.

<sup>2</sup> The Minister's written submissions are at GD6.

<sup>3</sup> The Appellant's written submissions are at GD1-9 to 11, GD4-2, and GD9.

<sup>4</sup> See the hearing recording.

## What the Appellant must prove

[7] A person isn't entitled to disability pension payments earlier than 11 months before they applied.<sup>5</sup> However, if the incapacity rule applies, a person's application is deemed (considered) to have been made earlier than it actually was. In that case, a person is entitled to earlier pension payments.

[8] 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 November 2020. The period of incapacity must be continuous.<sup>6</sup>

[9] The Appellant must prove this on a balance of probabilities. This means she must prove it is more likely than not to be true.<sup>7</sup>

[10] 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 and express the intention to apply for a disability pension. Under the test for incapacity, it doesn't matter whether the Appellant:

- knew that the CPP disability pension existed
- knew that she had to apply for the pension
- thought about applying for the pension
- could make, prepare, process or complete an application by herself<sup>8</sup>

[11] 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>9</sup>

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<sup>5</sup> See sections 42(2)(b) and 69 of the *Canada Pension Plan*.

<sup>6</sup> See sections 60(9) and (10) of the *Canada Pension Plan*. See also *Hussein v Canada (Attorney General)*, 2016 FC 1417.

<sup>7</sup> See *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

<sup>8</sup> 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.

<sup>9</sup> 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.

## Matters I have to consider first

### I accepted documents sent in after the deadline

[12] On January 3, 2023, the Appellant sent in copies of previous decisions by the Tribunal and the Federal Court of Appeal.<sup>10</sup> Although she sent in these documents after her submission deadline, I accepted them as part of the appeal record. This is because these decisions aren't evidence (used to **prove** facts). Rather, they are more like submissions (used to make arguments **based on** facts). An appellant is allowed to make submissions at a hearing. In this case, the Appellant simply made some of those submissions before the hearing.

### Reasons for my decision

[13] I find that the incapacity rule doesn't apply to the Appellant.

[14] To make this decision, 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 the Appellant's claim of incapacity
- evidence of activities in which the Appellant 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 disability benefits during that period<sup>11</sup>

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

- evidence of the Appellant's functional limitations and incapacity
- the Appellant's activities and what they show about incapacity
- what the Appellant says about why she didn't apply earlier
- the significance of Declaration of Incapacity forms

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<sup>10</sup> See GD9.

<sup>11</sup> See *Blue v Canada (Attorney General)*, 2021 FCA 211.

- how other decisions about incapacity apply to the Appellant

### **Evidence of the Appellant's functional limitations and incapacity**

[16] The Appellant's disability pension application lists many diagnoses, including:

- widespread chronic pain, numbness, and tingling
- fibromyalgia
- arthritis
- migraines
- insomnia
- tinnitus
- temporomandibular joint syndrome
- depression, anxiety, and post-traumatic stress disorder

[17] What matters more, though, is her functional limitations.

[18] She says:

- it takes her longer to do things
- she is forgetful—for example, she forgets to get her mail, take her medications, or go to appointments
- she has no energy or interest to do anything
- she has trouble focusing—for example, she records TV shows and watches them in small segments<sup>12</sup>

[19] None of these functional limitations shows that she was incapable of forming or expressing an intention to apply. They only show that it might have taken her longer to complete an application. And she might have needed help in the form of reminders and someone to work through the application with her.

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<sup>12</sup> See GD2-70 to 80 and the hearing recording.

[20] The Appellant expanded on her functional limitations specifically during the period when she is claiming incapacity.

[21] She says she depended on her daughter to **make meals, do housework, buy groceries, and drive** her to appointments. However, the evidence shows that the Appellant still made meals and did light housework on her own. She sometimes bought groceries and drove on her own.<sup>13</sup> This shows that she maintained some independence in her activities of daily living.

[22] She says she depended on her daughter to **pay bills and manage finances**. According to her and her daughter's testimony, her daughter started taking care of these things when the Appellant was in the hospital. This made practical sense. Her daughter continued to do so after the Appellant got out of the hospital because the Appellant (in her words) found paying bills "too annoying" and "too much to handle."

[23] I believe the Appellant was mentally capable of paying bills and managing her finances. It seems that the Appellant simply lacked the motivation or energy to do so. Her daughter was willing and able to take on this responsibility as a matter of convenience and care for her mother.

[24] The Appellant says she was **socially isolated**. I accept that this was true to a degree. At the same time, though, the Appellant maintained a relationship with her boyfriend. And her daughter was clearly very involved in the Appellant's life throughout this period.<sup>14</sup>

[25] She says her **thinking and communication** were slowed, and she could not express herself due to the "deep emotional pain."<sup>15</sup> I believe the Appellant was in deep emotional pain. However, the evidence shows that she was still able to think and communicate clearly. Her insight and judgment were reasonable. This means she could

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<sup>13</sup> See GD2-204 to 207.

<sup>14</sup> See GD2-81 to 83 and the hearing recording.

<sup>15</sup> See GD1-11.

make rational decisions.<sup>16</sup> There is no medical evidence that the Appellant experienced psychosis, hallucinations or delusions.

[26] I acknowledge the evidence of Dr. Paras (the Appellant's family doctor) on this point. In her medical report dated November 20, 2020, Dr. Paras wrote that the Appellant's capacity to engage in "workplace interpersonal interactions" was limited.<sup>17</sup> In my opinion, this supports that she was able to communicate generally, just not in a work setting. So if, for example, she needed help completing an application, she could have asked her daughter for help.

### **The Appellant's activities and what they show about incapacity**

[27] The Appellant's activities suggest that she had the capacity to form and express the intention to apply for a disability pension during the claimed period of incapacity.

[28] She **attended medical appointments** on her own.<sup>18</sup> According to the Appellant's daughter, she drove the Appellant to most of her medical appointments. She waited in the vehicle or the waiting room so that the Appellant could talk more openly with her healthcare providers. She told the Appellant what questions to ask, and she explained the pamphlets that the Appellant's healthcare providers gave her.

[29] This shows that the Appellant's daughter was actively involved in caring for her mother. But it doesn't convince me that the Appellant was unable to form or express an intention to apply. The Appellant still communicated with her healthcare providers independently and made her own decisions.

[30] The Appellant **consented to medical treatments**, such as injections.<sup>19</sup> She testified that she didn't know what she was consenting to, and the nurses didn't give her time to read the consent forms. I accept that the Appellant might not have read the

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<sup>16</sup> See GD2-86 to 90 and 169 to 171.

<sup>17</sup> See GD2-64.

<sup>18</sup> See GD2-134 to 136, 142, 143, 161, and 162.

<sup>19</sup> See GD2-165, 166, 172, 173, 201, and 202.

consent forms. However, I don't accept that she was unaware of what she was doing. The documentary evidence shows that she was engaged in discussing her treatments.<sup>20</sup>

[31] Finally, she **worked with a lawyer** to settle a case regarding one of her accidents. The Appellant's daughter took charge of the Appellant's case because she was unhappy with the lack of progress. She spoke with the Appellant's lawyer on the phone to move the matter toward a resolution. The Appellant, her daughter, and the lawyer only met once around June 2020 (the settlement was finalized around October). Although the Appellant's involvement was minimal, I find that this was because she lacked motivation, not capacity. The Appellant's evidence and her medical evidence support that she was unmotivated.<sup>21</sup>

[32] In summary, the Appellant's activities show that she maintained the ability to form and express the intention to make important decisions, including the decision to apply for a disability pension.

### **What the Appellant says about why she didn't apply earlier**

[33] The Appellant and her daughter's testimony is that the Appellant generally followed the recommendations of her daughter and healthcare providers.<sup>22</sup> This leads me to ask: Why didn't the Appellant follow their recommendation to apply for a CPP disability pension, too?

[34] Indeed, the Appellant's daughter testified that she encouraged the Appellant to apply many times.<sup>23</sup> Each time, the Appellant would "shut down," become emotional, and refuse to talk about it. The Appellant says that one of her doctors also told her to

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<sup>20</sup> See GD2-81 to 83, 174, 175, 201, and 202.

<sup>21</sup> See GD1-10, GD2-86 to 90, and the hearing recording.

<sup>22</sup> The Appellant testified that she said "okay" to whatever her doctors told her.

<sup>23</sup> I note that the Appellant says she struggled to ask for help (GD2-70 to 80). Based on this testimony, the Appellant's daughter was apparently willing to help the Appellant and brought up the topic multiple times. The Appellant would not have had to ask.



apply, but she could not process the information.<sup>24</sup> Later, she didn't even remember being told.<sup>25</sup> (It is unclear to me how the Appellant remembers that conversation now.)

[35] The Appellant's daughter argued that the Appellant was in denial about her disability, partly due to the shame that being disabled carries in their culture. As an example of this denial, the Appellant had a urinary tract infection that became a serious blood infection. She convinced herself that she just had the flu and refused to seek medical attention; her daughter eventually took her to the hospital. The Appellant added that all three of her psychiatrists agreed she was in denial and could not accept her new reality.

[36] With respect, the evidence doesn't support that the Appellant was in denial about her disability—at least not to the point that she lacked capacity. I base this finding on four things.

[37] First, I have no medical evidence about the circumstances surrounding her blood infection. I am not prepared to find that the Appellant's delay in seeking medical attention for an infection (which she might reasonably have thought was the flu) amounts to denial of her medical condition altogether.

[38] Second, I am not convinced that cultural characteristics can result in the degree of incapacity that the *Canada Pension Plan* demands.

[39] Third, the evidence from the Appellant's psychiatrists (Dr. Das, Dr. Smit, and Dr. Hamill) doesn't say she was in denial. If anything, the evidence shows that she understood how serious her condition was and didn't want to accept that she might not get better. She consciously decided **not** to apply for a disability pension. Her strong emotional reaction to the recommendation that she apply reinforces this.

[40] In March 2018, Dr. Das wrote that the Appellant was "refusing to do paperwork and 'complicated things' that are needed for her to get done." Dr. Das "spent a significant amount of time confronting her on her stubbornness and how she does not

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<sup>24</sup> See GD1-11.

<sup>25</sup> The Appellant said this at the hearing.

want to change things.” The Appellant was struggling to accept her “new self” and was “fixated on how or what life could have been prior to the car accidents.” Yet Dr. Das found no signs of psychosis. Rather, he observed that her thought process was linear and coherent; her insight and judgment were reasonable. He attributed her stubbornness to a “personality disposition.”<sup>26</sup>

[41] In January 2019, Dr. Smit wrote that the Appellant had no psychotic symptoms, hallucinations or delusions. She was well spoken and obviously intelligent, with good insight.<sup>27</sup>

[42] In May 2019, Dr. Hamill noted no psychosis either.<sup>28</sup>

[43] Fourth, there is documentary evidence that contradicts the Appellant’s testimony. The Appellant submitted a letter with her November 2020 application. She wrote:

To this date, my application is very late because my severe depression and physical limitations prevented me from completing it. Plus, I did not know that the CPP disability program even existed until 4 years after I became disabled. Ever since I first heard about this program from my family doctor, I tried many times to fill out the application, but I could not complete it until recently my family members finally have time to help me. I first became severely disabled from the end of 2014 ...<sup>29</sup>

[44] The Appellant’s letter tells me that she became disabled in 2014. Four years later (in 2018, the year she says her incapacity began), Dr. Paras told her about the CPP disability pension. Since then, she has tried to complete it many times. This means she **was** capable of forming or expressing the intention to apply. Incapacity doesn’t depend on a person’s knowledge of the disability pension program or their ability to complete an application on their own.<sup>30</sup>

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<sup>26</sup> See GD2-169 to 171.

<sup>27</sup> See GD2-86 to 90.

<sup>28</sup> See GD2-91 and 92.

<sup>29</sup> See GD2-70 to 80.

<sup>30</sup> 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.

[45] I pointed out to the Appellant that her letter seemed to contradict her argument about incapacity. Her daughter said that the words “[e]ver since I first heard about this program” referred to the time when the Appellant became capable of **processing** the fact that she was disabled, in June 2020. Her attempts to complete the application referred to the period between June 2020 (when she says her incapacity ended) and November 2020, when her application was received.

[46] I don’t accept this explanation. I think the letter is clear that the Appellant struggled to complete her application (possibly due to trouble gathering the relevant information), but not to form or express the intention to apply in the first place. Her daughter testified that she helped the Appellant gather the information she needed to apply beginning in June 2020. It took six months to do that. (Her daughter didn’t mention that the Appellant needed any other form of assistance.) The Appellant’s letter says she tried to complete the application **before** her family had time to help her. So she must have been trying to complete the application before her daughter started helping her in June 2020.

### **The significance of Declaration of Incapacity forms**

[47] The Appellant submitted two “Declaration of Incapacity” forms completed by two of her doctors. They say that she was incapable of forming or expressing an intention to apply for a disability pension from January 2016 to June 2020.<sup>31</sup> However, these forms aren’t determinative. They are just one factor for me to consider.<sup>32</sup>

[48] In this case, I give the forms little weight. They were completed by Dr. Paras and Dr. Wong. Dr. Paras started treating the Appellant in July 2020. Dr. Wong started treating the Appellant in November 2018.<sup>33</sup> They weren’t treating the Appellant when they say she became incapacitated. In fact, Dr. Paras wasn’t even treating her when she says she regained capacity.

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<sup>31</sup> See GD4-3 and 5.

<sup>32</sup> See *Flaig v Canada (Attorney General)*, 2017 FC 531.

<sup>33</sup> See GD2-60 and 81 to 83. This information contradicts Dr. Paras’s statement that he was treating the Appellant at the time she regained capacity (GD4-3).

[49] The fact that Dr. Paras and Dr. Wong had access to medical records from that time period doesn't change my view. The records that the Appellant has provided to the Tribunal don't support incapacity as it is defined by the *Canada Pension Plan*.

### **How other decisions about incapacity apply to the Appellant**

[50] The Appellant submitted copies of previous decisions of the Tribunal and one from the Federal Court of Appeal. In each of them, the appellant was found to have been incapable of forming or expressing the intention to apply for a benefit. I don't have to follow previous decisions of the Tribunal. However, the Tribunal tries to be consistent in its decisions. I will briefly explain why the facts in the other Tribunal decisions make them different than this one. Then I will talk about the Federal Court of Appeal decision (which the Tribunal does have to follow) and explain why those facts are different, too.

#### **– *The Estate of PH v Minister (Human Resources and Social Development)***

[51] In this case, the appellant had dementia. As a result, he “was regularly exhibiting behaviour and cognition issues that would not be found in a person who was sufficiently engaged with reality to be able to form or express the requisite intention.” He would leave in the middle of conversations, and speak Dutch instead of English at inappropriate times. He no longer recognized familiar places. He went to a wedding but didn't understand what was going on. He mistook a dog for a piglet.<sup>34</sup> There are no such instances of odd behaviour or impaired thinking in the Appellant's case.

#### **– *DJ v Minister (Employment and Social Development)***

[52] In this case, the appellant “was suffering from significant liver failure that would have clouded his thinking.”<sup>35</sup> As I have already discussed, the Appellant's thinking wasn't clouded.

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<sup>34</sup> See *The Estate of PH v Minister (Human Resources and Social Development)*, 2015 SSTGDIS 21 at paragraphs 21, 22, 30, and 42.

<sup>35</sup> See *DJ v Minister (Employment and Social Development)*, 2018 SST 458 at paragraph 15.

– ***BY v Minister (Employment and Social Development)***

[53] In this case, the appellant had “a mental condition of such magnitude that she lost contact with reality.” There was psychiatric evidence that she was clinically psychotic, with limited judgment, so that she could not make rational decisions. She suffered from delusions and paranoia that led her to mistakenly withdraw her application for a disability pension after she had already applied.<sup>36</sup> Once again, the Appellant was not psychotic, deluded or paranoid.

– ***WC v Minister (Employment and Social Development)***

[54] In this case, the appellant could not manage his activities of daily living to the extent that his house became uninhabitable. A nurse was assigned to provide personal home care for him. The nurse found a dead cat in a drawer, and evidence that there had been a fire in his bedroom which the appellant knew nothing about. The appellant didn’t have the mental awareness to form or express an intention to apply.<sup>37</sup> This doesn’t describe the Appellant in the present case.

– ***NG v Minister (Employment and Social Development)***

[55] In this case, the appellant was receiving treatment for Hepatitis C, which had “significant psychological side effects,” leading him to physically assault someone. The treatment was “difficult on the brain” and caused “cognitive impairment.” He was seeing an occupational therapist for help with comprehension. Two doctors completed Declaration of Incapacity forms. One was completed by a doctor who had treated the appellant for many years.<sup>38</sup>

[56] By contrast, the Appellant’s cognition wasn’t impaired. The Declaration of Incapacity forms, and the medical evidence more generally, don’t support that the Appellant lacked capacity.

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<sup>36</sup> See *BY v Minister (Employment and Social Development)*, 2018 SST 470 at paragraphs 15 to 19.

<sup>37</sup> See *WC v Minister (Employment and Social Development)*, 2019 SST 1496.

<sup>38</sup> See *NG v Minister (Employment and Social Development)*, 2019 SST 1704.

– ***Blue v Canada (Attorney General)***

[57] This case was decided by the Federal Court of Appeal.<sup>39</sup> The Appellant also provided the decision of the Tribunal’s General Division.<sup>40</sup>

[58] The Court in this case found that the appellant had restricted capacity. In other words, she had the capacity to do some things, but not to form or express an intention to apply for a disability pension. Her disability was “narrowly focussed, with both her trauma and her mental health issues arising out of or relating to engagement with hospitals, the medical professional and persons in authority.”<sup>41</sup> This was supported by psychiatric evidence. As a result, she could not contemplate applying for a disability pension.

[59] The Court described this as “a most unusual case,” and I agree. The facts are different than in the Appellant’s case. She hasn’t experienced the same type of trauma or mental health issues.

## **Conclusion**

[60] The Appellant isn’t entitled to payment of her CPP disability pension before December 2019. Evidence of her functional limitations, activities, and reasons for applying when she did don’t support that she was incapable of forming or expressing the intention to apply for a disability pension before November 2020.

[61] This means the appeal is dismissed.

James Beaton  
Member, General Division – Income Security Section

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<sup>39</sup> See *Blue v Canada (Attorney General)*, 2021 FCA 211.

<sup>40</sup> See *CB v Minister (Employment and Social Development)*, 2019 SST 1500.

<sup>41</sup> See *Blue v Canada (Attorney General)*, 2021 FCA 211 at paragraph 45.