



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of K. L. v Minister of Employment and Social Development*,
2016 SSTGDIS 109

Tribunal File Number: GP-14-4696

BETWEEN:

The Estate of K. L.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shannon Russell

HEARD ON: May 12, 2016

DATE OF DECISION: July 31, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative: S. L.

Witness: T. L. (Appellant's representative's spouse)

INTRODUCTION

[1] In September 2012, the Appellant's representative submitted four applications for the Guaranteed Income Supplement on behalf of K. L. These applications covered the payment periods of 2009/2010 to 2012/2013. The Respondent approved payment of the GIS and awarded benefits retroactive to October 2011, being 11 months before the date the applications were received. The Appellant's representative asked the Respondent to reconsider its decision and in support of his request he submitted that K. L. was incapacitated as that term is defined in section 28.1 of the OAS Act. The Respondent reconsidered and determined that K. L. was incapacitated and that the incapacity began in April 2012. The Respondent then used a deemed date of application of April 2012 to award GIS benefits retroactive to May 2011. The Appellant's representative appealed the Respondent's reconsideration decision to the Social Security Tribunal (SST or Tribunal).

FORM OF HEARING

[2] K. L. passed away in June 2015; however, the Tribunal was not made aware of her passing until April 2016, after the appeal had been scheduled for a hearing. The hearing of this appeal was by Videoconference, and the Notice of Hearing provided the following reasons for the form of hearing:

- a) The Appellant would be the only party attending the hearing.
- b) The method of proceeding was most appropriate to allow for multiple participants.
- c) Videoconferencing was available within a reasonable distance of the area where the Appellant lived.

- d) There were gaps in the information in the file and/or a need for clarification.
- e) This method of proceeding respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

PRELIMINARY MATTERS

(i) Pre-Hearing Documents Filed Late

[3] At the outset of the hearing, the Tribunal Member told the Appellant's representative that she would accept into evidence the documents that he filed late (i.e. after the filing deadline of March 14, 2016). These documents are numbered GD5-1 to GD5-30; GD6-1 to GD6-18; and GD7-1 to GD7-3). Following the hearing, the Tribunal Member wrote to the Respondent and explained that she had accepted into evidence the documents that were filed late. In keeping with the principles of procedural fairness, the Tribunal Member provided the Respondent with an opportunity to comment on the documents, provided the Respondent's comments were received by June 17, 2016. The Respondent did not provide any comments in respect of these documents.

(ii) Post Hearing Documents

[4] On June 10, 2016, the Appellant's representative submitted post-hearing documents. He submitted a brief letter indicating that, during the hearing, the Tribunal Member asked for a copy of K. L.'s Power of Attorney for Personal Care and Power of Attorney for Property. With his letter he enclosed the two Power of Attorney documents as well as a three-page document outlining his submissions in support of his position in this appeal (GD9-1 to GD9-8).

[5] On June 23, 2016, the Tribunal Member sent a letter to the Appellant's representative indicating that she had not asked him to submit any documents after the hearing. The Tribunal Member explained that, as a general rule, the Tribunal Member cannot consider evidence that is submitted after the hearing has concluded. The Tribunal Member also explained that post-hearing documents can be considered if the party who submitted the documents is able to satisfy the three criteria set out by the Federal Court of Canada in *Murray v. Canada (A.G.)*, 2013 FC

49. The Tribunal Member set out the three-part test for the Appellant's representative and provided him with an opportunity to submit written representations on the test by July 22, 2016.

[6] On July 21, 2016, the Appellant's representative responded to the Tribunal's letter of June 23, 2016. With respect to the first criterion (i.e. the requirement to show that the evidence could not have been obtained with reasonable diligence for use at the hearing), the Appellant's representative submitted that his post hearing document is his statement of the facts which he submitted orally at the hearing. He said his statement of evidence on record could not be made ready before the hearing because the Respondent's submissions were received late and because he had an inadequate knowledge of the Tribunal's procedure. With respect to the Power of Attorney documents, the Appellant's representative did not specifically address these documents in his analysis of the three criteria set out in *Murray, supra*. He did, however, indicate that during the hearing the Tribunal Member asked about the date and details of K. L.'s Power of Attorney and that the Tribunal Member noted that the documents at GD2-110 to GD2-117 were "totally blurred and un-readable".

[7] The Tribunal Member has decided not to accept any of the post-hearing documents into evidence. Dealing first with the Appellant's representative's written submissions, the Appellant's representative was given ample time during the hearing to provide his submissions to the Tribunal. He was asked at the outset of the hearing whether he had had the opportunity to review the Respondent's submissions and he indicated that he had, although he pointed out he received the Respondent's submissions late. At the end of the hearing he was asked if he had any further submissions to make to the Tribunal and he indicated he did not. If the Appellant's representative felt disadvantaged by being unfamiliar with the Tribunal's procedure, it was open to him to request an adjournment of the hearing. He did not. Finally, the Appellant's representative indicated in his submissions that "The post-hearing document submitted on June 9 is my statement of the Facts submitted orally to the Tribunal during the Hearing..." This suggests that the post-hearing submissions are not new and are simply a re-statement of the submissions the Appellant's representative already provided to the Tribunal at the hearing. As such, it cannot be said that these submissions would probably have an important influence on the result of the case.

[8] With respect to the Power of Attorney documents, the Tribunal Member did not ask the Appellant's representative to submit these documents into evidence after the hearing. The Tribunal Member did point out, during the hearing, that the documents beginning at GD2-110 were largely illegible, and the Tribunal Member asked the Appellant's representative to confirm the dates the Power of Attorney documents were signed. However, this issue was resolved at the hearing. The Appellant's representative indicated that the Power of Attorney documents were likely signed in June or July 2008. He also said these documents were completed at the same time as K. L.'s will was signed. It was noted that K. L.'s will was in evidence (GD6-5 to GD6-17) and this document clearly indicates it was signed in July 2008. The Appellant's representative also pointed to GD2-35, which is a document that was prepared by the Respondent and which indicates that the Respondent received the Power of Attorney on March 15, 2011 and the document was signed July 3, 2008. The Tribunal Member was satisfied with the Appellant's representative's responses and the Tribunal Member accepted that the Power of Attorney documents were likely signed in July 2008. It cannot be said that the post-hearing production of these documents would probably have an important influence on the result of the case.

THE LAW

[9] Subsection 11(2) of the *Old Age Security Act* (OAS Act) states that, unless the Minister has waived the requirement for an application, no supplement may be paid to a pensioner for a month in any payment period unless an application for payment of a supplement has been made by the pensioner and payment of the supplement for months in that year has been approved.

[10] Paragraph 11(7)(a) of the OAS Act states that no supplement may be paid to a pensioner for any month that is more than 11 months before the month in which the application is received or is deemed to have been made or in which the requirement for an application has been waived, as the case may be.

[11] Subsection 28.1(1) of the OAS Act states that 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.

[12] Subsection 28.1(3) of the OAS Act states that a period of incapacity must be a continuous period.

ISSUE

[13] The Tribunal must decide whether K. L. was incapacitated as that term is defined in section 28.1 of the OAS Act and, if so, the date that the incapacity commenced.

EVIDENCE

[14] K. L. was born in China. There is conflicting evidence as to her date of birth; however, for OAS purposes her date of birth was established as August 18, 1926 (GD2-3 and GD2-132). K. L. immigrated to Canada in 1974 and lived in Canada until she passed away in June 2015.

[15] K. L.'s GIS benefits ceased effective July 2009 because her income tax for 2008 was not filed with the Canada Revenue Agency (CRA).

[16] In September 2012, the Appellant's representative submitted four applications for the GIS on behalf of K. L., in his then capacity as her Power of Attorney. The GIS applications covered the payments periods of 2009/2010, 2010/2011, 2011/2012, and 2012/2013.

[17] On October 29, 2012, the Respondent sent two letters to K. L. In the first letter, the Respondent informed K. L. that her GIS was approved effective October 2011. In the second letter of the same date the Respondent informed K. L. that it could not approve her GIS applications for the payment periods 2009/2010 and 2010/2011 because the applications were received too late. The Respondent also indicated (erroneously) that K. L.'s file showed she was not receiving the OAS pension (GD2-95 to GD2-96).

[18] On December 24, 2012, the Appellant's representative asked the Respondent to reconsider its October 29, 2012 decision. He explained that (1) K. L. (his aunt) was 89 years old

and had been living alone, mostly in Oakville, for the last 38 years; (2) she was diagnosed with acute colon cancer four years ago while visiting Hong Kong; (3) she had surgery in Hong Kong and then follow up treatment in Mississauga in 2008; (4) since then, they began to notice K. L.'s loss of memory, behavior changes and mood imbalance; (5) initially they thought that all of K. L.'s behavior changes were due to the chemical effects of the cancer operation; (6) in April 2012, K. L. was referred by her family doctor (Dr. Wu) to Dr. Cheung, Geriatrician, at the Halton Healthcare Services, at which time it was confirmed that she was suffering from Alzheimer's dementia; (7) on June 15, 2012, CCAC concluded from their home assessments that K. L. was eligible for priority placement in a long-term care home, and she was admitted to X Long-Term Care Centre in Oakville on June 29, 2012; (8) S. L. then learned from staff at the Long-Term Care Centre that K. L.'s taxes had probably not been filed since 2008; (9) K. L.'s late application was due solely to her state of Alzheimer's dementia.

[19] With his letter of December 24, 2012, S. L. enclosed several documents, including:

- A letter from Dr. Wu, dated December 18, 2012, indicating that K. L. had been under his care since December 2008. Dr. Wu explained that K. L. had a history of colon cancer that was treated with surgery in Hong Kong and she had follow up treatment in Mississauga starting in 2008. In the past few years, she experienced progressive memory loss and signs of dementia. In April, she was referred to Dr. Cheung, Geriatrician, who confirmed the diagnosis of Alzheimer's dementia. K. L. was not competent to look after herself and she was not capable of making financial decisions. In July, she was admitted to the X Long-Term Care Centre (GD2-88).
- A medical report of Dr. Cheung regarding a cognitive assessment of April 9, 2012. Dr. Cheung explained that K. L.'s history was taken primarily from her nephew (S. L.) and he really was unaware of whether she had any medical problems except for the colon cancer which was found in 2008. Dr. Cheung said that, on examination, K. L. was pleasant and cooperative but easily distracted and quite repetitive. She told Dr. Cheung many times that she worked 17 jobs at once, was very well respected and people told her she worked very hard. K. L. scored 14/29 on the MMSE (that was done in Cantonese). Dr. Cheung did not score her on repetition because it was so hard

for K. L. to hear properly. K. L. was completely unable to draw the clock. In summary, Dr. Cheung described K. L. as an 88-year old woman who had approximately three years of cognitive changes, likely BPSD – behavioural and psychiatric manifestations of dementia. Dr. Cheung started K. L. on medication; suggested that S. L. look into day programs for his aunt; and arranged for the CCAC to contact S. L. to look into the process of a long-term care facility (GD2-118 to GD2-120).

- A medical report of Dr. Cheung which indicates that she saw K. L. in follow up on July 23, 2012. Dr. Cheung indicated that (1) K. L. had now been moved to X Long Term Care Facility and was doing very well there; (2) her behaviors and memory were about the same as at her last visit; (3) S. L. indicated that his aunt's angry outbursts were less intensive than before but the frequency had not changed; and (4) K. L.'s Alzheimer's dementia and BPSD seemed to be stable on her medications (GD2-53 to GD2-54).
- S. L.'s letter to the CCAC dated May 8, 2012 in which he explains that he has had Power of Attorney for K. L. (his Aunt) since July 2008 and that he and his family were finding themselves in a situation of crisis, urgency and uncertainty and needed urgent assistance for K. L.'s immediate placement into a long term care home. He said they visited the CCAC in Burlington in February 2012 but were told that a clinical assessment was required. Dr. Cheung diagnosed K. L. with dementia and said she would make an immediate referral to the CCAC for long-term care placement. By way of background he stated that (1) while visiting China in March 2008, K. L. was rushed to a hospital in Hong Kong where she was diagnosed with colon cancer and underwent surgery; (2) she returned to Canada in May 2008 where she received follow up care; (3) S. L. and his spouse (T.) landed in Canada on May 15, 2008 in order to help K. L. and to make plans to settle in Canada; (4) after staying with K. L. for one month, K. L. expelled S. L.'s wife (T.) from the house over a dispute involving recyclable materials. The situation was so bad that S. L. and his wife returned to Hong Kong seven weeks after landing in Canada on May 15, 2008; (5) they returned to Canada in late October 2008. Their son was born in Toronto and they left Canada

two weeks later; (6) S. L. returned to Canada alone in April 2009 to help with his aunt's annual oncology checkup and to assess her living situation. When he returned to Hong Kong he told his wife that his Aunt had changed and they returned to Canada in July 2009; (7) in January 2010, they moved from their two-bedroom townhouse in Toronto to a four-bedroom house in Burlington. With respect to K. L.'s dementia, S. L. indicated that she could have been suffering from dementia some four years ago when she was diagnosed with colon cancer and the family began to notice some behavioural and temperament changes and memory loss, which at the time they attributed to the chemical effects of her surgeries. He said he was totally ignorant about the initial signs and symptoms of dementia and in retrospect is now aware that his aunt had many symptoms, including mistaking old dishes as new dishes, speaking English to Chinese friends and speaking Cantonese to English friends, losing track of time, dates and ages, being confused over locations, inability to follow instructions, memory loss, mood changes, refraining from baths, and impaired judgement. In this letter, the Appellant's representative referenced a number of incidents that were concerning to him, including

- In May 2010, K. L. left the home with S. L.'s young son (one and a half years) and did not return for hours. They were brought back to the home by neighbors who found them wandering their street for a long time.
- In August 2010, K. L. started screaming late one night about lost jewelry, after some guests had been in the home that evening for dinner. About one week later, K. L. said she found the jewelry in the guest bathroom and admitted that she was losing her memory.
- In March 2011, K. L. misplaced some money S. L. had given her before he took a business trip. Days later, she told T. (S. L.'s wife) that she found the money inside her stacks of newspapers.
- On January 7, 2012, K. L. accused S. L. and his wife of taking her jewelry and asked to call the police. Later, K. L. said she found the jewelry in a garbage bag hiding under her mattress.

- S. L. and his family went to Hong Kong for six weeks in February 2012 because S. L.'s mother was gravely ill and she passed away shortly after S. L.'s arrival in Hong Kong. While away, they asked a family friend to check in on K. L. every 2-3 days. When they returned from Hong Kong they hoped the situation would be better after their long absence, but three days later she had another outburst over dish washing.
- A letter from the CCAC dated June 15, 2012 indicating that the CCAC had determined that K. L. was eligible for admission to a Long-Term Care Home (GD2-62 to GD2-63).

[20] On January 30, 2013, the Appellant's representative provided the Respondent was a Declaration of Incapacity – Physician's Report. The Declaration of Incapacity was completed by Dr. Wu on January 23, 2013 and indicates that (1) K. L.'s condition made her incapable of forming or expressing the intention to make an application; (2) the incapacity was caused by dementia; (3) her incapacity began on September 29, 2011 and he was treating her at the time the incapacity began; and (4) her incapacity was ongoing (GD2-90).

[21] On June 4, 2013, the Respondent wrote to K. L. and advised her that her GIS application for the payment period of 2010/2011 was approved. The Respondent explained that, although the application was received on September 27, 2012, the Respondent was using a deemed date of receipt of the application of April 2012 as a result of a finding of incapacity. The Respondent explained that the effective payment date was May 2011, being 11 months before the April 2012 deemed application date (GD2-74 to GD2-76).

[22] On December 10, 2013, the Appellant's representative wrote to the Respondent and stated that he could not understand why April 2012 was used as the deemed date of application. He pointed out that Dr. Wu reported that the incapacity was noted during K. L.'s medical visit of September 29, 2011 and Dr. Wu had reported in a separate letter that K. L. had progressive memory loss and signs of dementia in the past few years. He further submitted that K. L. could have had dementia prior to 2009, which was the main reason for her failure to file her income tax returns on time. He asked that the GIS be paid to K. L. for the period July 2009 to April 2011 (GD2-65).

[23] By letter dated August 21, 2014, the Respondent informed K. L. that it had reconsidered its decision and decided to maintain the original determination that the incapacity began in April 2012. The Respondent explained that it could not find that the incapacity began earlier because there were no previous investigations for K. L.'s dementia or medical documentation of a significant event that would show she was suffering from serious dementia (GD2-15 to GD2-16).

[24] The Appellant's representative appealed the Respondent's reconsideration decision to the SST in November 2014. He enclosed several documents with his Notice of Appeal, including Dr. Wu's referral for a geriatric assessment. The date of the referral is not clearly legible but appears to be February 2012. Dr. Wu indicated he was requesting the referral because K. L. was 88 years old and was having symptoms of dementia. She was very forgetful for recent events, was causing a lot of tension in the home, and was difficult to manage (GD1-52).

[25] On April 25, 2016, the SST received additional information from the Appellant's representative, including:

- A Proof of Death Certificate indicating that K. L. passed away on June 2, 2015 (GD5-24).
- An article on Dementia, which indicates, among other things, that dementia of the Alzheimer type is insidious in its onset, predictable in its downward progression, and irreversible (GD5-7 to GD5-14).
- medical definitions of "onset" and "insidious", from Merriam-Webster.
 - Onset: The initial existence or symptoms of a disease (GD5-5)
 - Insidious: Developing so gradually as to be well established before becoming apparent (GD5-6).

[26] On April 28, 2016, the SST received a copy of K. L.'s Last Will and Testament, dated July 3, 2008, which appoints S. L. and C. S. as executors (GD6-5 to GD6-17).

Oral Evidence

[27] The Appellant's representative did not ask any questions of the witness. After the Appellant's representative completed his submissions, the Tribunal Member asked the witness whether there was anything she wanted to add to what had already been said and she said she had nothing further to add. She said she agreed with what her husband had told the Tribunal.

SUBMISSIONS

[28] The Appellant's representative submitted that K. L.'s estate should receive GIS benefits for the period from July 2009 to April 2011 because K. L. was incapacitated as that term is defined in the OAS Act. More specifically, the Appellant's representative submitted that:

- a) The Respondent is inaccurate when it states that K. L.'s medical doctor determined the onset of dementia to be April 2012 (GD3-3 at paragraph 7). At no time did Dr. Cheung indicate in any way that the dementia started in April 2012. In her report of April 2012, Dr. Cheung stated "In summary, this is an 88 year old lady who has had approximately 3 years of cognitive changes, likely with BPSD – behavioral and psychiatric manifestations of dementia" (GD2-120).
- b) Dementia is known as a deadly disease but it is still not very well understood. Each case is different. Unlike some other illnesses, its onset and development cannot be precisely defined. According to the article at GD5-7, Dementia of the Alzheimer type is insidious in its onset, predictable in its downward progression, and irreversible. Medical definitions of "onset" and "insidious" have been entered into evidence. Also, the same article indicates that "Some studies have documented that dementia is often overlooked in community care settings...Some physicians in the community may not have the experience, awareness, or time to detect AD, and hence many people with AD remain undiagnosed and untreated" (GD5-7).
- c) The Respondent's finding that the incapacity began in April 2012 is arbitrary. Her incapacity actually occurred much earlier than that date and likely in June 2008 when K. L. expelled T. from the home. Support for the difficulties they were having can be found in the email sent to the Appellant's representative by a close family friend (GD2-33).

- d) Dementia statistics from Alzheimer's Australia suggest that on average symptoms of dementia are noticed by families three years before a firm diagnosis is made.
- e) K. L. exhibited all of the signs marked with a checkmark at GD5-8 and she exhibited these signs before April 2012. Despite the signs, K. L.'s family did not realize she had dementia because they were ignorant of the disease. Instead, they thought her symptoms were due to the chemical effects of the cancer surgery and also possibly attributed to the fact that she had lived on her own for so many years and was simply not used to having people around.
- f) When S. L. returned to Canada in April 2009 he got a more receptive reaction from K. L. and, as a result, S. L. and his family came back to Canada in July 2009 and lived together with K. L. until she moved into the care home.
- g) Around Christmas 2011, S. L. and his spouse sought advice from a long-time family friend, as they were having much difficulty with K. L., and the friend advised that K. L. could have dementia and suggested that S. L. seek assistance from the CCAC. S. L. contacted the CCAC and learned they would only do the assessment at the request of K. L.'s family physician and a geriatrician. S. L. approached Dr. Wu for a referral to a geriatrician, and eventually an appointment was made for February 21, 2012. S. L. had to cancel that appointment because he learned that his mother was gravely ill and he needed to travel to Hong Kong. The appointment was rescheduled for April 2012.
- h) After being assessed by the CCAC, K. L. was placed under "Crisis Priority" and was admitted to a Long-Term Care Home in 10 days. This clearly demonstrates her state of dementia progression.
- i) K. L.'s late filing of her income taxes for the years 2008 to 2010 was not due to her oversight. It was due solely to her dementia.
- j) The references by the Respondent's medical adjudicators to K. L. being left alone are very misleading and biased. Examples of such references can be found at GD2-35, GD2-36, GD2-72, and GD3-7 at paragraph 17. While it is true that he (S. L.) had to return to

Hong Kong from time to time, K. L. was not left alone. She was with S. L.'s wife (T,) and their son and was well cared for.

[29] In response to questions asked of the Appellant's representative by the Tribunal Member, the Appellant's representative indicated as follows:

- K. L.'s Power of Attorney for Property and Power of Attorney for Personal Care were likely signed in June or July 2008. They were signed at the same time that her will was completed, which was July 2008. Also, the Respondent's document at GD2-35 indicates that the Power of Attorney was signed on July 3, 2008.
- Before moving to Burlington in January 2010, K. L. was living in a townhouse/condo in downtown Toronto with S. L. and his family. This property was in K. L.'s name. It was sold in or around May 2010 and S. L. believes he likely looked after the sale in his capacity as Power of Attorney for Property, but he could not say for certain.
- S. L. could not recall whether K. L. was consenting to medical procedures (such as colonoscopies) during the claimed period of incapacity or whether it was S. L. who was providing the consent on her behalf in his capacity as her Power of Attorney. He went on to say that if there was a need for K. L.'s signature, he would explain this to her and talk close to her ear so she could hear and describe it briefly in Chinese characters so she could see it clearly. If she signed any consent, it was only because of his explanation and because he told her it was okay to sign the document.
- The CCAC did not provide S. L. with a copy of a report summarizing the specific findings of the home assessment.

[30] The Respondent submitted that the Appellant is not eligible for the GIS before May 2011 because:

- a) The Respondent's medical adjudicator determined that the earliest possible date of incapacity is April 2012 and eleven months before April 2012 is May 2011.

- b) Although the Appellant's representative reported memory loss and behavioural issues in K. L., she continued to spend most of her time alone for extended periods of time and, in fact, was not seen for cognitive assessment until April 2012.
- c) While K. L.'s family physician provided an incapacity date of September 2011, no supporting documentation was submitted to validate the September 2011 date.

ANALYSIS

[31] The incapacity provision is set out in section 28.1 of the OAS Act and it is an exception to the maximum retroactivity rules respecting payment of a benefit under the OAS Act. This provision allows an application to be deemed to have been made earlier than when it was actually made provided it can be shown that the person to whom the application relates was incapable of forming or expressing an intention to make an application.

[32] The test for incapacity under section 28.1 of the OAS Act is precise and narrow. It matters not that a claimant may lack knowledge about her eligibility for a benefit (*Tatsiopoulos v. MSD* (December 17, 2004), CP 21976 (PAB)) or that she may lack the capacity to make, prepare, process or complete an application (*Canada (Attorney General) v. Danielson*, 2008 FCA 78) or that she may be incapable of dealing with the consequences of an application (*Nenshi v. MSD* (January 9, 2006), CP 22251 (PAB)); *Canada (Attorney General) v. Poon*, 2009 FC 654).

[33] As a whole, there has not been much medical evidence filed in support of this appeal, particularly for the period before April 2012. In April 2012, Dr. Cheung examined K. L. and reported that K. L. was completely unable to draw the clock and scored 14/29 on the MMSE (that was done in Cantonese). The Respondent accepted that Dr. Cheung's findings showed that K. L. was incapacitated at the time of the exam. The Tribunal does not disagree with this finding. The question is whether K. L. became incapacitated before April 2012 and, if so, at what date.

[34] The Appellant's representative submits that K. L. did not *become* incapacitated in April 2012, being the date of Dr. Cheung's consult. While this may well be true, the difficulty for the Tribunal is that there is very little medical evidence on record for the period of time before April 2012.

[35] Dr. Cheung described K. L. as an 88-year old woman who had approximately three years of cognitive changes, likely BPSD – behavioural and psychiatric manifestations of dementia. While this indicates that K. L. was likely exhibiting symptoms of dementia for some time, it does not necessarily mean that K. L. was incapacitated for the three years prior to the April 2012 consult. The fact that a person may have symptoms and signs of dementia or even have a diagnosis of dementia does not mean that the person was also incapacitated as that term is defined in the OAS Act.

[36] The only medical evidence that speaks directly to the test for incapacity under section 28.1 of the OAS Act is the Declaration of Incapacity that was signed by Dr. Wu on January 23, 2013, and that Declaration is incomplete. For example, one of the questions on the form states:

What is/was the medical condition causing the applicant's incapacity? Please state the diagnosis and provide a copy of the relevant clinical findings that confirm the incapacity. (If more space is required, please attach a separate piece of paper).

[37] In response to this question, Dr. Wu wrote "Dementia". He did not provide a copy of the relevant clinical findings that would establish the necessary evidentiary link between the diagnosis of dementia and the opinion that K. L. was incapacitated. Similarly, although Dr. Wu indicated that K. L.'s incapacity began on September 29, 2011 he did not provide any explanation for why the incapacity began on that date. As a result, the Tribunal is left to wonder what it was about K. L.'s condition on September 29, 2011 that led Dr. Wu to conclude that she met the test for incapacity on that date. Without knowing more, the Tribunal is unable to accept September 2011 as the date of incapacity.

[38] On December 18, 2012, Dr. Wu reported that K. L. had been under his care since December 2008 and that in the past few years she had progressive memory loss and signs of

dementia. Dr. Wu went on to explain that K. L. was referred to Dr. Cheung in April who clinically confirmed the diagnosis of Alzheimer's Dementia. Although Dr. Wu said K. L. was incompetent to look after herself and was not capable of making any financial decisions, he seems to be referring to K. L.'s condition at the time of Dr. Cheung's consultation or possibly even at the date of his December 2012 report. The Tribunal accepts that K. L. had progressive memory loss and signs of dementia in the past few years, but this is not helpful in determining the date that her condition deteriorated to such an extent that she became incapacitated. Memory loss and signs of dementia are not, in and of themselves, a sufficient basis to find that a person was incapable of forming or expressing an intention to apply for a benefit.

[39] The Tribunal reviewed Dr. Wu's referral to Dr. Cheung which appears to have been made in February 2012. In this referral he states that K. L. was 88 years old and was having symptoms of dementia. She was very forgetful for recent events, was causing a lot of tension in the home, and was difficult to manage. These comments are obviously concerning. The Tribunal cannot, however, infer from these comments that K. L. was incapable of forming or expressing an intention to apply for a benefit. It was around this time that S. L. and his spouse were required to travel to Hong Kong and during that time K. L. stayed on her own in Burlington, albeit with a family friend checking in on her every few days. This suggests that she possessed some cognitive functioning as it is doubtful that S. L. would have allowed her to stay on her own if he had any concerns as to her safety. The evidence is very clear that S. L. and his spouse cared deeply for K. L. and made tremendous efforts to ensure her well-being.

[40] The Appellant's representative submitted that K. L. was likely incapacitated in June 2008, when she expelled his wife (T.) from the home. The Tribunal cannot accept this argument. First, there is evidence that K. L. signed a will and power of attorney documents before a lawyer in July 2008, and her lawyer would have had to be satisfied that she possessed the requisite capacity to execute those documents. Second, Dr. Wu had been K. L.'s family physician since 2008 and he did not report that she was incapacitated as early as 2008. As indicated previously, he reported that the incapacity began in September 2011. Although the Appellant's representative pointed out that some physicians in the community may not have the experience,

awareness, or time to detect Alzheimer's dementia, and hence many people with this condition remain undiagnosed and untreated, the Tribunal has no evidence that such was the case with Dr. Wu and the Tribunal is not prepared to speculate in this regard.

[41] The Tribunal considered the Appellant's representative's argument that K. L.'s failure to file her income taxes from 2008 to 2010 was attributed solely to her dementia. The evidence does not indicate that K. L. lacked the capacity to file her income taxes as early as April 2009 (which is when her 2008 income tax would have been due). Again, her family physician did not opine that she became incapacitated until September 2011 and he had been treating her since December 2008. Moreover, there is another possible explanation for why K. L. did not file her income taxes and that is that she signed a Power of Attorney for property in July 2008 and may well have been under the assumption that her Power of Attorney was filing her taxes on her behalf.

[42] For the reasons set out above, the Tribunal finds there is insufficient evidence to show that K. L. was incapacitated before April 2012.

CONCLUSION

[43] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security