



Citation: *LH v Minister of Employment and Social Development*, 2022 SST 319

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: L. H.
Representative: K. C.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated October 19, 2018 (issued by Service Canada)

Tribunal member: Carol Wilton

Type of hearing: Videoconference
Hearing date: October 28, 2021
Hearing participants: Appellant
Appellant's representative

Decision date: January 15, 2022
File number: GP-19-1332

Decision

[1] The appeal is dismissed.

[2] The Appellant, L. H., is not entitled to payment of his Allowance for the Survivor (ALWS) under the *Old Age Security Act* (OAS) before February 2015. He is not entitled to greater back payments of his ALWS.

[3] This decision explains why I am dismissing the appeal.

OVERVIEW

[4] The Appellant's wife passed away in 2005.¹ The Appellant became eligible for the ALWS when he turned 60 years old in September 2011. However, it was not until January 2016 that he applied for the benefit. The Minister approved the application. Payment was effective as of February 2015, 11 months before the date of application.²

[5] The Appellant asked for the payments to be retroactive to September 2011. He explained that he had been unable to form or express the intent to apply earlier than he did because of illness and memory problems.

[6] The Minister refused the Appellant's request. The Appellant appealed to the Social Security Tribunal.

[7] The Minister acknowledged that the Appellant was incapacitated from January 14 to March 6, 2011, when he was in intensive care in hospital. He may also have been incapacitated for two weeks in 2012. Otherwise, his activities show that he did not meet the definition of incapacity.

WHAT I HAVE TO DECIDE

[8] Is the Appellant entitled to payment of his ALWS before February 2015?

¹ GD32

² GD2-141

[9] This includes deciding the following matters:

- Did the Appellant meet the test for incapacity? Was it more likely than not that he was incapable of forming or expressing an intention to make an application before January 7, 2016? ³
- Did he stop being incapable before that day? and
- Was the application made within a period that was the same as the length of the period of incapacity, up to 12 months?

REASONS FOR MY DECISION

[10] I have decided that the Minister was right to start paying the Appellant's ALWS as of February 2015. The Appellant did not meet the test for incapacity, so his benefit could not be paid before that date. I reached that decision by considering the following issues.

[11] The earliest an ALWS benefit can be paid is the month an applicant turns 60. But a person who applies later will not always receive payment back to when they were first eligible. A person who applies after age 60 cannot get retroactive payment more than 11 months before the Minister received their application.⁴

[12] So, because the Appellant applied for his benefit in January 2016, payment would start as of February 2015, 11 months before.

The incapacity provision does not apply to the Appellant

[13] There is an exception to this rule. It is called the incapacity provision. When it applies, it means a person's ALWS application can be treated as if they applied before they actually did.

[14] To be able to use the incapacity provision, the Appellant had to prove it is more likely than not that he was **continuously** incapable of forming or expressing an

³ Subsection 28.1(2) of the OAS

⁴ Paragraph 21(9)(a) of the OAS

intention to make an application before January 2016.⁵ I have a lot of sympathy for the Appellant. I know he has health problems and challenges. But he does not meet the test for incapacity. Here is why.

[15] It is not easy to prove incapacity. It does not matter if the Appellant did not know he had to apply, or could not fill out the application form. Literacy is not a consideration either. He had to be incapable of forming or expressing an intention to apply. This is no different than having the capacity to form an intention to make other relevant choices in life.⁶

[16] The onus is on the Appellant to establish his claim of incapacity.⁷

[17] In deciding whether the Appellant met the test for incapacity, I had to look at the following factors:

1. The Appellant's evidence about the nature and extent of his physical and mental limitations;
2. Any medical, psychological or other evidence the Appellant provided in support of their claim of incapacity;
3. Evidence of activities in which the Appellant may have been engaged during the relevant period; and
4. The extent to which these other activities cast light on the capacity of the Appellant to form or express an intention to apply for disability benefits during that period.⁸

[18] If I find the Appellant was incapable of forming or expressing an intention to apply for the ALWS for a period before he submitted the application in January 2016, I can deem that the application was made in the month that his period of incapacity began.⁹

⁵ Section 28.1 of the OAS

⁶ *Sedrak v. Canada (Social Development)*, 2008 FCA 86. A recent decision of the Federal Court of Appeal carves out a narrow exception to this rule in a CPP disability case. *Blue v. Canada (Attorney General)*, 2021 FCA 211, discussed below.

⁷ *Grosvenor v. Attorney General of Canada*, 2018 FC 36

⁸ *Blue v. Canada (Attorney General)*, 2021 FCA 211. See also *Attorney General of Canada v. Danielson*, 2008 FCA 78.

⁹ Subsection 60(8) of the CPP

[19] I accept the Minister's submission that the Appellant was unable to form or express the intention to apply for the ALWS from January 14 to March 6, 2011 and from May 14 to 29, 2012. During those periods, he was hospitalized with life-threatening health issues that sometimes left him incoherent. However, he did not afterwards meet the time limitations for submitting an incapacity application. In order to benefit from the incapacity provision, he would have had to apply for the benefit within the same number of days as the period of incapacity.¹⁰

The Appellant's evidence

[20] The Appellant testified that his incapacity from December 2010 to January 2016 involved a poor memory, serious physical health issues, and an inability to care for himself.

[21] He testified that his incapacity began in December 2010. He developed memory difficulties. His memory is still impaired, but less so than in 2010-2016. He stated that his incapacity had not ended, although his condition has improved.

[22] The Appellant stated that he had been unable to form or express the intention to apply for the ALWS because prior to January 2016 he was unable to think beyond the day's needs. He only completed other applications because he was told to do so.

[23] The Appellant testified that he was living on his own from March 2011 to January 2016. He met with doctors by himself. However, he stated that he was physically very ill for much of this period. He was an outpatient at the heart function clinic until 2020. In addition, he sometimes did not eat properly. At one point he had malnutrition. He did go to the food bank, but not often.

[24] The Appellant testified that he needed help filling in the applications that he completed in 2011-2013.

¹⁰ Subsection 28.1(2) of the OAS

The medical evidence

[25] Prior to 2010, the Appellant had a history of Hepatitis C, coronary artery disease, and alcohol and tobacco abuse. In December 2010, he was in hospital for eleven days with pneumonia. At that time, he also had surgery for heart problems (angioplasty and stent insertion).¹¹ In January 2011, he became critically ill again. The diagnoses included organic encephalopathy (disease of the brain) and sepsis (infection of the bloodstream). Doctors thought he had experienced cerebral anoxia (loss of oxygen to the brain). This would affect his cognition. At times he was unable to speak intelligibly. However, he made a good recovery and left hospital in early March 2011.¹²

[26] The Appellant was hospitalized again for various periods of two weeks or less between March 2011 and January 2016. The medical reports show that the hospitalizations were the result of physical problems, including diarrhea, congestive heart failure, cardiogenic/septic shock, and liver and kidney failure.¹³ The evidence fails to show, however, that his mental health deteriorated significantly during this period.

[27] In March 2011, the Appellant scored 26/30 on a mini-mental state examination. This score shows only mild cognitive impairment.¹⁴

[28] In August 2011, the Appellant completed a test for cognitive impairment relating to his professional driver's licence (for his truck).¹⁵ He testified that he lost that licence, but retained his personal driver's licence.

[29] In April 2011, Dr. Jesse Morantz, internal medicine, stated that the Appellant told him that he occasionally forgot to take his medications. Apart from a poor memory, he had been able to care for himself adequately. His exercise capacity was quite good.¹⁶

¹¹ GD2-89, 94

¹² GD2-113

¹³ GD2-113, 115, 118, 121, 123, 125; GD28-79, 209, 210

¹⁴ GD20-7. Meg Casey, occupational therapist, administered the test: GD23-3.

¹⁵ GD16-7

¹⁶ GD2-102. Mere personality and memory problems do not constitute incapacity under the OAS Act: *Canada (Attorney General) v. Poon*, 2009 FC 654.

[30] In July 2012, the Appellant reported that he was able to walk about half a mile. He had not smoked or consumed alcohol for six months.¹⁷

[31] The office notes of the walk-in clinic and the Appellant's family doctor fail to support a finding of continuous incapacity from December 2010 to January 2016. They show that the Appellant attended medical appointments by himself. As the Minister submitted, he was able to express himself, provide a history, and make decisions about his own care. He understood instructions on treatment and medication.¹⁸

[32] The appeal file contains three declarations of incapacity from family doctors, two from Dr. Benjamin Bauer and one from Dr. Edward Berinstein. In December 2017, Dr. Bauer stated that the Appellant's incapacity began in December 2010 and ended in July 2012.¹⁹ In September 2018, however, he stated that the period of incapacity was from March 2011 onwards.²⁰ In February 2018, Dr. Berinstein's declaration failed to indicate whether the Appellant's condition made him incapable of forming or expressing the intention to make an application. In addition, although Dr. Berinstein stated that the incapacity was ongoing, he also said that he was treating the Appellant at the time the incapacity ceased.²¹ Given the omissions and contradictions in these documents, I have not attached significant weight to them.

[33] Dr. Bauer stated that in 2011, the Appellant had suffered an anoxic brain injury that would "almost certainly make completing any application or remember[ing] to complete any application for ... survivor benefits difficult if not impossible."²² The test, however, is whether he could have formed or expressed the intention to make an application.

[34] Dr. Berinstein stated that because of his cardiac issues and memory deficits, the Appellant had been unable to work since 2011.²³ However, this does not show that the

¹⁷ GD2-126, report from Heart Function Clinic

¹⁸ GD28-2-50

¹⁹ GD2-50

²⁰ GD2-24

²¹ GD2-42

²² GD20-13: correspondence of April 2019. Dr. Bauer said the same thing in May 2018: GD2-44.

²³ GD9-4: correspondence of November 2019

Appellant was unable to express or form the intention to make an application for the ALWS from March 2011 to January 2016.

[35] Psychiatrists Dr. Marcus Welgemoed (February 2020) and Dr. C. Strating (June 2021) provided their opinions on the effects of the Appellant's 2011 brain injury. Both stated that the Appellant might have had more significant cognitive impairment shortly after his brain injury than he did several years later.²⁴ These opinions fail to show that the Appellant had an incapacity from March 2011 to January 2016 as defined under the OAS.

The Appellant's activities after March 2011

[36] The Appellant was able to perform many activities of daily living between March 2011 and January 2016. The office notes of the walk-in clinic and his family doctor from during this period show that the Appellant attended medical appointments by himself. As stated above, he was able to express himself, provide a history, and make decisions about his own care. He understood instructions on treatment and medication.²⁵ He retained his personal driver's licence. In addition, the medical records show that the Appellant lived on his own and made frequent visits to the food bank.²⁶ This evidence suggests that he was able to do some basic tasks, drive, and look after some of his own needs.

[37] There are no powers of attorney for personal care or property in the appeal file.²⁷ This suggests that the Appellant was able to manage his own affairs.

[38] The Minister stated that the Appellant was able to contact Service Canada on several occasions between March 2011 and August 2013.²⁸ He also signed applications for other benefits. In May 2011, he applied for *Canada Pension Plan (CPP) disability*.²⁹

²⁴ GD3-1-ff.; GD25-2, 3;

²⁵ GD28-2-50

²⁶ GD28-23 October 2014, February 2015

²⁷ GD5-6 In February 2020 Dr. Marcus Welgemoed stated that the Appellant had no powers of attorney or advanced directives.

²⁸ GD8-5

²⁹ GD20-6

In December 2011, he applied for the CPP retirement pension.³⁰ In November 2015, he applied for the OAS pension.³¹

The relevance of the Appellant's activities to the incapacity claim

[39] In the *Blue* case, the Court considered the implications of a person's ability to carry on life activities such as paying bills on their incapacity status. It found that in Ms. Blue's case, the ability to carry out such activities failed to show that she had the capacity to form or express an intention to apply for disability benefits.³²

[40] The Court relied on reports from Ms. Blue's long-time psychologist, Dr. Benn. Dr. Benn reported that Ms. Blue suffered from multiple psychological conditions. These included an intense fear of being involuntarily hospitalized (as she had been in the past). She was extremely reluctant to engage with members of the medical profession and authority figures because of past trauma, though she was able to manage other aspects of her life. In Dr. Benn's opinion, Ms. Blue's psychological disability prevented her from forming the intention of applying for CPP disability benefits.

[41] The Court agreed with Dr. Benn. However, it stated that the *Blue* case was "most unusual....In many cases, the ability of an individual to carry on ordinary life activities may well be indicative of their capacity to formulate or express the intent to apply for a disability pension."³³

[42] Between March 2011 and January 2016, the Appellant was able to attend to his activities of daily living. There is no evidence that he suffered from paralyzing fears of the medical profession and persons in authority like the ones that afflicted Ms. Blue. Most significant is the fact that during the period in issue he visited Service Canada centres and applied for several other benefits. This shows a likely capacity to express or form an intention to make an application for the ALWS before January 7, 2016.

³⁰ GD20-3

³¹ GD2-80

³² The test for incapacity under subsection 60(9) of the *Canada Pension Plan* is similar to the test for incapacity under the OAS.

³³ *Blue v. Canada (Attorney General)*, 2021 FCA 211

The Appellant stated that he did not know he could apply

[43] The Appellant acknowledged that he had applied for other benefits between March 2011 and January 2016. However, he stated that he had only done so because other people had told him to. No one told him about the ALWS. He had only a grade 7 education and no computer skills. He was not equipped to find out about the ALWS on his own.

[44] At the hearing, the Appellant testified that he had applied for the ALWS when he was at Service Canada for another reason. The agent there told him he might be eligible for the ALWS and asked if he wanted an application form. This supports a finding that he did not apply for the benefit because he did not know about it.

[45] The law is clear, however, that lack of knowledge of a benefit is not the same thing as not having the capacity to form or express the intention to make an application for a benefit.³⁴

The Appellant stated that the Minister should have informed him of his entitlement to the ALWS

[46] The Appellant stated that in January 2017, the Minister sent him information about the ALWS. If he had received this information in 2011, he would have applied at that time.³⁵

[47] There is no legal obligation on the part of the Minister to inform all individuals eligible for a benefit of their entitlement to that benefit.³⁶

³⁴ See *Canada (Attorney General) v. Hines*, 2016 FC 112.

³⁵ Correspondence from Appellant, April 2021: GD20-16. By this time, he was already receiving the ALWS.

³⁶ *Lee v. Canada (A.G.)*, 2011 FC 689

Conclusion

[48] I sympathize with the Appellant. He has suffered a tremendous amount from his disabling conditions. I understand that he believes that his conditions and circumstances left him incapable of applying earlier. However, the law about incapacity is narrowly defined as having the capacity to form or express the intention to apply. Unfortunately, I cannot help him. I have applied the law as it is set out in the OAS. I can't disregard the law for compassionate reasons.

[49] I find it more likely than not that the Appellant was not continuously incapable of forming or expressing an intention to make a disability application between March 2011 and January 2016. He does not meet the test for incapacity, so I cannot deem him to have applied before January 2016. Payment cannot start before February 2015.

[50] The appeal is dismissed.

Carol Wilton
Member, General Division – Income Security Section