



Citation: *The Estate of AM v Minister of Employment and Social Development*, 2022 SST 1330

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

## **Decision**

**Appellant:** The Estate of A. M.

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated February 3, 2022 (issued by  
Service Canada)

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**Tribunal member:** Wayne van der Meide

**Type of hearing:** On the record

**Decision date:** November 8, 2022

**File number:** GP-22-819

## Decision

[1] The appeal is denied.

[2] The Estate of A. M. (Appellant) applied for an Old Age Security (OAS) pension on February 17, 2021. This was more than one year after the death of A. M. (the deceased).

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

## Overview

[4] The deceased died on May 1, 2018.<sup>1</sup> The Superior Court of Justice of Ontario issued a “Certificate of Appointment of Estate Trustee without a Will” on May 29, 2019.<sup>2</sup>

[5] The Appellant applied for OAS in relation to the deceased on February 17, 2021.<sup>3</sup>

[6] The Minister denied the application because it was made more than one year after the deceased died.<sup>4</sup>

[7] The Appellant asked the Minister to reconsider its decision on May 11, 2021.<sup>5</sup> He provided further information and evidence in support of his request on October 28, 2021.<sup>6</sup>

[8] The Minister maintained its original decision on February 3, 2022.<sup>7</sup>

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<sup>1</sup> See GD8-2.

<sup>2</sup> See GD8-2.

<sup>3</sup> See GD2-6 to GD2-15.

<sup>4</sup> See GD2-16 and GD2-17.

<sup>5</sup> See GD2-18 and GD2-19.

<sup>6</sup> See GD2-22 to GD2-30.

<sup>7</sup> See GD2-31 to GD2-34.

## The Appellant's arguments

[9] The Appellant makes two arguments.<sup>8</sup>

[10] First, he says that for several years before his death the deceased was quite ill and incapable of applying for OAS. He says the Minister should “deem” the application to have been made before the deceased died.

[11] Secondly, he says that in this case, the time-limit for an application by an estate is unreasonable. He notes that the “Certificate of Appointment of Estate Trustee without a Will” was not issued until May 29, 2019. He adds that the Estate did not get access to the deceased’s Canada Revenue Agency’s file until August 2019. He says that the Estate made the application for OAS as soon as it could.

## Reasons for my decision

[12] At a pre-hearing conference the Appellant said that he thought I would have the power to extend the time-limit for an application for OAS by an estate based on “exigent circumstances.” I do not have that authority. I must follow the law.

[13] I will now explain my reasons for my decision.

### Only a living person can claim “incapacity”

[14] Section 28.1 of the *Old Age Security Act* (OAS Act) gives the Minister the ability to deem an application to have been made before it was because the applicant was incapable.

[15] The Minister **cannot** rely on section 28.1(1) of the OAS Act to deem an application **by an estate** to have been made earlier. This section only applies to applications made by someone who is alive.

[16] The Pension Appeals Board (PAB) in *Minister of Human Resources Development v. Kirby* interpreted the incapacity provision in the *Canada Pension Plan*

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<sup>8</sup> See GD2-18 & GD2-19, GD2-22 to GD2-30 and GD10.

(CPP).<sup>9</sup> The incapacity provision in the CPP and the OAS Act are similar. The PAB in *Kirby* ruled that the incapacity provision contemplated the incapacitated person being alive at the time of the application.

[17] The PAB said this: “I find [s. 60(2) and (8)] to be mutually exclusive, each encompassing a separate category of claimants and each providing a distinct range of entitlements. The first deals with representatives or heirs of estates, the second with living but incapacitated contributors.”

[18] I believe that the PAB’s interpretation of the incapacity provisions in the CPP applies to the OAS Act and is correct.

### **The time-limit for applications by estates is fixed**

[19] Section 29 of the OAS Act deals with applications for an OAS pension made by an estate. It says that it applies “despite anything in this Act.” This means that the one-year limit for estate applications applies **despite** the incapacity provision in section 28.1. In other words, the incapacity provision in section 28.1 of the OAS Act **does not** allow an estate to get around the one-year time-limit in section 29 of the OAS Act.

[20] The Federal Court has said that the Minister **has no discretion** to extend the one-year time-limit in section 29 of the OAS Act. It said: “The terms ‘may’ or ‘peuvent’ [in section 29(1) of the OAS Act] clearly refer only to whether or not benefits will be paid. It authorizes when an application may be made, however it does not imply that the Minister has the discretion to consider applications made more than one year after a potential recipient’s death.”<sup>10</sup>

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<sup>9</sup> See *Minister of Human Resources Development v. Kirby*, (July 18, 2001) CP 17189 (PAB). While the Tribunal does not have to follow past decisions of the Pension Appeals Board (PAB), they can still have persuasive value. The PAB used to be responsible for appeals under the OAS Act and the *Canada Pension Plan* before the creation of the Social Security Tribunal.

<sup>10</sup> See *Canada (MHRD) v. Dublin (Estate)*, 2004 FC 1184.

## **Conclusion**

[21] I am sympathetic to the Appellant's circumstances. But I cannot decide an appeal based on my feelings.

[22] The appeal is dismissed.

Wayne van der Meide  
Member, General Division – Income Security Section