



Citation: *WT v Minister of Employment and Social Development*, 2022 SST 1317

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

Decision

Appellant: W. T.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated May 11, 2021 (issued by
Service Canada)

Tribunal member: Wayne van der Meide

Type of hearing: Teleconference

Hearing date: November 15, 2022

Hearing participant: Appellant

Decision date: November 29, 2022

File number: GP-21-1366

Decision

[1] The appeal is dismissed.

[2] The Appellant, W. T., isn't eligible to have the Allowance for the Survivor (ALWS) payments start before July 2018. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant has suffered with anorexia, severe depression and insomnia for many years. When she was in her twenties she was at the Clarke Institute for treatment for anorexia for a year. She has been under psychiatric treatment for most of her life.

[4] Well into her adulthood, she lived with her mother, who took care of her.¹ Unfortunately, her mother became ill around 2015 and moved into a palliative care facility.² Without her mother's care, the Appellant's mental and physical health deteriorated. She then spent the next three years either as an inpatient at hospitals or in group homes for people with mental health issues.

[5] The Appellant turned 60 on June 3, 2016.³ She applied for ALWS on June 10, 2019. The application was related to her husband who died in August 1995.⁴ The Minister of Employment and Social Development (Minister) approved her application.⁵ The Minister paid her ALWS retroactively to July 2018, which is the maximum allowed.⁶

[6] The Appellant requested the Minister reconsider its decision.⁷

[7] She says that her ALWS payments should start when she turned 60 because she did not have the capacity to apply earlier.

¹ See GD2-60.

² See GD2-62.

³ See GD2-36.

⁴ See GD2-3 to GD2-5.

⁵ See GD2-24.

⁶ See section 12(3) of the *Old Age Security Act Regulations*.

⁷ See GD2-6.

[8] The Minister says that the Appellant has not proved that she did not have the capacity to apply earlier.

[9] The Minister upheld its original decision.⁸

What the Appellant must prove

[10] For the Appellant to succeed, she must prove that she could not apply before June 10, 2019 because she was incapacitated from applying earlier.⁹

[11] Incapacity means that a person was incapable of forming or expressing an intention to make an application before the day on which the application was actually made.

[12] The Appellant must show that she was **continuously** incapable of forming or expressing an intention to make her application during the entire period she claims that she was incapacitated.¹⁰

[13] The test is not whether the Appellant could actually make or complete an application for benefits. She could have capacity to form or express an intention to apply even if she could not complete the application form or process.¹¹

[14] The fact that she may not have known about the benefits at the time does not show that she was incapacitated. Awareness of a benefit is not the issue. The issue is whether the Appellant could form or express an intention.¹²

[15] The Appellant has the burden to establish her claim of incapacity.¹³

⁸ See GD2-11 and GD2-12.

⁹ The incapacity provision is contained at subsection 28.1(3) of the *Old Age Security Act*. In this decision I will also refer to decisions about the *Canada Pension Plan* because that Act's section on incapacity is very similar to the one in the *Old Age Security Act*.

¹⁰ See subsection 28.1(3) and *Flaig v. Canada (Attorney General)*, 2017 FC 531.

¹¹ See *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

¹² See *Canada (Attorney General) v. Hines*, 2016 FC 112.

¹³ See *Grosvenor v. Attorney General of Canada*, 2018 FC 36.

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

- The Appellant's evidence about the nature and extent of her physical and mental limitations;
- Any medical, psychological or other evidence that may support her claim of incapacity;
- Evidence of activities in which the Appellant was engaged in during the relevant period; and
- The extent to which these other activities cast light on her capacity to form or express an intention to apply for disability benefits during that period.¹⁴

Reasons for my decision

The Appellant did not meet the test for incapacity

[17] For approximately three years before she applied for ALWS the Appellant was not in good mental or physical health. However, she has not proved on a balance of probabilities that she was continuously incapable of forming or expressing an intention to apply for benefits.

[18] I will now explain why I have come to this conclusion.

The medical evidence

[19] The Appellant told me that Dr. Pek became her family physician in August 2017. In October 2020, Dr. Pek Completed a Declaration of Incapacity saying that the Appellant was incapacitated between November 30, 2015 and January 16, 2016.¹⁵ This declaration was completed **after** the Appellant applied for benefits in June 2019.

¹⁴ *Blue v. Canada (Attorney General)*, 2021 FCA 211.

¹⁵ See GD2-22 and GD2-23.

[20] Because this declaration was completed by a physician who was not treating her during the relevant period, I agree with the Appellant that this declaration has limited value.

[21] The Appellant was admitted to hospital twice during the relevant period. She was at Grand River Hospital in Kitchener between November 15 and December 21, 2015.¹⁶ She was also in St. Catherines General Hospital between March 29, 2017 and August 24, 2017.¹⁷

[22] The medical reports from these periods in hospital show that for both stays she was suffering from depression, anxiety, insomnia and being over-prescribed benzodiazepines.¹⁸ One doctor also expressed a concern that she was experiencing cognitive impairment.¹⁹ She also had a history of alcoholism.²⁰ However, these conditions did not result in her being incapacitated from forming or expressing an intention to apply for benefits.

[23] The medical reports say things like this about the Appellant during her times in hospital:

- “Upon her discharge [the Appellant] presented as [a person] who has a logical thought process [and she] described her mood as feeling ‘really good’... She was goal and future oriented...”²¹
- “[The Appellant’s] insight is partial and the judgement is fair.”²²
- “No evidence of psychotic disorder.”²³

[24] These reports also show that the Appellant was able to express herself. For example, they say things like this:

¹⁶ See GD2-56 to GD2-58 and GD2-53 to GD2-55.

¹⁷ See GD2-9.

¹⁸ See GD2-39 to GD2-41, GD2-46 to GD2-49, GD2-50 to GD2-52, GD2-56 to GD2-58, GD14-3 and GD14-4 and GD15.

¹⁹ See GD8, GD9, GD11 and GD14.

²⁰ See GG2-40.

²¹ See GD2-39.

²² See GD2-57.

²³ See GD2-58.

- “[the Appellant] preferred to live in [an] assisted living environment for this transition period until she decides if she wants to live in an independent environment in the future”
- “During [her] hospitalization...[the] patient participated in many groups including CBD for anxiety and depression, coping skills and relaxation”
- “The patient was planning to continue with local AA group meetings”
- “The patient attended AA groups while in hospital...”
- “It was noted that the patient’s symptoms improved significantly and she made a decision about being transferred to a different home for special case in Hamilton to remain closer to her daughter.”
- “She lives in a group home in St. Catherines but does not like it and is making arrangements to find another group home in Hamilton.”

[25] These medical reports were written by several different doctors at two different hospitals. The consistency of the reports suggests to me that they are likely accurate descriptions of the Appellant’s medical conditions and how they did or did not affect the Appellant.

The Appellant’s evidence about her limitations

[26] In her submissions and at the hearing the Appellant denied that she was able to express herself during this period. For example, at the hearing she said that during this period she was “out of it.”

[27] I believe and accept some of what the Appellant says. For example, I do not agree with the Minister’s suggestion that the Appellant admitted herself to hospital on either occasion.

[28] For her first stay at Grand River Hospital, I accept that her daughter and son-in-law either called an ambulance or themselves took her to the emergency department.²⁴

²⁴ See the Appellant’s submissions at GD3 and a letter from her daughter at GD16.

At the hearing the Appellant said she did not remember how she got to the hospital. I believe her.

[29] For her second stay at St. Catherines General Hospital, I also believe the Appellant who said at the hearing that it was social worker who took her to that hospital.

[30] On the other hand, I do not accept that the Appellant played no role in treatment decisions while hospitalized or about where and how she lived in between hospitalizations.

[31] As noted above, several doctors from different hospitals all describe the Appellant as someone who participated in treatment decisions and courses of treatment that involved communicating.²⁵

[32] In her submissions and at the hearing the Appellant stressed that other people (her daughter, doctors, health professionals and social workers) made the decisions to admit her to hospitals or put her in group homes for people with mental health issues in between hospitalizations.²⁶

[33] Other people did **ultimately make decisions** about her treatment and where she lived. The Appellant's daughter has had a power of attorney regarding her mother since 2016.²⁷

[34] However, the fact that others made decisions about her treatment and living situation does not mean that she did not express herself and participate in at least some of these decisions.²⁸ As I have said, the evidence shows that she did participate in her treatment. She also expressed wishes regarding her future, such as a desire to continue or start participating in counselling and different support groups.²⁹

²⁵ See the medical reports that I have referred to above.

²⁶ See GD1-9 to GD1-12, GD-3

²⁷ See GD-10.

²⁸ See in particular

²⁹ See GD2-40.

[35] One report notes that she “made a decision” to change group homes to be closer to her daughter.³⁰ I do not think she “made a decision” as such, but when I asked her about this the Appellant said that although she did not want to go to another group home “they convinced me” to do so. This tells me that she participated in a discussion about her future and expressed her wishes.

[36] She was also able, during hospitalizations, to describe her history, such as her history of anorexia and alcoholism. She was also able to identify potential causes of her disorders, such as being overmedicated.³¹

[37] All of this tells me that she did have the capacity to form or express her intention to apply for benefits.

The Appellant was very unwell and unable to take care of herself or live independently

[38] I have sympathy for the Appellant. The evidence shows that she was very sick, both physically and mentally, for most if not all of the three years before she applied for ALWS. She was clearly losing her long-standing battle with anorexia. Her mother’s illness and death exacerbated this and her other health problems.

[39] She was clearly unable to care for herself without assistance. That is why she was either in hospitals or in group homes for people with mental health issues.

[40] I also accept that she was not cured during either of her stays in hospital during the relevant period. In fact, at the hearing the Appellant said she did not even “get better” during these hospital stays. I believe her. This is why even **after** she applied for benefits, she was again admitted to hospital in January 2020.

[41] I can even accept that, as she explained at the hearing, she did not receive the treatment or care she needed either at hospitals or in the group homes. For example, she said at the hearing that one doctor simply replaced benzodiazepines with other strong sleeping medication. She also said that another doctor stopped her sleeping

³⁰ See GD2-39.

³¹ See GD2-46, GD2-48, GD2-50 and GD2-51.

medication too quickly, leading to withdrawal. She said there was very little or no therapy, only quick visits with doctors.

[42] However, even significant mental health issues, even ones not properly treated, may not be enough to meet the test for incapacity as described in section 28.1 of the *Old Age Security Act*. As ill as she was, the Appellant was not incapable of forming or expressing an intention to apply for benefits.

[43] I note as well that a person must be **continuously incapable** before they actually applied for benefits. The Appellant says that “in 2017 my health was greatly improved...depression was much better...[I] had gained weight etc. [and] was weaned off a lot of prescription drugs so I don’t think I can qualify for back pay that year.”³²

Being unable to actually apply does not mean someone is incapable

[44] The fact that someone may not know about or be able to actually apply for benefits **does not** mean that they are incapable of forming or expressing an intent to apply, which is what the test is.³³

[45] I think this is important to say again because the Appellant said that she is not computer literate, and during the relevant period did not have access to a computer. She also said that at some of the group homes she was quite isolated and had limited ability to go places during this period. At the hearing she said she only applied when her social worker at the time brought her the application and assisted her to complete it. However, none of these facts show that she was incapable of forming or expressing an intention to apply.³⁴

³² See GD7-1.

³³ *Canada (Attorney General) v. Danielson*, 2008 FCA 78

³⁴ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

Conclusion

[46] I find that the Appellant isn't eligible for ALWS before July 2018.

[47] This means the appeal is dismissed.

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