



Citation: *The Estate of LB v Minister of Employment and Social Development*, 2023 SST 397

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: The Estate of L. B.
Representative: Elliot Berlin

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 7, 2018 (issued by
Service Canada)

Tribunal member: George Tsakalis

Type of hearing: Videoconference

Hearing date: November 23, 2022

Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: March 23, 2023

File number: GP-18-1079

Decision

[1] The appeal is partially allowed.

[2] The Appellant, The Estate of L. B., is eligible for an Old Age Security (OAS) pension with payments starting as of July 2014 and ending in September 2016.

[3] The Appellant is not eligible for a Guaranteed Income Supplement (GIS).

[4] This decision explains why I am partially allowing the appeal.

Overview

[5] L. B. (deceased) was born in June 1949. The Minister of Employment and Social Development (Minister) received his OAS pension application in June 2016.

[6] The deceased passed away in September 2016.

[7] In October 2016, the Minister approved the deceased's OAS pension application with payments starting in July 2015.

[8] The Minister received a GIS application without the deceased's signature in October 2016.

[9] The Minister decided not to award the Appellant a GIS. This is because the OAS Act did not allow for the approval of GIS applications after a person passed away.¹

[10] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[11] The Minister asked the Tribunal to summarily dismiss the appeal.² I declined the Minister's request.

[12] I placed this appeal into abeyance because another issue arose in this appeal in addition to the Appellant's entitlement to the GIS. The Appellant claims that the

¹ See GD2-41.

² See GD5.

deceased was incapacitated and this prevented him from applying for an OAS pension at an earlier date. The Appellant was trying gather evidence about the deceased's incapacity, including having a physician complete a Declaration of Incapacity. The Minister argued that I did not have jurisdiction to deal with the incapacity issue at that time because it had not made a decision about the deceased's incapacity.³ The Minister eventually agreed that I would have jurisdiction on the OAS incapacity issue once it decided on that issue.⁴

[13] It took the Appellant's legal representative a long time to gather evidence from the long-term care (LTC) facility where the deceased lived. But he eventually submitted voluminous medical documents.⁵ It also took a long time for the Minister to make a decision on incapacity.

[14] The Minister eventually decided that the deceased did not have incapacity under the OAS Act, which meant that he was not entitled to receive an OAS pension before July 2015. The Minister maintained its position that the Appellant could not receive a GIS because it did not receive a GIS application until after the deceased passed away.⁶

[15] The Appellant says that the evidence shows the Appellant had incapacity and is eligible to receive an OAS pension at the earliest possible date. This would be in July 2014, the month after the deceased turned 65. The Appellant also says that since the deceased had incapacity, he should be deemed to have made a GIS application and the Appellant is therefore entitled to receive GIS benefits.

What I have to decide

[16] Is the Appellant entitled to receive an OAS pension before July 2015?

[17] Is the Appellant entitled to receive a GIS?

³ See GD8-6.

⁴ See GD11.

⁵ See GD21 and 22.

⁶ See GD24.

Reasons for my decision

[18] I have decided that the Appellant can receive an OAS pension as of July 2014 because it proved the deceased had incapacity under the OAS Act.

[19] I have decided that the Appellant cannot receive a GIS. This is because the OAS Act says that the Minister cannot award a GIS benefit if it receives a GIS application after a deceased passed away.

The incapacity provision applies to the Appellant

[20] The furthest back the Minister can pay an OAS pension is 11 months before it received an application.⁷

[21] There is an exception to the 11-month rule. It is called the incapacity provision. When it applies, it means a person's OAS application can be treated as if they applied before they actually did.

[22] To be able to use the incapacity provision, the Appellant has to prove that it is more likely than not that the deceased was continuously incapable of forming or expressing an intention to make an application before June 2016.⁸

[23] It is not easy to prove incapacity. It does not matter if the deceased 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.⁹

[24] The onus is on the Appellant to establish incapacity.¹⁰

⁷ See subsection 8(2) of the *Old Age Security Act*.

⁸ See subsection 28.1 of the *Old Age Security Act* and *Canada (Attorney General) v. Poon*, 2009 FC 654 and *Leung Estate v. Canada (Attorney General)*, 2019 FCA 180.

⁹ See *Sedrak v. Canada (Social Development)*, 2008 FCA 86.

¹⁰ See *Grosvenor v. Canada (Attorney General)*, 2018 FC 36.

[25] In deciding whether the deceased met the incapacity test, I have to look at the following factors:

- The evidence about the nature and extent of the deceased's physical and mental limitations;
- Any medical, psychological or other evidence provided in support of the incapacity claim;
- Evidence of activities in which the deceased may have been engaged during the relevant period; and
- The extent to which these other activities cast light on the capacity of the deceased to form or express an intention to apply for benefits during that period.¹¹

[26] If I find the deceased was incapable of forming or expressing an intention to apply for the OAS pension for a period before the application was submitted in June 2016, I can deem the application to have been made in the month preceding the first month in which the pension could have commenced to be paid.¹²

The Appellant's evidence supported a finding of incapacity under the OAS Act

[27] The deceased's daughter is the Appellant's estate representative. She gave evidence on behalf of the Appellant. She provided the Tribunal with a statutory declaration before the hearing, stating that the deceased had incapacity at or the year before the OAS application had been submitted. She said the deceased's health had deteriorated by 2002. He was admitted to a LTC facility in September 2006.

[28] The statutory declaration said the deceased suffered from numerous health problems, including:

- Congestive heart failure;

¹¹ See *Blue v. Canada (Attorney General)*, 2021 FCA 211. See also *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

¹² See subsection 28.1(1) of the *Old Age Security Act*.

- Peripheral vascular disease;
- Stroke;
- Chronic kidney disease;
- Gastrointestinal issues;
- Diabetes mellitus with foot ulcer;
- Hyperplasia of the prostate;
- Chronic intractable pain; and
- Anemia.¹³

[29] The statutory declaration said the deceased had Type 1 diabetes. He suffered multiple transient ischemic attacks (TIA) and had two debilitating strokes. The strokes rendered the deceased incapable of caring for himself. He was immobile. He needed considerable help from his family. The deceased also suffered multiple aspiration episodes requiring hospitalization and the insertion of a feeding tube.¹⁴

[30] The statutory declaration said the deceased's physical and mental health deteriorated to the point that he had to be admitted to a LTC facility in September 2006. The deceased was unable to physically function at the LTC facility on his own. He relied on staff to help him his daily needs. He was fully dependent on others for the physical and mental necessities of everyday life.¹⁵

[31] The statutory declaration said the deceased could only communicate simple and immediate needs. He had no interest in participating in any social activities. He was

¹³ See GD21-4.

¹⁴ See GD21-5.

¹⁵ See GD21-5.

non-compliant with treatment. This non-compliance impaired not only his physical health, but also his mental health.¹⁶

[32] The statutory declaration said the deceased was only able to communicate his primal needs and wants. He had no desire or ability to make proper choices for himself. He had no ability to take responsibility for his own care or of his future care needs or planning.¹⁷

[33] The statutory declaration said the deceased suffered from speech and language impairments because of his strokes. He also developed reading and writing impairments. He had no access to the outside world. He had no capacity to apply for any benefits. He also engaged in frequent oppositional and non-compliant behaviour at the LTC facility, including:

- Not adhering to a diabetic diet;
- Refusing to comply with a soft-food diet even after multiple attendances in intensive care for aspiration;
- Having to have a feeding tube inserted because he was non-compliant with a diet of thickened fluids;
- Refusing to be changed and showered;
- Having trouble with his bowel movements and frequently refusing a fleet enema;
- Frequently skipping meals; and
- Refusing to go to medical appointments outside the LTC facility.¹⁸

[34] The statutory declaration said the deceased was not allowed to attend appointments outside the LTC facility without direct supervision. His daughter or staff

¹⁶ See GD21-5.

¹⁷ See GD21-5.

¹⁸ See GD21-6.

solely made transportation arrangements, and yet he would often refuse to leave the facility.¹⁹

[35] The deceased's daughter testified that she was never formally appointed the deceased's Power of Attorney. But she was the point of contact for the deceased at the LTC facility. She said that she became responsible for the deceased's well being. The deceased's spouse died in 1989. He could not live alone, and he entered the LTC facility in 2006. She said the deceased always needed assistance in the LTC facility. He could not get up to go to the washroom. He had the ability to express his basic needs to staff, such as wanting a cigarette. However, he ignored instructions. The LTC would call her because of the deceased's behaviour. She said the deceased became child like. He did not want to shower or change. He would not listen to the dietician. She said the only decisions the deceased made were just a basic expression of his needs. He could not leave the LTC facility without a chaperone. He could not make arrangements to leave the LTC facility on his own. The arrangements were made through the staff or herself.

[36] The deceased's daughter said he had no capacity to form the intention to apply for an OAS pension. She said the deceased had no valid government identification when he entered the LTC. The deceased had collected provincial disability benefits. She was not sure when he began receiving these benefits. But the provincial government accepted that he could not work. The provincial disability benefits were stopped when the deceased turned 65 in 2014. She said that the deceased's provincial disability case worker had sent numerous letters to the LTC facility.²⁰ The caseworker wanted to meet the deceased to have him apply for an OAS pension. She said the deceased either discarded these letters or he did not open his mail.

[37] The deceased's daughter said that the case worker looked into his situation because he would not respond to letters or telephone calls. The deceased's daughter became involved in the OAS application process. She had to find sufficient government identification for the OAS application to be approved. The deceased did not help with

¹⁹ See GD21-6.

²⁰ Two of these letters are seen at GD22-1717 and 1718.

the completion of the application. She had to direct him to sign the application. She witnessed his signature because the caseworker asked her to be present. She said the deceased had difficulty writing. But he managed to write his name on the application. She said the deceased had no idea what type of benefit application was being made for him.

[38] The deceased's daughter said she checked off a box on the application form asking for the GIS if the OAS pension application was approved. She said she did this on the advice of the case worker. She said she submitted a GIS application after the deceased passed away. She did not receive confirmation about the receipt of an OAS application until October 2016, about one month after the deceased passed away.

[39] The deceased's daughter said the deceased could not make an OAS or GIS application. She said that she acted like his parent, and he was the baby in the last 10 years of his life. He would sit in his own diaper and refuse to get changed. He lost the ability to stand up. He needed a wheelchair. He needed somebody to dress and shower him. He could answer basic questions. But he was generally quiet. She said he was incapacitated since his last stroke in April 2002.

[40] The deceased's daughter said she saw the deceased once a week. He was forgetful. He had difficulty concentrating. He would go outside without wearing appropriate clothing in the winter. He would put a large volume of sweeteners in his coffee, despite having diabetes. The deceased had difficulty understanding his doctors. He had limited social interaction. She was the one who had to give approval for the deceased to go to the hospital.

[41] The deceased's daughter said that the deceased's disability benefits were deposited in his account. The deceased's parents paid the facility fees. She would take care of paying his bills. She said the deceased could make decisions about his primal needs, such as when he was hungry and wanted to eat. But he certainly had no ability to decide to apply for a benefit. It was obvious to her that the deceased had brain damage and major cognitive impairments.

The medical evidence supported a finding that the deceased had incapacity

[42] The medical evidence from the LTC facility showed that the deceased was continuously incapable of forming or expressing an intention to make an application since at least January 2010.

[43] The Tribunal file contains a January 29, 2021 letter from the Assistant Director of Care at the LTC facility. She confirmed the deceased was able to make daily decisions for himself. However, he needed help with financial matters. In her opinion, the deceased did not have capacity to understand financial matters for about the last three years before his passing. She confirmed that no formal capacity assessment was conducted when the deceased resided at the facility.²¹

[44] The medical evidence from the LTC facility showed that in 2010:

- The deceased refused to keep his oxygen on, even though the benefits of oxygenation were explained to him.²²
- The deceased refused to bathe and shower.²³
- The deceased refused to have a G-tube inserted for feeding.²⁴
- The deceased did not comply with his diet. Even though he was diabetic, he would purchase large volumes of chocolate bars and skip meals.²⁵
- The deceased engaged in inappropriate behaviour, including shouting, and pointing a finger at a nurse.²⁶

[45] The deceased's medical problems continued in 2011:

- He refused to go to the hospital for an assessment.²⁷

²¹ See GD21-8.

²² See GD22-216.

²³ See GD22-60 and 141.

²⁴ See GD22-124.

²⁵ See GD22-34, 46 and 110.

²⁶ See GD22-75 to 76.

²⁷ See GD22-411.

- He refused to eat pureed soup, despite being warned of the risk of not doing so.²⁸
- He engaged in dangerous activity, including smoking in his room.²⁹

[46] The evidence from the LTC facility showed that the Appellant continued to have incapacity in 2012:

- He refused to shower and bathe.³⁰
- He was non-compliant with nutritional recommendations of thickened fluids.³¹
- He had difficulty explaining his medical problems to staff.³²
- His daughter made arrangements for him to have dinner outside the LTC facility.³³

[47] The medical evidence showed that the deceased refused medical assessments in 2013.³⁴

[48] The medical evidence from 2014 showed that:

- The deceased had difficulty communicating because of impaired hearing.³⁵
- The deceased refused to undergo medical examinations.³⁶
- The deceased sometimes refused to eat and was non-compliant with his diabetic diet. He had poor control over his blood sugars. He refused to comply with interventions to stabilize his blood sugars.³⁷

²⁸ See GD22-299.

²⁹ See GD22-284.

³⁰ See GD22-489 and 543.

³¹ See GD22-535.

³² See GD22-529.

³³ See GD22-502.

³⁴ See GD22-569 and 603.

³⁵ See GD22-1489.

³⁶ See GD22-868.

³⁷ See GD22-716, 745 to 746, and 750.

- The deceased's daughter left a message with the facility in which she asked a doctor to assess a rash on the deceased's arms.³⁸
- The deceased had no interest in organized programs. He spent his time watching television and drinking coffee.³⁹
- The deceased refused to have a personal support worker toilet him and he also refused a fleet enema.⁴⁰
- The deceased refused scheduled insulin injections.⁴¹
- The deceased refused to be shaved.⁴²
- The deceased used his motorized wheelchair unsafely. He was not able to stop it on time and he was banging into doors and walls. An occupational therapist said the deceased's alertness was affected by his blood sugar level.⁴³

[49] The medical evidence from 2015 showed that:

- The deceased continued to use his wheelchair in an unsafe manner.⁴⁴
- The deceased was discharged from a physiotherapy program because he refused physiotherapy intervention.⁴⁵
- The deceased was caught smoking inside the LTC facility.⁴⁶
- The deceased continued to consume a large volume of sugar, even though his blood sugars were high. He was not following his prescribed diet.⁴⁷

³⁸ See GD22-766.

³⁹ See GD22-773.

⁴⁰ See GD22-773 and 787.

⁴¹ See GD22-783 to 784.

⁴² See GD22-722.

⁴³ See GD22-784.

⁴⁴ See GD22-991, 994 and 1089.

⁴⁵ See GD22-1597.

⁴⁶ See GD22-1023.

⁴⁷ See GD22-1144, 1148, and 1212.

[50] The medical evidence did not show any improvement in the Appellant's medical condition or decision-making capacity in 2016. He died of cardiac arrest in September 2016.⁴⁸

I disagree with the Minister's argument that the deceased did not have incapacity

[51] The Minister relied on several instances in the LTC facility records that said the deceased had the ability to make his own decisions. This is because he scored a zero on a test called the Cognitive Performance Scale (CPS). The Minister said that this showed intact cognitive function and that the deceased had the ability to make his own decisions.⁴⁹

[52] I agree with the Minister there were comments in the medical records that the deceased had decision-making capacity because he scored a zero on CPS testing.⁵⁰

[53] However, I do not place much weight on the CPS scores. The LTC facility did not conduct a formal capacity assessment on the deceased. I agree with the Appellant's legal representative that the CPS was administered by dieticians. The dieticians were assessing the deceased's ability to decide whether he wanted to eat or not. Just because the deceased had the ability to make decisions on whether to eat or not does mean he had capacity to form the intention to apply for an OAS pension. I also do not believe that scoring zero on the CPS meant that the deceased had capacity under the OAS Act.

[54] The Minister pointed out that some of the medical evidence did not support a finding of incapacity. I agree that there were times where the deceased managed his power wheelchair safely. I also agree that the deceased was able to purchase items at the tuck stop within the LTC facility.

⁴⁸ See GD22-1416.

⁴⁹ See GD24-18

⁵⁰ See for example GD22-34, 110, 156, 535, 722, 745 to 746, 1119, 1212, and 1489.

[55] However, I am satisfied that the evidence showed that the deceased had severe physical and mental limitations. He had impaired mobility. He was limited in his activities of daily living. He relied on others to bathe, shave, and toilet him. He relied on others to administer his medications. He also had severe impairments in his ability to make decisions. I have no reason to disbelieve his daughter's evidence that he signed the OAS application with the help and direction of others.

[56] I agree with the Appellant's legal representative that the deceased had incapacity as defined in the OAS Act. The deceased was not able to attend to his own health care. He was not able to attend to his own hygiene. He was not able to attend to his own nutrition. He was not able to attend to his own safety. His daughter was called in to make decisions on his behalf by the LTC facility.

[57] I agree with the Appellant's legal representative that just because the deceased was able to carry out certain activities does not mean that he had the capacity to form or express an intention to apply for an OAS pension.⁵¹ The deceased was capable of communicating his primal needs, such as when he wanted to eat. But that does not equate to having capacity under the OAS Act. The evidence clearly showed that the deceased had severe medical problems that led to his admission to a nursing home and his reliance on others to provide his basic needs.

[58] I also agree that the deceased's incapacity had been continuous since at least January 2010. I did not see any improvement in his medical condition, in his ability to perform activities of daily living, and in his decision-making ability.

When payment of the OAS pension starts

[59] I have found that the deceased had incapacity under the OAS Act since at least January 2010. This means that I can deem the OAS application to have been made in

⁵¹ The Federal Court of Appeal in *Blue v. Canada (Attorney General)*, 2021 FCA 211 agreed that having the ability to carry out certain activities does not necessarily mean that a person has the capacity to form or express an intention to apply for an OAS pension.

the month preceding the first month in which the pension could have commenced to be paid.

[60] I deem the deceased's OAS application to have been made in June 2014. June 2014 is the month preceding the month in which the OAS pension could have commenced to be paid. The OAS pension could have started to be paid in July 2014, which is the month after the deceased's turned 65.

[61] This means the Appellant is entitled to an OAS pension starting in July 2014, which is the month after the deceased turned 65 years of age. All OAS pension payments stop the month the deceased dies⁵², which in this case would be September 2016.

The Appellant is not eligible for a GIS

[62] The Appellant is not eligible for a GIS. This is because the OAS Act says that the Minister cannot award a GIS benefit if it receives a GIS application after a deceased passed away.

[63] The Appellant's legal representative argued that if I find that the deceased was incapable of forming or expressing an intention to apply for an OAS pension, I will also have to find that he was also incapable of forming an intention to apply for a GIS, and I would have to deem an earlier GIS application date, just as I would for the OAS pension.

[64] I disagree with this argument.

[65] When I interpret the OAS Act, I must apply the "modern principle" of statutory interpretation. This means that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."⁵³

⁵² See subsection 8(3) of the *Old Age Security Act*.

⁵³ See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

[66] Section 29 of the OAS Act allows the Minister to award an OAS pension if an application is received within one-year of the deceased's passing. Section 29 of the OAS Act was amended in 2007 to read "pension" where it previously read "benefit". Section 2 of the OAS Act defines a pension to mean an OAS pension, while the word "benefit" includes a GIS.

[67] Section 29 of the OAS Act clearly limits the Minister to only awarding an OAS pension if an application is received after a person passes away.

[68] Even when the words of a statute seem clear, I still have to consider the total context of the section of the statute that I am interpreting.⁵⁴ I must seek to interpret section 29 of the OAS Act in a manner that best meets the overriding purpose of the OAS Act.⁵⁵

[69] When I look at the purpose of a statute, I am entitled to presume that all laws have a purpose. In so far as the language of the statute permits, I should adopt an interpretation that is consistent with or promotes the purpose of the law, while avoiding interpretations that defeat or undermine the purpose of the law.⁵⁶

[70] The purpose of the OAS Act is to provide income support to elderly persons.⁵⁷ It is not a vehicle for the accumulation of assets or the enhancement of estates.⁵⁸ The Tribunal has previously decided that the incapacity provisions in the OAS Act do not apply to GIS applications made after death.⁵⁹

[71] Section 29 of the OAS Act clearly does not allow post-mortem GIS application. The incapacity provision contained in Section 28.1 of the OAS Act applies to an application actually being made.

⁵⁴ See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4.

⁵⁵ See *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54. See also *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1.

⁵⁶ See *Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC).

⁵⁷ See *Collins v. Canada (C.A.)*, 2002 FCA 82.

⁵⁸ See *Minister of Human Resources Development v. Kirby*, (2001) CP 17189. See also *The Estate of G.S. v. Minister of Employment and Social Development*, 2019 SST 1502.

⁵⁹ See *The Estate of G.S. v. Minister of Employment and Social Development*, 2019 SST 1502.

[72] The interpretation put forward by the Appellant's legal representative contradicts the clear wording of the OAS Act, and it does not promote its purpose of providing income support to elderly persons, as opposed to assisting an estate.

[73] In addition, I can use legislative history when I am interpreting a statute.⁶⁰ I find that Parliament made a deliberate choice in 2007 to exclude post-mortem GIS applications, when it changed section 29 of the OAS Act.

[74] I do not see any evidence that the Minister received the GIS application before the deceased passed away. His daughter admitted that the application was sent in after his death.

[75] The deceased's OAS application did contain a request that he wanted to apply for the GIS if his OAS pension application was approved. I do not take this as being the same thing as actually applying for a GIS benefit. This is because the OAS Act says that no GIS benefit can be paid unless an application for the GIS is made.⁶¹ The OAS Regulations say that "an application for a benefit shall be made on an application form."⁶² The OAS Regulations further provide that "an application is deemed to have been made only when an application form . . . is received by the Minister."⁶³ The OAS Regulations also say that an "application form" means the form of application required by the Minister.⁶⁴

[76] The Minister did not receive the GIS application form until after the deceased died.

[77] Despite the able arguments of the Appellant's legal representative, I cannot use the incapacity provisions and award a GIS to the estate.

⁶⁰ *Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC).

⁶¹ See subsection 11(2) of the *Old Age Security Act*.

⁶² See subsection 3(1) of the *Old Age Security Act Regulations*. There are exceptions to the general rule. These exceptions do not apply to this appeal.

⁶³ See subsection 3(2) of the *Old Age Security Act Regulations*.

⁶⁴ See subsection 2(1) of the *Old Age Security Act Regulations*.

Conclusion

[78] The Appellant is eligible for an OAS pension with payments starting as of July 2014 and ending in September 2016.

[79] The Appellant is not eligible for a GIS.

[80] This means the appeal is partially allowed.

George Tsakalis
Member, General Division – Income Security Section