Citation: *The Estate of MK v Minister of Employment and Social Development*, 2024 SST 193

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	The Estate of M. K.
Respondent:	B. K.
Respondent:	Minister of Employment and Social Development
Representative:	Yanick Bélanger

Decision under appeal:	General Division decision dated April 5, 2023 (GP-22-662)

Tribunal member:	Neil Nawaz
Type of hearing:	In person
Hearing date:	February 7, 2024
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	February 29, 2024
File number:	AD-23-671

Decision

[1] I am dismissing this appeal. The Estate of the late M. K. is not entitled to additional retroactive payments of the Guaranteed Income Supplement (Supplement). M. K. (who I will refer to as the Deceased) was not incapacitated from applying for the Supplement before September 2018.

Overview

[2] The Deceased lived in Malton for many years. After her husband died in July 2009, she moved to North Bay to live with her adult children. She passed away in April 2021 at the age of 88.

[3] In September 2018, B. K., the Deceased's son and attorney for property, applied for the Supplement.[1] The Deceased had previously received the Supplement but hadn't applied for it since 2009.

[4] Service Canada, the Minister's public-facing agency, approved the application effective October 2017, which it said was the earliest payment date allowed under the law.[2] B. K. thought that his mother should have received additional retroactive Supplement payments. He claimed that she had been incapacitated for years and was incapable of managing her affairs. He appealed the Minister's determination of her effective Supplement payment date to the Social Security Tribunal's General Division.

[5] The General Division held a hearing by teleconference and dismissed the appeal. The General Division found insufficient evidence to show that the Deceased was incapable of forming or expressing an intention to make an application before September 2018. Among other things, the General Division noted that the Deceased had demonstrated competence by giving her son power of attorney the previous month.

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[1] See application for the Guaranteed Income Supplement for July 2018 to June 2019, completed by the Deceased's son and attorney for property and dated April 5, 2019, GD2-57.
[2] Under section 11(7)(a) of the *Old Age Security Act* (OAS Act), the earliest first payment date is 11 months before the date of application.

[6] Acting in his capacity as representative for his mother Estate, B. K. then applied for permission to appeal to the Appeal Division. Last July, one of my colleagues on the Appeal Division granted the Estate permission to appeal. Earlier this month, I held a hearing to discuss the Estate's incapacity claim in full.[3]

Issue

[7] In this appeal, I had to decide whether the Deceased was incapacitated from applying for the Supplement before September 2018.

Analysis

[8] I have applied the law to the available evidence and concluded that the Deceased was not incapacitated before September 2018. I have no doubt that she had significant medical problems in her final years, but I couldn't find enough evidence that she was incapable of forming or expressing an intention to apply earlier than she did.

The test for incapacity is strict

[9] Persons claiming incapacity must prove that they were unable to form or express an intention to apply for Old Age Security (OAS) benefits such as the Supplement.[4] That inability must be continuous from the date that they claim to have become incapacitated to the date that they actually submitted an application.[5]

[10] The incapacity provision is precise and focused. It does not require consideration of the capacity to make, prepare, process, or complete an application for benefits but only the ability to make or communicate a decision to do so.[6] Capacity is to be considered in light of the ordinary meaning of the term and determined based on the

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[3] After the hearing, I allowed B. K. an opportunity to send in additional documentary evidence that might have bearing on his mother's condition in the years before her application. On February 23, 2024, he submitted letters confirming that the Deceased had been a resident of X during the 2018, 2019, and 2020 taxation years (AD16). He also submitted a list of his mother's prescriptions from August 2018 to April 2021, as well as her bank statements from May 2016 to September 2018 (AD17). I considered this material but found that it did not help his case.
[4] See *Old Age Security Act* (OAS Act), section 28.1(1).
[5] See OAS Act, section 28.1(3).
[6] See *Canada (Attorney General) v Danielson*, 2008 FCA 78. This case, and others I will cite in this decision, addresses the *Canada Pension Plan*, but its incapacity provisions are nearly identical to those of the OAS Act.

medical evidence and on the claimant's activities. That capacity is similar to the capacity to form or express an intention with respect to other life choices.[7]

[11] That is true of this case too. The Estate has produced evidence showing that the Deceased was struggling to care for herself, but it does not show that she lacked the ability, when presented with specific options, to make informed life choices during the relevant period. As we will see, the Deceased may have lacked the **will** or the **initiative** to manage her life, but those are not the same things as lacking **capacity**.

[12] The available written and oral evidence suggests that the Deceased was capable of everyday activities and life choices that were not dissimilar from forming an intention to make an application for benefits.

The Deceased's son had limited contact with his mother

[13] B. K. testified about his mother's condition in the years before he finally took over her financial affairs. However, he had little firsthand knowledge about his mother's capabilities and capacities during the relevant period. And what little he did recall undermined his case.

[14] B. K. said that his father ran a heavy equipment business in Malton for many years. The Deceased helped her husband run the business until his retirement in 1995. When he passed away in 2009, his mother moved to the family homestead in North Bay, where her daughter, S. K. (B. K.'s sister), was already living. Joining them were her two elder sons, who had never left home.

[15] At the time, B. K. and his wife lived in Caledon, a more than three-hour drive from North Bay. After a couple of years, he visited his mother and siblings and was shocked to find them all living in squalor. He remembers walking into the house and being nearly overcome by a disgusting odour. He was alarmed to find his mother in such an environment, and he realized that she could no longer take care of herself. Because of their various personal problems, his siblings could not take care of her either.

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[7] See *Sedrak v Canada (Minister of Social Development)*, 2008 FCA 86.

[16] B. K. said that he wanted get his mother out. However, when he urged her to leave, she shrugged him off. She asked him, “How can I leave my own home?” He recalled that she began boiling apples on the stove to mask the background odour.

[17] He didn’t see his mother again until 2013. On that occasion, he didn’t recall her saying much. He saw her again in 2014 and 2015 for brief overnight visits. He didn’t remember much from those visits either, other than the amount of garbage that he saw lying around.

[18] In 2015, the Deceased was admitted to hospital with a serious infection to both her legs. B. K. did not witness this crisis, but he believes that it happened because his sister and brother weren’t taking proper care of their mother. After her discharge, she moved in with her other daughter, K. K., who lived in near North Bay in an apartment above a restaurant.

[19] From what B. K. understands, neither of his sisters could handle their mother’s care. They couldn’t make her meals, they couldn’t sort her pills. In 2017, he discovered that his mother had been briefly taken into care after the authorities became concerned that she was being neglected. He offered to bring their mother to his home in Caledon, but his sisters resisted that idea. The next he heard, his mother was in a nursing home in Huntsville. He thinks K. K. got her admitted there at some point in 2018.

[20] One day in 2018, B. K. received a call from a doctor at the nursing home. She told him that his mother wanted him to become her attorney for personal and financial affairs. He understood that the nursing home wanted someone to file income tax returns on his mother’s behalf, so he agreed. A few months later, he visited his mother at X. He was shocked by her appearance. He barely recognized her. She was tiny. She was blind. She was arthritic. She was in a wheelchair.

[21] I understand that Deceased’s last years were difficult, and I don’t doubt that she experienced many of the typical deficits associated with old age, such as impaired memory and reduced energy. However, according to his own testimony, B. K. saw the Deceased only a handful of times in the nine years before she granted him power of attorney. B. K.’s testimony also suggests that his mother still had the capacity to make

decisions about her life. When he offered to take her out of the home she was sharing with her children, she objected. When the nursing home urged her to assign power of attorney, she chose B. K.

[22] Moreover, the medical evidence on file contains no hint that she was experiencing significant cognitive problems.

The Deceased's medical reports do not indicate incapacity

[23] The Deceased had multiple contacts with health professionals from 2015 to 2017 without there being any mention of cognitive or mental problems. All of her medical interactions were related to physical issues:

- In February 2015, the Deceased was admitted to Emergency for redness and swelling in her lower legs. It appeared that she had multiple cats at home who had been scratching her legs. On examination, she was alert and in no acute distress. She was diagnosed with cellulitis, treated with antibiotics, and discharged after a two-week hospital stay.[8]
- In June 2015, the Deceased was seen for a chronically infected upper back epidermoid cyst for possible excision. Her medical history was notable for a previous cholecystectomy, previous breast cancer treated with a lumpectomy and radiation, and a partial hysterectomy. She told the examining surgeon that she had had the cyst since February and that, although it had been incised and drained, it had not healed.[9]
- In September 2017, the Deceased was hospitalized after her personal support worker became concerned about the level of care she was receiving at home. This "social crisis" was triggered by the breakdown of her electric wheelchair and her daughters' failure to get it fixed. She was noted to have a history of hypertension, osteoarthritis, and a longstanding difficulty with balance. On examination, her vital signs were unremarkable. After a four-day stay, the

[8] See emergency room report dated February 5, 2015 by Dr. Matthew Sheppard, family physician (GD2-32), and discharge summary dated February 20, 2015 by Dr. Milanga Abbysingh, family physician (GD2-30).
[9] See consultation report dated June 1, 2015 by Dr. Prabhsharan Kundhal, general surgeon, GD2-23.

> Deceased was discharged to the care of her daughters with Community Care Access Centre (CCAC) support.[10] The attending physician concluded: "The CCAC coordinator here was able to sit down with the family and have a more in-depth conversation, and it does sound is though there was a bit of an overreaction potentially. Their mother certainly concurred with this and was alert and oriented."

[24] None of the above reports contain any suggestion that the Deceased was incapacitated or unable to make decisions about her healthcare or other significant matters during the relevant period. The Deceased was elderly. She clearly suffered from a range of medical conditions. She may have been receiving less than optimal day-to-day care. But none of that meant she was incapacitated according to the statutory definition. In my view, if the Deceased had the capacity to consent to treatment from 2009−18, then she likely also had the capacity to form or express an intention to apply for the Supplement.

A declaration of incapacity does not determine this matter

[25] In September 2019, Dr. Lindsay MacMillan completed and signed a declaration of incapacity form behalf of the Deceased.[11] Dr. MacMillan selected "yes" to the question of whether the Deceased's condition made her incapable of forming or expressing the intention to make an application. She said that the Deceased's incapacity began 2010. However, when asked what medical conditions were causing the incapacity, Dr. MacMillan replied, "Severe visual and hearing impairment, mild cognitive impairment and wheelchair bound secondary to severe osteoarthritis."

[26] Dr. MacMillan later submitted a letter in support of the Estate's claim.[12] In September 2023, she wrote that the Deceased suffered from "mild to moderate" cognitive impairment, which resulted in "severe emotional/mental instability as well as physical

[10] See reports dated September 25, 2017 (GD2-21) and September 28, 2017 (GD2-19) by Dr. Sheena Brannigan, general practitioner.
[11] See Declaration of Incapacity completed by Dr. Lindsay MacMillan, general practitioner, on September 2, 2019, GD2-72.
[12] See Dr. MacMillan's letter dated September 23, 2023, AD9-2.

incapacity" that would have affected her ability to complete her taxes before her son assumed power of attorney in 2018.

[27] I can only give Dr. MacMillan's evidence so much weight. First, Dr. MacMillan mentions only a "mild" (later modified to "mild to moderate") cognitive impairment amid physical conditions that would not affect the Deceased's brain functioning. Second, Dr. MacMillan was not treating the Deceased when her supposed incapacity began, and I suspect that, as a Huntsville-based doctor, she did not see the Deceased until the latter's admission to X in or around June 2018. Finally, Dr. MacMillan's opinions are just two items of evidence among others suggesting that the Deceased was able to understand and consent to medical treatment.

The Deceased granted her son power of attorney

[28] It must be remembered that "forming" an intention calls for mental activity only. The Deceased's age may have dimmed her awareness of the Supplement, and it may have interfered with her will to apply for it, but it didn't destroy her essential cognitive powers to form an intention to make an application. The record shows that, when the Deceased was given options and advised which one to choose, she formed a specific intention to accomplish a specific action.[13] She was given an option to leave the house in North Bay, and she chose to stay. She was asked to select one of her children as her attorney for property, and she chose B. K.

[29] As the Minister has noted, the very act of granting power of attorney requires capacity. It appears that, when she was admitted to X, officials there wanted to ensure that the Deceased was receiving all the government benefits to which she was eligible. They presumably believed that she was unable to file her taxes or apply for benefits herself, or else they would not have taken steps to have an attorney for property appointed. It appears that X called in a lawyer to execute the necessary documents, including an affidavit in which he swore that the Deceased "appeared to understand"

[13] See *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

what she was signing.[14] (B. K. testified that his mother signed with an "X" not because she was incapable or illiterate, but because she had arthritis in her hands.)

[30] B. K. was asked how, if his mother was incapacitated, she was able to assign power of attorney to him. He replied that his mother, at that point, was very suggestible — she'd sign anything put in front of her. That might have been so, but she had demonstrated the ability to express her wishes and make choices in the past. The Deceased may not have been able to apply for benefits herself, but that doesn't mean she was also incapable of "forming or expressing" an intention to do so. The Deceased might have forgotten about the Supplement, if she ever knew about it in the first place, but there was no evidence to suggest that, if the option were put to her, she would have been mentally incapable of deciding to proceed or not to proceed.

Conclusion

[31] Although I tried, I couldn't find a way to grant the Estate additional retroactive benefits. In the end, there simply wasn't enough evidence that the Deceased lacked the capacity to form or express an intention to apply for the Supplement before September 2018. For that reason, the Estate is not entitled to receive Supplement payments earlier than October 2017.

[32] The appeal is dismissed.

Member, Appeal Division

[14] See power of attorney for property dated August 13, 2018, GD2-62.