



Citation: *Minister of Employment and Social Development v The Estate of LB*, 2024 SST 269

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Minister of Employment and Social Development  
**Representative:** Andrew Kirk

**Respondent/Claimant:** The Estate of L. B.  
**Representative:** Elliot Berlin

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**Decision under appeal:** General Division decision dated March 24, 2023  
(GP-18-1079)

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**Tribunal member:** Pierre Vanderhout

**Type of hearing:** Videoconference

**Hearing date:** February 9, 2024

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

**Decision date:** March 18, 2024

**File number:** AD-23-633

## Decision

[1] The appeal is allowed. L. B. (the Deceased) did not meet the criteria for incapacity under the *Old Age Security Act* (OAS Act). As a result, his Old Age Security (OAS) pension is payable as of July 2015.

## Overview

[2] The Deceased suffered a series of serious health setbacks in middle age. In 2006, when he was only 57 years old, he moved to X (X), a long-term care facility. He remained there until he passed away on September 21, 2016.

[3] The Minister of Employment and Social Development (Minister) received the Deceased's OAS pension application on June 10, 2016. The Minister approved the application. Payments started as of July 2015. This is the earliest possible start date for an application received in June 2016.

[4] The Claimant, which is the Deceased's estate, disputed the payment start date. The Claimant said the Deceased was incapable of applying for the benefits during the years he was in long-term care. The Claimant said this should result in an earlier payment start date. However, the Minister maintained its position. The Claimant appealed to the General Division (GD) of the Social Security Tribunal (Tribunal).

[5] In March 2023, the GD found that the Deceased had met the incapacity requirements of the OAS Act. The GD concluded that the Deceased's OAS pension payments should have started in July 2014 rather than July 2015. The Minister appealed the GD decision to the Tribunal's Appeal Division (AD).

[6] The question in this appeal is whether the Deceased met the incapacity criteria in the OAS Act between June 24, 2014, and June 10, 2016. If he did, then I must determine the impact on his OAS pension start date. If he did not, then his OAS pension must start on July 2015. My focus is on June 24, 2014, because that was the

Deceased's 65th birthday.<sup>1</sup> I do not need to consider capacity before that date because an OAS pension is only payable after a person's 65th birthday.

[7] For the reasons set out below, I find that the Deceased did not meet the incapacity criteria in the OAS Act between June 24, 2014, and June 10, 2016.

## **Withdrawal of joined appeal**

[8] The GD decision also addressed another dispute between the parties: Was the Claimant entitled to the Guaranteed Income Supplement (GIS)? The GD found that the Claimant was not entitled to the GIS because the GIS application was filed after the Deceased's death.

[9] The Claimant appealed that aspect of the GD decision to the Appeal Division. That appeal had its own file number (AD-23-645), although it was joined with the Minister's appeal on the OAS pension (AD-23-633). However, on January 25, 2024, the Claimant withdrew its appeal on the GIS issue.<sup>2</sup> As a result, I am not making any finding on the GIS issue.

## **Issues**

[10] There are two issues in this appeal:

- a) Did the Deceased meet the incapacity criteria in section 28.1 of the OAS Act between June 24, 2014, and June 10, 2016?
- b) If he did, what is the impact on the start date of his OAS pension?

## **Analysis**

[11] I see no dispute that the Minister received the Deceased's OAS pension application on June 10, 2016. At that time, the Deceased said he wanted his pension to

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<sup>1</sup> See GD2-9.

<sup>2</sup> See AD0B-1 and AD0B-2 in file AD-23-645.

start as soon as he qualified **or** in August 2013.<sup>3</sup> The August 2013 date is not relevant in this appeal because an OAS pension is only payable after a person's 65th birthday.

[12] The Minister approved the Deceased's application in November 2016.<sup>4</sup> Since the Deceased was already more than 65 years old in June 2016, the deemed approval date could be as early as June 2015. This means that the ds OAS pension could start as early as July 2015.<sup>5</sup> The Minister accepted July 2015 as the payment start date.<sup>6</sup>

[13] The Claimant appeared to agree that an OAS pension can start no earlier than July 2015 for an application received in June 2016. However, the Claimant said the incapacity provisions of the OAS Act require using an earlier application receipt date. The Claimant said the Deceased had been incapable for many years before the June 2016 receipt date and was still incapable when the Minister received his application.

[14] Section 28.1 of the OAS Act contains provisions that allow for an earlier payment date when the applicant is incapable. The incapacity could exist when the application is received, or it could have ended shortly before. In either case, the test for incapacity is the same. A person only meets the incapacity test if "the person was incapable of forming or expressing an intention to make an application."<sup>7</sup> Any period of incapacity must also be a continuous period.<sup>8</sup>

[15] I must now decide whether the Deceased met this incapacity test in the relevant period.

### **Did the Deceased meet the incapacity test between June 24, 2014, and June 10, 2016?**

[16] While this appeal concerns the OAS pension, the incapacity wording in the OAS Act is identical to the incapacity wording in the *Canada Pension Plan* (CPP).<sup>9</sup> The

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<sup>3</sup> See GD2-3 and GD2-4.

<sup>4</sup> See GD2-6.

<sup>5</sup> See sections 8(1) and 8(2) of the *Old Age Security Act* (OAS Act) and sections 5(1) and 5(2) of the *Old Age Security Regulations* (OAS Regulations).

<sup>6</sup> See GD2-6.

<sup>7</sup> See sections 28.1(1) and 28.1(2) of the OAS Act.

<sup>8</sup> See section 28.1(3) of the OAS Act.

<sup>9</sup> See sections 60(8) and 60(9) of the *Canada Pension Plan*.

CPP incapacity test also centres on whether a person is “incapable of forming or expressing an intention to make an application.” For this reason, decisions about incapacity under the CPP can also help decide this appeal.

[17] The incapacity test is difficult to meet. I cannot base my finding simply on whether the Deceased could make, prepare, process or complete an OAS pension application. I cannot rely on whether he had the physical capacity to complete the application. Instead, I must consider whether he was “incapable of forming or expressing an intention to make an application.” This is a much higher standard to meet, and it applies in only a very narrow set of circumstances.<sup>10</sup>

[18] I will now look at the Deceased’s circumstances in the period leading up to June 10, 2016.

**– The Deceased’s circumstances leading up to June 10, 2016**

[19] The Deceased’s medical history was complex. He had had type 1 diabetes since his teenage years. He suffered two debilitating strokes. His first one was in 1999. The next one was a couple of years later. His other medical conditions included:<sup>11</sup>

- heart disease (thickening/hardening of the arteries)
- transient ischemic attacks (brief strokes)
- congestive heart failure
- peripheral vascular disease (reduced circulation to a body part other than the brain or heart)
- high blood pressure
- high cholesterol
- chronic kidney disease
- enlarged prostate
- chronic intractable pain
- anemia

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<sup>10</sup> See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraphs 31 and 36.

<sup>11</sup> See GD21-3 and GD21-4.

- cataracts
- depression

[20] After the strokes, the Deceased could no longer care for himself. He would overeat and vomit. He could not use the bathroom on his own. He was incontinent. He had poor mobility and needed considerable assistance. He had multiple aspiration episodes (this happens when something goes “down the wrong pipe”). These led to hospital admissions and the insertion of a feeding tube. His mental health also suffered. He entered X in September 2006, since his family could no longer care for him.<sup>12</sup>

[21] Within a year or two of entering X, the Deceased began using a motorized wheelchair because he could no longer walk. He relied on X staff to get him in and out of the wheelchair. However, when he was in it, he could move himself around.

[22] The Deceased's life then settled into a routine. He would spend part of the morning in bed. Once in his wheelchair, he would pursue his interests relatively independently. He would smoke cigarettes in the designated outdoor smoking area. He would watch television. He would buy candy from the X “tuck shop.” He would generally have his meals (other than breakfast) in the X dining room, although he did not interact much with the other residents. At the end of each day, X staff would move him from his wheelchair to his bed.

[23] The Deceased's family members would sometimes visit him at X or take him somewhere. However, even with family members, he said very little. He seemed to limit the conversation to his immediate needs, such as food.

[24] The X records are voluminous. They include more than 1,700 pages, covering the period from January 2010 to September 2016. They document how X cared for the Deceased. The level of detail is very high: They record blood sugar levels, medications,

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<sup>12</sup> See GD21-5. His incontinence was discussed at the GD hearing. See the GD hearing recording at 0:43:18 to 0:43:52.

other treatments, bowel movements, dietary concerns, and behavioural issues.<sup>13</sup> Taken together, they show that caring for the Deceased was not easy.

[25] I cannot describe everything that happened at X over the last six years of the Deceased's life. However, looking at a single month provides a useful snapshot. The month of September 2015 appears to be fairly typical. He refused a bath and dinner.<sup>14</sup> He refused treatment for constipation.<sup>15</sup> He refused insulin on three occasions.<sup>16</sup> He had a wound that required medical treatment, but he refused to go to the hospital until he had finished watching a baseball game.<sup>17</sup> While he often refused care, he would sometimes ask for blood sugar checks.<sup>18</sup>

[26] Another time in September 2015, the Deceased put 35 packets of artificial sweetener in his travel-size mug of coffee. When confronted about this, he simply said, "It is not sugar."<sup>19</sup> That month, he was also reminded of the importance of operating his wheelchair safely, for his sake and the sake of those around him.<sup>20</sup> X staff also documented that he had refused to follow dietary intervention in the past, ate high-sugar and high-calorie snacks, and did not want to follow a prescribed diet.<sup>21</sup>

[27] The Deceased's conduct in September 2015 reflects the same pattern seen in other months. He would often refuse care, even though that care was objectively good for his health. For example, some of his other refusals included:

- receiving physiotherapy<sup>22</sup>
- drinking liquids<sup>23</sup>

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<sup>13</sup> See GD22-1 to GD22-1735. While the GD22 documents generally move forward from 2010 to 2016, they are not in strict chronological order. For example, the 2010 documents go backwards from December 2010 (at GD22-6) to January 2010 (at GD22-227).

<sup>14</sup> See GD22-1197.

<sup>15</sup> See GD22-1217. He also refused such treatment on September 5, but his refusal may have been because of a staff error (see GD22-1215).

<sup>16</sup> See GD22-1200, GD22-1203, and GD22-1218.

<sup>17</sup> See GD22-1214.

<sup>18</sup> See GD22-1201, GD22-1204, and GD22-1217.

<sup>19</sup> See GD22-1212 and GD22-1213.

<sup>20</sup> See GD22-1210.

<sup>21</sup> See GD22-1212.

<sup>22</sup> See GD22-1007.

<sup>23</sup> See GD22-1009.

- taking protein powder<sup>24</sup>
- using a hearing aid<sup>25</sup>
- having an injury examined<sup>26</sup>
- having a shower<sup>27</sup>
- changing his briefs (diapers)<sup>28</sup>

[28] The Deceased also had difficult interactions with others. In the dining room, he once swore at another resident and started heading toward that resident with a knife and fork.<sup>29</sup> He once scratched a staff member's finger because she tried to stop him from putting 52 packets of sugar in his coffee.<sup>30</sup> At another time, he used racist language and made a false accusation against a staff member.<sup>31</sup> He often refused treatment rudely.

[29] Despite his frequent refusals and behavioural issues, the Deceased would also sometimes act in what appeared to be his best interests. Besides requesting blood sugar checks, he would sometimes request medication for pain or headaches.<sup>32</sup>

[30] The Claimant has described the Deceased's behaviour in various ways. At the AD hearing, the Deceased's daughter suggested that his conduct was very "primal" and basic.<sup>33</sup> She said the Deceased had essentially become a child. Their roles had been reversed, and she had become his parent.<sup>34</sup> She also said consequences did not matter to him. He was very impulsive and only thought about what he wanted "in the moment."<sup>35</sup>

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<sup>24</sup> See GD22-1137.

<sup>25</sup> See GD22-756.

<sup>26</sup> See GD22-784.

<sup>27</sup> See GD22-1037.

<sup>28</sup> See GD22-781 and GD22-1099. See also the GD hearing recording at 0:41:19.

<sup>29</sup> See GD22-1029.

<sup>30</sup> See GD22-1144.

<sup>31</sup> See GD22-36.

<sup>32</sup> See, for example, GD22-1145, GD22-1150, GD22-1155, GD22-1162, and GD22-1166.

<sup>33</sup> See also GD21-5 at paragraph 16.

<sup>34</sup> She gave similar evidence at the GD hearing on November 23, 2022. See the GD hearing recording at 0:29:15 to 0:29:30 and 0:40:35 to 0:40:55.

<sup>35</sup> See also GD21-5 at paragraph 14.



[31] The Deceased would call his daughter with very basic complaints. He would say that he was hungry. He would say that he did not like the food. He would complain that the staff would not let him go outside.<sup>36</sup>

[32] I am reluctant to describe the Deceased's behaviour as "primal". According to the Cambridge Dictionary, "primal" means "basic and relating to an early stage of development." The dictionary gives the examples of "primal fears" and "a primal urge to connect with nature."<sup>37</sup> This is not quite consistent with, for example, watching television daily. However, I do accept that the Deceased's behaviour was focused on immediate gratification. He showed little or no concern for the consequences of his actions.

[33] I will now look at how the courts have assessed incapacity, as defined in the OAS Act and the CPP.

– **How to assess incapacity**

[34] In 2022, the Federal Court of Appeal (FCA) reviewed recent decisions and affirmed the state of the law regarding incapacity. The FCA confirmed that the test was whether the person had the capacity to form or express an intention to make an application. The FCA said this capacity was "the same as forming or expressing an intention to do other things."<sup>38</sup>

[35] The FCA added that, at a minimum, the following factors must be considered:<sup>39</sup>

- a) the applicant's evidence about the nature and extent of their physical and/or mental limitations
- b) any medical, psychological, or other evidence provided by an applicant in support of their incapacity claim

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<sup>36</sup> See the GD hearing recording at 0:41:00 to 0:41:20.

<sup>37</sup> Definition retrieved on February 19, 2024, from the online Cambridge Dictionary at <https://dictionary.cambridge.org/dictionary/english>. Published by Cambridge University Press & Assessment.

<sup>38</sup> See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 36.

<sup>39</sup> See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 37.

- c) evidence of other activities an applicant may have engaged in during the relevant period
- d) the extent to which these other activities cast light on the applicant's capacity to form or express an intention to apply for the benefit in question during that period

[36] Sadly, I do not have direct evidence from the Deceased regarding the nature and extent of his physical and mental limitations. He passed away before these proceedings began. However, I do have the evidence of his daughter, who observed him throughout the relevant period. She provided written evidence and gave oral evidence at the GD and AD hearings.

[37] Similarly, we also have extensive medical evidence from X that sets out the Deceased's conditions and behaviour throughout the relevant period. This evidence, together with evidence from the Deceased's daughter, also shows the Deceased's activities during the relevant period.

[38] I must now use the above evidence to determine the Deceased's capacity to form or express an intention to apply for the OAS pension. I must do this for the period from June 24, 2014, to June 10, 2016.

– **The Deceased could form or express an intention to do other things**

[39] I looked at various aspects of the evidence to decide whether the Deceased could form or express an intention to do other things.

[40] I find that the Deceased's day-to-day activities, his signatures on forms, X's delegation of decision-making to him, and other evidence of his cognitive ability all support the same conclusion. The conclusion is that he could form or express an intention to do other things. I will now discuss each of these aspects in more detail.

○ **The Deceased's day-to-day activities**

[41] The evidence shows that, during the relevant period, the Deceased could form or express an intention to do other things on a day-to-day basis.

[42] In June 2014, X staff described the Deceased as “very independent.” He did not participate in programs. He spent most of his time watching television (sports and movies) and going outside to smoke.<sup>40</sup> He would often visit the X tuck shop, where he would usually buy junk food. X staff made similar observations about his activities in September 2014, November 2014, February 2015, and May 2015.<sup>41</sup>

[43] Although the Deceased usually followed the same routine, he would sometimes do other things. In December 2014, for example, he told X staff that his wheelchair was not holding its electric charge. He asked them to call the wheelchair provider. Once the wheelchair had been fixed, he wrote a cheque to cover the cost of the repairs.<sup>42</sup>

[44] The Deceased appeared to have a strong desire for activities such as watching television or smoking. As noted above, this desire was strong enough that he refused medical attention for a wound until he had finished watching a baseball game.

[45] The Deceased did all these things according to his own schedule. Once in his wheelchair, he drove himself to the appropriate location for each activity. He would call his daughter if he needed something or wanted to complain.

[46] The Deceased violated X rules about smoking from time to time. However, whenever he was confronted about these violations, he said that he understood.<sup>43</sup> Similarly, he said he understood when he was warned about his dangerous use of the motorized wheelchair.<sup>44</sup>

#### ○ **Forms signed by the Deceased**

[47] Another factor to consider, according to the FCA, is evidence about decision-making capacity. This includes signing an application for benefits.<sup>45</sup>

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<sup>40</sup> See GD22-829.

<sup>41</sup> See GD22-724, GD22-773, GD22-951, and GD22-1489.

<sup>42</sup> See GD22-782 and GD22-783.

<sup>43</sup> See, for example, GD22-754, GD22-1035, GD22-1053, and GD22-1091.

<sup>44</sup> See, for example, GD22-785, GD22-1089, and GD22-1210.

<sup>45</sup> See *Canada (Attorney General) v Kirkland*, 2008 FCA 144.

[48] The Deceased signed an earlier version of the OAS pension application on April 2, 2015.<sup>46</sup> At the AD hearing, his daughter said he did not complete any other part of the form. She said he had not been responding to letters about the OAS pension from the Ontario Disability Support Program (ODSP). She said she told him, "You are not getting any money." She told him he needed to sign the completed application form because he had reached age 65. It could affect the type of room he had at X.

[49] The Deceased signed a citizenship certificate application in October 2015.<sup>47</sup> At the AD hearing, his daughter said she completed the rest of the form. She said she told him the form was to get proof of his Canadian citizenship. She said he did not ask any questions. She said he would sign things if she asked him. At the GD hearing, she said she told him he would have no money coming in unless he had proof of citizenship. She said she had to be involved in the process: He could not direct himself.<sup>48</sup>

[50] The same thing happened with other forms that the Deceased needed to sign. That would include forms such as tax returns. His daughter would tell him he needed to sign a particular form. He would sign it without asking any questions.

[51] The Deceased signed the OAS pension application on May 16, 2016. The Minister received it on June 10, 2016.<sup>49</sup> At the GD hearing, the Deceased's daughter said the Deceased signed the application form and wrote his name and social insurance number on the first page. She said she and one other person, probably the ODSP social worker, completed the rest of the form. She said she directed the Deceased to sign the application, since he would not have taken the initiative to sign it on his own.<sup>50</sup>

[52] At the AD hearing, however, the Deceased's daughter said she was not sure whether her father wrote his name and social insurance number on the first page. She

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<sup>46</sup> See GD1-18 to GD1-22.

<sup>47</sup> See GD1-26 to GD1-30.

<sup>48</sup> See the GD hearing recording at 1:08:00 to 1:08:40.

<sup>49</sup> See GD2-3 to GD2-6.

<sup>50</sup> See the GD hearing recording at 1:09:48 to 1:13:26.

said she might have written it on her lap, or perhaps her uncle or grandfather wrote it. She said she did not know.

[53] In any case, I find that the Deceased would sign forms if he were told that it would help him financially. He likely did not understand how the OAS pension process worked or how much he might receive. He may have been unable to fill out most of the form. But these aspects are irrelevant because he could still form or express the intent to apply. He showed this by signing the various forms.

○ **The nursing home let the Deceased make decisions about his care**

[54] The X documents reveal that staff would let the Deceased make decisions about his care, even if those decisions did not appear to be in his best interests. This shows that he could form or express an intention to do other things.

[55] Examples of the Deceased's decision-making appear in the X dietary notes. Those notes repeatedly referred to his dietary non-compliance. However, those notes also said he could make his own decisions because his Cognitive Performance Scale (CPS) score was 0, which is the best score. The worst score is 6. In the two years leading up to June 10, 2016, such notes appeared on the following dates:

- June 9, 2014<sup>51</sup>
- August 1, 2014<sup>52</sup>
- August 26, 2014<sup>53</sup>
- September 8, 2014<sup>54</sup>
- October 20, 2014<sup>55</sup>
- November 10, 2014<sup>56</sup>
- January 16, 2015<sup>57</sup>

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<sup>51</sup> See GD22-832 and GD22-833.

<sup>52</sup> See GD22-800.

<sup>53</sup> See GD22-716.

<sup>54</sup> See GD22-722 and GD22-734.

<sup>55</sup> See GD22-746.

<sup>56</sup> See GD22-760 and GD22-761.

<sup>57</sup> See GD22-1091 and GD22-1092.

- February 8, 2015<sup>58</sup>
- April 9, 2015<sup>59</sup>
- May 1, 2015<sup>60</sup>
- July 3, 2015<sup>61</sup>
- August 5, 2015<sup>62</sup>
- October 1, 2015<sup>63</sup>
- December 18, 2015<sup>64</sup>
- January 8, 2016<sup>65</sup>
- March 11, 2016<sup>66</sup>
- April 3, 2016<sup>67</sup>
- May 26, 2016<sup>68</sup>
- June 3, 2016<sup>69</sup>

[56] A dietician made those notes. However, I saw several cases where a nurse documented the Deceased's wishes to refuse bowel movement treatment. In each case, the nurse said the Deceased's wishes/rights were being respected. This happened on the following dates:

- August 27, 2014<sup>70</sup>
- August 28, 2014<sup>71</sup>
- September 23, 2014<sup>72</sup>

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<sup>58</sup> See GD22-1102.

<sup>59</sup> See GD22-1086.

<sup>60</sup> See GD22-1075.

<sup>61</sup> See GD22-1031.

<sup>62</sup> See GD22-1009 and GD22-1010.

<sup>63</sup> See GD22-1194.

<sup>64</sup> See GD22-1119 and GD22-1120.

<sup>65</sup> See GD22-1243.

<sup>66</sup> See GD22-1289 and GD22-1290.

<sup>67</sup> See GD22-1325.

<sup>68</sup> See GD22-1334 and GD22-1335.

<sup>69</sup> See GD22-1396 and GD22-1397.

<sup>70</sup> See GD22-718.

<sup>71</sup> See GD22-718.

<sup>72</sup> See GD22-730.

- September 24, 2014<sup>73</sup>
- December 17, 2015<sup>74</sup>
- December 18, 2015<sup>75</sup>
- April 24, 2016<sup>76</sup>

[57] The CPS score of 0 is just one piece of the puzzle. But it was consistent throughout the last years of the Deceased's life. At the AD hearing, his daughter said she was not aware of any times when the CPS score was different.

[58] This is different from the Deceased's other scores, which varied from time to time. For example, his Index of Social Engagement (ISE) score was 3 in September 2014.<sup>77</sup> But his ISE score was 4 in February 2015.<sup>78</sup> This suggests that X staff were putting some thought into their assessments of his abilities.

[59] X staff did not always cite the Deceased's CPS score when discussing his decision-making ability. For example, on May 21, 2015, an X activationist recorded that the Deceased would "continue to make his own decisions."<sup>79</sup> On November 3, 2015, an X activationist said the deceased could "make his own decisions."<sup>80</sup> His CPS score was not mentioned in either case.

○ **Other indications of cognitive ability**

[60] Other evidence of the Deceased's cognitive ability also supports his ability to form or express an intention to do other things, even if his intentions focused on immediate gratification.

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<sup>73</sup> See GD22-730.

<sup>74</sup> See GD22-1121.

<sup>75</sup> See GD22-1121.

<sup>76</sup> See GD22-1303.

<sup>77</sup> See GD22-724.

<sup>78</sup> See GD22-951.

<sup>79</sup> See GD22-1489.

<sup>80</sup> See GD22-1165.

[61] For example, on December 24, 2014, an occupational therapist said that no cognitive issues were apparent (although the Deceased was not formally tested).<sup>81</sup>

[62] On July 6, 2016, X assessors did a detailed “quarterly assessment” on various aspects of the Deceased’s health. The following information was recorded about his cognitive and communication abilities:<sup>82</sup>

- His short-term memory was OK (this was the highest level possible).
- His long-term memory was OK (this was the highest level possible).
- His recall ability was normal.
- He was independent in his daily decision-making and made decisions that were consistent and reasonable.
- He had no indicators of delirium, such as periodic disordered thinking.
- He had had no change in cognitive status over the previous 90 days.
- He could make himself understood.
- He could understand others.
- He had had no change in his ability to express, understand, or hear information over the previous 90 days.

[63] Although this was called a quarterly assessment, I did not see any other quarterly assessments for the relevant period. However, the July 2016 assessment refers to the previous 90 days and is broadly consistent with other observations in the X records.

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<sup>81</sup> See GD22-785.

<sup>82</sup> See GD22-1728.



○ **Conclusion regarding ability to form or express an intention**

[64] The above analysis shows that the Deceased could form or express an intention to do other things during the period from June 24, 2014, to June 10, 2016. This ability did not change significantly over those two years. This means the had the capacity to form or express an intention to make an application during that time.

[65] In reaching this conclusion, I considered the January 2021 letter from S. R. S. R. was the Assistant Director of Care at X. The Deceased's daughter asked her to provide a letter about the Deceased's ability to make financial decisions.

[66] S. R. said that the Deceased could make some daily decisions for himself. However, he required assistance for financial matters. S. R. did not think he had the full capability to appreciate and understand his financial matters. She did not know when he lost the capacity to manage his financial matters responsibly. However, she said he did not have that capacity in the three years before he died. She also said he did not have a formal capacity assessment while he was at X.<sup>83</sup>

[67] S. R.'s letter confirms that the Deceased would not have been able to apply for the OAS pension on his own. I agree. However, S. R.' letter also supports the Deceased's ability to form or express an intention to do other things. She explicitly confirms that he could make some daily decisions for himself. This is the essence of the OAS incapacity test.

[68] I will now consider the Claimant's concerns about the nature of the Deceased's decisions.

– **A person does not have to make correct or prudent decisions**

[69] The Claimant stressed that the Deceased's decision-making was very short-sighted and harmful. The Claimant said this showed a lack of capacity. For example, it was highly inadvisable for a person with diabetes to refuse insulin or to use 52 packets of sugar at once. I agree that the Deceased appeared to have little or no regard for the

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<sup>83</sup> See GD21-8.

consequences of his decisions. His decisions focused on what he wanted in the moment. This likely had a negative impact on his health.

[70] However, forming and expressing an intention to do other things does not carry with it a requirement to do the **right** things. For example, many people still smoke despite the prevailing medical opinion that smoking is harmful and has negative long-term consequences. This does not mean that people who continue smoking lack capacity to make decisions. It also does not mean they are unable to form or express an intention to do other things.

[71] I will now consider the Claimant's position about the meaning of "capacity".

**– I cannot apply other definitions of capacity**

[72] The Claimant urged me to consider other statutes, and decisions made under those statutes, when assessing the Deceased's capacity. The Claimant suggested that Ontario's *Substitute Decisions Act* and *Mental Health Act* provided helpful guidance on the meaning of capacity.<sup>84</sup>

[73] These statutes, or the decisions made under them, cannot bind me. They are provincial statutes that do not apply here. They are not intended to address a person's capacity to apply for a federal pension. The FCA has issued clear and binding decisions setting out how capacity is to be assessed under the OAS Act. Those FCA decisions are binding on me, and I have relied on them in reaching my decision.

[74] The Claimant also argued that capacity is not shown by the Deceased's decisions on whether, for example, he liked a particular food. The Claimant said such decisions are too basic to show meaningful capacity. In my view, the evidence shows that the Deceased's decisions went well beyond that. For example, he made decisions about how and where he would spend his time. He made decisions about whether he would receive certain medical treatments. X staff respected those decisions.

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<sup>84</sup> The Claimant's representative mentioned this in his oral submissions at the AD hearing. He initially raised this argument before the GD: See GD25-4 to GD25-6.

[75] The Claimant also urged me to consider the “ordinary meaning” of incapacity. The Claimant again said it was wrong to equate a very basic form of decision-making with capacity.

[76] I agree that the phrase “ordinary meaning” is important. In a binding 2008 decision called *Sedrak*, the FCA said the word “capacity” ought to be given its “ordinary meaning.” But the FCA also said that “[t]he capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant.”<sup>85</sup>

[77] I must follow that reasoning.

[78] The *Sedrak* decision affirms that, when assessing capacity, I must consider other choices that the Deceased faced. This is the relevant “ordinary meaning” of capacity. The Deceased regularly faced other choices, such as whether to consent to medical treatment or to engage in a different activity in another X area. He clearly formed intentions about those choices, although his intentions sometimes had negative long-term consequences.

### **What is the impact of my finding on the start date of the Deceased’s OAS pension?**

[79] I found that the Deceased was not incapable, within the meaning of the OAS Act, in the period between June 24, 2014, and June 10, 2016. This means that his OAS pension start date must be based on when the Minister received his application.

[80] The Minister received the Deceased’s OAS pension application on June 10, 2016. The Deceased wanted his pension to start as soon as he qualified.<sup>86</sup> He turned 67 that month. This means that the start date for his OAS pension is July 2015. July 2015 is 11 months before June 2016.<sup>87</sup>

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<sup>85</sup> See *Sedrak v Canada (Social Development)*, 2008 FCA 86 at paragraphs 3 and 4.

<sup>86</sup> See GD2-3 and GD2-4.

<sup>87</sup> See sections 8(1) and 8(2) of the OAS Act and sections 5(1) and 5(2) of the OAS Regulations.

## **Conclusion**

[81] The appeal is allowed. The Deceased did not meet the incapacity criteria under the OAS Act during the relevant period. This means his OAS pension application cannot be deemed to have been received before June 2016. As a result, his OAS pension can only start in July 2015.

Pierre Vanderhout  
Member, Appeal Division