



Citation: *DL v Minister of Employment and Social Development*, 2024 SST 1705

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: D. L.
Representative: D. B.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated March 27, 2023 (issued by
Service Canada)

Tribunal member: Brianne Shalland-Bennett

Type of hearing: Videoconference

Hearing date: November 27, 2024

Hearing participants: Appellant
Appellant's representative
Appellant's witness
Appellant's support person

Decision date: November 27, 2024

File number: GP-23-901

Decision

[1] The appeal is dismissed.

[2] The Appellant, D. L., can't have her Old Age Security (OAS) allowance for the survivor benefit paid earlier than August 2021. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant was born on December 22, 1958. She applied for an allowance for the survivor in July 2022.¹ The Minister of Employment and Social Development (Minister) approved her application. Payments started as of August 2021.²

[4] The Appellant disagrees with the start date of the allowance benefit. She appealed the Minister's decision to the Social Security Tribunal (Tribunal).

[5] The Appellant says she wants her allowance payments to start as of her 60th birthday (December 2018). She was incapacitated and could not make an application earlier. She also said she would have applied earlier if she knew about the benefit.

[6] The Minister says the Appellant can't have her benefits paid earlier. She was paid the earliest the law allows. She doesn't meet the criteria for incapacity. She wasn't incapable of forming and expressing the intention to apply for the allowance for the survivor benefit at the time the application was submitted.³

What the Appellant must prove

[7] For the Appellant to succeed, she must show that the OAS Act allows the Minister to pay her allowance for the survivor benefit earlier than August 2021. This may be possible if she could not apply earlier as defined by the OAS Act due to incapacity.

¹ See GD2R2-28 to 31.

² See GD2R2-49.

³ See GD13.

[8] To prove the Appellant meets the incapacity test, she must show she was incapable of forming or expressing an intention to make an application for the allowance for the survivor benefit earlier than July 2022.⁴

Reasons for my decision

[9] The Appellant doesn't meet the legal test for incapacity. She got the maximum retroactive payment for an allowance for the survivor. I explain the reasons for my decision below.

The Appellant got the maximum retroactive payment

[10] The law says when a person applies for a survivor's benefit, the maximum amount of retroactive benefits a person can get is limited to 11 months before the month the application is stamped by the Minister.⁵

[11] The Minister got the Appellant's application in July 2022. 11 months before that is August 2021. This means the Minister started paying her pension as early as possible.

[12] The only exception to the maximum retroactivity rule is if the Appellant could not apply earlier because of the concept of incapacity. I will discuss that next.

The Appellant doesn't meet the legal test for incapacity

– What the law says about incapacity

[13] The legal test for incapacity is strict. To satisfy the incapacity test, the Appellant must show it is more likely than not that she lacked the capacity to form or express the intention to apply for a benefit. The capacity to form or express an intention to apply for benefits is similar to the capacity to form or express an intention with respect to other choices in life.⁶

⁴ See 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*.

⁵ See subsection 12 (3) of the *Old Age Security Regulations*.

⁶ See subsection 28.1(3) of the *Old Age Security Act*.

[14] 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.⁷

[15] Under the test for incapacity, it doesn't matter if the Appellant: ⁸

- knew the benefit existed
- knew that she had to apply for the benefit
- thought about applying for the benefit
- could make, prepare, process, or complete the application herself

[16] To determine if the Appellant was incapacitated, I must consider the following:⁹

- her evidence about the nature and extent of her physical and mental limitations
- the available medical or psychological evidence supporting her limitations
- evidence about her activities during the relevant period
- the extent to which these activities cast light on her capacity to form or express an intention for form an intention to apply for an allowance for the survivor benefit during that period

– **What is the period of incapacity being claimed?**

[17] The Appellant's representative said for the purposes of this appeal, the period of incapacity being claimed is from December 2018 (the Appellant's 60th birthday) to June 2022 (the day she applied for the allowance for the survivor).¹⁰ I will use July 2022, because that is when the Minister got her application.

⁷ See subsection 28.1(3) and *Flaig v. Canada (Attorney General)*, 2017 FC 531.

⁸ See *Canada (Attorney General) v Danielson*, 2008 FCA 78; *Canada (Attorney General) v Hines*, 2016 FC 112; and *Maloschicky v Canada (Attorney General)*, 2018 FC 51.

⁹ See *Blue v. Canada (Attorney General)*, 2021 FCA 211.

¹⁰ See GD14-5.

– **Does what the Appellant says confirm incapacity?**

[18] The Appellant's testimony about her limitations and her activities don't support a finding of incapacity.

[19] The Appellant's evidence shows she has some limitations from being in a car accident in 1996. However, she has been independent with most of her activities of daily life. This includes making decisions about her care, attending appointments on her own, and paying her own bills. Here is what she says:

- She had a traumatic injury after she was hit as a pedestrian by a car.
- She can pay her own bills. She has been paying them since she was 19.
- She does her own housework and chores like putting wood to start a fire.
- She can go to her medical and other appointments on her own.
- She can make decisions about her own medical care and treatments.
- She can fill out information on forms, like her name and birthday.
- She can drive and do her own grocery shopping.
- Sometimes, she gets help with her day-to-day activities. She explained she gets tired, and that she's only human.

– **Does the medical evidence and other evidence confirm incapacity?**

[20] The Appellant's representative says I have to consider the Appellant's statements along with what the medical evidence and other evidence says.

[21] The medical evidence shows the Appellant has had limitations after she was struck by a car in December 1996. This resulted in a head injury, headaches, and pain throughout her body. She also felt depressed, got frustrated, and was fatigued.¹¹

[22] While the information about the Appellant's car accident confirms that the Appellant had a head injury following the accident, my focus is on what the medical evidence says closer to the period of incapacity – December 2018 to July 2022.

¹¹ See GD2R2-106, GD2R2-109, GD2R2-116 to 117, GD2R2-127, GD2-173 to 187, GD3-2, GD3-4, and GD3-6 to 12.

[23] I find the medical and other evidence doesn't show the Appellant was incapable of forming or expressing the intention to apply for an allowance for the survivor benefit.

[24] The medical evidence from 2015 to 2018 focuses on the Appellant's physical conditions and limitations and how they affect her ability to work. It doesn't show she had cognitive limitations. During this period, the medical evidence shows:¹²

- She injured her two fingers and was getting treatment.
- She had chronic back, neck, and shoulder pain.
- She had asthma and has reactive airway disease.

[25] The next available medical information in the file is dated October 2020. It stated she has the following conditions:¹³

- degenerative disc disease
- chronic pelvis pain
- IBS
- hypothyroidism
- tension headaches
- asthma and COPD
- possible meniscal tear

[26] Courtney Highleyman (nurse practitioner) attended the hearing as a witness. She started treating the Appellant a few months after the Appellant applied for the benefit – September 2022. Her written evidence is also included in the appeal file. I find her evidence is consistent with what the Appellant says.

[27] I find Ms. Highleyman's evidence shows the Appellant might have difficulty with more complex topics or completing forms. But, she is able to form or express the intention to participate in her medical care and she is largely independent in her daily life.

¹² See GD3-11 to 24.

¹³ See GD2R2-47.

[28] Here is what Ms. Highleyman says about the Appellant's conditions, limitations, and capacity:¹⁴

- She had a traumatic brain injury after she was hit by a car as a pedestrian. This is when her incapacity started.
- She has musculoskeletal issues, anxiety, and trouble sleeping.
- She has extreme difficulty discussing abstract principles.
- She can't process information more than a few simple steps.
- She is impulsive and easily distracted.
- She would not be able to complete her application without direct support.
- She has challenges with decision making and planning ahead.
- She can be verbally aggressive when she is frustrated and overwhelmed.
- She manages to live alone. She does her own groceries. She drives. To her understanding, she pays her own bills.
- She gets support from neighbours, her church, and her family.

[29] I asked Ms. Highleyman about her experiences interacting with the Appellant. She said the Appellant came to her appointments on her own but got a reminder call to attend. Sometimes, she missed her appointments. In general, the Appellant was able to follow medical advice or direction, but it would take a lot of explanation. And, the Appellant gave her forms for her to fill out to support her allowance for the survivor case. J. L. also shared some of the information on the Appellant's behalf.

[30] J. L. is an acquaintance of the Appellant. She helped the Appellant throughout the application and reconsideration process. Her evidence is consistent with the medical evidence.

[31] I find J. L.'s evidence shows the Appellant may need help with dealing with complex topics. She may need help with forms and seeking out help, but, she can handle her basic household and financial needs herself.

¹⁴ This is what Ms. Highleyman said at the hearing and in her written evidence. GD2R2-12 and GD2R2-23.

[32] Here is what J. L.'s evidence shows about the Appellant's capacity:¹⁵

- She can see to her basic finances and household needs.
- She is at a loss when looking for information.
- She is at a loss when filling out forms.
- She doesn't know what to do with information when she gets it.
- She doesn't have the intellectual ability to handle complex areas of life.
- She needs frequent assistance from those she trusts.

– **It doesn't matter that the Appellant didn't know about the benefit**

[33] The Appellant said she didn't know about the benefit when she turned 60. She was told by Community Services that she could get the benefit. Only then did she take steps to apply for the benefit.¹⁶

[34] 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.¹⁷

– **Do the Appellant's actions and decision-making confirm incapacity?**

[35] The Appellant's actions and decision-making don't confirm incapacity.

[36] Capacity is to be considered in light of the ordinary meaning of the term and determined on the basis of medical evidence and on the individual's activities. The OAS Act's incapacity provision is precise and focused. It doesn't include the capacity to make, prepare, process, or complete an application for benefits. The test is whether a person has the capacity to form or express an intention to make an application.¹⁸

[37] To determine incapacity, I have to look at both the medical evidence and the relevant activities between the date the Appellant claims she was incapacitated and the

¹⁵ See GD2R2-25 to GD2R2-44 to 45.

¹⁶ This is consistent with what the Appellant's representative submissions say and what J. L. (an acquaintance of the Appellant) said in her letters to the Minister. See GD2R2-25 to 26 and GD14.

¹⁷ See *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

¹⁸ See *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

date she applied. I have to consider the activities that cast light on her capacity to form or express the intent to apply for an allowance for the survivor benefit.¹⁹

[38] I acknowledge the Appellant has limitations that affect her ability to function or navigate more complicated matters of everyday life. However, the focus of the test is on an appellant's capacity to form or express an intention to apply. This is generally no different than having the capacity to form or express an intention to make other decisions in life.²⁰

[39] Just because the Appellant needed help with complex forms or processing certain types of information, doesn't mean she is incapacitated within the meaning of the OAS. The evidence shows she could form and express the intention to make decisions in her daily life during the period of claimed incapacity. The medical evidence also supports this finding. This means, I find she likely had the capacity to form or express an intention to apply for the allowance for the survivor benefit from December 2018, when she turned 60 years old, until July 2022, when the application was made.

Conclusion

[40] I find that the Appellant isn't eligible for her allowance for the survivor payments to start earlier. She also doesn't meet the test for incapacity. This means the Minister paid the Appellant correctly.

[41] This also means the appeal is dismissed.

Brianne Shalland-Bennett

Member, General Division – Income Security Section

¹⁹ See *Canada (Attorney General) v. Danielson*, 2008 FCA 78 and *O'Rourke v. Canada (Attorney General)*, 2018 FC 498

²⁰ See *Sedrak v Canada (Social Development)*, 2008 FCA 86; *Canada (Attorney General) v Kirkland*, 2008 FCA 144; and *Blue v Canada (Attorney General)*, 2021 FCA 211.