



Citation: *The Estate of KB v Minister of Employment and Social Development*, 2025 SST 712

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: The Estate of K. B.
Representative: U. B.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 28, 2024 (issued by
Service Canada)

Tribunal member: James Beaton
Type of hearing: Teleconference
Hearing date: July 3, 2025
Hearing participant: Appellant's representative
Decision date: July 8, 2025
File number: GP-24-2026

Decision

[1] The appeal is dismissed.

[2] The Appellant, the Estate of K. B., isn't eligible for an Old Age Security (OAS) pension before March 2017 or the Guaranteed Income Supplement (GIS) before May 2021. This decision explains why I am dismissing the appeal.

Overview

[3] K. B. applied for an OAS pension on February 20, 2018.¹ The Minister of Employment and Social Development (Minister) approved her application effective March 2017 (11 months before she applied). On April 12, 2022, she applied for the GIS.² The Minister approved her application effective May 2021 (11 months before she applied).

[4] On November 28, 2024, K. B. appealed the Minister's decision to the Social Security Tribunal's General Division because she wanted her payments to begin earlier. On February 7, 2025, K. B. passed away. Her son, U. B., represented K. B.'s estate in this appeal. In the rest of this decision, I will refer to K. B. as the Appellant, even though the appellant is actually her estate.

[5] The Minister says the law doesn't allow the Appellant's payments to begin earlier than 11 months before she applied. There is a possible exception to this called the "incapacity rule." But the Minister says the rule doesn't apply to the Appellant.³

[6] The Appellant says the rule does apply. U. B. says the Appellant was incapable of forming or expressing an intention to apply for benefits from 2006 until her death. He chose those dates because he says the Appellant's medical conditions kept her from taking care of her own finances from 2006 until her death.

¹ See GD2R-16.

² See GD2R-34.

³ See GD9.

Matters I have to consider first

I didn't accept late documents

[7] The Minister filed documents after the deadline (GD10). I didn't accept them. I gave my reasons in a letter on May 22, 2025.

What the Appellant must prove

[8] Generally, a person isn't eligible for benefit payments earlier than 11 months before they applied.⁴

[9] There is an exception called the incapacity rule. If the incapacity rule applies, a person's application is deemed to have been made earlier than it actually was. In that case, a person may be entitled to benefit payments that start earlier.

[10] To succeed in her appeal, the Appellant must prove that the incapacity rule applies to her. This means she must prove that she was incapable of forming or expressing an intention to make an application earlier than she did.⁵ The period of incapacity must be continuous.⁶

[11] The Appellant must prove it is more likely than not that the incapacity rule applies.⁷

[12] The legal test for incapacity is strict. Under the test for incapacity, it doesn't matter whether the Appellant:

- knew that the OAS or the GIS existed
- knew that she had to apply for these benefits

⁴ See sections 8(1), 8(2), and 11(7)(a) of the *Old Age Security Act* (OAS Act).

⁵ It is possible for someone to apply on behalf of an applicant who is still incapacitated (section 28.1(1) of the OAS Act). That isn't the situation here. U. B. testified that he helped the Appellant complete the application forms, but she signed them herself.

⁶ See sections 28.1(1), (2), and (3) of the OAS Act. See also *Hussein v Canada (Attorney General)*, 2016 FC 1417. This decision is about incapacity under the *Canada Pension Plan*, but the same principles apply to the OAS Act.

⁷ See *Grosvenor v Canada (Attorney General)*, 2018 FC 36. This decision is about incapacity under the *Canada Pension Plan*, but the same principles apply to the OAS Act.

- thought about applying for these benefits
- could make, prepare, process or complete an application by herself⁸

[13] The focus of the test is on the 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.⁹

The relevant time periods

[14] Before looking at the evidence, it is useful to identify the time periods that are relevant to this appeal, and why they are relevant.

Applicants must apply for benefits within a certain time

[15] To rely on the incapacity rule, an applicant must apply for benefits within a certain time after they regain capacity.¹⁰

- If the applicant is incapacitated for **fewer than 30 days**, they must apply no later than the month after they regain capacity.
- If the applicant is incapacitated for **30 days up to a year**, they must apply within the same length of time as the period of incapacity. For example, an applicant who is incapacitated for 100 days must apply within 100 days after they regain capacity.
- If the applicant is incapacitated for **more than a year**, they must apply within a year after they regain capacity. In other words, if someone is incapacitated

⁸ See *Canada (Attorney General) v Danielson*, 2008 FCA 78; *Canada (Attorney General) v Hines*, 2016 FC 112; and *Maloshicky v Canada (Attorney General)*, 2018 FC 51. These decisions are about incapacity under the *Canada Pension Plan*, but the same principles apply to the OAS Act.

⁹ See *Sedrak v Canada (Social Development)*, 2008 FCA 86; *Canada (Attorney General) v Kirkland*, 2008 FCA 144; *Blue v Canada (Attorney General)*, 2021 FCA 211; and *Walls v Canada (Attorney General)*, 2022 FCA 47. These decisions are about incapacity under the *Canada Pension Plan*, but the same principles apply to the OAS Act.

¹⁰ The exception is when someone applies on behalf of an applicant who is still incapacitated (section 28.1(1) of the OAS Act).

for a year or more, they have a maximum of one year to apply after they regain capacity.

The relevant time is two years before each application

[16] I only need to look at the two-year period immediately before the Appellant's OAS and GIS applications since, at most, she would have one year to apply for each benefit after being incapacitated for one year or more.

[17] The Appellant applied for an OAS pension on February 20, 2018. To see if the incapacity rule can help her qualify for more back payments, I need to look at the two-year period immediately before February 20, 2018: **February 19, 2016, to February 19, 2018**. I will call this the "first period."

[18] The Appellant applied for the GIS on April 12, 2022. To see if the incapacity rule can help her qualify for more back payments, I need to look at the two-year period immediately before April 12, 2022: **April 11, 2020, to April 11, 2022**. I will call this the "second period."

Reasons for my decision

[19] I find that the incapacity rule doesn't apply to the Appellant.

[20] To make this decision, I must consider:¹¹

- the Appellant's evidence about the nature and extent of her limitations
- any medical or other evidence in support of her claim of incapacity
- evidence of her activities during the claimed period of incapacity
- the extent to which these activities cast light on her capacity to form or express an intention to apply for benefits

¹¹ See *Blue v Canada (Attorney General)*, 2021 FCA 211. This decision is about incapacity under the *Canada Pension Plan*, but the same principles apply to the OAS Act.

[21] I will consider these factors under the following headings:

- the Appellant's limitations and activities
- why the Appellant didn't apply earlier
- the significance of Declaration of Incapacity forms

The Appellant's limitations and activities

[22] The Appellant wasn't incapacitated during the **first period**. Her limitations and activities don't show that she was unable to form or express the intention to apply for benefits.

[23] The Appellant lived with her son and depended on him and on in-home nursing care for things like bathing, changing her diapers, and getting ready for bed. She wore hearing aids and she walked with a walker or a cane. She experienced brief dizzy spells (she felt "a little bit lightheaded and confused") and possibly a couple seizures. She fell at least once, but there is no evidence that she suffered a concussion. She had "mild dementia manifesting in some long-term memory loss" and mild cognitive impairment. Her cognition temporarily worsened in February 2018 when she had the flu.¹²

[24] The Appellant's limitations during the first period were mostly physical and did not affect her ability to communicate. Her cognitive limitations were mild. She could still form and express an intention to apply for benefits.

[25] The Appellant wasn't incapacitated during the **second period**. Her limitations and activities don't show that she was unable to form or express the intention to apply for benefits.

[26] The Appellant continued to experience dizzy spells associated with confusion that lasted only a few minutes. She was able to recognize people and carry on a conversation.¹³

¹² See GD6-99, 105 to 107, 116 to 118, 120, 121, 436, and 439.

¹³ See GD6-111 and 139 to 141.

[27] A registered nurse completed a functional assessment in April 2021. The nurse found no evidence of cognitive impairment apart from some forgetfulness. There were no behavioural concerns. The Appellant could speak and understand English, although it was noted that her primary language was Punjabi.¹⁴

[28] On May 6, 2021, the Appellant moved into a long-term care facility.¹⁵ Shortly after moving into the facility, she completed a Montreal Cognitive Assessment. She scored 13 out of 30. However, the assessor thought that the Appellant's score might have been impacted by her poor hearing.¹⁶ So, I don't take this assessment as a reliable indicator of her mental capacity.

[29] On April 12, 2022, the day the Appellant applied for the GIS, she was treated for a swollen ankle. There are no notes about her cognitive abilities.¹⁷

[30] During the first and second periods, the Appellant was often accompanied at medical appointments by her son or her daughter, but this wasn't because of incapacity. U. B. explained that the Appellant was physically unable to get herself to appointments. For phone appointments, either he or the Appellant's daughter would join the call so that they could interpret to and from Punjabi, and repeat things that the Appellant didn't hear because of her poor hearing. They could also help her remember things, like when her last seizure was.

[31] I note that the Appellant didn't have a power of attorney that would let her children make decisions for her.

Why the Appellant didn't apply earlier

[32] Although U. B. helped the Appellant apply for benefits, I find that this wasn't because the Appellant was incapacitated. The Appellant was **never** responsible for managing her own financial affairs, even before 2006 (the date U. B. gave for the

¹⁴ See GD8-30 to 32.

¹⁵ See GD8-16 to 21.

¹⁶ See GD8-22 to 24.

¹⁷ See GD8-16.

beginning of the Appellant's incapacity). The Appellant's husband managed their financial affairs until his death, and then her son took over.¹⁸

[33] U. B. testified that he didn't turn his mind to OAS and GIS benefits for a while because he was so focused on taking care of the Appellant's physical needs.

[34] I find that the Appellant didn't apply earlier because she had always relied on others to manage her financial affairs—not because she was incapacitated. When she finally did apply, it was because U. B. realized that he should help her do so. It wasn't because of a change in her capacity.

The significance of Declaration of Incapacity forms

[35] The Appellant submitted a "Certificate of Incapability" and two "Declarations of Incapacity."

[36] The first form was completed by Dr. Egier and received by the Minister on January 23, 2023. According to Dr. Egier, the Appellant had been incapable of managing her own affairs due to dementia since July 2006.¹⁹

[37] The second form was signed by Dr. Egier on March 12, 2024. However, the Appellant's "treating physician" was noted as Dr. Chen. The form said the Appellant had been incapacitated since July 2006 due to dementia.²⁰

[38] The third form was completed by Dr. Chen on February 22, 2025. He said the Appellant had been incapacitated from July 2006 to the present (even though she had passed away earlier that month) because of dementia and epilepsy.²¹

[39] These forms aren't determinative. They are just one factor for me to consider.²² In this case, I don't give them much weight. Dr. Egier's clinical notes show that he first start treating the Appellant when she moved into the long-term care facility (well after

¹⁸ See the hearing recording.

¹⁹ See GD2R-43 and 44.

²⁰ See GD7-3.

²¹ See GD7-2.

²² See *Flaig v Canada (Attorney General)*, 2017 FC 531.

2006) and he first recorded concerns with her cognition in May 2022, after she had already applied for benefits.²³ The medical evidence as a whole, which I reviewed earlier in this decision, does not support Dr. Chen's opinion that the Appellant was incapacitated as defined by the *Old Age Security Act*. She may have had health problems, but she could still form and express an intention to apply for benefits.

Conclusion

[40] I find that the Appellant isn't eligible for earlier payment of OAS or GIS benefits because she wasn't incapacitated from forming or expressing an intention to apply.

[41] This means the appeal is dismissed.

James Beaton

Member, General Division – Income Security Section

²³ See GD8-16 to 21.