Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. D. v Minister of Employment and Social Development*, 2019 SST 370

Tribunal File Number: AD-18-655

BETWEEN:

J. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 23, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the decision that the General Division should have given is made. The Claimant was incapable of forming or expressing an intention to make an application prior to the date when she did so.

OVERVIEW

[2] J. D. (Claimant) worked in Canada before she moved to the United States. She has a number of medical conditions, including Lyme disease, arthritis, fibromyalgia, post-concussive illness, depression, anxiety and a cognitive impairment. She applied for a Canada Pension Plan retirement pension in August 2016 when she was 71 years old. The Minister of Employment and Social Development granted the application and began payments in October 2015 which was the greatest retroactivity of payment available under the *Canada Pension Plan* (CPP).

[3] The Claimant appealed the Minister's decision regarding when payment of the pension should start to the Tribunal. She argued that it should begin in 2012 because she was incapable of forming or expressing an intention to make an application from April 2012 when she had a head injury and concussion until she made the application. The CPP provides an exception to the maximum retroactivity allowed if a claimant is incapable of forming or expressing an intention to make an application.[1]

[4] The Tribunal's General Division dismissed the appeal because it decided that the Claimant was not incapable of forming or expressing an intention to make an application. The appeal is allowed because the General Division based its decision on erroneous findings of fact without regard for all of the evidence before it - that the medical evidence was inconsistent regarding when the Claimant was incapable, and it erred in law when it decided that the Claimant was not so incapable. The decision that the General Division should have given is made; the Claimant was incapable of forming or expressing an intention to make an application from April 2012 when she was concussed until 2016 when she applied for the pension.

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[1] CPP s. 60

ISSUES

[5] Did the General Division base its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act) that there were multiple periods of incapacity alluded to by the Claimant's physicians?

[6] Did the General Division err in law when it considered the Claimant's activities after she regained capacity as demonstrating that she was not incapable of forming or expressing an intention to make an application during the period of claimed incapacity?

ANALYSIS

[7] The DESD Act governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[2] The Claimant's grounds of appeal are considered below in this context.

Issue 1: Period of incapacity

[8] In order to succeed on appeal on the basis of an erroneous finding of fact, the Clamant must establish three things: that a finding of fact was erroneous (in error); that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.[3]

[9] The Claimant contends that she became incapable of forming or expressing an intention to make an application in April 2012 when she had a head injury and was concussed, and she recovered her capacity in 2016 when she applied for the pension. The fact that the Claimant had a concussion and chronic post-concussive symptoms is undisputed. The Claimant was treated by

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[2] DESD Act s. 58(1)
[3] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

at least three doctors after this incident. They provided written evidence to the Tribunal, which is summarized below.

Dr. Alexander's evidence:

- August 19, 2016: the Claimant's incapacity began April 4, 2012, and was continuous[4]
- October 7, 2016: the Claimant was incapacitated from a concussion on April 4, 2012, and she was unable to find information to apply before August 2016[5]
- October 11, 2016: the Claimant had difficulty planning and executing tasks continuously from 2012 to the date of the letter[6]

Dr. Slater's evidence:

- August 26, 2016: the Claimant's incapacity began April 4, 2014, and was ongoing[7]
- October 10, 2016: the Claimant was incapacitated as of April 12, 2012, with no periods of capacity[8]
- September 18, 2017: the Claimant had a brain injury on around April 4, 2012, and her incapacity was continuous[9]

Dr. Nevins' evidence:

- August 23, 2016: the Claimant's incapacity began in the 1990s and was continuous.[10] This was clarified in testimony. Dr. Nevins testified that the Claimant was able to function, but her condition became worse after the head injury in 2012

[4] GD2-14
[5] GD2-25
[6] GD4-1
[7] GD2-12
[8] GD2-24
[9] GD1A-4 to 5
[10] GD2-14

- October 11, 2016: the Claimant was incapacitated after an incident in 2005, and this was compounded by the April 4, 2012, injury[11]

- September 20, 2017: the onset of the cognitive impairments was April 2012 and her incapacity was continuous[12]

- September 20, 2017: the Claimant had been impaired since her concussion in April 2012, this was continuous and she could not have applied before she did[13]

Although not all of these medical reports identify the same exact dates that the Claimant's incapacity began, all of the doctors state that the Claimant was incapable after the April 2012 head injury. Similarly, the reports do not all set out an exact end date to the incapacity. However, the reports written in 2016 all refer to the Claimant still being incapable at the time the reports were written. This is consistent with the oral evidence at the hearing that the Claimant's condition improved in 2016, and that during this year she regained the ability to attend activities, etc.

[10] Therefore, the findings of fact "that multiple period of incapacity have been alluded to by the Claimant's treating physicians"[14] and "The lack of cohesive evidence presented provided no clear delineation as to continuous periods of time when the Claimant may have been incapacitated and when she ceased to be"[15] are erroneous. The medical reports consistently refer to the Claimant's incapacity from April 2012 to 2016.

[11] These findings of fact were made without regard for all of the evidence that was before the General Division. The General Division failed to consider all of the doctors' written evidence and Dr. Nevins' testimony at the hearing. At the hearing the General Division member explained the definition of incapacity in the CPP. After hearing this, Dr. Nevins testified that the Claimant's incapacity was from the time of the April 2012 head injury until 2016 when she recovered sufficiently to make the application.

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[11] GD2-22
[12] GD1A-3
[13] GD3-3
[14] General Division decision at para. 8
[15] *Ibid*. at para. 11

[12] The General Division decision was also based on these findings of fact. Therefore, the appeal must be allowed.

Issue 2: The Claimant's activities

[13] The General Division decision also states that the Claimant's activities may also cast light on their capacity to form or express the required intention.[16] However, the Federal Court of Appeal teaches that the relevant activities of a claimant between the start of disability and the date of the application may cast light on the capacity of that person **during that period** (emphasis mine).[17]

[14] The General Division considered the Claimant's activities, including that she attended a bible/ladies group, and began to swim regularly when her friend purchased a swim pass for her. However, the friend's evidence was that she first met the Claimant in 2016 , that she bought her the swim pass, and that she had to provide her with a great deal of assistance in making the application for the pension. So, while the Claimant's participation with her friend at the ladies' group, swimming, and completing documents demonstrate that the Claimant had some capacity to make choices and decisions, it demonstrates this capacity in 2016, when the Claimant says that she regained capacity to form or express an intention to make an application. This evidence is not relevant to her capacity before 2016. Similarly, the fact that the Claimant was able to complete other government benefit applications late in 2016 and 2017 do not reflect on her capacity to do so prior to that time.

[15] Therefore, the General Division erred in law. It relied on evidence regarding the Claimant's activities after she regained some capacity to form or express an intention to make an application before 2016. The appeal must be allowed on this basis also.

REMEDY

[16] The DESD Act sets out what remedy the Appeal Division can give when an appeal is allowed, including giving the decision that the General Division should have given.[18] It also

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[16] *Ibid*. at para. 12
[17] *Canada (Attorney General) v. Danielson* 2008 FCA 78
[18] DESD Act s. 59(1)

states that the Tribunal may decide any questions of law or fact that is necessary to dispose of an application.[19] I have read the General Division and the written record. I have listened to the General Division hearing recording. The record before me is complete; there is no suggestion that either party was not able to present their entire case to the General Division or that further documents should be reviewed before a decision is made. In addition, both parties requested that I make the decision that the General Division should have made if the appeal was allowed.

[17] The undisputed evidence is set out below:

a) The Claimant turned 65 years of age in 2005

b) The Claimant has a medical history of Lyme disease, arthritis, fibromyalgia, depression, anxiety and a cognitive impairment

c) On April 4, 2012, the Claimant had a head injury and concussion

d) She had chronic post-concussive symptoms and significant depression after this injury

e) The Claimant required caregiver services for six hours daily after this injury. This included assistance with shopping, food preparation, cleaning and errands. The caregivers arranged for the Claimant's bills to be paid automatically and for someone to prompt her to pay her rent

f) The Claimant also had drivers take her to appointments

g) The Claimant was treated by at least three doctors who penned reports that are in the written record (see paragraph 9 above).

h) These medical reports state that the Claimant was incapable of forming or expressing an intention to make an application from the date of the head injury until 2016

i) The Claimant had difficulties with organizing and attending appointments

[19] *Ibid*. s. 64(1)

j) The Claimant did not have anyone else make medical decisions on her behalf

k) In 2016 the Claimant attended a bible/ladies group, and became friends with someone who purchased a swim pass for her. The Claimant then began to swim on a regular basis

l) In 2016 the Claimant, with assistance, applied for the CPP retirement pension

m) After the Claimant applied for the retirement pension she also applied for other government benefits

[18] The CPP provides that if a claimant is incapable of forming or expressing an intention to make an application the benefits can be paid retroactively to the month preceding the month the incapacity commenced, provided the period of incapacity is continuous.[20] Medical evidence is important to decide whether a claimant is so incapable. In addition, the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so 'forming and expressing the intent'" need to be considered.[21]

[19] The Claimant's treating physicians all stated that the Claimant was incapable of forming or expressing an intention to make an application from 2012 until 2016. In addition, the evidence shows that the Claimant had difficulty with simple activities of daily living such as shopping and meal preparation. Her bills were paid automatically, which her caregivers arranged, and she required prompting to pay her rent. The Claimant made no important decisions during this time, such as changing her medical providers, initiating legal or insurance claims, or entering any business transactions. Based on this I find that the Claimant was incapable of forming or expressing an intention to make an application for the pension from April 2012 when she was injured, until August 2016 when she signed the pension application form.

[20] CPP s. 60(9) and (10)
[21] *Canada (Attorney General) v. Danielson* 2008 FCA 78

[20] The Claimant's involvement with the ladies' group and beginning to swim occurred after she regained some capacity so do not assist in determining whether she had the required capacity during the relevant period.

CONCLUSION

[21] The appeal is allowed.

[22] The Claimant was incapable of forming or expressing an intention to make an application from April 2012 until August 2016. Therefore, the application is deemed to have been made in March 2012.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	April 16, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Dr. Daniel Slater, Representative for the Appellant Stéphanie Pilon, Representative for the Respondent