



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. D. v Minister of Employment and Social Development*, 2019 SST 1229

Tribunal File Number: GP-18-2365

BETWEEN:

K. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: August 27, 2019

Date of decision: September 19, 2019

DECISION

[1] The Claimant, K. D., appealed the amount of her *Canada Pension Plan* (CPP) retirement pension. She wanted the months from May 2005 to June 2017 to be removed from her contributory period because she was disabled. I am allowing her appeal, in part. I cannot agree to exclude all the months she wanted, but I have decided the months from July 2015 to June 2017 should be removed. These are my reasons.

OVERVIEW

[2] The amount of a person's CPP retirement pension is based on how much they contribute to the CPP during their contributory period. Generally, the contributory period begins when a person turns 18 and ends when they retire. This is not a problem for someone who works and contributes to the CPP for most of that time. But someone who is out of the workforce for several years is better off if their contributory period is shortened by removing the months when they did not contribute. The CPP says this can happen in some circumstances.

[3] The Claimant has not worked since May 2005 because of her health. She received long-term disability benefits from her workplace insurance. Many years later, the Minister granted her a CPP disability pension. However, the Claimant didn't receive any CPP disability payments, because of the way the CPP applied in her case. I explain this in more detail later. The Claimant doesn't care if she gets a CPP disability pension. She cares about having months of disability removed from her contributory period, because that affects the amount of her retirement pension.

ISSUE

[4] I have to decide what months, if any, should be removed from the Claimant's contributory period because of disability.

ANALYSIS

[5] The Claimant began receiving a CPP retirement pension in July 2017, when she turned 65. Although this appeal is about the retirement pension, it is important to know how the Claimant came to be found disabled under the CPP.

[6] The Claimant first applied for a CPP disability pension in 2005, soon after she stopped working. The application was denied because she had only contributed to the CPP in two of the last six years. She needed four years of contributions.¹ The Claimant told me she was not concerned about the denial, because she was already getting long-term disability benefits. She was more concerned about not being able to contribute to the CPP. However, Service Canada said they would take her disability into account when she retired. So she did not appeal the denial, and she did not think about reapplying for a CPP disability pension for many years.

[7] In the fall of 2016 the Claimant discovered Service Canada's information was wrong. It turned out they would not consider her disability when they calculated her retirement pension, because she wasn't getting a CPP disability pension. That meant her retirement pension would be lower than she thought it should be.

[8] To fix this, the Claimant applied for a CPP disability pension in October 2016. Then she got a credit split of the CPP contributions she and her ex-husband had made during their marriage. This gave her an extra year of valid contributions.

[9] It also helped that the law about contributions had changed.² Now the Claimant only needed three years of contributions in a six year period. That meant she would be eligible for a CPP disability pension if she became disabled by December 31, 2007.³

[10] The Minister eventually granted the Claimant's disability application, but she did not receive any payments. That was because if it wasn't for the credit split she would not have had enough contributions to be eligible. In those cases, the CPP says you can't be paid the disability pension until the month after the credit split takes place.⁴

¹ Paragraph 44(1)(b) and 44(2)(a) *Canada Pension Plan*.

² Subparagraph 44(2)(a)(1.1) *Canada Pension Plan*

³ The Claimant's contributions are shown at GD2-14. The six year period began on January 1, 2002, and ended December 31, 2007. In that time, the Claimant made contributions in 2002, 2004, and 2005.

⁴ Subsection 55.2(9) *Canada Pension Plan*

[11] The Claimant's credit split took place in June 2017,⁵ so she could not be paid until July 2017. But that was also the month she turned 65. The CPP says a disability pension can't be paid to someone after they reach that age.⁶

How this affected the Claimant's CPP retirement pension

[12] Roughly speaking, the CPP retirement pension is 25% of a person's average monthly earnings from employment.⁷ A number of things affect this amount. The reconsideration decision and the Minister's submission explained how the Claimant's retirement pension was calculated and then revised to take the credit split into account. The Minister did not remove any time from the Claimant's contributory period, because she was never paid a CPP disability pension.⁸ The Claimant does not have a problem with the calculation, except for the decision not to remove any months from her contributory period.⁹

The Tribunal cannot take remedial action

[13] The Claimant told me that if she knew she had to be receiving a CPP disability pension to have time excluded from her contributory period, she would have appealed the denial of her 2005 disability application, or she would have reapplied sooner.

[14] Even if Service Canada gave the Claimant bad advice before 2016, I don't have the power to do anything about it. The Minister can take remedial action where someone has been denied a benefit or part of one because of mistakes made by government employees.¹⁰ But only the Minister can decide what action to take, or whether to take any action at all. I cannot hear appeals from those decisions.¹¹

⁵ A credit split takes effect the month in which the Minister receives the application or information on which it is based (Subsection 54.2(1) *Canada Pension Plan Regulations*). The Claimant applied in June 2017 (GD2-15).

⁶ Paragraph 44(1)(b); subsection 70(1) *Canada Pension Plan*

⁷ Paragraph 46(1)(a) *Canada Pension Plan*

⁸ GD2-10-13; GD3-3-4

⁹ GD5

¹⁰ Subsection 66(4) *Canada Pension Plan*

¹¹ *Pincombe v. Canada (Attorney General)*, [1995] FCJ No. 320 (FCA)

[15] I have to apply the law as it is set out in the CPP and interpreted by court decisions. So the Claimant can only succeed in this appeal if I find the CPP says some of the months she was disabled should be removed from her contributory period.

Possible exclusions from the Claimant’s contributory period “by reason of disability”

[16] The CPP says that when calculating a retirement pension, the Minister has to remove from the contributory period “any month that was excluded from the contributor’s contributory period under this Act [...] by reason of disability.”¹²

[17] Before I discuss what those words mean, it will help to narrow down the possible periods to be excluded. They all end in June 2017, the month before the Claimant turned 65. The Minister did not suggest the Claimant stopped being disabled before then. In fact, the Minister’s decision to grant the Claimant a disability pension had to include a finding that she was continuously disabled up to June 2017. The real issue is the start date of any excluded period.

[18] The first possibility for months to be excluded from the contributory period began in May 2005. That is when the Claimant had to stop working because of her poor health. She began receiving long-term disability benefits, and she was approved for a disability tax credit. This is the period the Claimant wants removed.¹³

[19] The second period began in December 2007. That is when the Claimant became disabled for the purposes of her CPP disability application. An agreement offer shows the Minister was prepared to find the Claimant became disabled in December 2007, with a deemed date of disability of July 2015, and an effective date (when payment was to start) of July 2017.¹⁴ The file doesn’t contain the completed agreement, but the Claimant told me she understood those dates, and that she signed the agreement and returned it to the Minister.

¹² Subsection 49(c) *Canada Pension Plan*

¹³ GD5

¹⁴ GD1-37-41, 46-48

[20] The Minister did not mention the agreement in its submission. The Minister only said it granted the Claimant a disability benefit.¹⁵ But the Minister could not have granted the benefit unless it determined the Claimant became disabled by December 31, 2007.¹⁶

[21] Whether the agreement was completed or the Minister independently made a decision to grant the Claimant a benefit, I am satisfied she was found to have become disabled at December 31, 2007. There is no evidence the Minister agreed to or decided on an earlier date of disability, and a later date is not possible.

[22] The third period began in July 2015, which was 15 months before the Claimant applied for her CPP disability pension. The CPP says a person cannot be deemed to be disabled more than 15 months before they made their application.¹⁷

[23] The last period is the one the Minister says applies. It began in July 2017, when the Claimant would have started receiving the disability pension if she had not also turned 65. The Minister says that only months when the Claimant was actually receiving a CPP disability pension can be excluded. Because the Claimant was never in that position, no months can be removed.¹⁸

What the CPP means when it says “by reason of disability”

[24] I have to decide what “by reason of disability” means. To do that, I have to examine the words in the provision that is in question (in this case, subsection 49(c)), consider the provision’s context in the CPP, and consider the purpose of the CPP.¹⁹

[25] I also have to consider court or Tribunal decisions on the same issue. Although they can be helpful, I don’t have to follow cases decided by other Tribunal members at this level or at the

¹⁵ GD4-4

¹⁶ This is because the *Canada Pension Plan* requires a person to have a severe and prolonged disability by the end of their minimum qualifying period (paragraph 44(1)(b)). The Claimant’s minimum qualifying period ended on December 31, 2007. Her contributions are at GD2-14.

¹⁷ Paragraph 42(2)(b) *Canada Pension Plan*

¹⁸ GD4-5-6

¹⁹ *Hillier v. Canada (Attorney General)* 2019 FCA 44

Appeal Division. I do have to follow decisions made by the Federal Court or the Federal Court of Appeal.

There must be a determination of disability under the CPP

[26] I started with a case called *Storto*. It says periods of disability can only be removed from the contributory period where a person was determined to be disabled under the CPP.²⁰ I have to follow that decision because it was made by the Federal Court of Appeal. But it makes sense to me anyway. The CPP says a person is disabled only if “determined in prescribed manner to have a severe and prolonged mental or physical disability”.²¹ The “prescribed manner” is in the *Canada Pension Plan Regulations*.²² It explains what information the Minister needs to make a decision where a person has applied for a CPP disability pension.

[27] This tells me the determination about the disability has to be for the purpose of deciding whether the person could receive a CPP disability pension. So it doesn’t matter when the Claimant had to stop working, or if she was receiving private disability benefits or a disability tax credit. What matters is when she was disabled under the CPP.

[28] I recognize the Claimant stopped working in May 2005 and began receiving long-term disability benefits. However, she was not found disabled under the CPP at that time. The earliest date she was considered disabled under the CPP was December 31, 2007. Therefore the months from May 2005 to November 2007 cannot be removed from her contributory period.

[29] That leaves three possibilities for the start of the period to be excluded “by reason of disability”:

1. December 2007 (the Claimant’s actual date of disability under the CPP)
2. July 2015 (the Claimant’s deemed date of disability under the CPP)
3. July 2017 (the earliest date for payment of the Claimant’s CPP disability pension, which means there is no exclusion).

²⁰ *Canada (Attorney General) v. Storto* (1994), 174 NR 221 (FCA)

²¹ Paragraph 42(2)(a) *Canada Pension Plan*

²² Section 68 *Canada Pension Plan Regulations*

There is no binding case law for the remaining possibilities

[30] There are no cases that I have to follow to help me decide which of these remaining periods applies to the Claimant's situation. The decision in *Storto* did not have to decide this issue. In a case called *Bartlett*, the Federal Court of Appeal dismissed an appeal where the months to be excluded were counted from when the person started receiving the disability pension.²³ But in that case the court didn't do anything except confirm which part of the CPP applied: subsection 49(c), which is the one I am applying here. It did not discuss what the words in subsection 49(c) actually mean, so it is not a binding authority on that issue.

[31] There are just a few Tribunal decisions touching on this subject. They have conflicting results. In one, the Appeal Division decided the months to be removed from the contributory period started when the person was deemed to be disabled.²⁴ In the Claimant's case, that would be July 2015. Two other cases from the Appeal Division say the contributory period ends when the person is found to have become disabled under the CPP.²⁵ In the Claimant's case, that would be December 2007. However, these cases weren't particularly useful to me because they did not thoroughly analyze the wording in the CPP by using the approach I mentioned above in paragraph 24.

[32] A recent decision called *L. A.* does contain the required analysis.²⁶ In that case, the claimant wanted to exclude months from his deceased wife's contributory period so he could get CPP death and survivor benefits. Although a different benefit was at issue, the Appeal Division had to apply the same CPP provision that I do. It decided that "by reason of disability" means the months to be excluded from the contributory period start when a person is found to be disabled under the CPP. In this case, that would be December 2007.

Looking at the words, the context, and the purpose of the CPP

²³ *Bartlett v. Canada (Attorney General)*, 2018 FCA 165

²⁴ *IQ v. Minister of Employment and Social Development*, 2017 SSTADIS 743

²⁵ *Minister of Employment and Social Development v. SO*, 2015 SSTAD 1210; *Minister of Employment and Social Development v. ZY*, 2018 SST 145

²⁶ *Minister of Employment and Social Development v. L A*, 2019 SST 965

[33] The law could be stated more clearly. Instead of “by reason of disability” it could have said the starting point for the excluded period was one of the possibilities being discussed here. But I don’t see anything in the wording to support the Minister’s position that “by reason of disability” means “when disability payments start.” A person is found to have become disabled, and four months later they start to receive their pension.²⁷ They are two separate events.

[34] There is nothing in the context or purpose of the CPP to support this interpretation either. The CPP is meant to provide social benefits to Canadians, so it has to be interpreted generously, with that object in mind.²⁸ Restricting entitlement to a program without express direction to do so goes against that purpose.

[35] I disagree with the way the Minister interpreted the law. But I also disagree with the way the Appeal Division interpreted it in *L. A.* I find the period to be excluded from the Claimant’s contributory period did not start until July 2015, when she was deemed to be disabled. I based this on my interpretation of subsection 49(c), paragraph 44(2)(b), and subsection 42(2) of the CPP.

[36] Subsection 49(c) says that when calculating a retirement pension, the period to be excluded from the contributory period is “any month that was excluded from the contributor’s contributory period under this Act [...] by reason of disability.”²⁹ I have to look at the entire phrase, not just the last four words. When it says “any month that was excluded” [my emphasis], it is talking about months that were already excluded from the contributory period because of disability. That means I have to see if some other part of the CPP excluded months from the Claimant’s contributory period for that reason.

[37] There is such a provision: paragraph 44(2)(b). It says that where a disability pension is payable, the contributory period begins when a contributor turns 18,³⁰ and ends “with the month in which [the contributor] is determined to have become disabled for the purpose of paragraph (1)(b)”.³¹ (Paragraph 44(1)(b) sets out when a person is entitled to a disability pension). So, for

²⁷ Section 69 *Canada Pension Plan*

²⁸ *Villani v. Canada (Attorney General)*, 2001 FCA 248

²⁹ Subsection 49(c) *Canada Pension Plan*

³⁰ Or January 1, 1966, whichever is later.

³¹ Subparagraph 44(2)(b)(ii) *Canada Pension Plan*.

disability purposes, the months starting with when a person is determined to have become disabled are excluded from the contributory period. It follows that those months are also excluded under subsection 49(c) when that person's retirement pension is calculated.

[38] That raises the next question: what does “determined to have become disabled for the purpose of paragraph (1)(b)” mean? The answer is in subsection 42(2), which says this:

For the purposes of this Act, a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability.³²

[39] And this:

A person is deemed to have become [...] disabled at the time that is determined in the prescribed manner to be the time when the person became [...] disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.³³

[40] Subparagraph 44(1)(b)(ii) is called the late applicant rule. A late applicant is someone like the Claimant, who applied many years after she last qualified for the CPP disability pension. This provision allows a late applicant to receive the pension if they were disabled when they last met the contribution requirements.

[41] *L. A.* decided the deemed date of disability - the date that is 15 months before the application - is only meant to limit how much back pay a late applicant gets. The Appeal Division said “ ‘By reason of disability’ refers to what [the contributor] actually proved about her disability to qualify for a disability pension and not to a legal label the Minister applied afterwards to limit how far back payments will go for those who apply late.”³⁴

³² Paragraph 42(2)(a) *Canada Pension Plan*

³³ Paragraph 42(2)(b) *Canada Pension Plan*

³⁴ *L. A.* at paragraph 40

[42] I see this differently. The two provisions I quoted above link the deemed date of disability to the date a person is determined to have become disabled. For regular applicants, the date is the same. But the CPP says that in no case, including late applicants, can a person be deemed disabled more than 15 months before they applied. The provision is “for the purposes of this Act” [emphases mine]. That means the whole CPP, not just the part that deals with payment of the disability pension. In fact, that part doesn’t say anything about the 15 month limit. It says the disability pension is paid four months after “the month in which the applicant became disabled.”³⁵ I do not see why the 15 month limit can apply to the payment provision but not to the rest of the CPP, especially when the law says pretty clearly that it does.

[43] The CPP provides social benefits, but it also contains measures to limit their cost. The late applicant provision allows someone to receive disability benefits when they would not otherwise be able to. However, the CPP restricts the amount of retroactive payment that person will get, through the “deemed disability” provision, and the credit split provision. Consistent with this, I interpret the CPP to also limit the effect a late determination of disability will have on the amount of a retirement pension.

[44] My reading of the CPP leads me to conclude that the Claimant could not be determined to have become disabled before July 2015. That was the end of her contributory period for disability pension purposes.³⁶ Subsection 42(2)(b) excluded the months from July 2015 to June 2017 from her contributory period for disability purposes. Subsection 49(c) also excluded those months “by reason of disability” for retirement pension purposes.

CONCLUSION

[45] The appeal is allowed, in part.

Virginia Saunders
Member, General Division - Income Security

³⁵ Section 69 *Canada Pension Plan*

³⁶ Subparagraph 44(2)(b)(ii) *Canada Pension Plan*