



Citation: *AS v Minister of Employment and Social Development*, 2021 SST 966

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant/Claimant:	A. S.
Respondent:	Minister of Employment and Social Development (Minister)
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated August 19, 2019 (issued by Service Canada)
Tribunal member:	Anne S. Clark
Type of hearing:	Teleconference
Hearing date:	July 21, 2021
Hearing participants:	Claimant Claimant's Representative (daughter) Witness (Claimant's Financial Advisor)
Decision date:	August 16, 2021
File number:	GP-19-1910

Decision

[1] The appeal is dismissed.

[2] The Claimant, A. S., isn't eligible to have his *Canada Pension Plan* (CPP) retirement benefits paid earlier than April 2017. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is a retired dentist. He and his daughter explained that he ran a thriving dental practice for 47 years. He had employees and paid taxes. He had a great work ethic and continued working as long as he could. He was self-employed and has no private retirement plan so he relies on receiving the maximum he can get from the CPP.

[4] The Claimant had two significant medical events he feels are relevant to his appeal. He had hip replacement surgery in December 2015 and was off work while he recovered. He returned to work and then had a stroke on January 6, 2016. He has not been able to work since.

[5] The Claimant applied for a CPP retirement pension in March 2018 when he was 74 years old. The Minister allowed the application and decided the Claimant was entitled to a CPP retirement pension effective April 2017 which was 11 months before the date he applied. The Claimant appealed the Minister decision to the Social Security Tribunal (Tribunal).

[6] The Claimant says his pension should be effective when he turned 70 years old in August 2013 because he misunderstood (or was misled by) printed information about the best time to apply for a CPP retirement pension. He also said after his hip replacement surgery in 2015 he could not apply for a retirement pension because he was "fully engaged" in returning to work. Further he believes his pension should be effective 11 months before January 2016 when he had a stroke because he was incapable of forming or expressing the intention to make an application. He says the period of incapacity began on January 6, 2016 and has not ended.

[7] The Minister says the Claimant received the maximum retroactive payments he is allowed under the CPP. The Minister submitted that the Claimant did not prove that he was incapable of forming or expressing the intention to make his application earlier than March 2018 when he actually applied. The Minister submits the Claimant is not entitled to additional retroactive payments.

What the Claimant must prove

[8] For the Claimant to succeed, he must prove the CPP allows his CPP retirement pension to be paid earlier than April 2017. This may be possible if he could not apply earlier because he was incapacitated as defined by the CPP. To prove he met the incapacity test he must show he was incapable of forming or expressing the intention to make his application earlier than March 2018.

Matters I have to consider first

The Claimant asked me to consider other circumstances

[9] The Claimant and his daughter discussed the Claimant's work ethics and the fact that he was a good employer and paid taxes for many years. His financial circumstances are limited because he does not have a private pension plan. He had significant health concerns he had to manage and he was not in a position to make his application earlier.

[10] The Tribunal is created by legislation. It only has the powers granted to it by its governing statute. This means I have to interpret and apply the provisions as they appear in the CPP and its regulations. I cannot change or waive them, even if they seem harsh or unfair in a particular situation.¹

¹ See, generally, the Supreme Court of Canada's decision in *R. v. Conway*, 2010 SCC 22.

Reasons for my decision

The Claimant received the maximum retroactive payment allowed under the CPP

[11] The CPP sets out when a retirement pension starts. It is the latest of either of the following:

- (a) The month when the claimant reached 65 years of age,
- (b) The month after the month in which the application was received, if they were under 65 years of age when they applied,
- (c) The 11th month before the month in which the application was received, if they reached 65 years of age when they applied (but not before they reached 65 years of age), and
- (d) The month chosen by the applicant.

[12] While the Claimant would like payment to start on when he turned 70 years of age in August 2013 his pension must start at the latest of one of the four situations listed above. The Claimant was over 65 years of age when he applied. So, the latest of these four scenarios is section (c) above.

[13] This means the Claimant's pension can be paid no earlier than 11 months before the month he applied. Since he already received the maximum he cannot succeed on this point.

The Claimant did not meet the test for incapacity

[14] To satisfy the CPP's incapacity test, the Claimant must prove it is more likely than not that he lacked the capacity to form or express the intention to apply for a benefit.² 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.²

² See *Sedrak v. Canada (Social Development)*, 2008 FCA 86

[15] The CPP incapacity provisions also require the Claimant to show that he was **continuously** incapable of forming or expressing an intention to make a CPP disability application during the entire period of the alleged incapacity.³

– **The Claimant’s actions and decision-making do not show incapacity**

[16] After he experienced the stroke on January 6, 2016 the Claimant realized he would need help managing his personal matters. On January 14, 2016 he arranged to sign a Power of Attorney to authorize his wife to act on his behalf. He clarified that they “discuss things” and she manages the accounts. This is different from before the stroke when he could manage the banking and accounts himself.

[17] The Claimant said that since the stroke he needs family members to drive him to medical appointments. His daughter drives him to his appointments and waits in the car. The Claimant he does not make medical decisions on his own. The doctors give him information and he makes decisions with their advice. The Claimant’s wife monitors his medication and he relies on her to take care of all household duties including things he used to do. In fact, the family has taken over responsibility for many things he used to do.

[18] The Claimant worries that he will forget or “misfile” information so he discusses everything with his family and relies on their advice to make decisions. He experiences brain fog. He can be confused and becomes stressed. He said he realized he was no longer able to do his own bookkeeping and taxes. He relies on a financial advisor (GVH) to advise him about taxes and personal finances. It was GVH who recommended that he file an application for CPP a retirement pension.

[19] GVH testified and said the Claimant approached him in late 2017 to ask for help with his income tax assessment and personal finances. GVH said he believes the Claimant was incapacitated in 2016. He said most of the decisions the Claimant needed help addressing happened in and after 2016. GVH described them as “gaps” in the

³ See subsection 60(10) CPP and *Flaig v. Canada (Attorney General)*, 2017 FC 531

Claimant's finances and he helped the Claimant revise and file forms and applications including his application for CPP retirement benefits.

[20] GVH said the Claimant attended a presentation GVH gave on taxes and personal finances. He attended alone. The Claimant told GVH he was overwhelmed by his personal finances. There was a family connection between the Claimant and GVH so GVH agreed to help. When GVH asked the Claimant about CPP benefits the Claimant said he had not applied because he believed the longer he waited the more he would receive. GVH advised him to apply immediately. GVH completed the forms and the Claimant signed them.

[21] GVH said the Claimant dealt with many serious "dynamics" and there were gaps in his personal finances – one of which was CPP. The Claimant said he knew he made mistakes with his savings and retirement funds and he needed help. GVH confirmed that he advised the Claimant but the Claimant made all decisions.

– **The medical evidence does not support a finding of incapacity**

[22] The Claimant says the period of incapacity began on January 6, 2016 and has not ended. His family physician Dr. J. Summerfield completed a Declaration of Incapacity and said the Claimant's incapacity began on January 6, 2016 and ended on May 1, 2016.⁴ The Claimant and his daughter could not be sure but thought May 1, 2016 might have been the date he was discharged from the medical and rehabilitation center.

[23] On September 17, 2019 Sr. Summerfield wrote that she made a mistake in the Declaration and should have reported the Claimant incapacity was continuing. She said that was because he remained incapable of completing forms for the appeal process.⁵

[24] Dr. Summerfield's description of the Claimant limitations relate to his ability to complete forms, not his capacity to form or express an intention to make an application.

⁴ The Declaration is at GD1-7

⁵ Dr. Summerfield's letter is at GD1-8

Her letter talks of the fact the claimant continues to need help with forms. This is consistent with the Claimant's evidence and testimony from his daughter and GVH. The Claimant is managing a very serious condition and can no longer do everything as before. The fact that he has limitations and needs help does not establish incapacity.

[25] The Claimant believes the fact that he relies on others to assist and advise him means he meets the test for incapacity. 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 CPP's incapacity provision is precise and focused. It is not describe the capacity to make, prepare, process or complete an application for benefits but only the capacity to form or express an intention to make an application.⁶ Incapacity is not about whether a person is able to complete the forms himself. Needing help or being disabled does not mean a person meets the definition of incapacity.⁷

[26] I have to consider the Claimant's capacity to make other decisions. To do that, I have to look at both the medical evidence and the relevant activities of the Claimant between the date he claims he became incapable of applying and the date he actually applied for the disability benefit which cast light on his capacity during that period of time to form or express the intent to apply for a disability benefit.⁸

– **The Claimant's lack of knowledge or disability do not establish incapacity**

[27] The Claimant said he had other things to manage such as hip replacement surgery and return to work that prevented him from applying earlier. He told GVH he decided to wait to apply because he thought he would get more money. He was not aware there are limits on retroactive payments.

[28] The fact the Claimant did not realize the impact of his decision to delay his application or was distracted by other important events in his life does not establish

⁶ The Court said this in *Canada (Attorney General) v. Danielson*, 2008 FCA 78

⁷ See *Canada (Attorney General) v. Danielson*, 2008 FCA 78 and *O'Rourke v. Canada (Attorney General)*, 2018 FC 498

⁸ See *Slater v. Canada (Attorney General)*, 2008 FCA 375

incapacity.⁹ Also, the CPP allows someone else to make an application on a person's behalf. The Claimant clearly considered having someone else take care of his decisions when he appointed his wife to be his attorney. He was capable of making those arrangements in the week after the stroke. He said made his own medical decisions but needs the advice of his healthcare professionals. He stressed that he has to rely on others for medical and financial advice; to drive him to appointments; to complete forms and to help him with his personal needs. Even so, beginning the week following the stroke (January 14, 2016) he was able to make decisions about his personal and financial affairs. This is consistent with having the capacity to form or express the intention to apply for CPP benefits.

[29] The Claimant and witnesses all addressed incapacity as if it is the same as the inability to complete forms and make an application. They seem to believe, incorrectly, that the fact the Claimant is not as capable as he was before the stroke he meets the test for incapacity. As I explained above, even though he has limitations, the Claimant does not meet the test for incapacity.

Conclusion

[30] I find that the Claimant isn't eligible for additional retroactive payments

[31] This means the appeal is dismissed.

Anne S. Clark
Member, General Division – Income Security Section

⁹ The Court discussed these points in *Maloshicky v. Canada (Attorney General)*, 2018 FC 51; *Sedrak v. Canada (Social Development)*, 2008 FCA 86; and *Canada (Attorney General) v. Hines*, 2016 FC 112.