



Citation: *SP v Minister of Employment and Social Development*, 2022 SST 562

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: S. P.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 21, 2020 (issued by
Service Canada)

Tribunal member: Pierre Vanderhout
Type of hearing: Teleconference
Hearing date: February 22, 2022
Hearing participant: Appellant
Decision date: February 25, 2022
File number: GP-20-1963

Decision

[1] The appeal is dismissed.

[2] The Claimant, S. P., isn't eligible for additional payments of her Canada Pension Plan ("CPP") survivor's benefit. She is only eligible for payments starting in January 2019. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant will be 69 years old in March. She worked for many years in Canada. She eventually moved to Las Vegas with her late husband, T. T. (the "Contributor"). She was a very wealthy author.

[4] The Claimant and the Contributor bought a large new home in Las Vegas, but a series of traumatic events followed. They both suffered extensive medical problems due to severe poisoning by multiple toxins. Their home turned out to be a "toxic house." The toxic house and the resulting litigation led to the Contributor's suicide on March 30, 2008. The Claimant was unable to write further books, and her fortune gradually disappeared. She declared bankruptcy in 2013 and was homeless by 2019. While she now has a roof over her head in Las Vegas, the homeowner is abusive and exploits the Claimant in return for housing. Her financial situation is dire and she cannot afford much-needed medical care.

[5] In December 2019, the Claimant applied for the CPP survivor's pension (the "Pension"). The Minister granted her the Pension, with payments effective January 2019. On reconsideration, the Minister granted an "exception" to the rules about retroactive payments and made the Pension payments effective January 2018.¹ The Claimant appealed that decision to the Tribunal. She wanted the Pension payments to start in March 2008, when the Contributor died.

¹ GD2-7

[6] The Claimant says the law has provisions to extend Pension benefits back to the Contributor's death. The Claimant says her desperate medical, financial, and living circumstances should be considered. She is isolated, financially destitute, and permanently disabled. She does not know how she will survive without additional retroactive payments. She says she didn't apply earlier because someone told her the Pension no longer existed. She applied as soon as she learned that the Pension was still in place.

[7] The Minister did not make written submissions, nor did the Minister attend the hearing. However, the Minister previously said it first paid the Pension from January 2019 as that was the earliest possible date. The Minister later adjusted the Pension start date to January 2018 because of the Claimant's circumstances, but said it could not pay any earlier. The Minister did not explain the legal authority for this payment date. The Minister also says it cannot adjust the Pension amount due to financial hardship. The Pension amount is based solely on the size and number of CPP contributions.

What the Claimant must prove

[8] For the Claimant to succeed, she must prove that section 72 of the *Canada Pension Plan* does not strictly apply to her situation. That section limits the start date of the Pension to 11 months before the Pension application is received. In the alternative, the Claimant must establish an earlier application date.

Reasons for my decision

[9] I find that the Claimant is not entitled to receive Pension payments before January 2019. I will first look at the CPP provisions that impose a maximum retroactivity period of 11 months.

The maximum retroactivity period is 11 months

[10] Section 72 of the *Canada Pension Plan* sets out the start date of an approved Pension. It also says that "in no case" is the Pension payable more than 11 months

before the application is received. The statute gives no flexibility here. As the application was received in December 2019, the Pension can't be paid before January 2019.

[11] The only way to have an earlier payment date would be to establish an earlier application date. I will now look at how that could happen.

The Claimant would need to establish incapacity

[12] The only CPP provisions that could assist the Claimant are those that deal with incapacity. In December 2019, the Claimant applied for the Pension. If she can establish a period of incapacity before the application date, her application date could be adjusted in certain circumstances.²

[13] There are rules about how soon the Claimant must apply after her incapacity ended.³ But the first hurdle is whether the Claimant actually met the CPP test for incapacity.

[14] The incapacity test is extremely difficult to meet. The Claimant would need to show that she "had been incapable of forming an intention or expressing an intention to make an application before the day on which the application was actually made."⁴

[15] I find that the Claimant never met this test.

[16] To establish incapacity, it is not enough to show that the idea of applying simply did not occur to the Claimant.⁵

[17] The Claimant essentially admitted that she did not meet the CPP incapacity test. She said she was never "in a coma."⁶ While this is an extreme example of the required level of impairment, it is not the only way to meet the test.

² Ss. 60(9) to (10) of the *Canada Pension Plan*.

³ Ss. 60(9)(b) and (c) of the *Canada Pension Plan*.

⁴ S. 60(9)(a) of the *Canada Pension Plan*.

⁵ See *Maloshicky v. Canada (Attorney General)*, 2018 FC 51.

⁶ See GD9-193. She also affirmed this at the hearing.

[18] The Claimant asked Dr. Erica Elliott to complete a Physician's Declaration of Incapacity form. In October 2021, Dr. Elliott indicated on the form that the Claimant did not meet the CPP test for incapacity.⁷ At the hearing, the Claimant did not dispute Dr. Elliott's conclusion, and again said the form "basically requires that I be in a coma." She also admitted that no doctor ever found her incompetent to manage her affairs.

[19] Nor are the Claimant's activities since the Contributor's death consistent with incapacity. I accept that her activity level declined after her 2000 move to the toxic Las Vegas house. She wrote 12 books in 1999 and 8 books in 2000. However, she says she wrote only 2 in 2007 and has not written any since the Contributor died.⁸

[20] While the Claimant did not write any more books, she had a considerable inventory of books and kits. She still sold books (and kits associated with her books), even after applying for the Pension. She would receive orders and fill them using her inventory. She employed a part-time helper until her 2013 bankruptcy. She kept up a website until about 2019, when it went down and she was unable to fix it. She still fills e-mail orders that she receives from prior customers. The clinical notes from her health care providers affirm her ongoing work activity long after 2008.⁹

[21] This ongoing activity is important. The activities of a claimant during the period in question may cast light on her continuous incapacity to form or express the required intention.¹⁰ The capacity to form an intention to apply for benefits is similar to the ability to form an intention with respect to other choices facing the claimant.¹¹ By filling orders, and even engaging paid help, the Claimant showed that she had formed the intention to conduct her business. She even acted on that intention. Although I don't need to rely on it, everyday acts such as driving a car or using a credit card can also be relevant in showing the ability to form an intention.¹²

⁷ GD9-200

⁸ GD9-75

⁹ See, for example, GD9-189 (2008), GD9-190 (2009), and GD9-192 (2014). In 2017, she was still facing "the daunting task of shutting down her home business and moving out": see GD6-9.

¹⁰ See *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

¹¹ See *Canada (Attorney General) v. Kirkland*, 2008 FCA 144.

¹² See *Grosvenor v. Canada (Attorney General)*, 2018 FC 36.

[22] I accept that the Claimant's activities after her husband's death were not as extensive as they were before. She did not spend many hours on work-related activities. She tired easily. She said she needed to sleep after doing a task for a couple of hours. She was, and is, likely disabled. Dr. Elliott refers to multiple forms of disability.¹³ However, having a disability is not the same as being incapable to form or express an intention to make an application.¹⁴ The evidence in this case cannot support a finding of incapacity. This means I cannot adjust her application date.

[23] I will now look at two other issues raised by the Claimant: erroneous advice and her exceptional personal circumstances.

The Claimant received erroneous advice

[24] The Claimant cannot say exactly who told her that the Pension (known to her as the "Widow's Allowance") no longer existed when the Contributor died. However, she believes it might have been her sister. She thinks she received that advice right around the time of the Contributor's death. She does not suggest that she received this advice from the Minister.¹⁵

[25] The Tribunal cannot help the Claimant in this regard. The *Canada Pension Plan* does contain remedial provisions about erroneous advice. However, those only apply when the Minister gave the advice and an applicant was denied a benefit because of that advice.¹⁶ In any case, the Tribunal does not have the jurisdiction to make findings about erroneous advice.¹⁷ The Claimant would have to address that with the Minister.

The Claimant's exceptional circumstances

[26] The Claimant says her exceptional circumstances should be considered. I acknowledge that she has faced multiple tragedies, including the suicide of her husband, since she moved to Las Vegas. She has permanent health problems and

¹³ See the letter at GD2-12.

¹⁴ *O'Rourke v. Canada (Attorney General)*, 2018 FC 498.

¹⁵ GD9-123 and GD9-129. See also GD2-33.

¹⁶ S. 66(4) of the *Canada Pension Plan*.

¹⁷ *Lee v. Canada (Attorney General)*, 2019 FC 1189.

cannot afford health care. Dr. Elliott said the Claimant's severe poisoning caused Stage 4 Lymphedema (with massive swollen legs making it hard to walk), chronic fatigue, immune dysfunction syndrome, ataxia, memory loss, depression, and multiple chemical sensitivities.¹⁸

[27] The Claimant's dealings with the American legal system have been disastrous. Many people seem to have taken advantage of her.

[28] The Claimant's dire straits are in stark contrast to the health and wealth she once had. She earned \$500,000.00 in 1988. She once employed seven people. Her two homes in Las Vegas (she bought the second house when she still owned the toxic house) totalled 9,200 square feet and had seven garages. At her second home, she spent \$100,000.00 designing and installing a swimming pool with three grass huts.¹⁹

[29] I have considerable sympathy for the Claimant. I cannot imagine the trauma that would result from a spousal suicide. She said she and the Contributor spent nearly \$500,000.00 just figuring out why they were having such extensive medical problems. While it is only one aspect of her present situation, the photos of her disfigured legs are disturbing.²⁰ Her current living arrangements are highly abusive and dysfunctional.

[30] However, the *Canada Pension Plan* prevents me from making decisions on the basis of compassion. Nor does it allow the Tribunal to consider exceptional personal circumstances. The Tribunal is created by statute. The Tribunal can only grant remedies that it has the specific authority to grant.²¹ It cannot bend the requirements of the *Canada Pension Plan*.²² At best, the *Canada Pension Plan* allows the Minister (but not the Tribunal) to forgive an overpayment in such a case.²³

[31] I note that the Minister did not attend the hearing. The Minister did not file written submissions with the Tribunal. Nor did it explain how it had the legal authority to grant

¹⁸ GD2-12

¹⁹ GD9-73, GD9-75, GD9-76, and GD9-77.

²⁰ An example is at GD9-151.

²¹ See *R. v. Conway*, 2010 SCC 22.

²² *Miter v. Canada (Attorney General)*, 2017 FC 262.

²³ See s. 66(3) of the *Canada Pension Plan*.

Pension payments starting in January 2018. At the hearing, the Claimant said the Minister did not explain the reason to her either.

Conclusion

[32] I find that the Claimant is entitled to the Pension starting in January 2019, as she did not apply for the Pension until December 2019. The *Canada Pension Plan* does not allow me to establish an earlier application date. However, the Minister may still forgive the apparent overpayment that results from this decision.

[33] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section