

Citation: *J. F. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 34

Appeal No: CP 27316

BETWEEN:

J. F.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Valerie HAZLETT PARKER

HEARING DATE: January 20, 2014

TYPE OF HEARING: In person

DATE OF DECISION: January 28, 2014

PERSONS IN ATTENDANCE

Counsel for the Respondent

Sarah Jane Harvey

Witness for the Respondent

Dr. Jean Trepanier

Observer

Dr. Andrew Watson

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 4, 2010, a Review Tribunal determined that a *Canada Pension Plan* (the “CPP”) disability pension was payable, and that payments would begin in January 2007.

[3] The Appellant originally filed an Application for Leave to Appeal that Review Tribunal decision (the “Leave Application”) with the Pension Appeal Board (PAB) on July 29, 2010, seeking further retroactive payment of CPP disability benefits.

[4] The PAB granted leave to appeal on August 25, 2010. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[5] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated October 15, 2013.

THE LAW

[6] To ensure fairness, the Appeal will be examined based on the Appellant’s legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the *Canada Pension Plan* (CPP) as it read immediately before April 1, 2013.

Paragraphs 60(8), (9) and (10) of the CPP provides:

(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

ISSUE

[7] The Appellant did not attend the hearing. This Tribunal must decide whether the matter should proceed in his absence.

[8] The Tribunal must also decide if it is more likely than not that the Appellant was incapable of forming or expressing the intention to apply for CPP disability benefits continuously from January 1996 to April 2008 when he made the application for CPP disability pension.

EVIDENCE

Preliminary Matter

[9] The following information is found in the records of the Pension Appeals Board. The Appellant contacted the Pension Appeals Board (PAB) in August 2011 and provided it with a new mailing address. He again contacted the PAB in September 2011 to request an adjournment of the hearing of this matter. He also had telephone contact with it in October 2011.

[10] When this matter was transferred to the Social Security Tribunal after April 1, 2013, this Tribunal sent a letter to the Appellant at the address he had provided to the PAB advising of this change. This letter was not returned to the Social Security Tribunal.

[11] The Notice of Hearing dated October 15, 2013 was sent to the Appellant at the address he had provided. It was not returned to the Social Security Tribunal.

[12] The hearing book (Exhibit 1) was sent to the Appellant at this address, and returned to the Social Security Tribunal.

[13] On December 19, 2013 the Social Security Tribunal wrote to the Appellant at another address found for him, being X X X, Ontario. This letter was not returned.

[14] The Respondent sent to the Appellant a copy of Exhibit 2. It was not picked up at the post office by the Appellant.

Incapacity

[15] The Appellant's evidence is taken from the written materials in the file. The Appellant obtained a Bachelor of Science Honours Degree, an Engineering Degree and a Master's of Business Administration. He worked in his own business manufacturing and selling eyeglasses until 1992. He also ran a business dealing with alloys and held sales positions. In 2007 he obtained a CAD certificate from college. He applied for CPP disability pension in April 2008, claiming that he was disabled by mental illness. This application was granted, with payment starting in January 2007.

[16] The Appellant claims that he was too sick to care for himself, so lived with his Mother from 1994 until 2002. His mental illness and sleep apnea were misdiagnosed and mistreated for a number of years, affecting his ability to recover. He claims that he was unable to form or express the intention to apply for CPP disability pension from January 1996 to April 2008, when he made the application that was granted.

[17] The Appellant was first referred for psychiatric treatment at age 9. Despite this he was able to complete an engineering program and obtain a degree. He worked for some time. He received intensive medical treatment in 1995, which was arranged by his mother. In January 1996 the Appellant's mother made an application for CPP disability benefits for the Appellant, which he signed. This application was denied by the Respondent and not appealed.

[18] On January 23, 1996 Dr. Phillips, family physician, reported that the Appellant suffered from bipolar affective disorder, and psychomotor epilepsy. He was stable at that time, but was required to apply for Ontario Disability Support Plan by the Ministry of Community and Social Services.

[19] The Appellant was treated by Dr. Josioukas, psychiatrist, from 1996 when she first assessed him, until 2002 when she moved her practice and the Appellant planned to move to X, Ontario. On July 4, 1996 she reported that the Appellant first had paranoia and

hallucinations at age 30, and a further episode three years prior to this report. He was prescribed lithium and other medication. She concluded that he suffered from bipolar disorder and his medication was causing slurred speech and impaired judgment. In May, 1996 she reported that the Appellant was psychiatrically stable.

[20] On July 9, 2002 Dr. Josiukas reported that the Appellant was looking for work in X, Ontario where he planned to move, and that he was planning to marry. The Appellant was under added stress as he was representing himself in court proceedings regarding his position as attorney pursuant to power of attorney for his parents.

[21] The Appellant was later treated by Dr. Girgla, psychiatrist. On January 6, 2005 he reported that the Appellant was unemployed. His bipolar and sleep apnea disorders were under control. The Appellant had been diagnosed with mild depression at Homewood Institute (a residential facility for addiction treatment). He had not been able to find a job since spring 2002. He referred the Appellant for therapy.

[22] On April 2, 2008 Dr. Girgla reported that the Appellant suffered from bipolar affective disorder, severe sleep apnea, asthma, endocrinology difficulties (andropause), and chronic back problems. Although he could not work at that time, he might be able to in the future. Medications were prescribed, and the Appellant's prognosis was described as chronic and guarded due to the chronicity and multiple diagnoses which prevented his return to work.

[23] On July 15, 2008 Dr. Girgla completed a Declaration of Incapacity which states that the Appellant has been incapable of forming or expressing the intention to apply for CPP benefits since November 2004.

[24] On July 21, 2008 Dr. Phillips completed a Declaration of Incapacity. It states that the Appellant is not incapable of forming or expressing the intention to apply for CPP benefits, and that he has been incapable since September 2, 1994.

[25] Dr. Trepanier testified for the Respondent. He was accepted as an expert witness in family medicine. He has not met the Appellant, nor examined him.

[26] Dr. Trepanier testified the Dr. Phillips, family physician, wrote in 1995 that the Appellant suffers from bipolar affective disorder and psychomotor epilepsy. He could not handle his business when he was acutely ill.

[27] In October 1995 Mrs. F., the Appellant's mother, wrote that the Appellant was working on a "big project" without specifying what that was.

[28] Dr. Trepanier also confirmed that the Appellant has consulted with and been treated by a number of medical professionals. These referrals would have been made by the Appellant's family physician with the Appellant's consent.

SUBMISSIONS

[29] Based on the materials in Exhibit 1, the Appellant submitted that he was incapable of forming or expressing the intention to apply for CPP disability pension because:

- a) He has suffered from significant mental illness for a number of years;
- b) His illness and its treatment have resulted in his incapacity.

[30] The Respondent submitted that the Appellant was not incapable of forming or expressing the intention to apply for CPP disability pension because:

- a) The Appellant has made a number of other decisions during the relevant time that demonstrate his capacity to make decisions, and therefore the capacity to form and express the intention to apply for CPP disability pension.

ANALYSIS

Preliminary Matter

[31] This Tribunal must decide whether to proceed in the absence of the Appellant. Section 12 of the *Social Security Tribunal Regulations* provides that the hearing must proceed in the absence of a party if the Tribunal is satisfied that the party received notice of the hearing.

[32] Section 6 of these *Regulations* also provides that a party must file with the Tribunal a notice of any change of their contact information.

[33] In this case, the Appellant had contact with the Pension Appeals Board in 2011. He kept it apprised of his address, and communicated with it regarding dates for the hearing of this matter.

[34] The Notice of Hearing for the date of this hearing was sent to the Appellant at the last address he had provided to the PAB. It was not returned to the Tribunal. The hearing materials were also sent to the Appellant, but were returned. A letter sent to him at an alternate address was not returned.

[35] The Appellant, from his contact with the PAB, clearly understood the importance of being able to communicate with the Tribunal and of the need to provide them with contact information. He has not advised of any further address change. I am satisfied that the Appellant received notice of this hearing based on the facts set out above. The hearing therefore proceeded in the Appellant's absence.

Incapacity

[36] The Appellant must prove on a balance of probabilities that he was incapable of forming or expressing the intention to apply for CPP disability benefits continuously from January 1996 to the date of application in April 2008.

[37] In *Slater v. Canada (Attorney General)* 2008 FCA 375 the Federal Court of Appeal dealt with this issue. It concluded that the medical evidence and the activities of the claimant between the date of claimed disability and the date of application which cast light on the capacity of that person to form or express the intent must be examined. The intent to make an application for CPP benefits is no different than the intent to make other choices which present themselves to an applicant.

[38] There is a great deal of medical evidence in this file. The Appellant has consulted with and been treated by numerous health professionals during the relevant time. None of the reports penned by any of these professionals state that the Appellant was incapable of

forming or expressing an intention to make decisions. There is no indication that the Appellant was ever unable to understand or consent to medical treatment for his mental health, endocrine issues, sleep apnea or other conditions.

[39] I do not place much weight on the Declaration of Incapacity signed by Dr. Phillips on July 21, 2008. This document is internally inconsistent as it says both that the Appellant was incapable of forming or expressing the intention to apply for CPP disability pension, and that he was not so incapable.

[40] The Declaration of Incapacity signed by Dr. Girgla is also not helpful. It states that the Appellant was incapable of forming or expressing the intention to apply for CPP disability pension from November 2004. It does not comment on his capacity prior to that date. It does not assist me in determining whether the Appellant was continuously incapable of forming or expressing the intention to apply for CPP disability pension from January 1996 to April 2008.

[41] At no time was a guardian appointed for the Appellant, for the purposes of medical treatment, to represent him in legal matters including his divorce, bankruptcy, or his ability to represent his parents' interests by power of attorney.

[42] The Appellant also made a number of important personal decisions during the time in question. These decisions included retaining and instructing counsel in various matters, declaring personal bankruptcy moving his home from one city to another, attending a post-secondary program (CAD in 2007), getting married, looking for work, representing himself in court proceedings which focused on his ability to make decisions on behalf of his parents, and applying for various government benefits. These are all complex decisions that required mental acumen and understanding. None of these decisions have been challenged or called into question. The Appellant's ability to make these decisions demonstrates his capacity to form and express the intention to make important decisions.

[43] For the reasons set out above, I find that the Appellant was not incapable of forming or expressing the intention to make an application for CPP disability pension continuously from January 1996 to April 2008. Therefore, his claim must fail.

CONCLUSION

[44] The appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division