

Citation: *M. H. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 152

Appeal No: CP 28787

BETWEEN:

**M. H.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal Decision**

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SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

HEARING DATE: June 4, 2014

TYPE OF HEARING In Person

DATE OF DECISION: June 13, 2014

## **PERSONS IN ATTENDANCE**

Appellant	M. H.
Representative for the Appellant	Fraser March
Counsel for the Respondent	Amichai Wise
Witness for the Respondent	Dr. Jean-Guy Baribeau
Observer	K. H.

## **DECISION**

[1] The appeal is dismissed.

## **INTRODUCTION**

[2] On April 12, 2012, a Review Tribunal determined that a *Canada Pension Plan* (the “CPP”) disability pension was not payable.

[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 6, 2012.

[4] The PAB granted leave to appeal on September 18, 2012. 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 February 18, 2014.

## **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.

[7] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and
- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[8] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[9] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[10] Section 60 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**

[11] There was no issue regarding whether the Appellant is disabled. She is in receipt of a CPP disability pension.

[12] In this case, the Tribunal must decide if it is more likely than not the Appellant was incapable of forming or expressing an intention to make an application from March/April 1999 continuously until December 2008 when she applied for a CPP disability pension.

## **EVIDENCE**

[13] The Appellant was 40 years old when she was granted a CPP disability pension. She was injured while working on a fishing boat, resulting in chronic pain. She was granted a CPP disability pension which commenced September 2007, which was 15 months prior to the date she applied for a CPP disability pension. The Appellant claimed that she was incapable of forming or expressing an intention to apply for this pension prior to that date. Dr. Cleary, her family physician, completed a Certificate of Incapacity on October 12, 2008 that stated that the Appellant had been so incapable since March/April 1999.

[14] The Appellant testified that after her work accident, she made a claim to the Workers Health and Safety Compensation Commission (WHSCC). She was assigned a Case Worker who did not treat her well, resulting in significant stress. She testified that it was so stressful to deal with this worker that she did not answer his calls, and stayed in bed for days when she had to deal with him. Ultimately, her husband, K. H., dealt with the Case Worker on her behalf. She believed that she filed a complaint with WHSCC about this Case Worker.

[15] The Appellant also testified that she had no recollection of applying for WHSCC or CPP benefits. Her husband filled out all of the WHSCC forms. These included annual reports regarding her condition. The Appellant also testified that Mr. K. H. completed the CPP disability pension forms. She signed all these forms, which included acknowledgements that the information contained in them was true.

[16] The Appellant also testified that she could not “keep her thoughts straight” due to her pain, and frustration with it. By 1999 she was not able to go grocery shopping and remember what to buy without a list. Mr. K. H. took over this chore. She simply took care of her children. She also testified that she must still write down all telephone messages or she forgets them.

[17] The Appellant confirmed that she has attended for numerous medical assessments and treatments since the accident in 1997. This has included physiotherapy, chiropractic treatment, psychiatry, psychological counselling, a wellness centre, various diagnostic tests and three functional capacity evaluations. The Appellant continues to attend for periodic

acupuncture treatment. She testified that initial appointments with many medical specialists were made for her by her family doctor or WHSCC, but she arranged for continued treatment appointments.

[18] Almost immediately after the work injury the Appellant attended for physiotherapy, which she testified was terminated as it was not providing any benefit. She also consulted with Dr. Martin, who could not find a physical explanation for her pain.

[19] The Appellant attended for a functional capacity assessment, with a report dated September 3, 1998. This report reviewed her medical history, and concluded that she could tolerate a seven or eight hour sedentary work day. It also remarked that psychological counselling might be beneficial. It made no other comment regarding her mental ability.

[20] On May 17, 1999, Dr. Bartlett penned a report for WHSCC. He concluded that the Appellant had physical limitations, but no anxiety or depressive symptoms. She was extremely pain focused.

[21] The Appellant attended for a second functional capacity evaluation, with a report dated May 27, 1999. It diagnosed the Appellant with mechanical low back pain, and stated that she had negative coping mechanisms. It concluded that the Appellant suffered from mild depression and mild-moderate anxiety related to her physical dysfunction.

[22] The Appellant testified that she understood and consented to undergo each functional capacity evaluation.

[23] The Appellant also consulted with Dr. Manocha, psychologist, who reported on February 15, 2001 that the Appellant should adjust to live with her pain. She would benefit from a trial of anti-depressants, needed long-term counselling and recommended a referral to a psychiatrist.

[24] On January 9, 2004 Dr. Howell reported on an Independent Medical Examination he had performed on the Appellant. He reviewed her treatment history and diagnosed the Appellant with chronic pain syndrome, mechanical low back pain, high perceived disability and endometriosis.

[25] The Appellant was treated by Dr. Porter, psychiatrist, who wrote a number of reports that were filed in Exhibit 1. On March 18, 2005 she reported that the Appellant had severe chronic pain and a disability, had been depressed since her accident and had a Global Assessment of Functioning (GAF) score of 60. On May 5, 2005 Dr. Porter prescribed anti-depressant medication, and concluded that the Appellant's depression was secondary to chronic pain and post-traumatic stress disorder.

[26] On September 29, 2005 Dr. Porter reported that the Appellant had improved with the anti-depressant medication, and that her counselling with Dr. Maher (psychologist) was helpful.

[27] On February 13, 2006 Dr. Porter reported that the Appellant would try homeopathic treatment, which she had done previously, acupuncture and non-medical pain management.

[28] On September 18, 2006 Dr. Maher reported that the cognitive behaviour management counselling was effective, and he was discharging the Appellant from his caseload.

[29] The Appellant testified that on more than one occasion she hallucinated, and received encouragement from a dead friend and aunt. This was when her youngest child was a baby and she was more depressed. She does not currently hallucinate. The Appellant received psychological counselling from Dr. Maher for some time. She was also prescribed anti-depressant medication which she took. In consultation with her doctor she stopped taking the anti-depressant medication in 2006. This was confirmed by Dr. Porter in her report dated September 18, 2007.

[30] Dr. Peacock confirmed in his report of February 5, 2008 that he was providing acupuncture treatment to the Appellant, but it was not helping her at that time.

[31] The Appellant testified that she attended numerous medical appointments, some quite some distance from her home. She drove herself to some appointments, although not for physiotherapy or acupuncture as the treatment was too intense for her to be able to drive home afterwards. She confirmed that no doctor has suggested that she should not drive.

[32] The Appellant also confirmed that no doctor had asked her whether she had a Power of Attorney or made arrangements for someone else to make medical decisions for her. She confirmed that she discussed her treatment with her doctors and agreed to and followed treatment recommendations. She also sought out and arranged for treatment from the Wellness Centre, in consultation with Dr. Porter.

[33] The Appellant also testified that in 2004 she underwent hysterectomy and bladder surgery. She had hoped that this would resolve some of her back pain.

[34] Dr. Baribeau also testified. He was accepted as an expert witness in general medicine. He had not examined the Appellant. His opinion was based on a review of the material in Exhibit 1. He adopted Exhibit 3 as his testimony.

[35] Dr. Baribeau testified that although there were numerous medical reports in Exhibit 1, they failed to show that the Appellant had any problems with her perception of events. The hallucinations she had are normal for a person under stress.

[36] He testified further that the Appellant underwent a number of medical procedures, including a CT scan and an MRI, consulted with an orthopedic surgeon and other specialists, with no mention of any concern regarding her decision-making ability.

[37] Dr. Baribeau acknowledged that some of the medication the Appellant took, including narcotic pain relievers, can impair decision making. The Appellant was prescribed narcotics in 2004, however, the dosage was decreased in 2005. He also acknowledged that a person can suffer from such intense pain that they are unable to make decisions.

[38] Dr. Baribeau explained what the GAF score is, and that many people work with a GAF score of 60. A score of 80 is normal. He also noted that in July 2006 the Appellant's GAF score was 73, which was a significant improvement, and quite close to normal. Dr. Porter reported in April 2007 that the Appellant had stopped taking anti-depressant medication in November 2006 which also indicated a significant improvement for her.



[39] Finally, Dr. Baribeau opined that there was nothing to support Dr. Cleary's statement that the Appellant was incapacitated from March/April 1999 in the hearing file. Even the report of Dr. Maher of October 16, 2008, which Dr. Cleary referred to in coming to the conclusion that the Appellant was incapacitated, did not state that the Appellant was incapacitated. There was no evidence of any thought disorder, which would have been referenced by the psychologist if it were an issue for the Appellant.

## **SUBMISSIONS**

[40] The Appellant submitted that she qualifies for further retroactivity of the disability pension because:

- a) She suffered from such intense, chronic pain that she was unable to form or express an intention to apply for CPP disability pension prior to her application;
- b) She was unable to make decisions regarding grocery shopping and other matters, which demonstrates her incapacity to do so;
- c) By the end of 1999 she had been assessed by twelve different specialists, plus an interdisciplinary team, which established her pain and that it was disabling;
- d) She was assessed for and underwent psychological counselling;
- e) She suffered from intense social discomfort when dealing with government agencies, to the point of being unable to function; and
- f) She was prescribed and took medications which affected her mental abilities.

[41] The Respondent submitted that the Appellant does not qualify for further retroactivity of the disability pension because:

- a) The Appellant has not satisfied her legal burden of establishing that she was unable to form or express an intention make an application continuously from 1999 to 2008;
- b) The Appellant sought out, consented to and participated in various medical treatments and procedures during this time;

- c) The Appellant signed documents related to government benefits during this time;  
and
- d) The medical evidence does not support that the Appellant was incapable of forming or expressing an intention make an application.

## **ANALYSIS**

[42] The Appellant must prove on a balance of probabilities that she was incapable of forming or expressing an intention to make an application from March/April 1999 to the date the application was made in December 2008.

[43] In deciding this issue, I am guided by the decision of the Pension Appeals Board in *Morrison v. Minister of Human Resources Development* (May 4, 1997, CP04182). In that case, the Pension Appeals Board dealt with the same legislative section. It concluded that section 60 of the CPP is a precise and narrow provision. It does not require the consideration of the capacity to make, prepare, process or complete an application for disability pension, but only the capacity of “forming or expressing an intention to make an application...” Therefore, I do not place much weight on the Appellant’s evidence that her Husband completed government forms on her behalf, and dealt with the Case Worker for WHSCC. This evidence does not assist me in determining whether the Applicant could form or express an intention to do these things.

[44] In *Sedrak v. Canada (Minister of Social Development)* 2008 FCA 86 the Federal Court of Appeal also concluded that the capacity to form an intention to apply for CPP is not different in kind from the capacity to form the intention to make other choices. Hence, I place significant weight on the evidence regarding decisions that the Appellant made during the relevant time. There was a great deal of evidence regarding medical choices the Appellant made from March/April 1999 until her application in December 2008. As her Representative argued, in 1999 alone she was assessed by at least twelve different medical professionals. She underwent treatment for pain and her injury. She attended functional capacity evaluations. She consulted with a surgeon and underwent gynecological and

bladder surgery. She testified that she understood and agreed to participate in these procedures and treatments. She followed all treatment recommendations. In addition, since 1999 the Appellant has undergone various diagnostic tests, which were explained to her and she consented to. This demonstrates that the Appellant had capacity to form and express an intention to do a number of things.

[45] From 2004 until 2008 the Appellant was also investigated and treated for mental health issues. The Appellant testified that she made appointments for treatment. There are numerous reports from Dr. Porter throughout this time. None of these reports raise any question about the Appellant's capacity to make decisions or consent to treatment.

[46] Dr. Maher also treated the Appellant's mental health. The Appellant's representative wrote in the Notice of Appeal to the PAB, that Dr. Maher provided 24 counselling sessions to the Appellant. In his report of October 2008 he did not mention any concern with the Appellant's capacity to instruct him, or to make decisions. In fact, the mental status examination by Dr. Maher in 2008 indicates that the Appellant was fully mentally competent.

[47] The Appellant also signed forms for WHSCC and CPP that her Husband completed on her behalf. She did not testify that she didn't understand them, only that she didn't read them.

[48] Finally, the Appellant testified that no medical professional asked that she provide a Power of Attorney or any other instruction so that someone other than she could make decisions on her behalf. This is strong evidence that no treating professional had any question about the Appellant's capacity to make decisions for herself.

[49] The Appellant's representative argued that the Appellant was incapacitated by her pain. While the medical reports do indicate that the Appellant suffered from chronic pain, none state that it was so severe that she could not instruct her treatment providers, or that she could not understand treatment recommendations. In fact, the evidence supports that the Appellant was compliant with all treatment recommendations. She also sought out treatment on her own at the Wellness Centre.

[50] The Appellant also testified that she required memory aids for groceries, telephone messages and perhaps other matters. I am not satisfied however, that these memory lapses were such that she was incapacitated as that term is referred to in the CPP. The Appellant was also able to care for her children during this time with some help. This bolsters the Respondent's argument that she was capable of decision making during the relevant time.

[51] Dr. Cleary penned the Certificate of Incapacity in October 2008. I have reviewed it along with the medical reports that he wrote. These medical reports do not explain the basis for his conclusion that the Appellant was incapable. Without this, I am not prepared to give this evidence much weight.

[52] The Appellant's representative argued that this case is similar to the one before the PAB in *Minister of Human Resources and Skills Development v. Estate of O.C.* (August 12, 2008, CP25411). That case involved a claimant who was diagnosed with paranoid schizophrenia, and hospitalized for this condition a number of times, voluntarily and involuntarily. The facts are in no way similar to the case before me, and so I do not find the reasoning in that decision helpful. Although the Appellant in this case hallucinated on a few occasions, Dr. Baribeau testified that this is not uncommon. She was never diagnosed with any significant mental illness. She was never hospitalized for this.

[53] Upon a review of the evidence, I am not satisfied that the Appellant was incapable of forming or expressing an intention to make an application continuously from March/April 1999 to December 2008.

## **CONCLUSION**

[54] The appeal is dismissed for these reasons.

*Valerie Hazlett Parker*  
Member, Appeal Division