

Citation: *G. A. v. Minister of Employment and Social Development*, 2015 SSTGDIS 22

Appeal No: GT-119381

BETWEEN:

G. A.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security**

SOCIAL SECURITY TRIBUNAL MEMBER: Jeffrey Steinberg

HEARING DATE: February 18, 2015

TYPE OF HEARING: Videoconference

DATE OF DECISION: March 13, 2015

DECISION

[1] The Tribunal is not satisfied that the Appellant has established on a balance of probabilities that he was incapable of forming or expressing the intention to apply for CPP Disability benefits prior to the date on which he first applied for benefits.

INTRODUCTION

[2] The Appellant originally applied for CPP Disability benefits on July 14, 2011. He had a Minimum Qualifying Period (MQP) of December 31, 2009. The Respondent granted the Appellant's application and paid him the maximum retroactive benefits to which he was entitled, i.e., August 2010, which was four months following the April 2010 deemed onset date of disability.

[3] The Appellant challenges the date of payment and contends that he was incapacitated prior to his date of application. He takes the position he should be paid back to October 23, 2007 on the basis he was incapable of forming or expressing an intention to apply for CPP Disability Benefits between then and July 2011.

[4] The Respondent denied the Appellant's request in its initial and reconsideration decisions. It takes the position that the evidence does not support a determination that he met the incapacity provisions as per sections 60 (8-10) of the legislation. Therefore, the date of onset with maximum retroactivity allowed should remain unchanged. The Appellant appealed the refusal of his request to the Office of the Commissioner of Review Tribunals (OCRT).

[5] The hearing of this appeal was initially scheduled to be held in-person for the reasons given in the Notice of Hearing (the "Notice") dated October 27, 2014:

i) Videoconferencing is available in the area where the Appellant lives; ii) There are gaps in the information in the file and/or a need for clarification; and iii) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

PRELIMINARY MATTER

[6] According to Canada Post documentation contained in the Tribunal record, the Appellant's representative signed for the Notice on October 28, 2014. Also, the Tribunal's Case Management Officer (the "CMO") assigned to the file attempted to contact the Appellant's representative and left him a voice mail message on February 4, 2015 confirming the date, time and location of the hearing as well as a call back number. Notwithstanding receipt of the Notice and voice mail message, neither the Appellant nor his representative appeared before the Tribunal at the appointed time. The Tribunal Member waited for one-half hour past the appointed start time of the hearing, however, no one appeared.

[7] Subsection 12(1) of the *Social Security Tribunal Regulations* (the "Regulations") provides that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received the Notice. In this case, the Tribunal is satisfied that the Appellant received the Notice through his representative. Neither the Appellant nor his representative advised the Tribunal that the scheduled date was inconvenient or that they were unable to attend the appointed time. Accordingly, the Tribunal decided to proceed in the Appellant's absence and make its determination on the basis of the documents and submissions contained in the hearing file.

THE LAW

[8] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[9] Paragraph 60(8)(9) and (10) set out the incapacity provisions of the CPP as follows:

(8) Where an applicant 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 subsection (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[10] According to Section 20(1) of the Regulations:

20. (1) If the constitutional validity, applicability or operability of any provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the regulations made under any of those Acts is to be put at issue before the Tribunal, the party raising the issue must

- a. file a notice with the Tribunal that
 - i. sets out the provision that is at issue, and
 - ii. contains any submission in support of the issue that is raised;

and

- b. at least 10 days before the date set for the hearing of the appeal or application, serve notice on the persons referred to in subsection 57(1) of the *Federal Courts Act* and file a copy of the notice and proof of service with the Tribunal.

ISSUE

[11] In this case, the Tribunal must decide if it is more likely than not that the Appellant was incapable of forming or expressing an intention to apply for CPP disability benefits before July 2011 and if so, the period of incapacity.

EVIDENCE

Documentary Evidence

[12] The Appellant's Application for CPP Disability benefits was date stamped by the Respondent on July 14, 2011. The Appellant signed the Application on July 12, 2011 and his representative, H. K. also signed the Application specifying his relationship to the Appellant as his friend.

[13] In the Questionnaire dated July 12, 2011 which he signed, the Appellant stated that he stopped working on October 23, 2007 following an accident in which he was seriously injured. As a result of his serious injuries, he had 11 head surgeries and was psychologically incapacitated to work in any capacity. He stated he was severely depressed with post traumatic stress disorder (PTSD). His wife assists him with almost all daily activities. He cannot remember any conversation and has no concentration. If he drives, it is for no more than 7 or 8 minutes.

[14] In the CPP Medical Report dated June 20, 2011, Dr. Panjwani, psychiatrist, stated that he started treating the Appellant in July 2008. Dr. Panjwani diagnosed Major Depressive Disorder, single continuous episode, severe with generalized anxiety and resistant to treatment, PTSD, chronic, Post Concussional Syndrome and provided a GAF of 40 (current) and 35 (past). He indicated a poor long-term prognosis due to the prolonged and severe nature of the Appellant's mental disorders. According to Dr. Panjwani, the Appellant was disabled to perform any gainful occupation.

[15] According to an October 23, 2007 medical report completed by Dr. Chellis, the Appellant was involved in a motor vehicle accident (MVA), was intubated and could not provide a history. He was noted to be the driver of a truck that went off the road and was apparently ejected from the vehicle sustaining a significant head injury. He appeared critically ill.

[16] According to a Hospital Discharge Summary dated October 23, 2007, the Appellant had a Glasgow Coma Scale of 8 upon arrival, was found to be hypotensive and tachycardic. He was intubated, was found to have a C6 facet fracture and a T12 superior endplate fracture.

[17] In a July 11, 2008 consultation report, Dr. Panjwani reported that the Appellant was injured in an MVA on October 23, 2007. He lost consciousness for 3 or 4 days and had no recollection of the accident. He apparently sustained head trauma, fractures and had since complained of trouble falling asleep, persistent headaches, dizziness, tinnitus in the left ear and continuous back and lower limb pain. He also went on to develop symptoms of depression and anxiety. On the mental status examination, his affect was withdrawn and

severely depressed although he denied any suicidal ideas or plans. He had impaired concentration, comprehension and short term memory as well as impaired past memory. Dr. Panjwani diagnosed Major Depressive Disorder, single continuous episode with anxiety, Post Concussional Syndrome, PTSD with a GAF of 35. He prescribed Sertraline, Seroquel, Meloxicam, Tylenol and Cymbalta. He stated that the Appellant was totally disabled and had a poor long term prognosis.

[18] In a reported dated July 7, 2011, Dr. Panjwani stated that the Appellant had been under his psychiatric care since July 11, 2008. He mentioned the October 23, 2007 MVA which resulted in head trauma, bilateral laminar fracture of C6, compression fracture of T12 and fracture of nasal bones. Since then, the Appellant had complaints of pain in his back, left side of body and left lower limb, persistent right parietal headaches, dizziness, tinnitus in left ear, trouble falling asleep, and difficulty walking, standing and sitting for any prolonged period of time. According to Dr. Panjwani, the Appellant developed symptoms of depression and anxiety soon after the accident, felt depressed, lonely, isolated and nervous, was easily moved to tears and felt irritable and tired all the time. He had anhedonia, trouble falling asleep and lacked motivation to do anything. He further had low energy levels, trouble concentrating or making decisions and memory problems. He avoided social activities, was relatively housebound and was coping poorly with stress. On mental status examination, his affect was agitated and severely depressed. There were no psychotic features. There was also no evidence of any formal thought disorder or delusion and no abnormal perceptual experiences. However, he had impaired cognitive and executive functions. Despite medication, his symptoms persisted and his mood was anxious and depressed. Dr. Panjwani stated that the Appellant was totally disabled to perform any gainful employment and would not benefit from any vocational rehabilitation program due his underlying psychiatric symptoms. The long-term prognosis remained poor due to the prolonged and severe nature of his disorder.

[19] In a May 22, 2012 Declaration of Incapacity, Dr. Panjwani indicated that the Appellant's condition made him incapable of forming or expressing the intention to make an application. According to Dr. Panjwani, the Appellant's incapacity began on July 11, 2008, the date Dr. Panjwani started to treat him. Dr. Panjwani noted that the actual injury

occurred on October 23, 2007 and stated that one should contact the family physician for a report in relation to the period of time before he started treating the Appellant.

SUBMISSIONS

[20] The Appellant's representative submitted that the Appellant was incapable of forming and/or expressing the intention to apply for CPP Disability benefits prior to his date of application because:

- a) He sustained severe head injuries on October 23, 2007, which rendered him totally physically disabled and mentally unable to manage his own affairs.
- b) He was taken to the hospital for an operation in a trauma centre and discharged eleven days later. Since then, he has been under the care of Dr. Panjwani, who opined that he suffered from Major Depressive Disorder, was and would remain cognitively impaired.
- c) Since the MVA, he has been incapable of managing his own affairs by reason of his "unsound mind"
- d) In 2011, the Appellant's wife made inquiries into applying for CPP Disability benefits by contacting the Ministry of Community and Social Services and a family friend, H. K.
- e) Mr. H. K., who speaks the Appellant's native language, provided the information required in order for the Appellant to apply for CPP Disability benefits. He communicated with WSIB, completed the CPP forms including the Questionnaire, Child Rearing Provision and Consent to Obtain Personal Information Form.
- f) The Appellant hardly drives and does not do so without his spouse present.
- g) The Appellant has been under disability since the MVA. The time to make an application was been postponed until an application was brought on his behalf

- h) The requirements contained in sections 43(2)(b), 44(1) and 44(2) of the CPP discriminate against the Appellant by denying him equality of access to a pension solely because of his disability. They create, in effect, a limitation period, when no such limitation period exists with regard to retirement pensions.
- i) Alternatively, from the time he stopped working in October 2007 until he applied for disability benefits in July 2011, he was incapable of forming or expressing an intention to make any application. Therefore, his benefits should be paid retroactive to October 2007.
- j) In support of his request, he submitted medical reports from his family physician, Dr. Sunerh and Dr. Panjwani, psychiatrist, who has treated him since July 2008. Dr. Panjwani completed the Declaration Incapacity – Physician’s Report dated May 22, 2012.
- k) The Appellant’s incapacity has been continuous between October 2007 and July 2011, during which period he was incapable of forming or expressing an intention to make an application given his severe medical problems and the side- effects of medication.
- l) In his report of June 7, 2011, Dr. Panjwani stated he felt the Appellant was permanently and indefinitely disabled mentally since October 2007.
- m) The Appellant was so psychologically disabled from his severe depression and associated health problems from fear of dying that he was incapable of appreciating, expressing or acting on the need to apply for CPP disability in October 2007.

[21] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) He was provided a translator during his hospital stay following the MVA, which suggests he was able to communicate during that time. His condition at discharge was noted to be “Good”.
- b) The Patient Profile Reports show that after MVA, he was prescribed a variety of medications by the family physician, which suggests he was able to express his symptoms and seek remedial treatment.
- c) According to Dr. Panjwani’s consult notes, the Appellant was able to provide details about the accident and hospitalization. The fact he complained about a variety of symptoms suggest he was actively involved in the consultations and attended follow up appointments.
- d) The Appellant’s treatment, including psychoeducation, pain and stress management, supportive psychotherapy and relaxation exercises, all require cognitive and/or physical interactions.
- e) Although Dr. Panjwani completed a Declaration of Incapacity stating the Appellant was incapacitated since Dr. Panjwani started treating him in July 11, 2008, the evidence does not substantiate the claim. The Appellant was actively engaged in the consults and treatments which required cognitive and/or physical interactions.
- f) The Appellant signed the Application and Questionnaire for Disability Benefits, Child Rearing Provision and Consent to Service Canada to Obtain Personal Information Forms (July 12, 2011). He also signed the Authorization to Communicate Information Form declaring that he understood the nature and effect of allowing Mr. H. K. to communicate on his behalf (September 8, 2011) and signed his request for Reconsideration letter on December 21, 2011.

- g) His Questionnaire for Disability Benefits (July 14, 2011) shows that he received WSIB benefits since the MVA, which generally requires completion of applications and various forms and financial management of the benefit.
- h) There is no indication he ever required a Power of Attorney or Public Trustee to make decisions on his behalf. He has not required institutionalized care.
- i) He remains able to drive and use public transit, which demonstrates capacity both mentally and physically and does not support a finding that he was incapable of forming or expressing intent to make an application at an earlier date.

ANALYSIS

[22] The Appellant must prove on a balance of probabilities that he was incapable of forming or expressing an intention to apply for CPP Disability benefits before July 2011.

[23] The Tribunal finds that the Appellant failed to comply with the requirements of Section 20 of the Regulations and therefore, will not consider his position that various sections of the CPP discriminate against him by denying him equality of access to a pension solely because of his disability.

[24] The Tribunal determines that the medical record is not conclusive of the issue before it.

[25] The Tribunal acknowledges Dr. Panjwani's comments in his July 11, 2008 initial consultation that the Appellant was severely depressed, had impaired concentration, comprehension and impaired short- term and long- term memory. He further set out a GAF of 35. In his June 7, 2011 report, Dr. Panjwani reported that the Appellant's symptoms had persisted despite medication. He noted the Appellant had trouble concentrating or making decisions, had memory problems, avoided social activities, was relatively housebound and coping poorly with stress. He indicated a GAF of 40.

[26] Although the contents of Dr. Panjwani's reports do not preclude a finding that the Appellant was incapable of forming or expressing an intention to apply for CPP disability benefits prior to his application date, the Tribunal is not satisfied that his reports alone are determinative of this issue. Although he reported that the Appellant has trouble concentrating or making decisions, he did not state in his fulsome reports that the Appellant was unable to form or express an intention to apply for CPP Disability benefits.

[27] The Tribunal notes that one might have trouble concentrating or making decisions yet still be able to form or express an intention to apply for CPP disability benefits.

[28] In the Declaration of Incapacity signed by Dr. Panjwani, in which he stated that the Appellant's condition rendered him incapable of forming or expressing the intention to make an application as of July 11, 2008, he stated: "Please refer to attached report for details". The attached report appears to be his June 7, 2011 report, the details of which are described above. As previously indicated, the Tribunal is not persuaded that trouble concentrating or making decisions necessarily and inevitably translates into incapacity to form or express an intention to apply for CPP disability benefits.

[29] In order to properly determine the issue of the Appellant's incapacity, the Tribunal has taken direction from the Federal Court of Appeal, which has stated that both activities and medical documents can help the Tribunal determine whether an individual is incapable of forming or expressing an intention to make a benefit application (*Slater v. Canada (Attorney General)*, 2008 FCA 375 (CanLII)).

[30] The Tribunal is not satisfied, based on the existing record as it relates to his activities, that the Appellant has met his onus of establishing that it is more likely than not that he was incapable of forming or expressing an intention to apply for CPP Disability benefits prior to July 2011.

[31] The Tribunal notes that the Appellant signed the following documents:

- a) Letter dated December 21, 2011 requesting a reconsideration of the decision to denying retroactive benefits (GT1-08).
- b) Application for Disability Benefits CPP dated July 12, 2011 (GT1-15).
- c) Child Rearing Provision dated July 12, 2011 (GT1-17).
- d) Letter dated January 25, 2012 setting out position on retroactivity of benefits (GT1-32).
- e) Questionnaire for Disability Benefits dated July 12, 2011 (GT1-51).

[32] The Tribunal further notes that in his Questionnaire, the Appellant indicated he has received Workplace Safety and Insurance Board benefits (WSIB) since 2007 for his multiple head injuries.

[33] In the Appellant's submission at GT5-4, the Appellant's representative states that he speaks the Appellant's native language, communicated on his behalf with WSIB and completed the CPP Forms, i.e., the Questionnaire, Child Rearing Provision, and Consent for Service Canada to Obtain Personal Information.

[34] The difficulty the Appellant faces is that the submissions are not substantiated by the evidence before the Tribunal. Neither the Appellant nor his representative gave sworn testimony in respect of the contents of the submission.

[35] Given the Tribunal's conclusion on this point, it is left with an evidentiary record which indicates the Appellant applied for CPP Disability and WSIB benefits and signed numerous forms. This undermines the contention he was continuously incapable of forming or expressing an intention to apply for CPP disability benefits prior to July 2011.

[36] The Tribunal further finds that other evidence calls into question the Appellant's assertion he was continuously incapable of forming or expressing an intention to apply for CPP Disability benefits during the relevant time frame. For example, the medical record

suggests that Dr. Panjwani obtained relevant information from the Appellant who attended before him and explained his ongoing symptoms. Dr. Panjwani did not indicate in any of his reports that the Appellant was incapable of communicating directly with him. It further suggests the Appellant participated in psychoeducation, pain and stress management, supportive psychotherapy and relaxation exercises as reported by Dr. Panjwani in his June 2011 CPP Medical Report. This evidence suggests to the Tribunal that the Appellant was capable of getting himself to the doctor, expressing himself and participating in treatment. At the very least, it raises doubts that the Appellant was incapable of forming or expressing an intention to apply for CPP Disability benefits.

[37] According to the Appellant's written submission, he was assisted in all communications, consultations and interactions with others. He never attended any appointments by himself and was always accompanied by his wife or extended family. The Appellant's representative states that the Appellant is bed-ridden, unable to communicate with his psychiatrist or others and requires assistance to make other people understand or to be understood.

[38] Absent evidence on this point, the Tribunal is unable to find that the Appellant was unable to communicate with his psychiatrist or others without assistance, was unable to get himself to the doctor, describe his symptoms or participate in treatment.

[39] The Tribunal is further confronted with the Appellant's statement in his Questionnaire that although he rarely drives, if he does so, it is for no more than 7 or 8 minutes. As noted by the panel in the Pension Appeals Board decision of *L.K. and Minister of Human Resources and Skills Development* (February 24, 2009), CP 25910 (PAB), driving is an activity that demands constant attention and decision-making. Although the Appellant's representative states in his written submission that the Appellant hardly drives without his wife present, neither the Appellant nor his wife attended the hearing to testify to this effect. In any event, a residual capacity to drive remains a cogent piece of evidence which raises doubts in the mind of the Tribunal along with all of the other evidence, whether the Appellant was incapable of forming or expressing the intention to apply for CPP benefits at an earlier period in time. As noted by the

Respondent, this would still require the Appellant to hold a valid driver's license and is an activity which requires good cognitive skills.

[40] In conclusion, the Tribunal is not satisfied based on the available evidence before it that the Appellant met the incapacity criterion set out in the CPP prior to the date he applied for CPP disability benefits.

CONCLUSION

[41] The appeal is dismissed.

Jeffrey Steinberg

Member, General Division