

Citation: *T. D. v. Minister of Employment and Social Development*, 2015 SSTGDIS 87

Date: August 16, 2015

File number: GT-125873

GENERAL DIVISION - Income Security Section

Between:

T. D.

Appellant

and

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

Respondent

Decision by: Heather Trojek, Member, General Division - Income Security Section

Heard In person on August 13, 2015, X, Ontario.

REASONS AND DECISION

PERSONS IN ATTENDANCE

T. D. – Appellant
Kaityln MacDonell – lawyer
S. W. – Observer (mother)
G. C. – Observer (step-father)
C. N. – Observer (caseworker)
Jatinder Bhullar – Observer – (Member, Social Security Tribunal)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on February 28, 2012 (GT1-29)

[2] Her application was denied at the initial stage. She requested reconsideration and was approved for CCP disability by the Respondent on December 10, 2012. The date of onset was determined to be November 2010, the maximum retroactive date based on the date that the Appellant's application was received. Pursuant to the Plan, payment of benefits commenced on March 2011.

[3] On the basis of incapacity, the Appellant requested, that the date of onset be retroactively adjusted to July 23, 2003. Her request was denied at the reconsideration level and she filed an appeal with the Office of the Commissioner of Review Tribunals (OCRT); this appeal was transferred to the Social Security Tribunal in April 2013.

[4] The hearing of this appeal was In person for the following reasons:

- 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.

THE LAW

[5] 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 Tribunal.

[6] Paragraph 42(2)(b) of the CPP states that a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP).

[7] According to section 69 of the CPP, payments start four months after the deemed date of disability.

[8] Subsection 60 (8) (9), (10), (11) deal with the issue of “incapacity” and read as follows:

60 (8) Where an application “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.”

60 (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 has 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

(d) 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

(e) where the period referred to in subparagraph

(f) comprises fewer than thirty days, not more Than one month after the month in which the person had ceased to be so incapable,

60 (10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period.

60 (11) Subsection (8) to (10) apply only to individuals who were incapacitated on or after January 1, 1991.

PRELIMINARY MATTER

[9] The Tribunal's Notice of Hearing confirmed that the filing period for additional documents ended on June 13, 2015. At the hearing, the Appellant's lawyer requested that one additional document be admitted into evidence. The Member requested that the document be forwarded directly to the Tribunal and deferred to make a decision regarding the admittance of the document until after the hearing.

[10] The document in question is an opinion letter prepared by Dr. Lynn Lightfoot, psychologist, dated June 12, 2015.

[11] Although this document was submitted after the filing period, the Tribunal decided to admit it into evidence because it's probative value outweighed any prejudice that its admittance may have on the Respondent.

[12] Upon receipt, the Tribunal forwarded a copy of this record to the Respondent.

ISSUE

[13] The date of onset of the Appellant's disability is the issue in dispute this appeal. The Appellant requests that her date of onset be reactively adjusted from November 2010 to July 23, 2003.

[14] In order for the Appellant to succeed, she must establish on a balance of probabilities, that she was incapable of "forming or expressing an intention" to make an application before February 28, 2012, the day on which the application was actually made.

[15] She must also establish that the period of incapacity existed continuously between July 23, 2003 and February 2012.

EVIDENCE

[16] At the hearing the Appellant testified that prior to her involvement in a motor vehicle accident on July 23, 2003; she was twenty-two years old and a third year nursing student at X University. She used to skate for Canada and was very fit. Before the accident she was an intelligent, physically active and outgoing young woman who was able to independently manage her finances and all other aspects of her daily life.

[17] In July 23, 2003 the Appellant hit the back of a parked transport truck going 100 km per hour. Immediately after the accident she was in a coma and on life support for three days (GT1-96). She sustained a multitude of serious injuries.

[18] According to Dr. Kreder, Sunnybrook and Women's College Health Sciences Centre, she sustained the following orthopedic injuries (GT1-96);

- a. Open right femur shaft fracture resulting in shortening of the leg;
- b. Right lateral femoral condyle intrarticular fracture;
- c. Open right elbow fracture dislocation;
- d. Multiple lacerations to the left lower leg;
- e. Multiple facial fractures and lacerations;
- f. C7-T1 transverse process fractures;
- g. Right ligamentous ankle injury;
- h. Right calcaneal fracture; and
- i. Left thumb 1P joint ulnar collateral ligament disruption with dislocation of IP joint.

[19] She also sustained a moderately severe traumatic brain injury (GT7-1). As a result of her nursing background she was very interested in learning about her brain injury.

[20] During and after her admittance to hospital she had to endure numerous reconstructive surgeries. She also participated in a variety of treatments, including physiotherapy, speech pathology and occupational therapy. She credits the success she had had in treatment to the fact she was physically fit. She testified that she approached her rehabilitation with the same determination that she put into training for a skating competition.

[21] At the hearing the Appellant testified that due to the severity of her injuries, she had to learn relearn how to walk, talk and eat. She experienced chronic pain, depression and anxiety. She could not do anything without the assistance of others, particularly her mother and her rehabilitation team.

[22] After release from hospital she lived with her mother in X. Initially, she was confined to a hospital bed. She used a wheelchair for 18 months before she could walk on her own again.

[23] When the Tribunal asked if she retained a lawyer, she testified that immediately after the accident her mother contacted a lawyer. She had little knowledge related to this; but was aware that the firm was Howie, Sacks and Henry and that seven or eight people were being sued in relation to her motor vehicle accident. She stated that she likely signed some papers but could not remember.

[24] After living with her mother she moved into an apartment with her boyfriend Ivan for one year. At this point she became completely estranged from her mother. The estrangement lasted approximately eight years. The estrangement ended approximately two years ago and her relationship with her mother has improved significantly since then.

[25] When asked why her relationship with Ivan ended, she testified that she told Ivan that she needed to know if he would be there for her. He said that he needed to do stuff for himself. As a result, she made the decision to end the relationship and asked him to move out of the apartment. She remained in the apartment and continued to live independently in X for three years.

[26] The Appellant testified that she had difficulty remembering specific dates when certain life events occurred.

[27] After the accident, her rehabilitation team encouraged her to return to university. She was trying to do what people suggested was best for her. She described going to school as being part of her therapy. She met with the head of nursing at X. After the meeting, she decided with the assistance of her rehabilitation counsellor to apply to the nursing program at X University. She attended an interview with the nursing department at X, but ultimately was not admitted to the program.

[28] She enrolled in two courses at X University, one in infectious diseases and the other in endocrinology. She completed both courses and obtained 58% in each. She testified that you need 60% in order to pass.

[29] According to a report prepared by Dr. S. Shapiro, the Appellant advised Dr. Finkel, psychiatrist in May 2005, that she began driving nine months after the accident. She drove from April 2004 until November 2004, when she was involved in a near miss accident when another driver ran a red light. She indicated that for financial reasons (expensive insurance rate) she had not returned to driving (GT1-200). At the hearing the Appellant acknowledged that she did drive after the accident; she also testified that as a result of fear and her neurocognitive deficits she was unable to drive for almost eight years.

[30] In 2006, the Appellant took a trip to Naples, Florida to attend the wedding gathering for a longtime girlfriend. All the planning regarding the trip was done for her. She was using crutches at the time.

[31] In 2006 she also developed an addiction to Percocet, OxyContin. As a result of her addiction she was admitted to the psychiatric ward at X Hospital. She was admitted under a Form One. While in the hospital, her behavior was erratic. She once tried to escape by ringing the fire alarm. When the Tribunal asked about her release, she testified that she knew how to “play the game” and was able to get them to release on her own recognizance. According to the records of Galit Liffshiz, occupational therapist the Appellant stayed in the hospital for two weeks (GT1-98).

[32] She was admitted to the psychiatric ward again in 2007 because she stopped taking her medication and was almost catatonic. According Dr. Asti, psychiatrist, the Appellant stayed in hospital for a period of six days. She was discharged against medical advice and refused to take her medications (GT1-273).

[33] After her relationship with Ivan ended she began a relationship with John, who lived in X. When their relationship first started she would sometimes take the bus from X to X. She did not move in with John right away because he had two children and they needed to adjust to her.

[34] The notes of Galit Liffshiz, confirm that the Appellant moved in with John in 2008 (GT1- 98).

[35] The Appellant testified that when she moved in with John, he told her about a class action suit against a pharmaceutical company involving OxyContin. After he brought this to her attention, she contacted her lawyer's office, Howie Sachs and Henry. They told her that they could represent her but there might be a conflict and it may be better for her to retain a different lawyer. She contacted and retained a lawyer in X to represent her in the class action. When the Tribunal asked why she chose to go to retain a lawyer in X and not Howie Sacks and Henry, she testified she has family in X and also thought that it might be good idea to "mix things up a bit."

[36] She also confirmed that her student loan was waived by the Government. When the Tribunal asked if she applied to have the loan waived, she testified that her mother coordinated all of that. She may have signed some papers but that was all.

[37] A letter from the Canada Student Loan Program dated July 14, 2009 confirms that the Appellant's request for approval to have her loan waived as a result of having a permanent disability was approved. This letter was addressed to the Appellant and sent to her address in X (GT1-90).

[38] After moving to X, she enrolled in and completed courses at X University. Eventually, she switched her degree from nursing to psychology. When asked how many courses she completed at X she could not recall. She does know that she needs to complete seven more courses in order to complete her degree. She expressed an interest in working in the field of addiction counselling.

[39] The clinical notes of Galit Liffshiz dated December 1, 2010 confirms that the Appellant's rehabilitation schedule currently includes the following;

- a. Twice-weekly SLP sessions at SL Hunter & Associates;
- b. Bi-weekly therapeutic counselling sessions with Dr. L. Cudmore, psychologist;
- c. Attends lectures at X University from 1:00 to 3:00 p.m. on Wednesdays;
- d. Weekly massage therapy;
- e. Hand therapy biweekly;
- f. Aqua therapy two to three times weekly and

g. Occupational therapy as needed (GT1-328).

[40] In a letter dated December 2, 2010, Dr. Cudmore, psychologist, states that the Appellant has experienced an exacerbation in anxiety symptoms due to the presence of multiple stressors including managing school, insurance/legal issues and other obligations. She confirms that the Appellant's current psychological struggles may cause her to fall behind on completing assignments and request that this be given due consideration (GT1-82).

[41] The Appellant testified that in December 2011 she settled her insurance claim and received a significant sum of funds. The insurance company did not think she was able to manage her money properly so it was put into a structured settlement. After attending mediation with her lawyer, someone came to her home and she had to choose between four different structured settlements. John was there with her, but said he didn't know what to do and left the decision up to her; she selected one. Later, her mother said that it was not the best one that she could have chosen.

[42] In a letter dated August 13, 2012, Gemma Bailey, speech-language pathologist, confirms that since 2008, the Appellant has progressed to two courses per semester within an alternate program at X University (GT1-67).

[43] When asked what led her to complete her CPP disability application in February 2012, she testified that her friend Ava told her about it. She went on the internet and printed out the Application but Ava helped her to complete it. At this point in time, she agreed that mentally she was fairly stable.

[44] Since the motor vehicle accident she confirmed her life has changed dramatically. She has tried various medications and has experienced many ups and downs. Over the years she has been addicted to pain medication and been admitted to psychiatric wards for short periods of time. When asked by her lawyer, she agreed that in the past she made decisions that were not always in her best interest. She confirmed that she has made her decisions with the help of people around her.

[45] In 2012 or 2013 the Appellant moved out of John's house after an altercation involving his ex-wife.

[46] In a Certificate of Incapability dated February 23, 2012. Dr. Kathleen Swayze, family physician states that the Appellant was unable to manage her financial affairs up until six months ago (GT1-17).

[47] According to a letter from the Appellant dated August 29, 2012, she signed up for driving desensitization training and began driving again in February 2012 (GT1-21).

[48] In a Declaration of Incapacity dated June 28, 2013, Dr. Swayze, states that the Appellant's incapacity began on July 23, 2003 and ceased in the fall of 2011 (GT1-370-371).

[49] The Appellant testified that she had two nervous breakdowns, one in 2013 and the other in 2014. She spent all her money on clothes and jewelry and ended up living in homeless shelters for brief periods of time; she was also hospitalized in X.

[50] The report of Dr. Lynn Lightfoot, psychologist, dated June 12, 2015, confirms that the Appellant is now living on her own in an apartment in X (GT-9).

SUBMISSIONS

[51] The Appellant submitted that she sustained catastrophic injuries in a motor vehicle accident which occurred on July 23, 2003 and was until February 2011 continuously incapable of expressing or forming an intention to make an application for CPP disability benefits.

[52] The Respondent submitted that the Appellant participated in numerous activities which demonstrate that she remained capable of expressing or forming the intent to make an application for CPP disability on her own behalf earlier than the day her application was actually made.

ANALYSIS

[53] In the Tribunal's opinion, the test of "incapacity" is a very difficult one to meet.

[54] The principles governing this test are clearly set out in the decisions of the Federal Court of Appeal noted below;

[55] In *Sedrak vs. Canada (Minister of Social Development)*, 2008 FCA 86, the Court states that “capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an Appellant. The fact that a particular choice may not suggest itself to an individual because of his or her world view does not indicate a lack of capacity.

[56] According to *Canada (Attorney General) v. Danielson*, 2008 FCA 78, the activities of a claimant during an alleged period of incapacity “may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered. Section 60 of the Plan is precise and focused; it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply of forming or expressing an intention to make an application.”

[57] The Tribunal was also persuaded by *Pedersen v. MHRD* (May 1, 2001), CP 11660 which states that a lack of knowledge does not equate to a lack of capacity.

[58] There is no doubt in the Tribunal’s mind that the Appellant suffered catastrophic injuries as a result of her motor vehicle and that her rehabilitation has been a long and arduous one.

[59] However, the activities that the Appellant participated in since her motor vehicle accident, clearly demonstrate, to the Tribunal, that she was capable of making a variety of decisions. These include but are not limited to the following;

- a. beginning and ending a number of personal relationships;
- b. living independently in an apartment for three years in X;
- c. discharging herself from hospital;
- d. completing a variety of university courses and changing her course of study from nursing to psychology;
- e. participating in various forms of therapy including physiotherapy, yoga, massage and aqua therapy;
- f. driving a motor vehicle in 2004 and taking public transit on her own from X to X.

These are all activities that require the ability to consciously make decisions and act upon them. The fact that the Appellant may have been guided or assisted by others, including members of her rehabilitation team, when making certain decisions does not, in the Tribunal’s opinion, change this fact.

[60] The Tribunal agrees that there may have been some brief periods of time, when the Appellant was incapable of forming or expressing her intentions. For instance, when she was hospitalized for six days in 2007. However, her testimony clearly and conclusively shows, in the Tribunal's opinion, that her incapacity could in no way be interpreted as "continuous".

[61] The Appellant described two events which in the Tribunal's mind clearly and unequivocally demonstrate that she had decision-making capacity before she applied for CPP disability benefits. One occurred in or around 2008, when the Appellant moved in with John. Based upon information he provided, the Appellant, on her own initiative contacted Howie, Sacks and Henry to discuss the possibility of joining a class action law suit involving OxyContin. Ultimately, she decided to retain a lawyer in X to represent her in the class action. In the Tribunal's opinion, the Appellant consciously and deliberately made the decision to "mix it up a bit" and retain a firm other than Howie, Sack and Henry. If she were able to make decisions of this complexity, she clearly, in the Tribunal's opinion, had the ability to form or express the intention of applying for CPP disability benefits.

[62] The second event occurred in on or around December of 2011, when the Appellant settled her insurance claim and independently selected one of four structured settlements completely on her own. This, in the Tribunal's opinion, clearly demonstrates that she had decision-making capacity at least a year prior to submitting an application for CPP disability.

[63] Although the Appellant may have made some decisions, which may or may not have been in her best interest, this does not mean that she was incapable of forming or expressing an intention to apply for a disability pension. Moreover, the fact that she may not have been aware that she could have applied for a disability pension until February of 2012, does not mean that she is entitled to claim entitlement to retroactive benefits.

[64] Having considered and weighed all the oral and documentary evidence, the Tribunal is not satisfied, on a balance of probabilities, that the Appellant was "continuously" incapable of forming or expressing an intention to make an application for CPP disability benefits in accordance with Subsection 60(10) of the CPP.

CONCLUSION

[65] The appeal is dismissed.

Heather Trojek
Member, General Division - Income Security