

Citation: *D. N. v. Minister of Employment and Social Development*, 2015 SSTGDIS 97

Date: August 28, 2015

File number: GT-124579

Between: GENERAL DIVISION - Income Security Section

D. N.

Appellant

and

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

Respondent

Decision by: Virginia Saunders, Member, General Division - Income Security Section

Decided on the record on August 28, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on January 13, 2012. The Respondent granted the application, with payments to begin effective February 2011. This decision was maintained on reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Social Security Tribunal (Tribunal) in April 2013.

[2] After reviewing the documents and submissions already filed by the parties, the Tribunal decided to proceed on the record pursuant to Section 28 of the *Social Security Tribunal Regulations* (SST Regulations) for the following reasons:

- a) The member has decided that a further hearing is not required.
- b) This method of proceeding respects the requirement under the SST Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[3] Notice of the intention to proceed on the record was sent to the parties on June 19, 2015, and they were given until July 24, 2015, to file additional documents or submissions. Nothing was received from either party.

THE LAW

[4] 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.

[5] 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 be under 65 years of age; not be in receipt of the CPP retirement pension; be disabled; and have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[6] Paragraph 44(2)(a) of the CPP provides that for disability purposes a person is considered to have made contributions for not less than the MQP only if the contributions are made on employment earnings that are above the basic exemption for disability. This means that a person's contributions to the CPP in any given year only count for the purposes of a disability application if he or she earned above the basic exemption for disability in that year. The amount of the basic exemption for disability purposes is calculated each year with reference to sections 18, 19 and 20 of the CPP.

[7] A late applicant provision is set out in subparagraph 44(1)(b)(ii) of the CPP. It provides a remedy to a person who failed to apply for disability benefits at a time when he or she had sufficient contributions, by considering whether or not the person was disabled at that time and continues to be disabled.

[8] Once a person meets the eligibility requirements for the disability pension, the CPP then sets out rules for payment. According to paragraph 42(2)(b) of the CPP, a person cannot be deemed to have become disabled more than 15 months before the Respondent received the application for a disability pension. That is the case even where the late applicant provision is used. Section 69 of the CPP further limits payment of the pension to the fourth month after the deemed date of disability.

[9] Subsections 60 (8), (9) and (10) of the CPP provide an exception to the limited retroactivity of payment, by allowing for an application to be deemed to have been made earlier than it was in cases of incapacity. These provisions state:

(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

[10] The Tribunal must decide when payment of the Appellant's disability pension is to begin.

EVIDENCE

[11] The Appellant was born in 1952. Her Record of Earnings revealed that she made valid contributions to the CPP in 1970, 1972 through 1990; 1995 through 2000; and in 2004 and 2005.

[12] The Appellant first applied for CPP disability benefits in August 2006. This application was denied in May 2007, because she had not made enough valid contributions to the CPP. She re applied in June 2008, and was denied for the same reason in August 2008. In neither case did the Appellant request reconsideration. Neither decision considered the late applicant provision or the incapacity provision.

[13] The application that is the subject of this appeal was filed in January 2012. It was completed by the Appellant's husband as her representative, and was returned to her for her signature, which she provided on February 16, 2012. In the questionnaire that accompanied the application, the Appellant stated that she last worked on November 14, 2005, after which she was unable to work because of obsessive compulsive disorder, back pain, paranoid schizophrenia, "bipolar 2" and clinical depression.

[14] The Appellant's family physician, Dr. D. M. Barry, completed a medical report dated February 1, 2012, in support of the application. He stated that he had been treating the Appellant since April 2001 for bi-polar depression, and that she remained extremely dysfunctional. He stated that with treatment "she has attained some steady level of behaviour and affect," but it was clear that she would not have managed at all without assistance from her ex-husband, her treating physicians, and with financial assistance.

[15] Dr. Barry completed a Declaration of Incapacity dated February 1, 2012, in which he stated that the Appellant's incapacity was caused by bipolar disorder, and that it began on January 1, 2000, and was ongoing. He indicated that the Appellant was treated at the Victoria Mental Health Centre by Dr. C. Blashko.

[16] The initial adjudication summary for the January 2012 application revealed that the Respondent applied the late applicant provision and determined that the Appellant was continuously disabled since December 31, 2002, when she last met the contributory requirements. Her earnings in 2004 and 2005 were regarded as not being indicative of gainful employment. As a result, the application was granted. The Respondent deemed the Appellant disabled in October 2010, and started payment of the pension as of February 2011.

[17] In a letter to the Respondent dated August 11, 2012, the Appellant and her husband questioned the start date of her pension payment, and raised the issue of incapacity. They stated that her disability went back many years and that her mental health "was such that applying or asking for someone to apply on her behalf for CPP-Disability was beyond her. She was also unable to provide the needed information to complete an accurate application for benefits. The applications made for her have been made [by] her husband interceding."

[18] The Respondent issued two reconsideration decisions: one dated September 17, 2012, which determined that the calculation of the effective payment date was correct; and the other dated January 8, 2013, which decided that the information in the file did not support a finding that the incapacity provision in the CPP applied in the Appellant's case.

[19] In addition to the reports by Dr. Barry set out above, the file contains the following information relevant to the Appellant's mental capacity:

- a) The Appellant was approved for sickness benefits from July 31 to August 18, 2000; and then for the maximum 15 weeks effective August 21, 2000.
- b) Dr. Barry's notes from the Appellant's office visits beginning September 2001 through May 2012 indicated that the Appellant saw him frequently for a number of health issues. There is periodic mention of stress, anxiety and poor sleep but no referral to counselling or psychiatric help until December 2005.
- c) A "Return to Work/School Certificate" dated September 25, 2001, signed by Dr. Barry, stated that the Appellant had been under his care from September 2000 to September 2001 and would not be able to return to work until what appears to be December 8.
- d) A Temporarily Excused Request signed by Dr. Barry and dated November 15, 2001, stated that the Appellant was precluded from all employment because of affective disorder, fibromyalgia and chronic fatigue syndrome.
- e) A Temporarily Excused Request signed by Dr. Barry and dated August 2, 2002, stated that the Appellant was precluded from all employment because of affective disorder, panic attacks and personality disorder, and that she could start looking for work in six months. Dr. Barry stated that her prognosis was poor.
- f) An Employer Questionnaire dated May 15, 2012, stated that the Appellant worked part-time in food service for Zeller's Inc. from April 2003 to November 2006. She stopped working for personal reasons. She would be re-hired if any work was available.

- g) A summary of treatment and assessment for the Appellant by psychiatrist Dr. M. Korn and therapist C. MacDonald, dated October 4 and 5, 2006, indicated that the Appellant was referred to Vancouver Island Mental Health and Addiction Services by Dr. Barry for anxiety and depression, in response to chronic physical abuse by her partner. Her treatment began March 2, 2006, and ended September 26, 2006. She was last seen on May 3, 2006. The report indicated that the Appellant received assessment, short-term counselling and medication. In response to treatment her sleep improved, and she had some decrease in anxiety and some improvement in problem-solving abilities. She discontinued her treatment, and was noted to be living in supportive housing which provided informal supports.
- h) A psychiatric consult report by Dr. L. Chapman, dated September 3, 2008, stated that the Appellant had been referred to psychiatric emergency by her family physician in relation to suicidal ideation. Dr. Chapman noted that the Appellant described “a fairly chronic history of bipolar mood disorder, with frequent mood episodes in most years” with a gradual deterioration in the past year and an overall decline in her functioning. She described being more isolative, somewhat more depressed, more anxious and neglecting her own hygiene. She was socially withdrawn, tended to avoid crowds and was eating less and sleeping more.
- i) Dr. Chapman stated that on mental status examination the Appellant was alert, well oriented, cooperative and pleasant during the interview. She established good rapport and accessibility; her affect was mildly inappropriate; her thought form was mildly concrete, with mild poverty of thought content. She endorsed very fleeting auditory hallucinations to which she appeared to maintain some insight. She denied paranoid or grandiose delusions, or any urges or intention to harm herself. She endorsed no other psychotic symptoms, and her insight and judgment were intact.
- j) Dr. Chapman diagnosed the Appellant with bipolar mood disorder and generalized anxiety disorder. She recommended referral to the Mood Disorders Clinic for long term psychiatric treatment and re-evaluation of her psychiatric medication.

- k) A report by Dr. C. Blashko, psychiatrist, dated November 7, 2008, stated that he saw the Appellant for assessment at the Victoria Mental Health Centre on November 6, 2008. Her chief complaint was that she had been struggling with isolation and depression for some time. She described a history of depression on and off throughout her life, with an acute manic episode with psychosis in about 2003. She received outpatient treatment. She had a significant family history of mental disorder.
- l) Dr. Blashko noted that on mental status exam the Appellant was attentive throughout her interview although it was evident that she was slowed in her thought process. There was no evidence of psychomotor agitation. Her thought content revealed ongoing suicidal thoughts and a fear of abandonment and loss, as well as intermittent paranoia. She had full insight into this. Dr. Blashko stated that while he did not formally test the Appellant's cognition, she was oriented to time, date, place and person and was not distractible. Her judgment and insight were moderate.
- m) Dr. Blashko stated that the Appellant had bipolar I disorder, with mitigating social circumstances that needed to be addressed, including a need for increased support and prevention of further crises. As a result, she qualified for case management through the centre, and he would provide medication management. He listed numerous medication changes that he wanted to make and stated "[t]his was explained to [the Appellant] and her husband. Both agreed and accepted that these were reasonable recommendations." He was to see her again in three weeks. She was referred to the day hospital "to try to improve her social connections."
- n) In a letter dated December 20, 2011, the Appellant's husband stated that the Appellant had been disabled since July 2000, and was incapacitated by mania, delusions and depression. She lacked memory, concentration and mental stamina, and could not problem solve, read books, complete forms or manage her own affairs. She could not follow instructions or directions. She was not capable of living independently. He stated that he had intervened for the Appellant on her previous disability application, and she did not ask that any applications be made. He stated that the Appellant "has

not been able to remember details, or provide the assistance and information needed to advocate effectively for her, [due] to her mental illness.”

- o) An unfiled Questionnaire for Disability Benefits dated December 27, 2011, completed by the Appellant’s husband, described similar difficulties as in the above letter. He stated that the Appellant continued to see Dr. Blashko every six weeks for ongoing psychiatric therapy, and that she saw Dr. Barry every month for prescription refills.

SUBMISSIONS

[20] The Appellant submitted that she qualifies for a disability pension payable beginning earlier than February 2011 because:

- a) She has been disabled since July 2000, but due to her mental incapacity and uncertain prognosis she did not apply for disability benefits at that time;
- b) She was not able to furnish documents or provide information to properly complete her application of June 2008, and had she been able to do so that application would likely have succeeded.

[21] The Respondent made no submissions to the Tribunal.

ANALYSIS

[22] The Respondent received the Appellant’s application in January 2012. In accordance with paragraph 42(2)(b) of the CPP, the Appellant was deemed to be disabled in October 2010, which is 15 months before the date of application. According to section 69 of the CPP, payments started as of February 2011, which is four months after the deemed date of disability.

[23] The Appellant has received the maximum retroactivity allowed by the CPP. Payment any earlier than that is only possible if she is deemed to have applied at an earlier date pursuant to the incapacity provisions of subsections 60(8) to (10) of the CPP. In order for that to happen, the Tribunal must find on a balance of probabilities that the Appellant was

incapable of forming or expressing an intention to make the application before the day on which it was actually made, and that her period of incapacity was continuous.

[24] In *Baines v. Minister of Human Resources and Skills Development*, 2011 FCA 158 (leave to appeal to the Supreme Court of Canada refused), the Federal Court of Appeal upheld a decision of the Pension Appeals Board in which the Board held that the incapacity provision applies only to applications for benefits, not to appeals from the rejection of applications. In *Baines*, the Appellant was initially denied at the reconsideration level and did not pursue her appeal. She was granted benefits on a later application with respect to the same injuries. She argued that her benefits should be back-dated beyond the maximum retroactivity allowed by the CPP, as if her original appeal had been pursued. In the present case, the Appellant claims that she would have pursued her 2008 application differently and more diligently, except that she lacked capacity to do so.

[25] The Tribunal finds that *Baines* applies to this appeal, in spite of the different fact situations. The principle is the same. The incapacity provisions cannot be used to revive a previous application that was unsuccessful, even if a subsequent application is allowed for the same condition. The Appellant here made applications in 2006 and 2008. They were refused. She cannot invoke the incapacity provisions to avoid the consequences of her failure to submit more evidence when she first made those applications, or to request reconsideration of the decisions to deny.

[26] The Tribunal considered whether *Baines* did not apply because the Appellant's husband has stated that he submitted the earlier applications for the Appellant, apparently without instruction from her. In effect the Appellant is arguing that the earlier applications should be regarded as not having been made, or that they are not evidence that she had capacity at that time. The Tribunal does not accept this argument. The Appellant was aware of the applications, as she signed them. As discussed below, the evidence does not support a conclusion that she met the test for incapacity at the time the applications were made.

[27] Even if *Baines* did not apply here, the Tribunal cannot find that the Appellant was incapable of forming or expressing an intention to make an application at any time between 2000 and the time she actually applied in January 2012.

[28] The Tribunal does not accept the statements of the Appellant's husband as an accurate indication of her mental state. His viewpoint is based on emotion rather than objective observation. Moreover, in the many years that he claims the Appellant lacked capacity to make decisions, fill out forms or perform basic activities, he took no steps at any time to obtain legal control over her affairs or to obtain treatment for her that one might expect would be necessary for someone with the limitations he claims she has or had.

[29] The Appellant's activities during the alleged period of incapacity are relevant to the determination of whether or not she was able to form or express an intention to apply for benefits. The examination is not focused on the capacity to make, prepare, process or complete an application for disability benefits, but only on the capacity of forming or expressing an intention to make an application (*Canada (Attorney General) v. Kirkland* 2008 FCA 144;

Canada (Attorney General) v. Danielson 2008 FCA 144).

[30] The medical evidence indicates that the Appellant has struggled with a mental condition for many years and that she has been under observation and received treatment since at least 2000. Before February 2012 there is no suggestion in any of the medical notes or reports that she continuously lacked capacity to the extent required by the CPP. She attended medical appointments, went to work, gave and received information, took medication without assistance, signed documents, and was noted to be alert, oriented and to have judgment intact. None of the health professionals who assessed or treated her suggested that she was incapable of managing herself or her affairs, that she did not understand her condition or her surroundings, or that she needed anything beyond supportive out-patient treatment and medication.

[31] There is a lack of medical documentation between November 2008 and February 2012. The Appellant continued to see Dr. Blashko every six weeks during this time, which does not suggest a marked change in her condition. There is no evidence of any crisis or deterioration requiring more intensive treatment. This absence of evidence leads the Tribunal to conclude that the Appellant's condition remained the same as it had been previously.

[32] Although Dr. Barry stated in February 2012 that the Appellant was incapable of forming or expressing an intention to make a disability application as of April 2001, that statement is not supported by the medical evidence from the relevant time, nor is it supported by the Appellant's actions or those of her doctors.

[33] The Tribunal finds that the Appellant was not incapable of forming or expressing an intention to make an application for CPP disability benefits at any time.

CONCLUSION

[34] As there is not sufficient evidence of incapacity to support an earlier deemed date of application, the appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security