



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. O. v. Minister of Employment and Social Development*, 2016 SSTGDIS 61

Tribunal File Number: GP-15-4312

BETWEEN:

D. O.

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 Section

DECISION BY: Connie Dyck

HEARD ON: August 9, 2016

DATE OF DECISION: August 13, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, D. O.

The Appellant's father, D. R., as a witness

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 18, 2015. The Respondent allowed the application and the date of onset of disability was determined to be December 2013, the maximum retroactivity allowed. The Appellant appealed the date of onset to the Social Security Tribunal (Tribunal).

[2] The hearing of this appeal was by Teleconference for the following reasons:

- a) The Appellant will be the only party attending the hearing.
- b) The method of proceeding is most appropriate to allow for multiple participants.
- c) The method of proceeding provides for the accommodations required by the parties or participants.
- d) The issues under appeal are complex.
- e) There are gaps in the information in the file and/or a need for clarification.
- f) Credibility is not a prevailing issue.
- g) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] 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).

[4] 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.

[5] 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.

[6] Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

[7] Subsection 60 (8) of the CPP states that 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.

[8] Subsection 60 (10) states that for the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

ISSUE

[9] The issue before the Tribunal is whether the Appellant was incapable of forming or expressing the intent to make an application on her own behalf earlier than the day the application was actually made.

EVIDENCE

[10] In a Declaration of Incapacity – Physician’s Report dated August 20, 2015 completed by Dr. M. Pirzada, family physician noted that the Appellant’s incapacity began on November 2, 2008 and was ongoing, however the Appellant’s condition did not make her incapable of forming or expressing the intention to make an application and there was not enough evidence in the Appellant’s medical chart to support incapacity. He also noted that he had not seen the Appellant since March 2012. (GD 2-132)

[11] In a report by Dr. Heather Menzies, dated February 3, 2009 the Appellant was reported to have a diagnosis of anxiety disorder. Axis diagnosis based on the DSM-IV Multiaxial evaluation was for Axis I – anxiety/adjustment disorder; for Axis II – cluster B traits; for Axis III – iron deficiency; for Axis IV – job stressors, relationship stressors and for Axis V – Current Global Assessment of Functioning (G.A.F.) of 60 and a G.A.F. of 50-60 in the previous year. Dr. Menzies stated that the Appellant was experiencing a great deal of stress related to her work and the resulting anxiety left her unable to fulfill her work responsibilities. Precipitating factors were noted to include a large class size with little support and difficult students who made the Appellant feel emotionally and physically threatened. Dr. Menzies noted that there had been improvement in the Appellant’s mental and physical health and function abilities since stopping work and that the Appellant was no longer as anxious or emotionally labile, however she still had an ongoing sense of being easily overwhelmed with some mood lability. Dr. Menzies reported that she had discussions about the Appellant returning to work and the Appellant was working with her union and a psychologist to explore further options. No referral to a

psychiatrist had been made. It was Dr. Menzie's opinion that while the Appellant continued to improve, she was not yet ready to return to work. (GD 2-126 – GD 2-128)

[12] In a questionnaire to support a claim for the Disability Tax Credit with Canada Revenue, completed on October 26, 2010, Dr. Pirzada stated that the Appellant was able to independently find solutions without difficulty and was able to make appropriate judgments most of the time. Dr. Pirzada also reported that the Appellant was able to independently plan her daily activities most of the time. (GD 2-105 – GD 2-107)

[13] In a letter dated May 10, 2011, Dr. Pirzada stated that he began treating the Appellant on December 2, 2009 as she had a diagnosis of post-traumatic stress disorder syndrome. He stated that the Appellant's long term disability had expired and the Appellant asked him to review her chart and write a letter in support that she was not yet recovered from her post-traumatic stress disorder and long term disability benefits needed to be continued. (GD 2-188)

[14] In a letter dated June 25, 2013, Dr. Pirzada stated that the Appellant had been "constantly" requesting through the administration of his clinic that he elaborate on the Appellant's situation while she was not regular on her rehab session, as this might help her case with having long term disability benefits reinstated. Dr. Pirzada elaborated on how many times the Appellant was since from January 2011 to November 2011. She was seen a total of 11 times. During the January 17, 2011, the Appellant stated she felt that her post-traumatic stress disorder had not been dealt with and she was not fit to go back to work. She requested that she needed to be assessed for lateral thigh lift and a note was sent to Dr. Singh, a plastic surgeon. During a consultation on April 12, 2011, the Appellant requested that Dr. Pirzada write a letter to extend her long term disability benefits. In a meeting with Dr. Pirzada on May 11, 2011, the Appellant requested a letter to explain her anxieties, which Dr. Pirzada did on May 13, 2011. On August 8, 2011, the Appellant advised Dr. Pirzada that she was having some lab work performed and was having some anxiety and requested medication from Dr. Pirzada for that issue. (GD 2-70 - GD 2- 72)

[15] At the hearing, the Appellant testified that she was held at gunpoint on July 22, 2008, while she was in Minnesota. Subsequent to that she dealt with a bully employer, working until

she got medical leave, was evicted from her home and was told by the teacher's union that she needed to be in Winnipeg.

[16] She stated that she was told by Dr. Meade that she did not have to be this way forever and that PTSD does not have to be forever. She stated that her condition of PTSD is not better, although there has been some improvement, but she is very isolated. Dr. Meade had said that one of the important things to do with PTSD was to try and keep them doing the things they did prior to the incident, such as driving. However, this is a trigger due to the fact that she travelled alone to Minnesota state and had to come back on her own after the incident. She testified that she saw Dr. Prizada on her own and when she was without a vehicle, she would take public transit on her own. She stated that if she went to a doctor's appointment, that was the only task she could accomplish that day.

[17] We are dealing with PTSD and there are many people who don't understand it. She stated that it is different for every person because it is based on the things that have happened to them and it makes a person do things that they would not normally do. She stated that it does things to your mental functions and incapacitates you. You become frozen and cannot do tasks when you are frozen. She explained that in 2010, she was living day to day. She stated that her days are like that as she does not know how this condition will affect her on that day.

[18] She stated that she was given the Disability tax credit form by someone at A Step Beyond and Associates. She stated that she has an issue with Disability tax credit form and that they have to chose a, b, c. She stated that perhaps at times around the time that the form was completed that there was improvement or a possible recovery. She stated that some of the forms are written in a way that doctors cannot speak to specific issues of the Appellant's condition, as they are yes or no or multiple choice.

[19] The Appellant testified that her body reacts to the mental trauma she faces. She stated that prior to her incident in July 2008, she was able to care for her family and friends and was even enrolled in furthering her education.

[20] The Appellant stated that the teachers union/school told her that she had to apply for E.I. sick benefits when she stopped working in December 2008, however she does not remember if

she applied or someone did it for her. She began receiving long term disability benefits several months after that.

[21] The Appellant stated that she has no Power of Attorney, Public Guardian or Trustee and that she is responsible for her own decisions.

[22] Her father stated that the Appellant had been living with him since 2013 and he said when she arrived she was lost and confused mentally. He explained that it is difficult for doctor's to assess people when they only see them for a few minutes a week. He stated that the Appellant had been living on the streets in Winnipeg prior to her moving in with him.

[23] She explained that the return to work co-ordinator for MTS was very rude and the Appellant left her office feeling very bullied and in an uncontrollable state. She explained the circumstances surrounding the stopping of her LTD disability benefits.

[24] The Appellant explained to the Tribunal that in July 2008 she was living on her own, but was evicted from this apartment in September 2009 for non-payment of rent. The Appellant explained that her long term disability payments were not paid to her during the summer months and this caused her to be unable to pay her rent. She advised the Tribunal that she then went to live with a friend in Dauphin for a few months and returned to live alone in an apartment in Winnipeg in December 2009. She explained that she was in receipt of long term disability and was able to pay her rent at this time and lived here until February 2012 when she was again evicted due to non-payment of rent. The Appellant advised the Tribunal that when her long term disability payments were ceased, she was given \$5.00 and a phone number for the Welfare office. She stated that she received welfare benefits in December 2011.

SUBMISSIONS

- a) The Appellant submitted that she had been unable to make the decision to apply for a CPP disability benefit sooner than she did as a result of the trauma she endured on July 22, 2008.

[25] The Respondent submitted that:

- a) The evidence does not support a determination that the Appellant was incapable of forming or expressing the intent to make an application on her own behalf earlier than the day the application was actually; and
- b) The Appellant does not meet the criteria of the incapacity provision within the meaning of the CPP.

ANALYSIS

[26] The Appellant's application for a CPP disability benefit was received in March 2015. Under paragraph 42(2)(b) of the legislation, the earliest the Appellant could be deemed to be disabled is December 2013, which is fifteen months before the disability pension application was made.

[27] The Tribunal considered the Appellant's submission that she was incapable of forming or expressing the intention to make an application from July 22, 2008 to the date of the hearing. She testified that her incapacity began on the date of the hostage incident and had not ended. It was Dr. Pirzada's opinion that the Appellant's incapacity began on November 2, 2008 and was ongoing, however the Appellant's condition did not make her incapable of forming or expressing the intention to make an application and there was not enough evidence in the Appellant's medical chart to support incapacity.

[28] The Tribunal finds that the evidence and the testimony of the Appellant does not support that the Appellant was incapable for forming or expressing the intention to make an application. The Tribunal looked to *Morrison v. Minister of Human Resources Development*, Appeal CP04182, March 7, 1997, wherein the Board stated that it was necessary to look at both the medical evidence and "the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so "forming and expressing" the intent" (*Ibid.* at p. 5). This approach was approved by the Federal Court of Appeal in *Canada (Attorney General) v. Danielson*, 2008 FCA 78 at paragraph 7 and *Canada (Attorney General) v. Kirkland*, 2008 FCA 144 at paragraph 7. The approach is also consistent with the fact that "the

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 applicant. The fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity.” Thus, “nothing in the scheme requires us to give to the word “capacity” a meaning other than its ordinary meaning” (*Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86 at paragraphs 3-4).

[29] The Tribunal finds that the evidence calls into question the assertion that the Appellant was continuously incapable of forming or expressing an intention to apply for CPP Disability benefits during the relevant time frame. In October 2010, Dr. Pirzada stated that the Appellant was able to independently find solutions without difficulty and was able to make appropriate judgments most of the time. Dr. Pirzada also reported that the Appellant was able to independently plan her daily activities most of the time.

[30] This is supported by the evidence of Dr. Menzies, who noted in February 2009 that the Appellant had a G.A.F of 60 and a G.A.F. of 50-60 in the previous year. A G.A.F. of 60 is indicative of a level of function which is not congruent with incapacity. Further, the medical evidence of Dr. Pirzada states that the Appellant had been “constantly” requesting through the administration of his clinic that he elaborate on the Appellant’s situation while she was not regular on her rehab session, as this might help her case with having long term disability benefits reinstated. During the January 17, 2011, the Appellant stated she felt that her post-traumatic stress disorder had not been dealt with and she was not fit to go back to work. She requested that she needed to be assess for lateral thigh lift and a note was sent to Dr. Singh, a plastic surgeon. During a consultation on April 12, 2011, the Appellant requested that Dr. Pirzada write a letter to extend her long term disability benefits. In a meeting with Dr. Pirzada on May 11, 2011, the Appellant requested a letter to explain her anxieties, which Dr. Pirzada did on May 13, 2011. On August 8, 2011, the Appellant advised Dr. Pirzada that she was having some lab work performed and was having some anxiety and requested medication from Dr. Pirzada for that issue. This evidence suggests to the Tribunal that the Appellant was capable of expressing herself 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. The Appellant was capable of forming and expressing an intention to dispute the

termination of her long term disabilities and take actions to attempt to have them reinstated and it is therefore reasonable to assume that the Appellant was capable of forming and expressing an intention to make an application for CPP disability benefits earlier than the day the application was actually made.

[31] The Tribunal is further confronted with the Appellant's testimony that she continues to hold a valid driver's license, and was able to drive herself to her doctor appointments and subsequently use public transit when she no longer had a vehicle. 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. The Appellant has argued that she was encouraged to continue driving in an attempt to improve her condition. However, 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.

[32] The Tribunal also considered the testimony of the Appellant that the Appellant has no Power of Attorney, Public Guardian or Trustee and that she is responsible for her own decisions. She was also able to live on her own and find new accommodations to live. The Appellant was living on her own from July 2008 to September 2009 in a rented apartment; resided temporarily with a friend from September 2009 to December 2009, and then found an apartment to rent where she lived by herself paying rent from December 2009 to February 2012. The Tribunal acknowledges that the Appellant was evicted by her landlord, but the evidence of the Appellant was this because of a lack of funds due to her long term disability benefits not being paid in the summer and therefore being unable to afford the rent and not due to an issue that would support incapacity. The Tribunal finds that the evidence of the Appellant being able to find suitable accommodations to live, reside on her own, pay her bills and manage her daily affairs, supports that the Appellant had the capacity to form the intention to apply for benefits as it is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant.

[33] The Appellant's argument is that she continues to suffer symptoms of post-traumatic stress disorder is not disputed and the Appellant is in receipt of a CPP disability pension, however the issue before the Tribunal is whether the Appellant was incapable of forming or expressing the intent to make an application on her own behalf earlier than the day the application was actually made. While the Tribunal is sympathetic to the Appellant's situation, the Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the CPP.

[34] 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 she applied for CPP disability benefits.

CONCLUSION

[35] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security