Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 1

Tribunal File Number: GP-16-1067

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: February 7, 2017

REASONS AND DECISION

PRELIMINARY ISSUES

[1] There was a preliminary issue concerning the Respondent's redaction of documents that were filed in accordance with section 26 of the *Social Security Tribunal Regulations*. These documents are commonly referred to as the 'Reconsideration File'. A number of the documents in the Reconsideration File (indexed as "GD2" in this case) appeared to have had text redacted by the Respondent before they were filed with the Tribunal. These redactions were not made by the Appellant. This was an issue because the Tribunal determined that some of the redacted portions may have been relevant to determining the issues on appeal.

[2] On September 29, 2016, the Tribunal asked the Respondent to provide unredacted copies of several pages in GD2. In an e-mail dated October 4, 2016, the Respondent refused to do so, explaining that the redacted information contained detailed medical information about the Appellant's adult children and was not relied upon to adjudicate the Appellant's claim.

[3] On October 11, 2016, the Tribunal reiterated its request for unredacted copies of the specified GD2 pages, explaining that it was the Tribunal's role to determine which documents were relevant to the issues on appeal. The Tribunal indicated that it was inappropriate for the Respondent, being a party to the appeal, to withhold or otherwise alter documents on the basis that they were irrelevant. The Tribunal also indicated that it did not matter whether the Respondent relied on the redacted information in making its decision.

[4] In an e-mail dated October 17, 2016, the Respondent again refused to provide unredacted copies of the GD2 pages in question, citing section 26 of the *Privacy Act*. The Respondent also suggested that the Appellant's application was denied because the Appellant did not meet the statutory requirements for cancelling a retirement pension in favour of a disability pension, thus making the third party medical information irrelevant for the appeal.

[5] In a letter dated October 25, 2016, the Tribunal asked both parties if they had any further evidence or submissions with respect to the issue of the Appellant's incapacity prior to making the application for CPP disability benefits. The Tribunal specifically identified ss. 60(8) and 60(9) of the *Canada Pension Plan* as potentially relevant, as those subsections are concerned

with capacity to form or express an intention to make an application before the day on which the application was actually made. The Respondent was once again reminded of its obligation under section 26 of the *Social Security Tribunal Regulations* to file any documents relevant to the decision.

[6] On November 1, 2016, the Respondent provided a response to the Tribunal's question of October 25, 2016. However, it did not provide unredacted copies of the previously requested GD2 pages. The Appellant did not provide a response to the Tribunal's question of October 25, 2016.

[7] On November 30, 2016, the Tribunal made a further request to the Respondent. In addition to the previously requested GD2 documents that had not been provided, the Tribunal requested copies of 4 additional GD2 pages that also appeared to have been redacted in whole or in part. The Tribunal asked for all of the unredacted documents to be provided by December 30, 2016. The Respondent did not reply to that request. Accordingly, on January 9, 2017, the Tribunal sent out a notice of a pre-hearing conference to specifically discuss the redacted GD2 documents. This conference was scheduled for January 24, 2017.

[8] On January 24, 2017, the Appellant and a representative of the Respondent attended the pre-hearing conference. Relying on the *Privacy Act*, the Respondent maintained that it would not provide unredacted copies of the requested documents. The Tribunal indicated that exceptions under ss. 8(2)(a) and 8(2)(b) of the *Privacy Act* permitted the Respondent to provide unredacted copies of the GD2 documents in question.

[9] Despite the Respondent's continued refusal to provide unredacted copies of the documents, the Respondent did agree to read the redacted portions of the GD2 file at the pre-hearing conference. The Appellant was present throughout this process and did not object to it. In fact, when asked whether she had any concerns with what was read by the Respondent, the Appellant replied on each occasion that she had none. The Tribunal was therefore satisfied that the Respondent's reading of the redacted pages accurately reflected what was actually on them.

[10] Almost all of the redacted information did in fact pertain to the Appellant's children and was ultimately irrelevant to the issue of the Appellant's capacity under ss. 60(8) or 60(9) of the

Canada Pension Plan. The lone exception was a section on page GD2-12, where a passage regarding the Appellant's financial worries was also redacted. This did not relate to a third party's personal information and, even with respect to the *Privacy Act*, should not have been redacted. There were additional sections of GD2 that had been redacted but were not detectable as such to the Tribunal. This was because the redactions were made in the same colour (white) as the pages themselves and therefore were impossible to detect. This is of significant concern, as the Tribunal could not have known of all of the locations in the file where information had been redacted. However, the Respondent identified these additional redacted sections and the Appellant agreed with the Respondent's oral reading of them. The Tribunal was satisfied that the additional redacted information was ultimately not relevant to the issue at hand.

Outcome of Pre-Hearing Conference

[11] This was a very difficult situation for the Tribunal. The Respondent's position is inconsistent with the full and frank disclosure of documents that is essential for a fair resolution of the dispute between the parties. It is simply not tenable for a party to exercise such control over the process: this was amply illustrated by the "undetectable" redactions made by the Respondent that were only discovered by accident during the pre-hearing conference. Furthermore, the Respondent redacted at least one portion of the file (on page GD2-12) that did not appear to be covered by any reasonable interpretation of the *Privacy Act*.

[12] Nonetheless, the purpose of full disclosure under section 26 of the *Social Security Tribunal Regulations* is to allow the Tribunal to make a fair and independent assessment of the issue on appeal. Given that the Appellant agreed that the Respondent's reading of the redacted information at the pre-hearing conference accurately reflected the redacted text, the Tribunal is unable to conclude that it does not have all of the required information at its disposal. As the purpose of the pre-hearing conference was to resolve the issue of the redacted portions of GD2 and that purpose had been achieved, the Tribunal advised the parties on February 1, 2017 that it was able to proceed with preparing a decision on the merits of the case.

[13] The Tribunal notes that it may well have reached a different conclusion if the Appellant had not personally verified the accuracy of each and every redacted portion of GD2 that was

read by the Respondent at the hearing. Similarly, another outcome may have resulted if the particular facts and circumstances of the appeal had been slightly different.

[14] The Tribunal also notes that the Respondent's position in this matter caused an extraordinary amount of time to be spent on an issue that should never have arisen. The Tribunal had to make repeated demands for the redacted information and ultimately had to schedule a pre-hearing conference. This required all of the parties, including the Respondent, to unnecessarily spend time dealing with redacted information that was ultimately disclosed verbally and which the Appellant had herself provided to the Respondent in support of her application. In fact, some of the redacted information was in the Appellant's own handwriting and was clearly intended by her to be part of the evidentiary record.

[15] In addition, the Respondent's apparently unintentional redaction of a passage (on page GD2-12) that did not concern the privacy interests of third parties starkly illustrated the dangers of having a party to the proceedings unilaterally assume responsibility for redacting documents relevant to an appeal before this Tribunal. Furthermore, the Respondent's use of "white redaction" prevented the Tribunal from being able to discern where some redactions had actually taken place.

[16] Although the Tribunal ultimately elected to proceed with the matter, the concerns expressed above are serious and, in only a slightly different context, could have led to a very different outcome. Accordingly, the Tribunal's election to proceed is strictly confined to the exact circumstances of this particular appeal and should not be taken as any kind of support for the position taken by the Respondent with respect to the redaction of documents.

INTRODUCTION

[17] The Appellant's application for a *Canada Pension Plan* ("CPP") disability pension was date stamped by the Respondent on October 5, 2015. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[18] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

a) The member has decided that a further hearing is not required.

b) The issues under appeal are not complex.

c) There are no gaps in the information in the file or need for clarification.

d) Credibility is not a prevailing issue.

e) 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

[19] 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").

[20] The calculation of the MQP is usually important because, in most cases, a person must establish a severe and prolonged disability on or before the end of the MQP. However, the date by which a severe and prolonged disability must be established will be different if a person begins receiving a CPP retirement pension before her MQP expires.

[21] Subsection 70(3) of the *Canada Pension Plan* states that, subject to s. 66.1 of that same act, a person who begins receiving a CPP retirement pension is ineligible to apply for CPP disability benefits. Subsection 66.1(1) of the *Canada Pension Plan* states that a CPP retirement pension can only be cancelled in favour of a CPP disability benefit if the person is deemed to have been disabled prior to the month that the CPP retirement pension commences.

Furthermore, s. 42(2)(b) of the *Canada Pension Plan* states that a person cannot be deemed to be disabled more than 15 months before the application for CPP disability benefits is made.

[22] 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.

ISSUE

[23] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2017. However, the Appellant started receiving her CPP retirement pension in July of 2014. A claimant can only change a CPP retirement pension to a CPP disability benefit if she is found to be disabled prior to the commencement date of the CPP retirement pension. Accordingly, in this case, the Tribunal must decide if it is more likely than not that the Appellant was deemed to have had a severe and prolonged disability on or before June 30, 2014.

EVIDENCE

[24] The Appellant is now 65 years old and lives in X, Ontario. She has a grade 12 education. Her most recent job, as a full-time Contract Research Administrator at Aboriginal Affairs and Northern Development, started on May 7, 2007. In her application materials, she indicated that she stopped working on June 8, 2014 because of severe stress, bipolar disorder, and the fact that both of her children had severe illnesses.

[25] Later in her application materials, the Appellant listed her illnesses and impairments as severe stress, bipolar disorder, depression and social anxiety. She wrote that these illnesses prevented her from working because her daughter had schizophrenia and her son had Type 1 Chiari Malformation, as well as fibromyalgia, for which treatment was planned.

[26] The Appellant began receiving her CPP retirement pension in July of 2014. There is no medical documentation pre-dating the commencement of her CPP retirement pension. She received regular Employment Insurance (“EI”) benefits from August 24, 2014 to September 7,

2014 but then started receiving disability benefits from Sun Life (a private insurer) effective September 8, 2014. A Sun Life letter dated November 28, 2014 confirmed the commencement of those private insurance benefits. The letter stated that "in the event that you do not apply for CPP disability benefits your plan allows Sun Life the right to calculate your LTD benefit based upon on estimation of what you may otherwise have been entitled to."

[27] On January 7, 2015, Dr. Phaneuf (Mental Health Day Treatment Program) prepared an intake assessment regarding the Appellant. Dr. Phaneuf wrote that the Appellant was well known to the outpatient mental health department and had been followed on and off by Dr. Browne for years. She had a history of significant major depressive episodes with intermittent periods of improved functioning, as well as a possible diagnosis of bipolar II disorder.

[28] The Appellant told Dr. Phaneuf that her depression returned in October of 2013: her job was intense and high-pressured and she had increasing anxiety at work. She avoided talking to co-workers and began hiding out in her office. Her mood was down, she was sleeping more, she had poor energy, and she began eating more. After leaving work, she described her mood as emotionless but also reported having a lot of anger in addition to apathy. Although she described herself as affectionate, she did not feel anything when she hugged her children and she found this to be distressing.

[29] Dr. Phaneuf noted a number of chronic and significant psychosocial stressors for the Appellant. Her daughter had schizophrenia and required the Appellant's assistance. The Appellant's adult son lived with her and had Asperger's Disorder as well as other significant health issues. The Appellant said that her main struggle was her extreme isolation; she also was having some problems with agoraphobia. She found it difficult to leave the house and interact socially with anyone. She denied any paranoid or psychotic symptoms and said she was just extremely anxious and fearful of being judged or of having to speak spontaneously to anyone.

[30] With respect to the Appellant's medical history, Dr. Phaneuf said that she had never been admitted to hospital for mental illness reasons, although she continued to be seen by Dr. Browne. She had gastric bypass surgery about 7 or 8 years previously with no major sequelae. She had obstructive sleep apnea and had used a CPAP device for the past 9 years. She had a difficult relationship with her ex-husband but this no longer appeared to be a major issue. Dr.

Phaneuf's examination of the Appellant revealed a full range of affect, although the Appellant said she was sad, anxious and sometimes emotionless. Attention, memory and concentration appeared grossly normal, although the Appellant felt that her memory was exceedingly poor and, along with impaired concentration, seemed to be getting worse. Her treatment goals were labeling her emotions and developing some better supports in her life. She recognized how pathological her cycle of avoidance and agoraphobia had become and that she was struggling to overcome it.

[31] Dr. Phaneuf raised the possibility of a day treatment program that would involve a group of 10 people. The Appellant broke down and became quite anxious about that prospect. Dr. Phaneuf explained that the program could be very helpful for her but that the decision was ultimately up to her. As the Appellant was very ambivalent and anxious about it, Dr. Phaneuf said that she would receive a call about a potential start date in a few weeks and she could discuss with the program RN whether she felt prepared to attend.

[32] On July 18, 2015, Dr. Phaneuf reported on the Appellant's attendance at the Mental Health Day Treatment Program from May 4, 2015 to June 18, 2015. The Appellant had some difficulty with fatigue and motivation and, as a result, was absent for 5 days. She wanted to work on issues of low self-esteem, lack of a balanced lifestyle, and social isolation. She also identified a lack of developed coping strategies, an inability to express herself effectively, and some financial stressors. She appeared to benefit from the structure and social aspect of the program, as she was attentive and supportive in the group and made gains in her mood, energy level and function. While her engagement waned at times, she was positive and respectful of others. She became able to identify her preferred cognitive distortions and understood better how they impaired her path to wellness. She was discharged from the program in stabilized and improved condition.

[33] For follow-up, Dr. Phaneuf reported that the Appellant would continue to see Dr. Browne as an outpatient and was on the waiting list for a counsellor with the Canadian Mental Health Association. She was also going to explore a mood disorders support group and a mindfulness course. She was encouraged to explore volunteer opportunities in her community and had enrolled in a sewing class. On July 30, 2015, Dr. Browne provided a note stating that the Appellant was unlikely to return to work in the next year.

[34] On August 17, 2015, a Sun Life letter to the Appellant stated that she was in the process of applying for CPP disability benefits. She was asked to complete and return certain forms to Sun Life within 21 days of receiving that letter. She was reminded that, if she did not apply for CPP disability benefits, Sun Life could calculate her LTD benefit on the basis of what she might otherwise have been entitled to receive in CPP disability benefits. On the evening of September 29, 2015, the Appellant sent a registered mail package from a post office located in X.

[35] On October 5, 2015, the Respondent received the Appellant's application materials (dated September 1, 2015) as well as a Medical Report (dated September 25, 2015) from Dr. Robert Esguerra (Family Physician). In her application materials, the Appellant described functional limitations of speaking, remembering, concentrating and sleeping.

[36] Dr. Esguerra's Medical Report provided diagnoses of bipolar affective disorder and major depression. He wrote that the depression had been very controlled and the Appellant had been functional until the summer of 2014 when her symptoms of depression and hopelessness became overwhelming. She had been unable to return to work since then. He noted impaired memory, impaired concentration, tearfulness, and a GAF score of 50. The prognosis was "unknown – guarded", as her level of function had plateaued despite treatment.

[37] On January 2, 2016, the Appellant sent a letter to the Respondent. She wrote that, when she began receiving the CPP retirement pension in July of 2014, she was not made aware that she could qualify for a CPP disability benefit until she was advised by Sun Life in the early summer of 2015 and did not receive the application materials until she received them from Sun Life on August 17, 2015. She claimed that she did forward materials to Sun Life within the requested 21 days. She also hand-delivered a blank form to Dr. Esguerra and asked that he complete it as soon as possible. However, as he was busy, he did not complete it until September 25 and she sent the application materials to the Respondent by registered mail on September 29, 2015.

[38] The Appellant went on to state that she was never advised by her employer, the Respondent or Sun Life that she had only 15 months to apply for CPP disability benefits. She said she complied with the only deadline of which she was aware: the 21 day limit set out by Sun Life. The Appellant expressed concern that she would be retiring from her full-time

permanent position with the federal government on August 11, 2016: her salary would be substantially reduced and she had to deal with the living expenses of two sick adult children who both lived at home with her. Her daughter was attempting to take courses at Carleton University, while her son was unable to follow his desired course of study in computers.

[39] The Appellant said that she borrowed money and took her son to the Mayo Clinic in Minnesota at her own expense to see how he might be treated and ultimately return to school. The trip to the Mayo Clinic cost more than US$20,000.00 (which she borrowed) and she was extremely worried about how she would be able to live on a small pension once she retired with all of those outstanding expenses. She concluded by stating that, along with her own mental illnesses, she also had to deal with the mental and physical illnesses of her two children. She said that these factors, along with her children's ongoing medical expenses, prevented her from working and from keeping up with her finances.

[40] In a letter received by the Tribunal on March 21, 2016, the Appellant stated that she was unable to work as of June 9, 2014 due to a severe nervous breakdown. As a result of also being diagnosed with bipolar disorder and depression, she said that she was totally unable to comprehend any required paperwork. She said that she missed the deadline due to her mental state. She indicated that her psychiatrist had extended her expected return-to-work date to August 1, 2016, although she was retiring on August 11, 2016. She said that her state of mind remained unchanged and having to care for two ill children only added to her ongoing stress and depression. She wrote that being a bipolar single parent always interfered with her work because of her constant ups and downs. She continued to suffer from depression and found it challenging to face her family's needs. She was almost totally housebound, was unable to socialize, was paranoid, and unable to answer the door or telephone. She said that her memory and problem-solving continued to slowly decline and she would never be able to hold down a job again.

[41] The Appellant added that she was also caring for her 90-year-old mother who lived in a nursing home. She said that all of the people depending on her added to her condition and worsened her bipolar flare-ups. She said that she only applied for CPP at the age of almost 63 as she "was negligent due to my on-going situation and stressful lifestyle", indicating that she should have applied at age 60 because she suffered her first nervous breakdown in 2011 and

was off work for 16 months at that time. She said that at the time of her second breakdown in June of 2014, she was unable to do just about anything in a normal matter. She said her life and work obligations had always been a challenge since her bipolar and depression diagnoses in 1985 and that she continued to suffer from major highs and lows every day. She also indicated that she was registered with the Canada Revenue Agency as disabled.

[42] On June 20, 2016, Dr. Esguerra wrote that he understood the Appellant's appeal was denied because she was unable to submit material in a timely fashion. He had been her family doctor for more than 10 years: he wrote that her illness was permanent and would preclude her from working at this time. He also that the symptomatology of her illness would be a definite cause for disorganization and inability to comply with time constraints and deadlines. He said that "these restrictions were applicable during the time she would have had to appeal the decisions against her disability benefits".

[43] On July 7, 2016, Dr. Esguerra provided a note stating that he had seen the Appellant on July 7, 2016. He wrote that she was totally disabled at that time and would not be able to return to work for 4 months. As noted above, the Appellant did not respond to the Tribunal's October 25, 2016 request for further evidence or submissions on the issue of the Appellant's incapacity prior to her eventual application for CPP disability benefits.

SUBMISSIONS

[44] The Appellant submitted that she qualifies for a disability pension because:

a) Her life and work obligations have been a challenge since her bipolar and depression diagnoses in 1985 and she continued to have major highs and lows every day;

b) In addition to her own mental illnesses, she also had to care for her mother and deal with the mental and physical illnesses of her two children as well as their ongoing medical expenses;

c) Her various dependants added to her condition and worsened her bipolar flare-ups: her late application for CPP benefits arose from her ongoing situation and stressful lifestyle; and

d) She was not made aware that she could qualify for a CPP disability benefit until the early summer of 2015, was never advised that she had only 15 months to apply for CPP disability benefits, did not have the CPP disability application materials until August 17, 2015, and complied with the only deadline of which she was aware (the 21 day limit set out by Sun Life).

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

a) Her application was not received until October 5, 2015, which was more than 15 months after her CPP retirement pension commenced;

b) Being unaware of the CPP disability program is not the same as being unable to express the intent to apply for disability benefits;

c) Her actions in attempting to comply with the Sun Life deadlines do not support a finding that she was incapable of expressing the intent to apply for disability benefits on an earlier date or that she was continuously disabled in accordance with CPP legislation; and

d) No information with respect to incapacity, such as an ISP 1800 form, has been submitted by her family physician or her treating psychiatrist.

ANALYSIS

[46] As the Appellant began receiving a CPP retirement pension in July of 2014, the Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before June 30, 2014.

Severe

[47] The Tribunal must first determine whether it is even possible for the Appellant to establish a severe disability on or before June 30, 2014. Her application materials were not received by the Respondent until October 5, 2015.

[48] As noted above, the combined effect of ss. 70(3) and 66.1 of the *Canada Pension Plan* is that a CPP retirement pension can only be cancelled in favour of a CPP disability benefit if the person is deemed to have been disabled prior to the month in which the CPP retirement pension commenced. Most importantly, s. 42(2)(b) of the *Canada Pension Plan* states that a person cannot be deemed to be disabled more than 15 months before the application for CPP disability benefits is made. This means that the Appellant cannot be deemed to be disabled earlier than the month of July, 2014. As that earliest possible deemed date of disability is not on or before June 30, 2014, the Appellant's application appears to be simply too late.

[49] For the Appellant, the only potential relief from that result lies with the potential application of s. 60(9) of the *Canada Pension Plan*. In certain circumstances, that subsection allows the date of application to be deemed earlier than the application materials were actually received by the Respondent. However, a critical element of that subsection is that the claimant must have "been incapable of forming or expressing an intention to make an application before the date on which the application was actually made". In order to determine whether s. 60(9) of the *Canada Pension Plan* might assist the Appellant, the Tribunal must first determine whether that incapacity criterion is met. The Tribunal notes that the similar s. 60(8) does not apply because the Appellant applied on her own behalf.

[50] It is not helpful to the Appellant that she may initially have been unaware of the CPP disability program or the associated deadlines. It is a long-standing legal principle that a person cannot avoid compliance with legislative provisions on the mere basis that they are unfamiliar with them. In the specific context of CPP disability benefits, the Federal Court of Appeal found in *McDonald v. Canada (Attorney General)*, 2013 FCA 37, that not knowing about a potential CPP disability entitlement was insufficient to establish incapacity to form an intention to apply. In any case, it appears that the Appellant would have been made aware of the CPP disability program when she received the Sun Life letter of November 28, 2014.

[51] However, there is evidence from the Appellant and Dr. Esguerra that, for example, the Appellant was disorganized and had multiple demands on her that interfered with her ability to submit the original application prior to October 5, 2015. The nature of her condition itself might also have interfered. The Tribunal must therefore determine whether the documentary evidence

can be interpreted to support the application of s. 60(9) of the *Canada Pension Plan*, given that there is no evidence explicitly stating that the Appellant was incapable of forming or expressing an intention to make an application at any relevant time.

[52] The incapacity criteria in s. 60(9) of the *Canada Pension Plan* have been discussed at the Federal Court of Appeal on a number of occasions. Those decisions make it clear that the burden of meeting the incapacity criteria in s. 60(9) is very high. In *Canada (Attorney General)* v. *Danielson*, 2008 FCA 78, the court stated that a consideration of the capacity to make, prepare, process or complete an application for disability is not required: the only relevant consideration is whether the person was incapable of *forming or expressing an intention to make an application*. This is a much more difficult test for a claimant to meet: a claimant may not be able to complete an application for disability benefits, for whatever reason, but could still have the capacity to form an intention to apply. The *Danielson* decision also says that a claimant's activities between the claimed disability commencement date and the date of application may be relevant to cast light on whether she had a continuous incapacity to form or express the required intention.

[53] In another Federal Court of Appeal decision (*Sedrak* v. *Canada (Social Development)*, 2008 FCA 86), the court held that capacity to form the intention to apply for benefits is not different in kind from the capacity to form the intention with respect to other choices which present themselves to an applicant. Together, the decisions in *Danielson* and *Sedrak* show that a capacity to form an intention to make choices (even if those choices do not relate to applying for CPP disability benefits) between the claimed disability date and the date of application will prevent a claimant from being able to rely on s. 60(9) of the *Canada Pension Plan*.

[54] The Appellant undoubtedly faced mental health challenges between June 8, 2014 and October 5, 2015, in addition to providing support to both her elderly mother and her adult children. The Tribunal accepts that these must have been very challenging times for her. However, the evidence does not suggest that she was incapable of forming an intention to make choices during that period. In a letter received on March 21, 2016, the Appellant herself stated that her state of mind remained unchanged and her memory and problem-solving continued to slowly decline. It is notable that this was written after she actually applied for CPP disability

benefits: the obvious inference is that her state of mind would not have prevented her from filing her application (or forming an intention to do so) at an earlier date.

[55] The evidence also suggests that the Appellant was able to make other choices during the relevant period. She repeatedly mentioned her responsibilities with respect to her children: although a specific date was not provided, she made the major decision to borrow money and take her son to the Mayo Clinic in an attempt to treat his significant medical challenges. The Appellant also stated that she was registered with Revenue Canada as disabled: the decision to register for that status would necessarily have been made after she had stopped working. In addition, she stated that she was caring for her 90-year-old mother. She also took extensive steps in the summer of 2015 to assemble the necessary documentation for a CPP disability benefit application. These all imply or affirm capacity to form an intention to make choices.

[56] Capacity to form an intention to make choices can also be found in the various medical reports. On January 7, 2015, Dr. Phaneuf's examination of the Appellant revealed grossly normal attention, memory and concentration. Dr. Phaneuf also raised the possibility of a group day treatment program but ultimately left the decision to attend up to the Appellant. It is notable that the Appellant chose to, and did, attend the group program. On July 18, 2015, Dr. Phaneuf reported that the Appellant was attentive and supportive in the group and made gains in her mood, energy level and function: she was discharged from the program in stabilized and improved condition. She was also going to explore a mood disorders support group, a mindfulness course and volunteer opportunities. She had already enrolled in a sewing class. All of this is strongly supportive of a continued capacity to form an intention to make choices.

[57] While it is not clear that Dr. Esguerra's letter of June 20, 2016 applies to the period before the Appellant applied for CPP disability benefits, it nonetheless points to problems with disorganization and deadlines rather than a much more serious incapacity to form an intention to make choices. Finally, the Tribunal notes that the Appellant was specifically asked on October 25, 2016 to provide any additional evidence or submissions with respect to the issue of capacity under s. 60 of the *Canada Pension Plan*. However, the Appellant did not provide a response.

[58] Given the evidence before the Tribunal, the wording of s. 60(9) of the *Canada Pension Plan*, and the binding case law interpreting that subsection, the Tribunal finds that the Appellant

has not established any incapacity to form an intention to make choices during the period from June 8, 2014 to October 5, 2015. As a consequence, the Appellant cannot rely on the provisions of s. 60(9) of the *Canada Pension Plan* and it necessarily follows that she cannot establish an application date before October 5, 2015. This means that s. 42(2)(b) of the *Canada Pension Plan* prevents a deemed disability date from being established prior to July 1, 2014 and, as a result, the Tribunal finds that the Appellant could not have had a severe disability commencing on or before June 30, 2014.

Prolonged

[59] As the Tribunal found that the Appellant could not establish a severe disability commencing on or before June 30, 2014, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[60] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security