



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. A. v. Minister of Employment and Social Development*, 2017 SSTGDIS 41

Tribunal File Number: GP-16-1023

BETWEEN:

**A. A.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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

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DECISION BY: Virginia Saunders

DATE OF DECISION: April 19, 2017

## **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 14, 2016. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] This appeal was heard by questions and answers for the following reasons:

- a) there are gaps in the information in the file and/or a need for clarification.
- b) 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 a CPP disability pension. To qualify, an applicant must be under 65 years of age; not be in receipt of a CPP retirement pension; be disabled; and have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[4] The requirement that an applicant not be in receipt of a CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension.

[5] Section 66.1 of the CPP and section 46.2 of the *Canada Pension Plan Regulations* (CPP Regulations) allow a person to apply to cancel a benefit within six months of the commencement of payment. However, subsection 66.1(1.1) of the CPP provides that a person cannot apply to cancel a retirement pension in order to receive a disability pension unless he or she is deemed to have become disabled before the month the retirement pension became payable.

[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] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of a disability pension where the disability application is made fifteen months or more after payment of the retirement pension began.

[8] An exception to this is set out in subsections 60(8) through (10) of the CPP, which allow 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.

[9] 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**

[10] The Tribunal must decide whether the Appellant is eligible for a CPP disability pension, and in particular whether the Appellant was incapable of forming or expressing the intention to apply for the disability pension before he actually did so in January 2016 and, if so, the applicable dates.

## **EVIDENCE**

[11] The Appellant was born in X 1954. In January 2014 he applied for a CPP retirement pension, and indicated that he wanted to receive it as soon as he qualified (GD10-12-16).

[12] On April 7, 2014, the Appellant had a left basal ganglia ischemic stroke, and was hospitalized for several days. He was seen on that day by Dr. S. Kaiway, neurologist.

[13] Dr. Kaiway next saw the Appellant on May 2, 2014, along with his wife and two daughters. Dr. Kaiway's report of that visit indicated that the Appellant's family had noticed that he seemed a little quieter, was talking less and his voice was somewhat softer. He remained fluent but had occasional difficulty with word finding. He was less aggressive and assertive than he had been. He had not been back at work.

[14] Dr. Kaiway reported that, among other things, the Appellant's speech was fluent and appropriate. His repetition was intact and his affect appropriate. His comprehension appeared intact. She stated that the Appellant was doing quite well. He was encouraged to keep control of

his glucose, follow his blood pressure, and remain on aspirin. She was to see him again in two months (GD10-44-45).

[15] The Appellant turned 60 in August 2014 and the following month he began receiving a CPP retirement pension (GD10-17).

[16] On January 13, 2016, the Appellant was assessed by Dr. N. Dehghan, rheumatologist, for a two-year history of pain in his shoulders. Dr. Dehghan's report noted that the Appellant had had ten sessions of physiotherapy and now wanted a cortisone injection. She stated that on physical exam he appeared well. His presentation was consistent with rotator cuff tendinopathy. She advised against a steroid injection but the Appellant insisted and so he was given one (GD10-39-41).

[17] On January 14, 2016, the Appellant applied for a CPP disability pension. He stated that he was unable to work as of April 4, 2014, because he had a stroke and that for one year after that he could not talk. He stated that he now had depression and could not talk properly or move his right hand. He listed functional limitations in almost all areas, including being forgetful and having difficulty concentrating (GD2-17-20; GD2-34-31).

[18] Dr. H. Karimirad is the Appellant's family physician. Her medical report dated January 12, 2016, stated that after a stroke in 2014 the Appellant's function suddenly decreased and he was not able to work. He was not able to decide for himself and he was very dependent on his wife and children. He was not able to be left alone and needed support and direction (GD2-30-33).

[19] On February 5, 2016, the Respondent denied the Appellant's disability application because it was submitted more than 15 months after he began receiving his CPP retirement pension (GD2-10).

[20] The Appellant had a psychiatric consult in February 2016, with Dr. A. Burgmann. Dr. Burgmann's report indicated that the Appellant reported having an evolving depression dating back to April 2014 when he had his stroke. He reported being in the hospital for five days and that he experienced memory and cognitive impairment as well as some protracted aphasia. Over the course of time his language and memory slowly improved but he continued to

be depressed. He had previously had anxiety and it had returned with the stroke. He described low mood, over- stimulation with noise, difficulty activating himself, insomnia, low energy, limited concentration, and helpless and hopeless feelings. He had tried Wellbutrin recently but could not tolerate the side effects. There had been no psychiatric hospitalizations. Dr. Bergmann made some recommendations for treatment (GD10-35-37).

[21] In his letter requesting reconsideration of that decision, and in his Notice of Appeal, the Appellant stated that he was in the hospital for one week after his stroke in April 2014. He stated that during that time he experienced many challenges such as difficulty speaking, walking, and being active, and that he had severe challenges thinking and making decisions. He stated that due to these challenges and health concerns it was difficult for him to apply for the CPP disability pension because he often forgot information and deadlines and needed assistance remembering things (GD2-8; GD1-1).

[22] The appeal proceeded by way of written questions and answers. The Tribunal asked the Appellant:

Please state the exact dates during which you experienced the challenges you described in your Notice of Appeal, and give examples of your difficulties. Please note that the Tribunal cannot contact your doctors as suggested by you. It is your responsibility to provide the evidence to support your case.

[23] In response, the Appellant stated that after his stroke he was in hospital for five days and after that he could not talk, think or move. He was depressed and was away from all activity. He listed medications that he was taking for blood sugar and cholesterol, and stated that for his depression he was taking bupropion, vitamin D and vitamin B (GD5-4).

[24] Dr. N. Mahmoud is an internal medicine specialist who saw the Appellant in January 2017 for cardiac assessment and assessment of hypertension. His report dated January 16, 2017, stated that after the Appellant's stroke in 2014 "he was thrombolized and recovered very well. He does not have aphasia or extremity weakness. He does complain of depression and some change in his personality after the stroke" (GD10-33-34).

[25] On February 3, 2017, Dr. Karimirad completed a Declaration of Incapacity for the Appellant. She stated that he had been incapable of forming or expressing the intention to make

an application, and that the incapacity began and ended in April 2014. She stated that she was his treating physician at that time, and that he was also treated by Dr. Burgmann and Dr. Kaiway (GD10-47-48).

[26] The Appellant stated on February 9, 2017, that his stroke impaired his communication, memory and cognitive abilities. He stated that his ability to process language was challenging and it was difficult to piece information together to communicate thoughts or ideas. He stated that his stroke resulted in short attention span, memory loss, difficulty solving basic problems, impaired speech and communication, impaired cognitive abilities, difficulty processing information, depression and anxiety, severe fatigue, inability to make coherent decisions, muscle weakness, and physical impairments (GD9-1).

## **SUBMISSIONS**

[27] The Appellant submitted that he qualifies for a disability pension because:

- a) he has a severe and prolonged condition; and
- b) he was incapable of forming or expressing an intention to make an application before January 14, 2016, because of the effects of his stroke.

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

- a) he was receiving a CPP retirement pension for more than 15 months before applying for CPP disability benefits;
- b) he does not meet the test for incapacity set out in the CPP; and
- c) in any event there is no evidence that he had a severe and prolonged condition at his MQP of December 31, 2011.

## ANALYSIS

[29] The Appellant's application for a CPP disability benefit was received in January 2016. Under paragraph 42(2)(b) of the CPP, the earliest he could be deemed to be disabled is October 2014, fifteen months before the disability application was made.

[30] Because the Appellant's retirement pension started in September 2014 and because the earliest he could be deemed to be disabled is October 2014, it is not possible for the Appellant to be deemed to be disabled *before* receiving the retirement pension. On that basis, he is not eligible to receive a CPP disability pension.

[31] The Appellant's application may be deemed to have been made 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. The onus is on the Appellant to establish that he was incapable at the relevant time.

[32] 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 (*Sedrak v. Minister of Social Development* 2008 FCA 86).

[33] The Appellant's activities during the alleged period of incapacity are relevant to the determination of the issue of whether or not he 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. Danielson* 2008 FCA 144).

[34] While the Appellant submitted that he was incapable as of April 2014 up to January 14, 2016, Dr. Karimirad stated that he was incapacitated only in the month of April 2014. Dr. Karimirad's statement is consistent with what the Appellant stated when he requested



reconsideration and in his Notice of Appeal: that for one week after his stroke he was having great difficulty. Dr. Kaiway's report does not clearly state what the Appellant's abilities were immediately after the stroke, but by the time she saw him less than one month later on May 2, 2014, he was recovering well.

[35] In the following months up to January 2016 the Appellant attended numerous medical appointments related to his shoulder. He was apparently able to discuss his condition and make decisions for himself. He was not hospitalized as a result of any lingering effects of the stroke, nor was he receiving any type of therapy to deal with serious cognitive issues or other impairments that might have indicated incapacity.

[36] There is nothing in the medical documentation to support a conclusion that the Appellant's physical or mental impairments were of a magnitude that would have left him incapacitated within the meaning of the CPP at any time after April 2014. He may have been soft-spoken, disorganized, forgetful, and depressed, but there is no evidence that he was continuously incapable of forming or expressing the intention to make an application. While Dr. Karimirad's report of January 2016 stated that the Appellant was dependent on his family and needed support and direction, those statements are contrary to all of the other medical evidence and there are no details or examples provided to support a finding of incapacity.

[37] Even accepting that the Appellant was incapacitated for a short period after his stroke, and that his incapacity ended on April 30, 2014, at the latest, under paragraph 60(9)(c) he would have had to have made his disability application by May 31, 2014. His application was made almost two years later, in January 2016.

## **CONCLUSION**

[38] The Tribunal finds that the Appellant does not meet the requirements of subsections 60(8), (9) or (10) of the CPP. His application cannot be deemed to have been made earlier than it was. As a result, he is not eligible for a CPP disability pension.

[39] Because of this finding, the Tribunal did not go on to consider whether the Appellant met the definition of severe and prolonged at his MQP date.

[40] The appeal is dismissed.

Virginia Saunders  
Member, General Division - Income Security