



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. C. v. Minister of Employment and Social Development*, 2017 SSTGDIS 152

Tribunal File Number: GP-16-3751

BETWEEN:

**D. C.**

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: John F. L. Rose

HEARD ON: September 26, 2017

DATE OF DECISION: October 12, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on November 20, 2015. The Appellant claimed that she was disabled because she had suffered a stroke. The Respondent allowed the application initially effective December 2014. The Appellant objected to the start date of her benefit stating that she was incapacitated prior to the date of her application and it should be backdated to April 2013. The Respondent denied that request on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

### THE LAW

[2] The legislation allows for retroactive consideration of an application for disability benefits, however, that period is restricted to 15 months prior to the application date with benefits beginning following a four month waiting period, unless the applicant can establish that she was incapable of forming or expressing an intention to do so prior to actually making the application.

[3] Paragraph 60(8)(9) and (10) set out the incapacity provisions of the CPP as follows:

(8) Where an applicant 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 subsection (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[4] This appeal was heard by Teleconference for the following reasons:

a) There are gaps in the information in the file and/or a need for clarification;

b) Credibility is not a prevailing issue; and

c) 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.

[5] The following people attended the hearing: The Appellant and her spouse, who also acted as her representative.

## **EVIDENCE**

[6] The Appellant reported on the Questionnaire for Disability Benefits that she last worked from 2010 until April 25, 2013 as a teacher until she stopped due to a stroke. She was notified by letter dated March 1, 2016 that she approved for benefits effective December 2014.

[7] In the Appellant's request for reconsideration she stated that she was in hospital and rehab for six months and she had been too busy to think and apply. She stated that she needed assistance to apply. In her Notice of Appeal received November 10, 2016 she stated that she was never consulted while in hospital about making a claim for CPP disability but if she was she would have done so but she would have needed assistance. The Notice of Appeal also indicated that she did not have a power of attorney at that time because she had a joint account with her husband.

### **Medical Records**

[8] A X Rehabilitation Institute report by Dr. Meigi Guo, dated August 6, 2013 indicated that at that time she required assistance with grooming, bathing, toileting and transfers. She was able to feed herself with assistance and used a wheelchair for ambulation. She had cognitive deficits in the domains of attention, visuospatial, judgment, memory, as well as anomic aphasia. He said that she had good insight into her physical defects but denied any problems with her thinking. She was to remain an inpatient for several weeks before discharge. The discharge report from Dr. John Masgoret indicated she had made significant improvement in some of her neurological, visual, cognitive defects and impulsivity control. On July 16, 2013 she had been transferred to the Acquired Brain Injuries unit with a goal of going home.

[9] A declaration of Incapacity – Physician's Report was received from Dr. Patricia K. Francis, family physician, which indicated that the Appellant's incapacity began in March 2013 and was ongoing. The incapacity was caused by a sinus stroke causing spasticity, hyperreflexia, involuntary movement and she was in rehab for one year. She reported her condition is improving slowly.

[10] An undated Medical Report was completed by Dr. Francis, and received by Service Canada on January 15, 2016. It indicated that the Appellant had been in hospital for a stroke

on March 30, 2013 for a number of months but did not specify when she was discharged. She was restricted to a wheelchair and her speech was limited and she required assistance in her activities of daily living.

[11] Dr. Francis sent a further letter to the Respondent on April 26, 2016 advising that the Appellant had been incapacitated since March 2013 but she was too ill to apply at that time.

### **Oral Testimony**

[12] The Appellant's husband told the Tribunal that the Appellant had a stroke in April 2013 and went to hospital a few days later. She was taken to the hospital but preferred to go home because she slept better. She was not admitted despite his protests and she was taken home. She fell a few times and he took her back to the hospital as she was unable to walk on her own. She was then admitted for observation and continued to get weaker.

[13] Surgery was suggested and he says he had some doubts and was concerned about the adverse effects and wanted her to decide. As they were getting ready for surgery, the doctor asked her directly if she wanted the operation and she said yes. There was no power of attorney for personal care and decisions were made on the advice of physicians and she was involved in those decisions.

[14] After the surgery she stayed at the hospital for two weeks and was then sent to the Bickle Centre which was a rehabilitation hospital. At that time her communication was difficult and she would often repeat the first word of sentence. After a couple of months she could communicate better and it was easier to do so with speech and sign language. She still has some speech problems. During that time he said no one asked her if she wanted to apply for any type of benefit and she was not in any shape to decide for herself. She stayed in that hospital for about 80 days and was then sent to a X rehab centre for 30 days and then she came home.

[15] Her whole body is affected by the stroke but more so on her left side. She has difficulty feeding herself and he had to assist but she is quite a bit better now than when she was to come home. His biggest concern at that time was whether he would be able to get enough sleep to look after her because prior to the stroke she needed to get up numerous times in the night to use the washroom. They discovered a type of pole that could be used to help her get up and they

tried it in rehabilitation and felt it could work for her. Once at home she could use the pole to get up by herself and go to the washroom on her own.

[16] Since she has been home her day is scheduled. When she gets up she takes medication, has a shower and breakfast. She goes on the exercise machine for about 35 minutes and watches TV. After a break she goes upstairs and practices on the parallel bars for an hour and then watches TV. She cannot be left alone and usually comes with him if he goes anywhere, otherwise he leaves her with their daughter. She can go to the washroom on her own. They take her out for walks every day in her wheelchair and to the mall.

[17] He stated that she forgets a lot and it is hard for her to find the right word and would keep repeating it but that got better after two months at home. She can read, and does read the newspaper every morning which helps with her physical rehabilitation and keeps her busy. When she had the stroke she was told not to make financial decisions on her own and is still that way. She did not have a power of attorney for property. He said he always made those decisions prior to the stroke and continued to do so after.

[18] A few weeks after coming home she developed a shake making it difficult to stand and look after her. She was given some new medication and that helped. Once at home she kept improving slightly and slowly. She needs someone with her to walk and they do an hour and a half every day.

[19] She has not had any formal treatment for her cognitive abilities and she needs to be prompted all the time. Her stimulation includes interacting with the TV, him and the family and she calls her mother on the phone regularly using speed dial as she is unable to dial the whole number.

[20] In November 2015 he was looking on the internet to see if it was worthwhile for her to apply for an early CPP retirement pension and they found out about disability benefits. He felt that she qualified and so he applied on the same day. He said that they would have applied earlier if they were aware of it. He stated that he likely explained it to her at the time and she understood what it was. If they found out earlier, she could have applied with assistance. She cannot sign her name very well as she doesn't have that control, but she did sign the application.

[21] She is not receiving any other kind of benefits but she was already on a teacher's pension before she had the stroke and she was working as a supply teacher.

[22] He said that CCAC came to speak to them about assistance they could provide with showering for her but they are doing without it.

[23] The Appellant told the Tribunal that her husband does most things for her including taking her upstairs, eating, the washroom and putting her to bed. She said that she recalls the doctor telling her about the surgery and that she had to sign a paper to authorize it.

[24] She stated that her husband found out about disability benefits on the internet and remembers him talking to her about it and that was two years ago. She demonstrated some confusion on words and some dates throughout her testimony and her speech was difficult.

## **SUBMISSIONS**

[25] The Appellant submitted that she qualifies for a disability pension from April 2013 because:

- a) She was incapable of applying at that time,
- b) She was never advised to apply, and if she had been, she would have needed assistance in doing so; and

[26] The Respondent submitted in writing that the Appellant does not qualify for a disability pension prior to her start date of December 2014 because:

- a) She applied for benefit on November 20, 2015 and she has been allowed the maximum retroactivity allowed based on the date of her application; and,
- b) While she had a serious medical condition in April 2013, the evidence does not support that she was incapable of forming or expressing the intent to apply for a disability benefit prior to applying.

## ANALYSIS

[27] The Appellant must prove on a balance of probabilities that she was incapable of forming or expressing an intention to apply for CPP Disability benefits before November 20, 2015.

[28] In this appeal we are not concerned about the Appellant's incapacity to work which she has been clearly unable to do since the stroke and which has been accepted by the Respondent.

[29] In addition, there is really no dispute that the Appellant was not *physically* capable of obtaining, completing or submitting an application without substantial assistance from others. The Declaration of Incapacity from Dr. Frances specifies her spasticity, involuntary movement and speech defect as a result of her stroke. Her husband's testimony gives insight into the assistance the Appellant requires on a day to day basis with the activities of daily living and the exercise regime she is involved in to maintain her mobility.

[30] However, 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).

[31] The medical evidence of Dr. Frances does not make reference to her cognitive capacities, but only with respect to her physical ones. While Dr. Guo notes some cognitive deficits in August 2013, the Appellant denied any changes to her cognition, or problems with her thinking and it appears that she made substantial improvement while in rehab. This is consistent with her spouse's testimony as to improvements made since coming home. In reviewing her daily activities it is noted that she reads daily, speaks with her mother, watches TV and interacts with others. I am not concerned with the fact that she could not easily sign her name to the application. She has not required a power of attorney to look after her property and although her spouse indicates that he does this for her, he also said he managed those decisions prior to her stroke as well.



[32] She has not required a power of attorney for health care decisions but relies on the advice of her doctor and support of her family. It is telling that her surgeon asked her directly if she wanted to have the surgery and she answered yes. This suggests that at that time, the surgeon felt she was capable of making that important decision.

[33] I would expect that there would have been a short period of incapacity following surgery but it appears by the time she went home in August 2013, her cognitive abilities had stabilized. While she continues to have daily physical rehabilitation at home, she is not undergoing any treatment for cognitive difficulties. It was apparent in the hearing that her speech was affected and while she had difficulties with some dates and works, she was able to understand and respond to questions.

[34] The main reason that she did not apply for benefits earlier was that neither she, nor her husband, knew they were available. Her husband's evidence was that had she been asked about applying for benefits earlier she would have said yes. He reiterated that after the stroke they were just trying to survive day to day and did not have time to research these types of things. That is unfortunate as it likely that she would have qualified at an earlier date had she done so. Lack of knowledge of entitlement to a disability pension is not recognized as incapacity. (*Owen McDonald and Attorney General of Canada* 2013 FCA 37)

[35] The onus is on the Appellant to show, on a balance of probabilities, that she had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made. The Tribunal is not satisfied that she was. While she has struggled with her physical abilities since the stroke, the reason she did not make the application earlier was because she was unaware of the benefit and not because she was incapable of expressing an intention to do so.

## **CONCLUSION**

[36] The appeal is dismissed.

John F. L. Rose  
Member, General Division - Income Security