



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. B. v. Minister of Employment and Social Development*, 2017 SSTGDIS 178

Tribunal File Number: GP-17-581

BETWEEN:

**J. B.**

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: Pierre Vanderhout

DATE OF DECISION: November 23, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* ("CPP") disability pension on September 3, 2013. The Appellant claimed that she was disabled because of fibromyalgia, allergic contact dermatitis, adjustment disorder, cognitive impairment, fatigue, and unrefreshed sleep. The Respondent accepted the Appellant's claim and granted a CPP disability pension with a deemed disability date of June 2012 and a payment commencement date of October 2012. However, the Appellant requested a reconsideration of her claim, as she claimed that she had been disabled as of February 2011. The Respondent upheld its original decision upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[2] The previous General Division Tribunal Member elected to summarily dismiss the Appellant's appeal. The Appellant then appealed the summary dismissal to the Tribunal's Appeal Division. In a decision dated February 23, 2017, the Appeal Division allowed the appeal of the summary dismissal and referred the matter back to the General Division for a *de novo* hearing. The Appeal Division also asked that the matter be assigned to a different member of the General Division and that the previous decision of the General Division be removed from the record. These instructions have been followed and the current Tribunal Member has not seen the decision of the previous Tribunal Member.

[3] Given that the Respondent has already accepted the Appellant's disability under the CPP, the sole issue in this appeal is the deemed disability date. In turn, the deemed disability date will determine the payment commencement date.

[4] This appeal was heard by written "Questions and Answers" for the following reasons:

- a) The method of proceeding provides for the accommodations required by the parties or participants. In particular, the Appellant stated that she could not appear for an in-person hearing but might respond to written questions and answers.

[5] The Tribunal has decided that the Appellant is not eligible for a deemed disability date prior to June 2012, for the reasons set out below.

## **EVIDENCE**

[6] A considerable amount of documentary evidence has been filed, in addition to the evidence adduced through the “Written Questions & Answers” process. While all evidence has been considered, only the most relevant evidence is specifically referenced in this summary.

[7] The Appellant is currently 52 years old and lives in X, Alberta. She was most recently employed as a Collections Officer for the Canada Revenue Agency. Her last day of work was February 10, 2011. At that time, Dr. Stephen Bell (Family Physician) stated that she was totally disabled and estimated that it would be four months until she returned to work. However, she never did return to work and she ultimately filed a successful application for CPP disability benefits. In her application materials, she stated that she was no longer able to work because of her medical condition on February 11, 2011.

[8] Before she stopped working altogether, the Appellant’s allergic contact dermatitis had been accommodated through working at home. On May 11, 2011, she saw Dr. Scott Wilson (Neurology and Electromyography) for complaints of numbness, tingling, and concerns with her cognitive function. Dr. Wilson noted that that the cognitive complaints were non-specific: it had more to do with mental fatigue and difficulty with concentration and forgetfulness. Her nerve conduction studies were normal.

[9] On August 1, 2011, Dr. Bell stated that the Appellant was unable to work due to her muscle aches, fatigue, and severe concentration difficulties. These had prevented her from performing her basic work duties, even in an accommodated home work environment. Dr. Bell noted a diagnosis of fibromyalgia in October 2010: she was still awaiting a specialist appointment with Dr. Stein. She was about to begin an orientation class at a chronic pain clinic. Dr. Bell could not provide a return to work date. On November 1, 2011, Dr. Bell confirmed that she was still unable to work and would remain off for at least the next six months.

[10] On February 15, 2012, Dr. Y. Majeed (Chronic Pain Centre) saw the Appellant for her chronic pain. Dr. Majeed listed some factors aggravating her chronic pain. There was a

significant contribution from her children. Her 15-year-old son had ADHD and high needs: he wet his bed every day and would often wake her up in the middle of the night to prepare food when he was hungry. She also felt overwhelmed by her 12-year-old daughter and by managing tasks around the home: this included general maintenance, making food, and generally taking care of her children. In the recent past, her symptoms had disappeared when she was away from her children but quickly resumed when she returned home. She had been off work and “on disability” for a year: her symptoms had gotten somewhat better but had not totally gone away. She left work because of her body pain issues.

[11] Dr. Majeed noted that fatigue had always been present. The Appellant’s sleep was quite poor and unrestorative. She had hypothyroidism and was on thyroid replacement therapy. She had lost interest in activities that were once important to her. She felt guilty about what her physical symptoms had done to her relationship with her children. Her energy levels had greatly diminished over the past five to seven years. She felt her concentration levels had decreased dramatically. She said she was no longer able to multitask and felt as though she had some kind of brain injury. She felt she could not focus anymore and felt generally that she had burnt out over the last five years.

[12] Dr. Majeed found the Appellant’s symptoms to still be quite significant: they imposed a great deal of disability on her life. She appeared to be suffering from significant depression and this directly impacted her pain. In particular, her stressors at home exacerbated her pain. Further attendance at clinic group programs was suggested. She had already attended the Goals Group and the Explaining Pain Group: the Sleep Group and Relaxation Group were recommended. Dr. Majeed said that she would likely thrive in those groups because of her pleasant demeanour and motivation. A psychologist referral was going to be arranged as well.

[13] On March 15, 2012, Dr. Majeed reported that Cymbalta helped the Appellant’s mood and anxiety levels. Her chronic pain issues were still exacerbated by the multiple stressors at home. Her difficult 15-year-old son had ADHD and anxiety issues but was not ready to go for counselling and, as a result, she had to go out of her way to accommodate his needs. Dr. Majeed advised her to put herself first and take care of herself: she also had to accept that things will change for the better. Dr. Majeed thought the groups would be helpful for her and also

encouraged her to do regular exercises for 30-40 minutes each day. On June 14, 2012, Dr. Majeed noted that her son continued to wake her up most nights, although she had an overall improvement in pain and mood. The groups were very useful and she would continue with them.

[14] On October 10, 2012, Dr. Majeed said the Appellant seemed to be doing better. However, she had generalized body ache that she rated at 8/10. She also stopped taking Cymbalta, because it kept her from sleeping, and replaced it with Cipralex. Most of her symptoms were from the multiple stressors in her life. There had been some employment issues and she was to see her manager the next week. She was also going through divorce proceedings and had to go to court again in November. She found yoga classes at the Chronic Pain Centre to be useful. She also found the physiotherapist to be useful. She had learned good coping skills and employed pacing techniques. She was going to see the social worker and kinesiologist at the Chronic Pain Centre.

[15] In the written hearing, the Appellant was asked about the employment meeting and divorce proceedings. She said she had no recollection of the employment issue or the meeting with her employment manager. She also said that she did not attend court, nor had she retained a lawyer for this purpose. When asked about any other court appearances or representatives between February 20, 2011 and September 3, 2013, she simply answered “no court”.

[16] On March 2, 2013, Dr. Bell completed a Medical Practitioner’s Assessment, finding that the Appellant was unfit to work at any job duties. He said it was “unknown” when she might be capable of modified, alternate or full duties. In addition to her physical issues, he said that she had poor focus and difficulty with retaining, processing or remembering information. She took a long time to do her daily tasks. She had been unable to do her required work when she left her job and this had not changed.

[17] In connection with the Assessment performed by Dr. Bell, the Appellant had signed a Medical Assessment Consent Form on February 21, 2013. By signing the Consent Form, she confirmed that the reasons for the assessment had been fully explained to her and that personal information would be collected in the course of the assessment. She confirmed reading the text of the Consent Form or having it explained to her. She confirmed understanding the nature of the assessment and the reasons that her personal information would be collected and used by Dr.

Bell. She confirmed that she had given her consent for the assessment voluntarily and could withdraw her consent at any time. The Consent Form expired on August 20, 2013.

[18] On March 14, 2013, Dr. Majeed reported that the Appellant seemed to be under a lot of financial stress, as she was struggling with her disability insurance and non-payment by her ex-husband. Her pain increased when her stress was high, especially when talking to her insurance company. The benefits of medication, deep breathing, and yoga were discussed. She continued to see her physiotherapist and was pleased with the program.

[19] Although not filed with the Respondent until September 3, 2013, the Medical Report accompanying the Appellant's application materials was actually completed by Dr. Bell on April 7, 2013. He noted cognitive impairment, myalgias and fatigue that had slowly been developing since 2005. She had difficulty remembering or learning new tasks: it took her a long time to do ordinary tasks such as paying bills. The prognosis was poor for any substantial improvement.

[20] A lengthy assessment was performed by Dr. Eleanor Stein (Psychiatry and Psychotherapy) on April 22, 2013, with revisions on May 24, 2013. The Appellant's complaints included unrefreshing sleep, low energy, allergies/sensitivities, pain (increasing with stress and even minimal exertion), immune symptoms, cognitive symptoms, low blood pressure, word-processing difficulty, poor balance, poor appetite, and sensitivity to extreme temperatures.

[21] Dr. Stein recorded that the Appellant spent the evening helping her children with homework and preparing for the next day. The cognitive symptoms had been slowly worsening over time. She now had great difficulty with multitasking and paperwork took her much longer than before. She had trouble remembering where she put her lists and her brain "shut down" if there was too much light or noise. She lost concentration and would forget where she was driving or what she was doing. She would not read entire newspaper articles but would only skip around to get the gist of the story. The cognitive symptoms were exacerbated by stress, multiple sources of stimuli, or trying to solve more than one problem at a time.

[22] Although she initially said she was not coping well, the Appellant then told Dr. Stein that she was not coping too badly, considering that she had few supports and was dealing with her illness mostly by herself. Dr. Stein said that the Appellant interacted easily, had reasonable

recall of events, and was able to present her symptoms in an organized manner. Her assessment of her illness, the help she had received to date, and the advocacy she had done for herself all suggested unimpaired insight and judgment. Her cognitive function was grossly intact, and no abnormalities of form or content of thought were noted.

[23] Dr. Stein made an Axis I diagnosis of adjustment disorder with anxiety. The Appellant had Axis III diagnoses of hypothyroidism, inhalant allergies, chemical allergies, chronic fatigue syndrome, fibromyalgia, allergic contact dermatitis, and Raynaud's Syndrome. There were a number of psychosocial stressors, including her son's behaviour and bedwetting, financial stress, poor health, uncertainty about the future, and the upcoming court proceeding concerning her ex-husband's child support arrears. On Axis V, Dr. Stein set the General Assessment of Functioning (GAF) score at 50: her low energy and cognitive dysfunction limited her ability to work, socialize and manage the household. Dr. Stein found physical health to be her primary limiting symptom. Her energy level was rated at 50%.

[24] On June 23, 2013, Dr. Bell said the Appellant was unable to do any extended cognitive tasks: she had to space things out over days to complete the tasks necessary to run a household. She remained unable to handle the tasks of her previous job or any alternate employment.

[25] While the Appellant's application materials for CPP disability benefits were not filed with the Respondent until September 3, 2013, the Application itself was dated March 15, 2012 and the accompanying Questionnaire was dated April 12, 2012. She reported severe cognitive memory impairment, with failing long- and short-term memory. She had unrefreshing sleep and no energy. She provided a number of functional limitations, including remembering and concentrating. She had problems with lists and forgot to pay bills or to pick up grocery items. It took her an inordinate amount of time for basic daily tasks. She could not focus for long, as she got distracted or uncomfortable. She no longer read books and only skimmed articles. She had to reread things: she could not get her brain to concentrate and remember what she was doing.

[26] In the written hearing, the Appellant was asked about her completion of these documents. She confirmed that she completed both the Application and the Questionnaire herself. She started completing the Application in March 2012 and finished it on March 15, 2012. She started completing the Questionnaire in March or April of 2012 and finished it on April 12, 2012. She

also confirmed that she was primarily responsible for the care of her children between February 10, 2011 and September 3, 2013.

[27] In the written hearing, the Appellant was asked about her attendance at a number of treatment groups that were mentioned in her medical documentation. She provided a list showing that she attended “Orientation” (1 session on May 16, 2011), “Explaining Pain” (1 session on August 17, 2011), “Goals” (2 sessions on September 16 and 23, 2011), “Self-Management” (8 sessions between March 30 and May 25, 2012), “Nutrition” (2 sessions on April 24 and May 1, 2012), “Relaxation” (5 sessions between May 22 and June 26, 2012), “Tapping into Community” (1 session on November 2, 2012), “Understanding Social Be [sic]” (1 session on August 16, 2012), “Yoga” (7 sessions between October 2 and November 6, 2012), “Trigger Point” (4 sessions between November 14 and December 5, 2012), and “Sleep” (5 sessions between March 26 and April 23, 2013). She was asked what tasks she performed in these groups and why she stopped attending. She said she had no recollection of what she learned in any of these groups and did not provide any details on why she stopped attending.

[28] On November 28, 2013, Dr. Bell completed a Declaration of Incapacity to support the Appellant’s application for CPP disability benefits. He did not answer the first question: “Did the applicant’s condition make him/her incapable of forming or expressing the intention to make an application?” However, he did answer subsequent questions that could imply a positive response to that question. He said that the incapacity began on February 10, 2011 and was still ongoing. He said that the incapacity was caused by fibromyalgia and contact dermatitis with a chemical sensitivity adjustment reaction.

[29] On December 20, 2013, Dr. Stein reported that the Appellant had repeatedly complained about her cognitive function since her health problems began in 2005. Cognition was her primary health complaint and the symptom which most limited her ability to work and function on a day-to-day basis. In a cognitive test, she was in the low or very low range on all of the tests completed: these scores were significantly lower than expected for her level of education and career attainment. This most likely indicated that her health condition had negatively impacted her ability to think clearly and quickly. Dr. Stein noted that her last two job performance appraisals (in 2009 and 2010) identified several deficiencies, including an inability to work to a



deadline, an inability to prioritize files, and an inability to research and analyze assigned cases appropriately. These results could have been due to cognitive dysfunction.

[30] Dr. Stein found the Appellant's cognitive symptoms to be measurable and severe. While workplace accommodation of a decreased workload and increased time to complete tasks helped with simpler tasks, this did not help with the mental fatigue she had after cognitive tasks requiring concentration for one hour or more.

[31] On January 28, 2014, the Appellant wrote that she had severe memory and cognitive issues that left her unable to work. She continued to have these issues: they affected both her work and home life. It had taken more than two years to see Dr. Stein, who performed cognitive testing. It had been difficult to keep everything (papers, reports, application) in order.

[32] On November 25, 2015, Dr. Bell wrote a letter at the Appellant's request. He said that she had significant medical impairment of her ability to function cognitively since February 2011. He said that this would have interfered with her ability to complete or to process that she needed to complete her application for CPP disability benefits. He added that she had no real support person who could have completed her application for her or would have been aware that it could be done. On the same date, the Appellant wrote that she was incapable of forming the intention to apply earlier, due to cognitive deficiencies which preceded her intention. She also said that she could not form this intention before communicating.

[33] In a Hearing Information Form dated March 10, 2017, the Appellant indicated that the "Written Questions and Answers" format would be the only form of hearing in which she could participate. She would not be able to participate in a teleconference, videoconference, or in-person hearing, as her impairment related to cognition and processing information. She said an oral hearing would not be appropriate because she would have to analyze information, process it, and answer "on the spot". On June 30, 2017, Dr. Bell wrote that the Appellant was unable to attend an in-person hearing because of her medical restrictions. However, he added that she "may respond in writing to any questions".

[34] In a letter dated September 6, 2017, the Tribunal confirmed its decision to conduct the hearing by way of written questions and answers rather than one of the oral hearing formats. A

list of questions for the Appellant was included; her answers were received by the Tribunal on October 3, 2017. In a letter dated October 6, 2017, the Respondent was given an opportunity to reply to the answers supplied by the Appellant on October 3, 2017. However, the Respondent did not file a reply.

## **SUBMISSIONS**

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

- a) She has been disabled since she stopped working on February 10, 2011, and had been severely restricted for a considerable period of time before that;
- b) Her deemed disability date ought to be adjusted from June 2012 to February 2011, as her cognitive difficulties left her incapable of applying earlier than her actual application date of September 3, 2013; and
- c) The Tribunal ought to take the 2004 Pension Appeals Board decision of *Weisberg v. Canada (Minister of Social Development)*, CP 21943, into account: she knew that some impairment was taking place, but was “unsure of forming and making a decision to apply for CPP” disability benefits before she actually did.

[36] Although the Respondent filed submissions during the previous consideration of this matter by the General Division, the Respondent did not file submissions on this occasion.

## **ANALYSIS**

[37] This case is solely concerned with the maximum retroactivity of the Appellant’s benefits. The retroactivity of benefits is based on the application date for CPP disability benefits. In this case, the Appellant has not disputed that her application for CPP disability benefits was filed on September 3, 2013. When the maximum retroactivity provisions of the CPP are applied to that application date, this results in a deemed disability date of June 2012 and a payment start date of October 2012. This matches the Respondent’s determination in this case.

[38] However, the Appellant argues that her application was delayed because of her cognitive limitations. She submits that the calculation of her deemed date of disability ought to consider

these cognitive limitations. If her deemed date of disability were earlier, she would be entitled to an earlier payment commencement date and would therefore receive more retroactive benefits than she has received thus far.

[39] Paragraph 42(2)(b) of the *Canada Pension Plan* confirms that a person shall not be deemed to be disabled more than 15 months before the making of an application. An application is deemed to have been made when it is received by the Respondent. This has been repeatedly affirmed in decisions such as the Pension Appeals Board's 2004 decision in *Galay v. Minister of Social Development*, CP 21768. While decisions of the Pension Appeals Board are not binding on the Tribunal, they may be of persuasive value and the Tribunal sees no reason not to follow this interpretation of the legislation. Section 69 of the *Canada Pension Plan* further confirms that a disability pension is payable from the fourth month after the applicant became disabled. These principles were followed by the Respondent when it determined that the Appellant's deemed disability date was June 2012 and her payment commencement date was October 2012.

[40] The Pension Appeals Board's 2000 decision in *Proulx v. Minister of Human Resources Development*, CP 07859, notes that a single exception exists for calculating the deemed disability and payment commencement dates. This exception applies when the applicant was mentally incapacitated and unable to form or express the intention to make an application prior to the actual date of the application. This exception is set out in section 60 of the *Canada Pension Plan* and the Appellant argues that it ought to apply in this case.

*Do the Section 60 Incapacity Provisions Apply?*

[41] The two key provisions in incapacity cases are ss. 60(8) and 60(9) of the *Canada Pension Plan*. As noted in the *Weisberg* decision, subsection 60(8) applies when a claimant has suffered a permanent incapacity and the application is made by someone else on her behalf. Subsection 60(9) applies to an applicant who has suffered incapacity but has since recovered. As the Appellant herself completed and submitted the application materials, s. 60(9) is the applicable incapacity provision in this case. She cannot maintain that her incapacity continued beyond the application date when she did the very thing she claimed to be incapable of doing.

[42] The precise application of subsection 60(9) depends on when the alleged incapacity commenced and ended. The Appellant continued working until February 10, 2011 and claimed she could no longer work because of her medical condition on February 11, 2011. In his November 28, 2013 Statement of Incapacity, Dr. Bell stated that her incapacity began on February 10, 2011. While there are concerns with the Statement of Incapacity that will be discussed below, the Tribunal will nonetheless consider the potential interpretation most favourable to the Appellant: she may have become incapable under s. 60(9) on February 10, 2011 and that such incapacity lasted continuously (as required by s. 60(10)) until she ceased to be incapable at some point on or before September 3, 2013, when her application was received.

[43] The key element of subsection 60(9) is the criteria for incapacity. A claimant must have “been incapable of forming or expressing an intention to make an application before the day on which the application was actually made” [emphasis added]. This subsection refers only to forming or expressing an intention to apply: it does not refer to being able to complete or submit an application. Further guidance in interpreting this subsection may be found in recent Federal Court of Appeal decisions. While Pension Appeals Board decisions are merely of persuasive value, Federal Court of Appeal decisions are binding on the Tribunal.

[44] In *Canada (Attorney General) v. Danielson*, 2008 FCA 78, the Federal Court of Appeal confirmed that section 60 does not require consideration of the capacity to make, prepare, process, or complete an application for disability benefits, but only the capacity of forming or expressing an intention to make an application. The activities of a claimant during the period between the claimed commencement date and the application date may be relevant to cast light on her continuous incapacity to form or express the requisite intention. In *Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86, the Federal Court of Appeal stated that 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 a claimant.

[45] The Federal Court of Appeal’s subsequent decision in *Slater v. Canada (Attorney General)*, 2008 FCA 375, states that an analysis under s. 60(9) required looking at both the medical evidence and the relevant activities of the claimant which cast light on the capacity of the person concerned to form or express an intention during the relevant period. These binding

decisions make it clear that other evidence, including the Appellant's relevant activities, must be considered in addition to Dr. Bell's November 28, 2013 Statement of Incapacity.

[46] The Statement of Incapacity is notable for Dr. Bell's failure to answer the vital first question ("Did the applicant's condition make him/her incapable of forming or expressing the intention to make an application?"). As Dr. Bell did answer subsequent questions that could imply a positive response to that question, his failure to answer the initial question is not in itself fatal to the Statement. More worrisome, however, is his statement that the incapacity began on February 10, 2011 and was still ongoing. Dr. Bell completed the Statement of Incapacity on November 28, 2013 but the Appellant had filed her application by September 3, 2013. This is, of course, inconsistent with an ongoing incapacity to form or express the intention to make an application. As a result, the Tribunal is unable to assign any weight to Dr. Bell's statement that the incapacity was ongoing.

[47] For the same reasons, the Tribunal has some difficulty with Dr. Bell's November 25, 2015 letter, in which he stated that the Appellant had significant medical impairment of her ability to function cognitively since February 2011. He said this would have interfered with her ability to complete or to process that she needed to complete her application for CPP disability benefits. However, as with the Statement of Incapacity, this is contradicted by the fact that the Appellant had completed her application more than two years before. In fact, as will be discussed in more detail below, she had completed her Application form by March 15, 2012. While Dr. Bell added that she did not have a support person who could have completed her application for her or would have been aware that it could be done, the lack of a support person or representative is not relevant under s. 60 of the *Canada Pension Plan*. The only relevant consideration is her own capacity, not the existence of a support network.

[48] At best, the Tribunal might be able to rely on the start date of the incapacity provided by Dr. Bell in each of the above two documents. However, in accordance with the Federal Court of Appeal decisions outlined above, the Tribunal will have to examine the other medical evidence and the relevant activities of the Appellant to determine whether incapacity existed at February 10, 2011 and, if so, how long it lasted.

[49] While the Respondent received the application materials on September 3, 2013, the evidence reveals that they were actually initiated and completed a considerable time before that. The Appellant completed both the Application and the associated Questionnaire herself. She completed the Application on March 15, 2012 and the Questionnaire on April 12, 2012. In order to establish the kind of incapacity contemplated by s. 60(9) of the *Canada Pension Plan*, she would have to establish that she was incapable of forming or expressing the intention to make an application. However, by March 15, 2012, she had done much more than form or express the intention to apply: she had actually completed the required Application form. As such, by March 15, 2012, it would have been logically impossible for the Appellant to be incapable under s. 60(9). She had already demonstrated the necessary capacity by that date. It is irrelevant that she did not go through with actually filing the application materials until much later.

[50] Other evidence from March 15, 2012 through September 3, 2013 also shows a capacity beyond that contemplated in s. 60(9). Examples include the October 10, 2012 references to meeting with her employment manager and an upcoming court appearance. At the same time, she reported attending physiotherapy and multiple classes at the Chronic Pain Centre, as well as upcoming visits with a social worker and kinesiologist. She had learned good coping skills and was employing pacing techniques. She signed a Medical Assessment Consent Form on February 21, 2013, confirming that she understood the nature of the assessment and the reasons that her personal information would be collected and used by Dr. Bell. She had voluntarily consented and could have withdrawn her consent at any time: the consent was valid until August 20, 2013. On March 14, 2013, she was struggling with both her disability insurance and non-payment by her ex-husband but continued to talk directly to her insurance company.

[51] Furthermore, on May 24, 2013, Dr. Stein recorded that she spent evenings helping her children with homework and preparing for the next day. Dr. Stein also said that she interacted easily, had reasonable recall of events, and presented her symptoms in an organized manner. Her assessment of her illness, the help she had received to date, and her self-advocacy all suggested unimpaired insight and judgment. Dr. Stein found her cognitive function grossly intact: there were no abnormalities of form or content of thought. All of these reinforce a basic level of functioning and affirm that she was at least capable of forming or expressing the intention to make a CPP disability application.

[52] The best that the Appellant could do would be to establish incapacity under s. 60(9) for a period between February 10, 2011 and a point in time no later than March 15, 2012. This requires a review of the activities undertaken by the Appellant during this period of time.

[53] Most notable is the Appellant's confirmation that she was primarily responsible for the care of her children between February 10, 2011 and September 3, 2013. More specifically, on February 15, 2012, Dr. Majeed noted that her children were quite demanding. Her 15-year-old son had ADHD, wet his bed every day, and often woke her up in the middle of the night to prepare food when he was hungry. She also felt overwhelmed by her 12-year-old daughter and by managing tasks around the home: this included general maintenance, making food, and generally taking care of her children.

[54] The Tribunal places significant weight on the evidence relating to the Appellant's parenting obligations. While the Tribunal is not suggesting that this was easy for her, her parental responsibilities alone would require a level of functioning that would at least permit her to form or express an intention to make an application for disability benefits (even if she did not actually commence the paperwork until March 15, 2012). Indeed, her recognition of the demands placed upon her is in itself quite telling. In addition, she attended group treatment sessions on May 16, 2011, August 17, 2011, September 16, 2011 and September 23, 2011. She clearly would have formed the intention to attend these sessions.

[55] The non-binding decision of the Tribunal's Appeal Division in *M. H. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 152 is also instructive. In denying that appeal, the Tribunal considered the claimant's ability to make decisions on her own behalf, make decisions for her healthcare, and her ability to care for her children. The Appellant in this case cared for her children throughout the relevant period. There is also no evidence that any medical professional questioned the Appellant's ability to make decisions on her own behalf and/or for her healthcare. In fact, Dr. Majeed's February 15, 2012 report commented on her very pleasant demeanour and motivation to get better. Dr. Majeed believed that this would allow her to thrive in additional group programs at the Chronic Pain Centre. Her continued participation in treatment by Dr. Bell and Dr. Majeed also points to the capacity to form an intention to participate in activities relating to her disability.

[56] Having considered the evidence, particularly the Appellant's continuing parental responsibilities, the Tribunal is not persuaded that she was incapable of forming or expressing an intention to make an application for CPP disability benefits after she stopped working on February 10, 2011. She may have been unaware of such benefits prior to March 15, 2012. It is also possible that she may have been aware of them but unable to complete the required paperwork. Neither case equates to being incapable of forming or expressing an intention to apply, particularly in light of her significant parenting responsibilities.

[57] The non-binding principle advanced by the Appellant from the *Weisberg* decision also does not assist her. In that case, the claimant did not have had any cognitive recognition that he was disabled. He was aware that something was wrong but was incapable of recognizing that it was a disabling condition. The Board found that his incapacity to appreciate his own deficits, even when told what they were, rendered him incapable of forming the intent to apply for a disability pension. However, in this case, the Appellant did recognize that she was disabled. She obtained notes from her family doctor on August 1, 2011 and November 1, 2011 attesting to her inability to work. On February 15, 2012, she told Dr. Majeed that she had been "on disability" for a year. This awareness continued in the future, as she indicated on March 14, 2013 that she was struggling with her disability insurance.

[58] The Tribunal also considered the other medical evidence in the file. There are frequent references to cognitive dysfunction before the Appellant's application was filed and the Tribunal is not suggesting that the Appellant's cognitive function was close to an optimum level. However, decreased cognitive function is not the test set out in s. 60(9). The test is whether she was incapable of forming or expressing an intention to make an application for CPP disability benefits. Dr. Bell's Statement of Incapacity is flawed, for the reasons set out above, and the other evidence fails to reasonably support a finding of incapacity under s. 60(9).

[59] In this regard, the Tribunal sees a parallel with the non-binding 2006 decision of the Pension Appeals Board in *Nenshi v. Minister of Social Development*, CP 22251. In *Nenshi*, the Board denied the appeal even though medical reports showed that mental illness made it difficult for the claimant to make important decisions. Her memory was affected and she was unable to focus or concentrate on any task. Although she was clearly disabled under the CPP, she always



knew that she was ill and received treatment for her illness. She may not have been able to deal with the physical act of completing the forms, but she could still form and express an intention to apply. While it is not necessary to rely on the decision in *Nenshi*, the Tribunal notes that it is quite similar to the Appellant's situation in the present case.

## **CONCLUSION**

[60] The Tribunal finds that the Appellant has not established an incapacity that permits her to take advantage of the provisions of s. 60(9) of the *Canada Pension Plan*. As such, her application date remains September 3, 2013 and there is no legal basis on which to establish a deemed disability prior to June 2012. The payment commencement date remains October 2012.

[61] The appeal is dismissed.

Pierre Vanderhout  
Member, General Division - Income Security