



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. J. v. Minister of Employment and Social Development*, 2018 SST 458

Tribunal File Number: GP-17-1092

BETWEEN:

D. J.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Kelly Temkin

HEARD ON: April 9, 2018

DATE OF DECISION: May 22, 2018

DECISION AND REASONS

DECISION

[1] The Claimant has established that he was incapable of forming an intention to apply for CPP disability as of May 2016. He is eligible for a Canada Pension Plan (CPP) disability pension with payment commencing February 2016.

OVERVIEW

[2] The Claimant was sixty years old when he began to receive a retirement pension in October 2015. He did not apply for a disability pension until January 2017. He last worked as a research and development manager in September 2013 when he was forced to leave his job due to symptoms of liver disease, although he was not diagnosed at the time. The Minister does not deny he is disabled but takes the position that he is not eligible for a CPP disability pension because he applied for a CPP disability pension more than 15 months after he started to receive a CPP retirement pension. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant submits that he is eligible to apply for CPP disability because he was incapable of expressing the intention to apply for CPP disability between September 2013 and July 2017. He also claims that he was disabled as of September 2013 and ongoing.

ISSUES

1. Was the Claimant incapable of forming and expressing an intention to make an application for a disability benefit sooner than January 2017?
2. If so, did the symptoms of his liver disease result in his being incapable of pursuing a substantially gainful occupation the month before he began his retirement pension, September 2015?
3. If so, is his condition long continued and of indefinite duration?

ANALYSIS

The Claimant must not be in receipt of retirement benefits

[4] The only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled before the month the retirement pension first became payable. The earliest a person can be “deemed” disabled is fifteen months before the disability pension application is received by the Minister.

[5] The practical effect of this is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

[6] Unless the incapacity exception applies, the Claimant is not eligible for CPP disability. He began to receive a CPP retirement pension in October 2015 and applied for CPP disability in January 2017, which was approximately eighteen months after he started to receive the retirement pension. Because he applied for CPP disability in January 2017, the earliest date that he could be deemed disabled is October 2015, which is when his retirement pension started.

The incapacity exception

[7] The CPP provides an exception to the 15 months’ time limit for applying for CPP disability after initially receiving a CPP retirement pension.

[8] The exception allows for persons who lack the capacity to apply for benefits to have the date of their application backdated to a time when they became incapable of forming or expressing the intention to apply.¹ To satisfy the test for incapacity an applicant must establish on the balance of probabilities that he or she lacked the capacity to form or express an intention to apply for the benefit.

[9] The capacity to form the intention to apply for benefits is similar in kind to the capacity to form an intention with respect to other choices in life.² Capacity is to be considered in light of the ordinary meaning of the term and determined on the basis of the medical evidence and on the individual’s activities.³

¹ section 60 of the CPP

² Sedrak.v.Minister of Social Development, 2008 FCA 86

³ Attorney General of Canada v. Danielson, 2008 FCA 78

[10] The wording is precise and focused and it does not require consideration of the capacity to make, prepare, process, or complete an application for disability benefits, but only consideration of the capacity, quite simply, of forming or expressing an intention to make an application.

[11] I should look at both the medical evidence and the relevant activities of the Appellant between the claimed date of commencement of disability and the date of application which cast light on his capacity during that period of time to form and express the intent to apply.

[12] In this case, the period of potential incapacity to be considered is between October 2015 (when the Claimant first started to receive a CPP retirement pension) and January 2017 (when he applied for CPP disability).

The Claimant was incapable of forming or expressing an intention to apply

[13] The Minister's position is that it acknowledges the Claimant had a serious medical condition requiring a liver transplant and he has not been able to work; however, despite the opinion of his family doctor his actions demonstrate capacity:

- There is no indication the Claimant required a Power of Attorney (POA) to make decisions on his behalf,
- He signed his CPP disability application; consent to communicate information to an authorized person; Reconsideration letter; and Notice of Appeal-Income Security Form; retirement application
- He was able to consent for various medical investigations

[14] I reviewed the medical evidence on file as well as the Claimant's activities in determining whether or not the Claimant was incapable of "forming or expressing an intention" to make a disability application. I have also considered the oral testimony of the Claimant and his wife in reaching my decision. I have found their evidence to be thoughtful and straightforward. I accept their evidence.

[15] I found the following to be most significant with respect to the alleged period of incapacity October 2015 and ongoing:

- The Appellant gives his wife Power of Attorney in July 2007.
- The family doctor, Dr. Abbott writes that the Claimant's incapacity began on September 3, 2015 and is ongoing. She writes that the hepatic encephalopathy worsened by May 2016 to overt encephalopathy and the Claimant was incapable of forming or expressing the intention to apply for CPP disability. He was not capable of complex thinking at the time and the doctor did not believe he could understand the implications of his choice. His incapacity continued until after his liver transplant on June 29, 2017. She writes that the Claimant was ultimately diagnosed with cirrhosis of the liver secondary to non-alcoholic fatty liver disease in the spring of 2015. By this point in time, he was suffering from significant liver failure that would have clouded his thinking. The family doctor writes that patients with grade 1 encephalopathy have subtle cognitive deficits and can often appear normal without formal testing. However patients can experience changes in behaviour, mild confusion, slurred speech and disordered sleep at this stage. The family doctor writes that the Claimant was clearly experiencing symptoms as early as 2013. He went on to develop overt hepatic encephalopathy in 2016 but he was experiencing a milder disease early on.
- The Claimant looked for less stressful work and possibly setting up his own business in the summer of 2015, until his health declined to the point when this is no longer possible. He testified he was "incapacitated" during this time.
- Following discussion with the Claimant, his wife applied on his behalf for a CPP retirement benefit in October 2015. She acted alone when she applied for a disability benefit on his behalf in January 2017. She handled all correspondence regarding his CPP file and the Claimant signed his signature on the forms.
- The gastroenterologist states that the Claimant provided written consent to undergo an endoscopy in November 2015. The doctor stated the Claimant was orientated to time,

place, and person in November 2016. The Claimant signed consent for a paracentesis in March 2017.

- In a CPP medical form completed by Dr. Teriaky, gastroenterologist, on December 13, 2016, the doctor confirms the Claimant's medical condition has limited his quality of life and ability to work.
- The Medical Director of Liver Transplantation, Dr. Marrotta, writes the Claimant developed hepatic encephalopathy in May 2016 which confirmed his inability to work as he was not able to think clearly or make sound decisions.
- The Claimant was seen by various specialists at London Health Sciences Centre since May 12, 2015. His liver disease of NASH and Alpha 1 antitrypsin has prevented him from working in any capacity and he had had various appointments and procedures in the past couple of years to manage his symptoms of liver failure.
- The Claimant's wife writes in October 2017, that from May 2016 until June 2017, a month after his liver transplant, the Claimant was totally incapacitated.
- The Claimant's son writes in October 2017, that his father stayed with him from July 2016 to May 2017. During this time he lacked the ability to make decisions for himself and required constant care.

[16] The Supreme Court has accepted the notion of restricted incapacity for specific areas.⁴ I am satisfied that if the Claimant did consent to certain medical procedures this is not determinative of the issue before me. I accept the testimony of the Claimant's spouse that the discussions with the gastroenterologist were brief and for this reason have given more weight to the opinion of the family doctor that patients with grade 1 encephalopathy often appear normal without formal testing. I am satisfied the POA was not required as the Claimant's wife attended every medical appointment with her spouse and established a rapport with his treating physicians.

⁴ Williams v. MSD (April 11, 2005), CP 21005 (PAB). This case is not binding, but I find it persuasive

[17] I am satisfied that the Claimant's signature on the CPP forms is not indicative of capacity. In fact, the opposite. The Claimant strikes me as a person who would prefer to complete forms and communicate on his own behalf if he were capable.

[18] The medical evidence is not consistent as to exactly when the Claimant lacks capacity. While the family doctor writes his incapacity began in September 2015, there is a distinction to be made between the medical evidence supporting a cognitive decline and incapacity. In the months that followed his application for a retirement pension, the Claimant's illness progressed and his condition deteriorated to the point of overt encephalopathy. The medical opinions converge regarding incapacity in May 2016. I find that between May 2016 and July 29, 2017, the month following his liver transplant, the Claimant was incapable of forming or expressing the intention to make a CPP disability application. Therefore he is considered to have applied in May 2016 which is within the 15 month period.

[19] I must now consider if his disability was severe and prolonged before September 2015.

The Claimant had a severe and prolonged disability in May 2015

[20] Since the Claimant started to receive an early retirement pension in October 2015 he must prove on the balance of probabilities that he became disabled by September 30, 2015. 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 is incapable regularly of pursuing any substantially gainful occupation; not just if he is incapable of performing his usual job. A disability is prolonged if it is likely to be long continued and of indefinite duration.

[21] I have found that the symptoms of his liver disease resulted in his being incapable regularly of pursuing a substantially gainful occupation by May 2015.

[22] The Minister acknowledges the Claimant had a serious medical condition requiring a liver transplant and he has not been able to work. I accept this admission. The Minister does not dispute the Claimant is disabled and the evidence proves he is.

[23] I have also given significant weight to the opinion of Medical Director of Liver Transplantation that due to his symptoms of liver failure the Claimant was not able to work in

any capacity since May 2015. I also have given weight to the opinion of the long-standing family doctor that the Claimant was experiencing cognitive impairment due to hepatic encephalopathy in September 2015.

[24] Although the Claimant's education, work history and transferable skills would notionally work in his favour for pursuing employment, his medical condition precludes him pursuing gainful employment. He is absolutely not capable of working due to his medical condition.

[25] There is no expectation of recovery noted in the medical record and the Claimant's testimony confirms that he continues to experience health challenges related to his liver transplant.

[26] Given the Claimant's age and the severity of the medical condition requiring the extreme measure of an organ transplant, I am of the view that it would be unreasonable to think he would recover sufficiently within a reasonable timeframe to return to work.

[27] I find, on the balance of probabilities, the Claimant had a severe and prolonged disability in accordance with the CPP criteria in May 2015 when his symptoms of liver failure deteriorated to the point he was not able to pursue a substantially gainful occupation.

Payment of the disability pension

[28] With the Claimant's incapacity to form or express the intention to apply, I have deemed the disability application to have been made in May 2016. The Claimant can be paid disability benefits in September 2015, after a legislated four month waiting period.⁵

CONCLUSION

[29] The appeal is allowed.

Kelly Temkin
Member, General Division - Income Security

⁵ section 69 of the CPP