



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. L. v. Minister of Employment and Social Development*. 2018 SST 472

Tribunal File Number: GP-17-1141

BETWEEN:

K. L.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Kelly Temkin

Claimant represented by: J. L.

Date of decision: May 30, 2018

DECISION AND REASONS

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Claimant was 60 years old when she began to receive a CPP retirement pension in October 2013. She did not apply for a disability pension until July 2016. She last worked as a support co-ordinator when she stopped in January 2006 due to an injury/operation and permanent impairment of both hands. The Minister takes the position that she is not eligible for a disability pension because she applied for a disability pension more than 15 months after she started to receive a retirement pension. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant submits that she is eligible to apply for CPP disability because she was incapable of expressing the intention to apply for the disability pension between 2006 and July 2016. She also claims that she was disabled as of 2006 and ongoing.

PRELIMINARY ISSUE

[4] I acknowledge receipt of GD23 and note it is similar to previous correspondence. I accept the document and have shared GD23 with the Minister but not asked the Minister for any response.

ISSUES

1. Was the Claimant incapable of forming and expressing an intention to make an application for a disability benefit sooner than July 2016?
2. If so, did her medical conditions; left wrist pain, Post-Traumatic Stress Syndrome, Chronic Pain Syndrome, Anxiety and Depression, result in her being incapable regularly of pursuing any substantially gainful occupation the month before she began her retirement pension, September 2013?

3. If so, is her condition long continued and of indefinite duration?

ANALYSIS

The Claimant must not be in receipt of a retirement pension

[5] 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.¹

[6] 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.

[7] Unless the incapacity exception applies, the Claimant is not eligible for CPP disability. She began to receive a CPP retirement pension in October 2013 and applied for CPP disability in July 2016, which was approximately 32 months after she started to receive the retirement pension. Because she applied for CPP disability in July 2016, the earliest date that she could be deemed disabled is April 2015, which is after her retirement pension started.

The incapacity exception

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

[9] 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.² 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.

¹ subsection 66.1(1.1) of the CPP

² section 60 of the CPP

[10] 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.³ 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.⁴

[11] 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.

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

[13] In this case, the period of potential incapacity to be considered is between 2006 (when the Claimant states she was incapacitated) and July 2016 (the date she applied for disability

The Claimant was not incapable of forming or expressing an intention to apply

[14] The Claimant's position is that she was unable to express the intent to apply for disability benefits from 2006 onward.

[15] The Minister's position is the cumulative information does not substantiate incapacity as defined within the CPP:

- There is no indication she required a Power of Attorney (POA) to make decisions on her behalf
- She was able to consent for various medical investigations and procedures (surgery in 2006, Lidocaine injections in 2007), attend medical appointments independently and request further consultations on her own behalf (requested referral to a psychologist in 2007).

³ Sedrak.v.Minister of Social Development, 2008 FCA 86

⁴ Attorney General of Canada v. Danielson, 2008 FCA 78

- She was in contact with WSIB with regard to an application for benefits through their agency during the time frame she claimed to be unable to apply for CPP Disability benefits.
- She signed the applications for both CPP Retirement benefits (in 2013) and CPP disability benefits (in 2016).

[16] 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.

[17] In May 2017, Dr. D. Ho, Family Physician, completed the Declaration of Incapacity on the Claimant's behalf noting she had been incapacitated since 2006 and this was ongoing. In answer to "Does the applicant's condition make him/her incapable of forming or expressing an intent to make an application?" he answered "no" and went on to state that she was taking analgesics and had multiple stress dealing with disabling life routine and the WSIB. She may have had suboptimal mental function from time to time.⁵

[18] The Claimant writes that she has been heavily medicated since 2006 and her ability to reason at times and make clear decisions is impacted.⁶ She has received poor advice throughout of applying for CPP from WSIB and Service Canada.

[19] I have given significant weight to Dr. Ho's statement that the Claimant was not incapable of forming or expressing an intention to make an application. The doctor stated that she may have suboptimal mental function from time to time; however, her activities demonstrate that she was capable of consenting for various medical investigations and procedures in 2006 and 2007⁷, attend medical appointments independently and request further consultations on her own behalf.⁸ She was in contact with WSIB about an application for benefits through their agency during the time frame she claimed to be unable to apply for CPP Disability benefits. She also applied for both CPP Retirement pension (2013) and CPP disability benefits (2016). Dr. Ho's statement that

⁵ GD6-2

⁶ GD2-12

⁷ Surgery in 2006 and Lidocaine injections in 2007

⁸ GD2-46

her incapacity is not continuous is supported by the Claimant's view that her ability to reason and make clear decisions is impacted from time to time.

[20] To qualify under the incapacity provision, she must have been incapable of forming or expressing the intent to apply for a benefit and the incapacity must have been for a continuous period of time. The intent to apply for benefits is not significantly different than the capacity to form an intention with respect to the other choices she had made during the timeframe of claimed incapacity. I find that the Claimant has not demonstrated incapacity within the meaning of the CPP.

[21] As the Claimant cannot satisfy the incapacity exception, I do not need to consider if her disability was severe and prolonged by September 2013.

[22] The Claimant asked that the Minister investigate whether there was an error made by departmental staff. On May 2, 2018 the Minister denied that there was erroneous advice or administrative error and the Claimant was given 30 days to appeal this decision to the Federal Court. I acknowledge the Claimant's frustration that the Tribunal does not have jurisdiction to determine allegations of erroneous advice or administrative error on the part of the Minister. The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. While I am sympathetic to the Claimant's situation, I cannot use the principles of equity or consider extenuating circumstances to allow the Claimant to cancel the retirement pension in favour of a disability pension.

CONCLUSION

[23] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

[24] The Appeal is dismissed.

Kelly Temkin
Member, General Division - Income Security