



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *P. P. v Minister of Employment and Social Development*, 2018 SST 1224

Tribunal File Number: GP-17-301

BETWEEN:

P. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: John F. L. Rose

Claimant represented by: K. P.

Teleconference hearing on: September 11, 2018

Date of decision: October 25, 2018

DECISION

[1] The Claimant is not entitled to have his Canada Pension Plan (CPP) disability pension considered as having been made at an earlier date.

OVERVIEW

[2] The Claimant last worked as a recreational technician until June 20, 2014 when he stopped due to a stroke. The Minister received the Claimant's application for the disability pension on April 26, 2016. The Minister allowed the application with an effective date of payment of May 2015, which was the maximum retroactivity allowed under the CPP. The Claimant disagreed, stating that he was incapable of making his application earlier. The Minister denied on reconsideration and the Claimant appeals to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. In order for me to consider the Claimant's application to have been made at an earlier date, he must show that he was incapable of forming or expressing the intent to make an application on his own behalf on or before the day the application was actually made.

PRELIMINARY MATTERS

[4] The Claimant did not attend the hearing. He was represented by his spouse, who also gave evidence. She advised that the Claimant was sleeping in preparation for treatment. He had recently been diagnosed with melanoma and was dealing with the recent loss of their son. She wished to proceed without him notwithstanding that it would be unusual for the Claimant not to give evidence on his own behalf. She stated that she intended to give evidence of her direct knowledge of the circumstances surrounding his incapacity. As she was not a "legal" representative, in the sense that she was a lawyer or paralegal, I allowed her to give oral testimony at the hearing.

ISSUE(S)

[5] Did the Claimant's conditions result in the Claimant being incapable of forming or expressing the intent to make an application on his own behalf on or before the day the application was actually made?

[6] If so, did the Claimant have a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation prior to May 2016 and was that disability also long continued and of indefinite duration.

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged¹. A person is considered to have a severe disability if 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. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

[8] If an individual was incapable of applying for CPP benefits sooner, under the incapacity provision², the decision maker can deem an application to have been received earlier. This means that the payments can start earlier. *Incapable* for the purposes of this provision means incapable of forming or expressing an intention to make an application³.

Severe disability

[9] The Minister does not dispute that the Claimant suffered a severe and prolonged disability and in fact granted benefits to him effective May 2016. The primary issue is whether that date can be backdated as a result of applying the incapacity provision.

Incapacity

[10] The definitions of incapacity and disability are different under the CPP. The Claimant can have a severe and prolonged disability, but still not be incapacitated with respect to making an application. 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 life⁴. The Claimant submits that he

¹ Paragraph 42(2)(a) *Canada Pension Plan*

² Subsection 60(9) *Canada Pension Plan*

³ Paragraph 60(9)(a) *Canada Pension Plan*

⁴ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

was unable to form or express the intention to apply for a CPP disability pension from June 22, 2014 to April 21, 2016 when the application was made. The Minister disputes that.

The Claimant was incapable of forming or expressing an intention to apply for a CPP disability pension immediately following his stroke in June 2014.

[11] Dr. John McConnell, the Claimant's family physician, completed the Declaration of Incapacity on May 24, 2016⁵. He gives a start date of June 22, 2014 but states the end date is unknown and that the medical condition causing the incapacity was acute leukemia and "CVA at that time as well". He notes that the Claimant was on life support at the time of the diagnosis, and following recovery family circumstances were very testing and he was unable to make the application. I note that Dr. McConnell states he was not treating the Claimant in June 2014. The Claimant's spouse explained that he was on life support for two weeks and in the summer following the stroke, he was in and out of hospital but made some progress. I am satisfied the Claimant meets the definition of incapacity in the CPP because he was on life support for two weeks following his stroke and would not have been able to form or express an intention to apply for a pension.

The Claimant was not incapable of forming or expressing an intention to apply for a CPP disability pension for the entire period preceding his application.

[12] In a letter signed by the Claimant on July 27, 2016, he stated that there was a discussion about applying for CPP disability benefit when he was still in hospital in 2014, but because he was on long-term disability it would not be worth it as it would be deducted from those benefits. The letter stated that he later found out that he would still have been able to receive the child's portion. His spouse told me that she had written that letter and he signed it. She testified that the discussion about applying was more between her and the social worker at the time and paperwork was started which she thought was submitted to CPP. She stated that the Claimant did not really take part in those conversations and she had heard making the application would not benefit him so it was not pursued further.

[13] The Claimant signed the letter but acknowledges that it was "typed and written" by his wife. As I did not hear directly from the Claimant, I must presume that he was aware of and

⁵ GD2-50

agreed with the contents of the letter which establishes that, in fact, shortly after the initial period of incapacity he considered whether to apply for benefits but did not.

[14] The Claimant's letter also discloses that he was able to apply for a reinstatement of his driver's licence, although it was not successful. This was also supported by an April 2015 letter from Dr. Carmen Tuchak, a specialist in Physical Medicine and Rehabilitation, who noted that the Claimant stated that he was not sure at that time whether he would be able to return to work but that he had applied for reinstatement of his licence. In my view this supports his ability to form the requisite intention to make applications.

[15] K. P. told me that the family circumstances referred to by Dr. McConnell were, in part, a result of their daughter becoming very ill in Calgary in early 2015. She stated that they moved the family out of the province to be with her, with no home or income. The stress was very high and it was difficult to make applications for assistance or to qualify. The family issues were also noted in Dr. Tuchak's letter. It was clearly a very difficult time for this family, however, those circumstances do not provide a basis for me to allow this appeal. While it may have been more difficult for him to physically make the application, it does not mean that he was incapable of forming or expressing an intention to apply for the benefit.

[16] 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. Section 60 of the CPP is precise and focused and it does not require consideration of the capacity to make, prepare, process or complete an application for benefits, but only the capacity of forming or expressing an intention to make an application⁶.

[17] I accept the Claimant's spouse's testimony that he was suffering from some cognitive and mobility issues following the stroke, and continues to do so. This is amply supported by the medical evidence and is the basis for his entitlement to benefits. However, those difficulties do not appear to be sufficient for him to meet the definition of incapacity under the CPP up until the date of the application. A Neuropsychological Assessment Report completed in May 2015⁷ outlined some of problems with attention, multitasking and memory but also reported he was

⁶ Canada (Attorney General) v. Danielson, 2008 FCA 78

⁷ GD2-11

within normal limits in many areas. This included reasoning/problem solving, auditory attention/working memory and some other aspects of memory which I find is consistent with the balance of medical evidence on file. The Claimant's spouse also testified that while she made most of the decisions following his stroke, there were no powers of attorney signed nor did he ever give up his ability to make medical decisions for himself. Again, this demonstrates a level of functioning sufficient to form or express the intention to make an application for benefits.

The Claimant is not entitled to have his application considered at an earlier date.

[18] The onus is on the Claimant to show, on a balance of probabilities, that he was incapable of forming or expressing an intention to apply for a CPP disability pension prior to April 26, 2016 when the application was received. I am not satisfied that he has done so. His medical condition prevented him from applying for a few weeks following his stroke, but after that time I find he considered making an application and decided not to do so. In addition, while he suffered from some cognitive issues, they were not such that he was incapable of forming or expressing an intention to apply for CPP. It appears that at least some of the delay in filing was also due to the family's unfortunate circumstances following his illness, which is not something I can consider.

CONCLUSION

[19] The appeal is dismissed.

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