



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. S. v Minister of Employment and Social Development*, 2018 SST 1347

Tribunal File Number: GP-17-441

BETWEEN:

E. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: M. S.

Teleconference hearing on: July 25, 2018

Date of decision: December 14, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of January 2014.

OVERVIEW

[2] The Claimant was born in 1953. He began receiving a CPP retirement pension in January 2014. In April 2016, he applied to have the retirement pension switched to a disability pension. The Minister received the Claimant's application for the disability pension on April 29, 2016. The Minister denied the application initially and on reconsideration because the Claimant applied too late to switch his retirement pension for a disability pension. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant alleged that he suffered from semantic variant primary progressive aphasia, which is a neurological condition that could lead an individual to lose their ability to speak, write, read, and comprehend written and spoken language. He stated that this condition made him incapable of applying any earlier for the disability pension.

PRELIMINARY MATTER

[4] I held a teleconference hearing on July 25, 2018.

[5] On August 8, 2018, I sent correspondence to the parties advising that it would be inappropriate to issue a decision following the hearing because of concerns over procedural fairness. I had decided not to proceed with summary dismissal in this case because of a potential incapacity argument. However, the Minister did not provide any submissions on the issue of incapacity and whether the Claimant had a severe and prolonged disability if incapacity was established. The hearing evidence was obtained through the Claimant's wife because the Claimant's medical condition made it extremely difficult for him to understand other people and to communicate. The Claimant obtained a legal representative only one day before the hearing. The Claimant's wife stated that the Claimant was incapacitated in 2013, but the Tribunal had no medical records for that time period. I requested that the Claimant provide medical records from 2013 and onwards that provided evidence related to his incapacity and his medical condition. I

requested that these records and written submissions be provided on or before September 4, 2018. I also requested submissions from the Respondent on or before October 4, 2018.¹

[6] The Tribunal received a letter from the Claimant's legal representative on August 23, 2018 requesting an extension of time to September 21, 2018 to obtain medical records.²

[7] On August 28, 2018, I granted the Claimant's request for an extension of time to obtain medical records to September 21, 2018.³

[8] The Tribunal records confirm that the Claimant's legal representative received my August 28, 2018 correspondence granting her an extension of time to obtain medical records. However, the Tribunal was not provided with further medical records. There has been no communication from the legal representative explaining why the medical records were not obtained by September 21, 2018.

[9] I am now prepared to make my decision based on the available evidence.

ISSUES

[10] Was the Claimant incapable of forming or expressing an intention to make an application for a disability benefit any time before April 29, 2016?

[11] If so, did his medical condition result in him being incapable regularly of pursuing any substantially gainful occupation the month before he began receiving his retirement pension, December 2013?

[12] If so, is his medical condition long continued and of indefinite duration.

¹ GD6-1-2

² GD7

³ GD8

ANALYSIS

The Claimant must not be in receipt of a retirement pension

[13] The only way a retirement pension can be cancelled in favor of a disability pension 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 15 months before the disability pension application is received by the Minister.⁴

[14] The practical effect of this is that the CPP does not allow for the cancellation of a retirement pension in favor of the disability pension where the disability application is made 15 months after the retirement pension started to be paid.

[15] Unless the incapacity exception applies, the Claimant is not eligible for CPP disability. He began to receive a CPP retirement pension in January 2014 and applied for CPP disability in April 2016, which was approximately 27 months after he started to receive the retirement pension. Put another way, because he applied for CPP disability in April 2016, the earliest date that he could be deemed disabled is January 2015, which is after his retirement pension started. The Claimant must be deemed disabled before January 2014 to be able to cancel his retirement pension for a disability pension.

The incapacity exception

[16] To satisfy the test for incapacity a claimant must establish on a balance of probabilities that he or she lacked the capacity to form or express an intention to apply for the benefit.⁵ 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.⁶

[17] 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,

⁴ Subsection 66.1(1.1) *Canada Pension Plan*

⁵ Section 60 *Canada Pension Plan*

⁶ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

process or complete an application for benefits but only the capacity of forming or expressing an intention to make an application.⁷

[18] I should look at both medical evidence and the relevant activities of the Claimant between the date he claims he became incapable of applying and the date he actually applied for the disability benefit which cast light on his capacity during that period of time to form and express the intent to apply.⁸ Section 60 of the CPP also requires that claimants demonstrate that they were continuously incapable of forming or expressing an intention to make a CPP disability application during the entire period of the alleged incapacity.⁹

[19] In this case, the period of incapacity to be considered is between September 2013 (when the Claimant alleges that his incapacity began) and April 2016 (the date he applied for the disability pension).

The Claimant proved that he was incapable of forming or expressing an intention to make an application for a disability benefit as of September 2013

[20] The Claimant's wife in a letter to the Minister dated August 29, 2016, stated that the Claimant began experiencing health issues in or around 2013. He began having problems completing his work tasks. He had difficulty communicating with customers. He ceased operating his X business in September 2013. The Claimant's wife stated that they elected to receive an early CPP retirement pension. She confirmed that the Claimant began receiving a retirement pension in January 2014. She stated that they tried to obtain a medical diagnosis for the Claimant. He was not diagnosed with semantic variant primary progressive aphasia until September 2015. She stated that it was impossible for the Claimant to apply for CPP disability within the 15 month period after receiving his retirement pension because he did not have documentary medical evidence to support his application.¹⁰

[21] The Claimant's wife testified she noticed in 2013 that the Claimant could not communicate with clients. He had a hard time speaking with them. He could not recall names and he was repeating phrases constantly. He began working less before he stopped business

⁷ *Canada (Attorney General) v. Danielson*, 2008 FCA 78

⁸ *Slater v. Canada (Attorney General)*, 2008 FCA 375

⁹ *Flaig v. Canada (Attorney General)*, 2017 FC 531

¹⁰ GD1-8-9

operations in September 2013. The Claimant's family physician recommended that the Claimant see a neurologist. The Claimant saw Dr. D. Djordjevic, Neurologist in May 2013. She diagnosed the Claimant with a form of aphasia. The Claimant's wife thought that he might have Alzheimer's disease. The Claimant saw another specialist in September 2013, Dr. G. Marotta. Dr. Marotta did not believe that he had Alzheimer's. The Claimant was eventually diagnosed with semantic variant progressive aphasia in September 2015 by Dr. C. Tartaglia, Neurologist.

[22] The Claimant's wife testified that the Claimant failed cognitive tests. He was able to dress himself in 2013, but he could not pick out his own clothes. The Claimant would not eat in 2013, unless she put the food out in front of him. She began guiding him through shaving in 2014. He was showering on his own in 2013, but she had to begin telling him to shower in 2014. The Claimant was doing some housework in 2013, but he would not cut the grass or garden. He could no longer remember how to fix the sink if it was plugged. The Claimant was driving in 2013. However, near the end of 2015, he went out for a coffee and he kept driving until he ran out of gas. His driver's licence was suspended after this episode. The Claimant was also no longer capable of taking care of his finances. She was the one who made the decision for the Claimant to apply for a retirement pension. She filled out his application forms for a retirement pension and the Claimant signed the form. She decided not to apply for a disability pension because she did not have a diagnosis from a doctor. The Claimant was taking medications on his own in 2013, but she started giving him medications in 2015. His condition is getting worse with time. She completed the Claimant's application for a disability pension. The Claimant simply signed the form.

[23] The medical evidence shows that the Claimant saw Dr. Tartaglia on April 2, 2015. He was accompanied by his wife and brother. They advised that the Claimant began having problems with language in 2012, but that his other cognitive functions were spared. Dr. Tartaglia noted that the Claimant's language was markedly impaired. He had significant difficulty understanding any of her questions. Neuropsychological testing was done, but he was very limited in performing tests because of significant difficulty with comprehension. She was of the opinion that the Claimant had a history of progressive language deficits that were limiting his ability to function. She felt that the Claimant's family was underestimating the extent of his symptoms. She was concerned about the Claimant still driving, and she asked the family to have

him taken for a driving assessment. Dr. Tartaglia was of the opinion that the Claimant had a primary progressive aphasia.¹¹

[24] A brain MRI taken on April 27, 2015 showed marked atrophy of the left frontal lobe.¹²

[25] Dr. Tartaglia saw the Claimant again on September 13, 2015. She noted that the Claimant's memory was not an issue. He was having increasing difficulty speaking. The Claimant continued to meet up with friends for coffee and he visited his mother. He was doing some chores around the house, but his wife was managing the household. Dr. Tartaglia noted that the Claimant did not get lost. She was of the opinion that his primary progressive aphasia was quite severe.¹³

[26] Dr. Tartaglia completed a Medical Report on April 13, 2016 to the Minister. She stated that the Claimant had a four year history of progressive language impairment with an inability to speak and also a significant limitation in comprehension.¹⁴

[27] I have the Claimant's wife's testimony that the Claimant had significant impairments in 2013. I am concerned that there are no medical records in the file prior to April 2015 and I requested previous medical records that unfortunately were not provided. However, I am satisfied based on the hearing evidence and the medical records that the Claimant was incapable of forming or expressing an intention to make an application for a disability benefit as of September 2013 when he stopped working and that his incapacity has been continuous since then.

[28] Even though I do not have any medical records prior to April 2015, the atrophy shown in the April 2015 MRI would not likely have suddenly appeared. In fact, Dr. Tartaglia referenced a June 2013 head MRI that showed marked atrophy of the left anterior temporal lobe, as well as the left orbital frontal area.

[29] The Claimant did extremely poorly on the tests administered by Dr. Tartaglia in April 2015, again it is more likely than not that these poor test results would not have suddenly

¹¹ GD2-54-57

¹² GD2-59

¹³ GD2-51

¹⁴ GD2-43

appeared, but rather were because of longstanding cognitive problems. Dr. Tartaglia also noted in her report to the Minister that the Claimant has a four-year history of progressive language impairment with an inability to speak and significant limitation in comprehension.

[30] I also found the Claimant's wife's testimony to be persuasive. I am satisfied that the Claimant was incapable of forming or expressing an intention to apply for a disability benefit as of September 2013. I accept her evidence that the Claimant had been able to perform activities on his own in 2013, such as eating, showering and dressing. However, the Claimant performed these activities at the direction of his wife. I accept that the Claimant was incapable of making decisions on his own as of September 2013. Even though the Claimant continued to drive into 2015, it was evident that he should not have been doing so. Dr. Tartaglia expressed concerns about the Claimant driving when she first saw him in April 2015.

The Claimant had a severe disability as of September 2013

[31] If the Claimant proves that he had incapacity under the CPP, he must also establish on a balance of probabilities that he became disabled under the CPP on before his Minimum Qualifying Period (MQP). The Claimant's MQP is December 31, 2013, which is the month before he began receiving his retirement pension.

[32] Disability is defined under the CPP as a physical or mental disability that is severe and prolonged¹⁵. 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 likely to result in death. A person must prove on a balance of probabilities that their disability meets both parts of the test, which means that if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

[33] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It's not a question of whether a person is unable to perform their regular job, but the person's inability to perform any substantially gainful work¹⁶.

¹⁵ Paragraph 42(2)(a) *Canada Pension Plan*

¹⁶ *Klabouch v. Canada (A.G.)*, 2008 FCA 33 (CanLII)

[34] I am satisfied that the evidence shows that the Claimant was unable to perform any substantially gainful work as of September 2013, when he finally stopped working.

[35] I am satisfied that the Claimant's medical condition led to impairments in the areas of speaking, memory, concentration, and driving. I am also satisfied that the Claimant's ability to perform his activities of daily living were significantly impaired because of his medical condition.

[36] The medical evidence supports a finding of a severe disability by September 2013. Although the Claimant did not see Dr. Tartaglia until April 2015, she referenced a June 2013 MRI of the head that showed marked atrophy of the left anterior temporal lobe, as well as the left orbital frontal area. I accept that the Claimant had significant cognitive deficits that led to an inability to work as of September 2013. I also accept the Claimant's wife's evidence that the Claimant was unable to work because the medical evidence corroborates her hearing evidence.

[37] I must also assess the severe part of the test in a real world context.¹⁷ This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Claimant was 60 years old in 2013. He had worked as a self-employed plumber for more than 30 years. I find that his neurological condition was so severe at the time of his MQP that he could not work in any occupation. I accept his wife's evidence that he was unable to pick out his own clothes by the end of 2013. An individual in such a state cannot work in any occupation in a real world context.

[38] I am also satisfied that the Claimant pursued treatment. The Claimant's wife took him to see medical specialists in 2013, but a firm diagnosis was not obtained until April 2015. He has tried speech therapy, but Dr. Tartaglia stated that such therapy is not usually effective in treating the Claimant's medical condition.¹⁸

¹⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248 (CanLII)

¹⁸ GD2-45

Prolonged Disability

[39] I find that the Claimant has proven on a balance of probabilities that he has a prolonged disability that is likely to be long continued and of indefinite duration or is likely to result in death.

[40] The Claimant suffers from a neurological condition for which there is no cure. Dr. Tartaglia in her Medical Report to the Minister confirmed that the Claimant suffers from a progressive neurodegenerative disease.¹⁹

CONCLUSION

[41] The Claimant was incapable of forming or expressing an intention to apply for a CPP disability pension continuously from September 2013.

[42] Since I have found the Claimant was incapable, I can deem an earlier application date for the disability pension.²⁰ As required by the legislation, the deemed application date in this case would be December 2013. The Claimant had a severe and prolonged disability in September 2013, when he stopped working. Payments start four months after the date of disability, as of January 2014.

[43] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security

¹⁹ GD2-46

²⁰ Subsection 60(9) *Canada Pension Plan*