



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v D. M.*, 2018 SST 1308

Tribunal File Number: AD-18-238

BETWEEN:

Minister of Employment and Social Development

Appellant

and

D. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 28, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the decision that the General Division should have given is now given.

OVERVIEW

[2] D. M. (Claimant) was honourably discharged from the Canadian Armed Forces in 2003 after many years of service. He applied for a Canada Pension Plan disability pension in 2008 and claimed that he was disabled by mental and physical illnesses resulting from his service. The Minister, which now operates as the Minister of Employment and Social Development, refused the application. The Claimant applied again for the disability pension in October 2014 and claimed that he was disabled by the same conditions. The Minister granted this application with maximum retroactive payment to July 2013.

[3] The Claimant appealed the Minister's decision regarding when payment of the disability pension should begin to the Tribunal. He argued that payment should begin as of 2008, when he first applied for the pension, and that he was incapable of forming or expressing an intention to apply for the pension before he did so in 2014. The Tribunal's General Division allowed the appeal and decided that the Claimant was incapable continuously from 2003 onward.

[4] The appeal from this decision is allowed because the General Division made an error in law. The General Division applied the incorrect legal test for incapacity. The Claimant's claim for further retroactive payment is dismissed.

ISSUE

[5] Did the General Division make an error in law when it decided that the Claimant was incapable of forming or expressing an intention to apply for the disability pension?

ANALYSIS

[6] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that can be considered. They are

that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.¹ The Minister argues that the General Division made an error in law because it applied the incorrect legal test for incapacity in this case.

[7] The *Canada Pension Plan* (CPP) states that a person cannot be deemed to be disabled more than 15 months before the Minister has received the application for the pension.² It also provides an exception to this, if the claimant had been incapable of forming or expressing an intention to make an application for a continuous period before the application was made.³ This exception to the maximum retroactivity rule has been described as narrow and focused.⁴ It is a difficult legal test to meet.

[8] To decide whether a claimant was incapable of forming or expressing an intention to make an application for a disability pension, the decision-maker must examine medical evidence and the claimant's relevant activities.⁵ The Claimant's psychiatrist testified before the General Division. She is an accomplished psychiatrist with many years of experience treating members of the military, and first responders. She testified that the Claimant first had contact with her clinic in 2016. She diagnosed him with several significant mental illnesses and was of the opinion that these were likely present for several years prior to the Claimant's discharge from the Canadian Armed Forces. She testified that the Claimant was probably incapable of completing paperwork required for complex tasks and that the incapacity was probably present years earlier.⁶ The psychiatrist also testified that, when the Claimant applied for the disability pension in 2008, he was acting in response to a threat from his long-term disability insurer; he had no intention to apply for the pension, but he was pressured and threatened to do so.⁷

[9] Regarding the Claimant's other relevant activities, the psychiatrist testified that his capacity in 2008—when he applied for the pension—was different than when he applied in 2014

¹ DESD Act, s 58(1).

² CPP, s 42(2)(b).

³ CPP, ss 60(8) to 60(10).

⁴ *Canada (Attorney General) v Danielson*, 2008 FCA 78.

⁵ *Ibid.*; *Sedrak v Minister of Social Development*, 2008 FCA 86.

⁶ General Division decision at para 38.

⁷ General Division decision at para 40.

because of his mental illnesses and the changes in the Department of Veterans Affairs' approach to veterans over time.⁸ The psychiatrist further testified that the Claimant's organizing and filing of 10 years of income tax returns with the assistance of an accountant and his application to have his driver's licence reinstated could also be seen as responses to perceived threats against his well-being or the well-being of his family.⁹

[10] The General Division considered this evidence, along with the written record and the Claimant's testimony. It considered the CPP and relevant decisions from the Federal Court of Appeal. The General Division concluded that the law does not preclude a different interpretation of section 60 of the CPP based on the evidence before the decision-maker. This evidence distinguished between the capacity of a person to act of their own volition (acting on their own will) and the capacity to act only in response to a threat of dire consequences (acting on the will of another).¹⁰ The General Division decided that the Claimant was incapable of forming or expressing an intention to apply for the disability pension under the CPP from 2003 onward because he acted only in response to perceived threats to his or his family's well-being and he acted on the will of another, not on his own will.

[11] The General Division erred in law. The incapacity provision of the CPP is a narrow exception to the maximum retroactivity rule. The provision does not require a decision-maker to consider a claimant's motivation for making or not making a decision. It is not required to consider whether a claimant is pressured into making an application for the pension or any other task. The legal test is simply whether the claimant is incapable of forming or expressing an intention to apply. By incorporating the additional element of the Claimant's motivation for making decisions, the General Division applied the wrong legal test to the facts before it.

[12] The appeal must be allowed for these reasons.

⁸ *Ibid.* at para 42.

⁹ *Ibid.* at para 43 to 45.

¹⁰ *Ibid.* at para 64.

REMEDY

[13] The DESD Act sets out what remedies the Appeal Division can give on an appeal.¹¹ It is appropriate that I give the decision that the General Division should have given. The DESD Act gives the Appeal Division legal authority to make the decision that the General Division should have made, and to decide questions of law or fact necessary for the disposition of an appeal.¹² The facts are not in dispute. The parties agree on what legislative provisions and case law are relevant. In addition, the Claimant last applied for a Canada Pension Plan disability pension in 2014, so a significant amount of time has passed.

[14] The evidence is straightforward, and it includes the following:

- a) The Claimant was discharged from the Canadian Armed Forces in 2003.
- b) The Claimant's minimum qualifying period (the date by which the Claimant must be found to be disabled to receive the pension) ended December 31, 2006.
- c) The Claimant has many significant mental illnesses, including post-traumatic stress disorder, anxiety, and depression. He has additional conditions, including traumatic brain injury, severe sleep apnea, and substance addiction that is in remission.
- d) The Claimant applied to have his driver's licence reinstated in 2007.
- e) The Claimant applied for a Canada Pension Plan disability pension in 2008 and again in 2014.
- f) The Claimant agreed to and received treatment for his conditions after his honourable discharge from the Canadian Armed Forces.
- g) The Claimant has been able to drive his family members to and from appointments and activities.
- h) The Claimant hired an accountant, organized documents, and filed income tax returns for 10 years with the accountant's assistance.

¹¹ DESD Act, s 59.

¹² DESD Act . 64(1)

- i) The Claimant tried to start and operate a home-based business three times but without success.

[15] The legal issue to be decided is whether the Claimant was continuously incapable of forming or expressing an intention to apply for the disability pension before he did so in October 2014. This is a narrow exception to the maximum retroactivity rule under the CPP. Both medical evidence and the Claimant's activities must be considered.¹³ There is no question that the Claimant has several significant medical conditions that have persisted despite his efforts to overcome them. However, I am not persuaded that he was continuously incapable of forming or expressing an intention to apply for the pension before he did so in 2014. The Claimant made significant decisions during the period of claimed incapacity, including having his driver's licence reinstated, consenting to treatment and pursuing this treatment, hiring an accountant and filing many years of tax returns, and making the first application for the disability pension in 2008. This clearly demonstrates that the Claimant was capable of forming and expressing an intention to do a lot of things, including applying for the disability pension. The Federal Court of Appeal teaches that while a claimant's activities are to be considered, their motivation for engaging in them is not. Therefore, whether the Claimant was acting on his own will or in response to the will of another is not a relevant consideration.

[16] There was no evidence that the Claimant was not able to make medical decisions for himself, that any treatment provider required that someone else make decisions on the Claimant's behalf, or that anyone acted for him under a power of attorney.

[17] The Claimant's psychiatrist testified that it was likely that the Department of Veterans Affairs guided the Claimant through the process when he applied for the disability pension in 2008. I place very little weight on this evidence. She was not treating the Claimant at that time, and so this evidence is speculation. Similarly, I place little weight on her evidence regarding the Claimant's motivation to have his driver's licence reinstated or why he took steps to have his income tax returns filed.

¹³ *Danielson supra* note 4; *Sedrak supra* note 5.

CONCLUSION

[18] I applaud the Claimant for his perseverance and his efforts to provide for himself and his family despite very significant medical challenges. He has a very sympathetic case. The Tribunal does not have any legal authority, however, to make decisions based on extenuating circumstances or compassion.

[19] The appeal must be allowed. The Claimant's claim for further retroactive payment of the disability pension is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	November 21, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. M., Respondent Casey Dorey, Counsel for the Respondent Jean-François Cham, Counsel for the Appellant