



Citation: *GL v Minister of Employment and Social Development*, 2019 SST 1744

Tribunal File Number: GP-19-283

BETWEEN:

G. L.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant: Self-represented

Minister: Represented by Jessica Spafford

Pre-hearing telephone conference on: April 23, 2019

Date of decision: May 13, 2019

DECISION

[1] The Claimant is not eligible for a *Canada Pension Plan* (CPP) disability pension.

OVERVIEW

[2] The Claimant started to receive an early CPP retirement pension in September 2016.¹ In December 2017, he applied for a CPP disability pension.² He stated that he unable able to work because of several conditions including brain damage caused by a stroke, diabetes, low energy, and neck, back and head pain.³ The Minister denied the application both initially and on reconsideration.⁴ The Claimant appealed the reconsideration decision to the Social Security Tribunal. In his appeal submissions, the Claimant stated that he was in the process of gathering medical information with respect to his lack of capacity to apply for disability benefits prior to December 2017.⁵

[3] On October 25, 2018, the General Division summarily dismissed the appeal on the basis that it had no reasonable chance of success. The Claimant appealed and on February 7, 2019 the Appeal Division allowed the appeal on the basis that the General Division erred in law by failing to consider whether the Claimant was incapable of forming or expressing an intention to make the application. The appeal was referred back to the General Division for reconsideration.

Pre-Hearing Conference

[4] On March 27, 2019, I conducted a pre-hearing conference to discuss, amongst other matters, the issues involved in an incapacity claim, the nature of the evidence and medical documentation required for such a claim, and the Claimant's potential eligibility for the post-retirement disability benefit that came into effect on January 1, 2019.

[5] I reviewed the test required to establish incapacity to apply for a benefit under the CPP: an inability to form or express the intent to apply for the benefit. I also discussed the need for

¹ GD2-28

² GD2-20

³ GD2-75

⁴ GD2-10 and 17

⁵ GD4-3

medical evidence to establish incapacity. The Claimant stated that we were just “going back and forth” and he did not intend to file any further medical evidence or documents.

[6] Ms. Spafford stated the Minister had reviewed the file and determined that the Claimant would likely be eligible for the new post-retirement benefit with payment starting as of May 2019; however, the Claimant would have to indicate that he wished to apply for the benefit. The Claimant stated that he would not apply for the new benefit, the Minister should “just forget it”, and he wished to pursue his remedy in court so a jury could decide. He stated, “I said no...that’s it...stop it...send a letter so I can go to court.”

ISSUES

1. Is the Claimant eligible for a CPP disability pension even though he started to receive his retirement benefit in September 2016 and he did not apply for CPP disability until December 2017?
2. Was the Claimant incapable of forming or expressing an intention to apply for a CPP disability pension prior to December 2017?

FORM OF HEARING

[7] I decided this appeal on the basis of the documents and submissions filed for the following reasons:

- A further hearing was not required because the Claimant indicated he did not intend to file any further medical evidence or documents.
- There are no gaps in the information in the file or need for clarification.
- This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ANALYSIS

[8] To qualify for the disability pension, a Claimant must not be in receipt of a CPP retirement pension. The Claimant began to receive a CPP retirement pension in September 2016. His application for a CPP disability application was made in December 2017.

[9] The Claimant is not eligible for the CPP disability pension because he cannot receive both a CPP disability benefit and retirement benefit at the same time. The earliest date that he could receive the disability benefit is September 2016; however, he was in receipt of a CPP retirement benefit at that time and he cannot cancel his retirement benefit.⁶

[10] The Claimant suffered a stroke in May 2017. In July 2017, his daughter took CPP disability forms to the hospital patient relations adviser. Unfortunately, the forms were not completed until December 2017, because of a delay in obtaining a medical report.⁷

[11] I am sympathetic to the Claimant's position but I am bound by the CPP provisions. I am not empowered to exercise any form of equitable power in respect of the appeals coming before me. The Tribunal is a statutory decision-maker and I am required to interpret and apply the provisions as they are set out in the CPP. I have no authority to make exceptions to the provisions of the CPP nor can I render decisions based of fairness, compassion, or extenuating circumstances.

There is no evidence to establish that the Claimant lacked capacity to form or express the intent to apply for CPP disability

[12] To satisfy the test for incapacity the Claimant must establish that it is more likely than not that he lacked the capacity to form or express an intention to apply for the benefit before December 2017.⁸

[13] The capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices that present themselves to a Claimant. The word capacity should be given its ordinary meaning.⁹

[14] The meaning is precise and focused. It does not mean that I consider the capacity to make, prepare, process, or complete an application for disability benefits. I must consider only the capacity, quite simply, of forming or expressing an intention to make an application.¹⁰

⁶ See attached schedule of applicable CPP provisions.

⁷ AD1-5 and 13

⁸ Subsections 60 (8) to 60(11) of the CPP

⁹ *Sedrak v Canada (Social Development)*, 2008 FCA 86

¹⁰ *Canada (Attorney General) v Danielson*, 2008 FCA 78

[15] Although the Claimant was severely disabled after his May 2017 stroke, there is no evidence that he lacked the capacity to form or express an intention to apply for CPP disability. In his disability questionnaire, the Claimant stated that his memory was “not too bad...average” and that his concentration was average. He does not indicate any cognitive limitations.¹¹ On both May 24, 2017 and November 8, 2017 Dr. Ghavanini, the Claimant’s treating neurologist, stated that the Claimant was “awake, alert, and oriented.”¹²

CONCLUSION

[16] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security

¹¹ GD2-76

¹² GD2-45 and 46

Applicable CPP Provisions

Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, a Claimant must not be in receipt of a CPP retirement pension.

Paragraph 42(2)(b) of the CPP provides that a person cannot be deemed disabled more than fifteen months before the Minister received the application for a disability pension.

The requirement that a Claimant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension.

There is an exception to this provision and it is found in section 66.1 of the CPP. Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

If a person does not cancel a benefit within six months after payment of the benefit has started, 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 (subsection 66.1(1.1) of the CPP).

Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Minister.

The effect of these provisions 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.