



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *V. K. v Minister of Employment and Social Development*, 2019 SST 1631

Tribunal File Number: GP-18-1102

BETWEEN:

**V. K.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Susan Smith

Claimant represented by: Loretta Edlund

Teleconference hearing on: May 7, 2019

Date of decision: May 28, 2019

## **DECISION**

[1] The Claimant has not met the burden of proof in demonstrating he was incapable of forming or expressing the intention to apply for a Canada Pension Plan (CPP) disability pension before January 2017, being the month he actually applied, and therefore I dismiss his appeal. These reasons explain why.

## **OVERVIEW**

[2] The Claimant is sixty-three years old. He was in a car accident on October 11, 2014, in which he sustained significant physical injury and a concussion. He suffers from post-concussion syndrome that interfered with his ability to achieve restorative sleep for nearly two years. He is well educated and enjoyed a high degree of success in many aspects of life prior to his accident, particularly his ability to earn a living. He applied for a CPP disability pension because the symptoms of his physical and cognitive limitations since his car accident make him incapable regularly of pursuing any substantially gainful occupation. He stopped working in October 2014 and since then has remained disabled from all work.

[3] When the Minister received the Claimant's application for the CPP disability pension on January 24, 2017, they approved his application with the full 15 months of retroactive benefit allowable under the legislation, with a deemed date of disability of October 2015 and payments beginning February 2016.<sup>1</sup> The Claimant submitted he was incapable of applying for a disability pension earlier because of incapacity and he requested a greater period of retroactive benefit to October 2014. The Minister denied the Claimant's request for additional retroactive eligibility to receive benefits and maintained the decision on reconsideration. The Claimant appealed to the Social Security Tribunal.

## **ISSUES**

[4] Was the Claimant incapable of forming or expressing an intention to make an application on his own behalf prior to the day his application was actually made? If so, when did the Claimant become incapable?

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<sup>1</sup> GD2-25-27

## ANALYSIS

[5] The rules regarding the date a disability began or, in the case of a late application, the deemed date a disability began; determine the date payment begins, so they are strict. Once the date of disability is established, the earliest payment can begin is four months after the date of disability. The Claimant applied for a disability pension late so he has a deemed date of disability. The deemed date of disability cannot be more than fifteen months before the date of application unless the person was incapable of forming or expressing the intention to apply sooner. The exception to the rule requires that the applicant fall squarely within the definition of incapacity.

### **The incapacity exception**

[6] The exception allows the Minister to deem the Claimant's CPP disability application made at an earlier time if the Minister is satisfied that the person had been incapable of forming or expressing an intention to make an application on his own behalf. The period of incapacity must be a continuous period.<sup>2</sup>

[7] 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. Nothing in the CPP requires the word "capacity" imply other than its ordinary meaning.<sup>3</sup> The medical evidence and the activities of the claimant between the date of claimed disability and the date of application, which cast light on the persons capacity to form or express the intent, must be examined. The intent to make an application for CPP benefits is no different from the intent to make other choices that present themselves to an applicant.<sup>4</sup>

[8] The wording used in 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 disability benefits, but only the capacity of forming or expressing an intention to make an application. Subsections 60(8) and (9) taken together allow for persons who lack the capacity to apply to either have an application made on their behalf, or to make the application themselves when they

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<sup>2</sup> Subsections 60(8) & (10) of the Canada Pension Plan

<sup>3</sup> *Sedrak v. Minister of Social Development*, 2008 FCA 86

<sup>4</sup> *Slater v. Canada* 2008 FCA 375

reacquire the capacity to do so. The activities of a claimant during the relevant period may cast light on his continuous incapacity to form or express and the requisite intention.<sup>5</sup>

[9] To determine if the Claimant's symptoms of traumatic injury resulted in incapacity within the meaning of the CPP I must consider all of the evidence. I must look at both the medical evidence and the Claimant's activities between the claimed onset of incapacity and the date of application.

**The Claimant's activities during the relevant period do not support lack of capacity to form or express an intent to apply for CPP disability**

[10] 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 sooner.

[11] I find that the evidence, including the testimony at the hearing, does not support the Claimant was incapable of forming or expressing the intention to make an application. I considered the medical evidence, the submissions, the testimony, and the relevant activities of the Claimant between his claimed date of disability and the date of his application, which cast light on his capacity during that period, of forming and expressing an intention.

[12] The Claimant's representative submitted that the Claimant suffered severe sleep deprivation for nearly two years following his accident and that sleep deprivation alone would render the Claimant incapable of forming or expressing an intention. I accept that the Claimant's symptoms of post-concussion syndrome and his sleep deprivation significantly diminished his cognitive abilities. However, I find that his limitations fall short of rendering him incapable of forming or expressing an intention.

[13] The Claimant testified that he has no memory of his activities following the accident. He does recall that he required assistance from others because his severe physical injuries made him unable to move without assistance. He recalls that he relied on friends to help him with nearly all activities of daily living. He also recalls that he lived alone. His friends that helped him out

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<sup>5</sup> *Canada v. Danielson*, 2008 FCA 78

attended on a daily basis but he spent the night alone in his own home most of the time. He recalled his friends sometimes stayed the night but not always and not frequently.

[14] The Claimant participated in a number of activities that I consider relevant in assessing his incapacity. He compiled a detailed list of his limitations on June 13, 2015 that he provided to his family physician.<sup>6</sup> Eight months after his accident the Claimant was able to recall the following in writing his list of limitations:

- he had not been to the gym a single time; he had lost muscle mass and strength;
- he still had to elevate his leg; he lost half a foot to foot in his jumping ability;
- he lost interest in reading;
- he lacked interest in sex;
- he experienced mood swings;
- he became overwhelmed in public places, etc.

He made the decision to attempt to drive in 2015 because he thought he was capable. He became panicky and over whelmed so he recognized that driving was a bad decision and he does not drive.

**The Medical reports do not support the Claimant was incapable of forming or expressing an intention to apply for CPP disability sooner**

[15] The Claimant attended two independent medical examinations (IME). His representative accompanied him to one examination and he attended one alone. At both IME, he participated in the interview. He acknowledged he understood the purpose and consented to the interview. He provided information and answered questions.

[16] Dr. Chue, in August 2015, interviewed the Claimant extensively and reached several conclusions. His opinion was the Claimant had a GAF of 60. His impairment was primarily due to his persistent/residual physical symptoms. He was not currently capable of returning to his

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<sup>6</sup> GD1-32 & GD2-96

previous occupation but should be capable of a return with reduced hours in the future. He demonstrated “an appropriate degree of motivation regarding recovery, but on his own terms”.<sup>7</sup>

[17] In his interview with Dr. Chue, the Claimant explained that the design of the car saved him from worse injuries. He told the doctor that he had taken an interest in car design. He described the injuries he sustained as well as the injuries his companion sustained. He reported some symptoms that had improved over time but some had not. He reported a reduction in his IQ that he claimed was previously very high. He reported he received brain wave optimization with a therapist and he had purchased cold lasers to administer treatment to himself. He reported he had educated himself of the use of lasers.<sup>8</sup>

[18] I consider Dr. Chue’s evaluation compelling because he reached his conclusions based on what the Claimant independently told him regarding the accident, his symptoms, and the treatment the Claimant had chosen to pursue. Dr. Chue recorded the details of the Claimant’s story as told to him by the Claimant. He made no mention of any difficulty the Claimant demonstrated in providing the information offered. I find it unlikely that a doctor with Dr. Chue’s credentials would have based his opinions on the information provided by a person he found incapable of forming or expressing an intention and report simply does not support incapacity. On the contrary, it tends to demonstrate the Claimant was in charge of his own medical care.

[19] The Claimant also attended an examination by Dr. Gross in August 2016. He reached the conclusion after an extensive interview that the Claimant would benefit from a comprehensive interdisciplinary rehabilitation program to optimize his return to work. He noted the Claimant’s impairments by listing numerous physical limitations and he noted probable residual effects of mild brain trauma. He estimated the impairment at 5-15 percent.<sup>9</sup>

### **The Declaration of Incapacity is not persuasive**

[20] I considered the Declaration of Incapacity completed by Dr. Khan, which stated the incapacity began October 11, 2014 and is ongoing. Dr. Khan was not the Claimant’s treating

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<sup>7</sup> GD2-133-162

<sup>8</sup> GD2-135-6

<sup>9</sup> GD2-402-3

physician at the time he says the incapacity began. He notes the medical condition causing incapacity is post-concussion syndrome and chronic traumatic encephalopathy. Dr. Khan reached the opinion the Claimant is incapable of forming or expressing an intention but offered no details of explanation for the basis of his opinion or why he felt the incapacity was ongoing.<sup>10</sup>

[21] I find the Declaration of Incapacity fails to convince me the author conducted an independent review of the symptoms that might render the Claimant incapable of forming or expressing an intention. The medical evidence does not show that Dr. Khan was regularly treating or assessing the Claimant. I find it fails to persuade me that Dr. Khan is a better judge of the Claimant's symptoms than two independent medical examiners.

[22] I find the Claimant has participated extensively in decision making with respect to his course of treatment and activities of daily living since his injury. The test for incapacity does not require the Claimant be capable of functioning at his pre-injury level. It does not require that he be able to make good decisions. The Claimant has lived on his own and directed his care continuously. The Claimant clearly has diminished cognitive ability and poor memory, but it is not the same as being incapable of forming an intention. Having carefully considered all of the Claimant's evidence, submissions, and the medical reports I find the Claimant has failed to convince me that he was incapable of forming or expressing an intention to apply for benefits sooner.

[23] The Claimant has the burden of proof. He has failed to establish that it is more likely than not that he lacked the capacity to form or express the intention to apply for a CPP disability benefit continuously from October 2014 to January 2017.

## **CONCLUSION**

[24] The appeal is dismissed.

Susan Smith  
Member, General Division - Income Security

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<sup>10</sup> GD2-389