



Citation: *C. B. v Minister of Employment and Social Development*, 2019 SST 1023

Tribunal File Number: GP-18-1081

Between:

C. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

**SOCIAL SECURITY TRIBUNAL INTERLOCUTORY
DECISION**

General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Anna Szczurko

Minister represented by: Christian Malciw

Teleconference hearing on: June 13, 2019

Date of decision August 8, 2019

DECISION

[1] I am not directing the Claimant to consent to disclosure of Dr. Benn's file. I am also not directing her to disclose any affidavit or pleading relating to her divorce and custody proceedings of her daughter. However, I am directing her to disclose any deed of sale or associated mortgage documents relating to a residence signed by her between April 2004 and April 2016, and to the extent they are available, her income tax reports during that time.

[2] This decision does not decide the merits of the appeal. It concerns only what documents the Claimant is required to disclose. I will decide the merits of the appeal later.

OVERVIEW

[3] The Minister requests that I direct the Claimant to consent to disclosure of the complete file of Dr. Benn, her treating psychologist. The Minister also requests that I direct her to disclose the following non-medical documents dating from April 2004 and April 2016:

- any deed of sale of a residence and associated mortgage documents that she signed;
- her income tax reports;
- any affidavit or pleading relating to her divorce or custody of her daughter.

ISSUES

1. Do I have the jurisdiction to direct the Claimant to make the requested disclosures?
2. If so, should I direct the Claimant to do so?

Issues on the Appeal

[4] The appeal involves an application by the Claimant for a *Canada Pension Plan* (CPP) disability pension, which the Minister received in May 2016.¹ The Minister allowed the application with payment starting as of June 2015.² This is the maximum period of retroactivity

¹ GD2R-34

² GD2R-21

permitted under the CPP based on the application date.³ The Claimant requested a reconsideration of the start date for payment on the basis that she lacked the capacity to form or express the intent to apply for CPP disability before May 2016. The Minister denied the request for reconsideration, and the Claimant appealed to the Social Security Tribunal.

[5] Since the Minister granted the Claimant the disability benefit, the primary issue on the appeal is whether the Claimant was incapable of forming or expressing an intention to apply for the CPP disability benefit prior to May 2016. If I find she lacked this capacity, I will also have to determine when her incapacity began and ended. Documents related to her capacity during the relevant period will help me decide these issues.

[6] If I find the Claimant was incapable of forming or expressing an intention to apply for a period before she actually applied in May 2016, I can deem that she applied in the month that her period of incapacity began.

[7] In her disability application, the Claimant stated that she had been unable to work because of several conditions including post-traumatic stress disorder, cognitive disorder (not otherwise specified), panic disorder with agoraphobia, multiple specific phobias, and insomnia.⁴ In a May 2016 report that accompanied the application, Dr. Benn, clinical psychologist, stated that she had been seeing the Claimant on an almost weekly basis since April 2004. The Claimant's post-traumatic stress disorder had been severely re-triggered in 2003, and she had been unable to work since that time.⁵ In her submissions, the Claimant stated that payment of her CPP disability benefit should be backdated to April 2004.⁶

[8] Since the Claimant made the CPP disability application in May 2016, the relevant period of potential incapacity is from April 2004 to May 2016.⁷

Claimant's position on the appeal

³ Paragraph 42(2)(b) of the CPP

⁴ GD2R-108

⁵ GD2R-100 to 102.

⁶ IS1-3

⁷ GD2R-112

[9] The Claimant has suffered from severe post-traumatic stress disorder since she was young. Her “terror” is triggered by her fear that members of the medical community will again commit her to a psychiatric facility against her will. As a result, she could not think about exposing her post-traumatic stress disorder and risking commitment without shutting down. She was not able to make the decision to apply for CPP disability until she had undergone years of therapy with Dr. Benn.⁸ The Claimant relies on Dr. Benn’s May 2, 2016, January 17, 2017, and March 10, 2017, reports.⁹

Minister’s position on the appeal

[10] The evidence does not support that the Claimant was incapable of forming or expressing the intent to apply for CPP disability from April 2004 to April 2016. She was able to live on her own, manage her own financial affairs, raise her daughter, seek out and pursue medical treatment including weekly sessions with Dr. Benn, and make decisions regarding the dissolution of her marriage and custody of her daughter.

ANALYSIS

[11] The Minister is requesting that I direct disclosure of documents set out in paragraph 3, above.

[12] I must first determine if I have the jurisdiction to make the requested direction. If I determine that I do, I must also determine whether I should do so.

I have jurisdiction to make the requested directions

[13] I can decide any necessary question of law or fact as to whether a CPP benefit is payable.¹⁰ A Claimant for CPP disability must supply the Minister with reports of any physical or mental disability including the nature, extent, and prognosis of the disability, any limitations resulting from the disability, and any other pertinent information. A Claimant is also required to supply a statement of her occupation and earnings for any period.¹¹ A party to a proceeding

⁸ IS1-1 to 6

⁹ GD2R-100 to 105; GD2R-63 to 65; and GD1-10 to 14

¹⁰ Section 64(2) of the *Department of Employment and Social Development Act*

¹¹ Section 68 of the *Canada Pension Plan Regulations*

before the Tribunal may request the Tribunal to provide for any matter concerning a proceeding before the Tribunal.¹²

[14] I agree with Mr. Malciw that the case law establishes that I have the jurisdiction to determine the right of access of the Minister to relevant information under section 68 of the CPP Regulations.¹³ Under a fair reading of that section, Dr. Benn's file notes are "reports of [a] physical or mental disability" as well as "any other pertinent information." The non-medical documents are "any other pertinent information" and the tax reports also are statements of "her occupation and earnings."

[15] I find that I have the jurisdiction to make the requested directions.

Should I make the requested directions?

[16] Having found that I have the jurisdiction to make the requested directions, I must now determine whether I ought to do so. Different considerations arise with respect to the direction to consent to the production of Dr. Benn's file than those with respect to the production of the non-medical documents.

Dr. Benn's file

[17] Mr. Malciw argues that the Minister is entitled to all relevant information and the Claimant does not have the right to choose what information to release to the Minister for assessing a disability application. The Minister has both a statutory right under section 68 of the CPP Regulations and a common-law right to obtain relevant information for a proper determination of the Claimant's incapacity claim. Failure to provide the information can result in a dismissal of the appeal, or an adverse inference against the Claimant for refusing to provide the requested information.¹⁴

¹² Section 4 of the Social Security Tribunal Regulations

¹³ The cases establishing my jurisdiction are discussed in the Minister's submissions at IS6 and IS12.

¹⁴ The cases supporting the Minister's submissions are set out in IS12.

[18] Ms. Szczurko's primary position is that providing Dr. Benn's clinical notes would undermine the therapeutic alliance between the Claimant and Dr. Benn, and potentially hinder Dr. Benn's ability to treat her.¹⁵ She argues:¹⁶

1. Section 68 of the Regulations is limited to reports and does not require disclosure of clinical notes.
2. It is not necessary for the Minister to request the clinical notes where it has already received reports from Dr. Benn, which provided all relevant information.
3. To compel production of those notes would compromise the Claimant's mental integrity and cause her significant psychological distress. This would cause irreparable harm to and a potential breakdown of therapeutic relationship between the Claimant and Dr. Benn.
4. Disclosure of the notes would breach the Claimant's right to security of the person under section 7 of the Charter of Rights and Freedoms.
5. Disclosure of the notes is not practical. There have been approximately 540 meetings, and the notes would fill five or six banker's boxes. They include significant irrelevant information involving third parties and highly sensitive personal information. Dr. Benn would have to go through each page, redact this information, and photocopy each page. This would involve weeks of work that would take Dr. Benn away from her family and treating other patients.
6. There is no added value to the notes since Dr. Benn has already included all relevant information in her reports.

[19] The Claimant suffers from long-standing severe mental health issues. Dr. Benn's psychological/psychiatric diagnoses include chronic severe post-traumatic stress disorder; panic disorder with agoraphobia; multiple specific phobias including nosocomephobia (intense and persistent fears of medical or psychiatric hospitals) and iatrophobia (intense and persistent fear of medical and psychiatric doctors); and moderate to severe cognitive disorder, not otherwise specified.¹⁷

[20] In March 2017, Dr. Benn stated that in situations that risk her mental health history becoming known to others, the Claimant develops "unavoidable dissociation, paranoia,

¹⁵ IS8-3.

¹⁶ The cases supporting the Claimant's submissions are discussed in IS14.

¹⁷ GD24-104 to 105

withdrawal, and immutable avoidance.” This is because she is distressed and worried about the risk of being “institutionalized again as [she was] in young adulthood.”¹⁸

[21] Dr. Benn’s November 2018 report is compelling and persuasive evidence that I should not direct disclosure of Dr. Benn’s file.¹⁹ Dr. Benn stated that she is not able to comply with a request for copies of the Claimant’s treatment sessions notes for four main reasons. First, there are voluminous records, interspersed with a great deal of personal information related to other persons that would have to be redacted. Second, their release would undermine the therapeutic trust and integrity of the Claimant’s ongoing treatment. Third, any relevant information can be made available by the timely response to questions asked by the Tribunal or the Minister. Dr. Benn stated that she is willing to answer questions. Fourth, she is professionally prohibited from releasing the notes.

[22] It would be patently unfair to direct a disclosure that creates a serious risk of psychological harm to and a potential breakdown of the Claimant’s therapeutic relationship with her longstanding psychologist. Further, it makes no sense to direct the Claimant to consent to Dr. Benn making a disclosure that is impractical and a potential breach of Dr. Benn’s professional obligations. Significantly, Dr. Benn has already provided several reports, given oral evidence under oath at the initial General Division hearing, and is willing to answer further questions.

The non-medical documents

[23] Ms. Szczurko acknowledges that the concerns Dr. Benn raised do not apply to the Minister’s request for disclosure of non-medical documents. However, she argues that the documents by themselves are not informative. The Minister is entitled to ask questions and relevant documents should be provided only in the context of the answers to questions. The Minister does not have a license to delve into private aspects of the Claimant’s life that are not related to her claim and are arguably not relevant for the disposition of her claim.²⁰ Mr. Malciw argues that the documents are relevant to the incapacity application since they shed light on the Claimant’s activities and ability to make decisions during the relevant time.

¹⁸ GD1-12

¹⁹ IS9-5 to 6

²⁰ IS14-8

[24] I agree with Mr. Malciw that the Claimant should disclose deeds and mortgages signed by her relating to residences. These are relevant to her capacity to manage her financial affairs and to make decisions. I also agree that she should produce her tax records to the extent they are reasonably available since these would be relevant to her ability to manage her financial affairs.

[25] I am not prepared to direct that she supply copies of any affidavit or pleading relating to her divorce and custody proceedings of her daughter. Such documents are of limited relevance. They would likely contain confidential information relating to third parties, particularly her daughter, as well as highly personal information. The Minister is entitled to ask questions concerning steps taken by the Claimant in the divorce and custody proceedings.

CONCLUSION

[26] I am making the following directions:

1. The Claimant is directed to file with the Tribunal copies of any deeds or mortgages signed by her relating to her residences between April 2004 and May 2016 by September 11, 2019.
2. The Claimant is not directed to consent to disclosure of Dr. Benn's file and she is not directed to file copies of affidavits or pleadings relating to her divorce proceedings and custody of her daughter.
3. The Minister shall file written questions, if any, for the Claimant and Dr. Benn by October 11, 2019.
4. The Claimant shall provide answers to the questions by November 11, 2019.
5. Both parties are to file their final submissions by December 11, 2019.

Raymond Raphael
Member, General Division - Income Security