



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. G. v Minister of Employment and Social Development*, 2019 SST 1055

Tribunal File Number: GP-17-3041

BETWEEN:

**L. G.**

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: Raymond Raphael

Claimant assisted by: A. J. (mental health counselor)

Teleconference hearing on: July 23, 2019

Date of decision: September 6, 2019

## DECISION

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

## OVERVIEW

[2] This appeal involves an application by the Claimant for a CPP disability pension, which the Minister received on January 31, 2017.<sup>1</sup> The Minister denied the application both initially and upon reconsideration on the basis that the Claimant was ineligible for the benefit because she applied for it more than 15 months after she started to receive a CPP retirement pension in March 2015.<sup>2</sup> The Claimant appealed to the Social Security Tribunal.

[3] The Claimant takes the position that because of her severe suicidal depression and other mental health issues she lacked the capacity to form or express the intention to apply for the CPP disability prior to January 31, 2017.

[4] This is the Claimant's second application for a CPP disability application. She made her initial application in September 2015.<sup>3</sup> The Minister denied that application in December 2015 on the basis that the Claimant did not have a severe and prolonged disability as of February 2015 (the month before she started to receive the early retirement benefit).<sup>4</sup> The Claimant did not request reconsideration.

## ISSUES

1. Do the CPP incapacity provisions apply so that the Claimant is eligible to apply for CPP disability even though she did not apply for the benefit until more than 15 months after she started to receive a CPP retirement benefit?
2. If so, did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by February 28, 2015?
3. If the answer to both of these questions is yes, is her disability long continued and of indefinite duration?

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<sup>1</sup> GD2-33

<sup>2</sup> GD2-23 & 8

<sup>3</sup> GD2-116

<sup>4</sup> GD2-103 to 104

## ANALYSIS

[5] I must first determine whether the Claimant is eligible for CPP disability even though she did not make the current application until January 2017.

[6] 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 March 2015. She made her current application for a CPP disability application in January 2017, which was 24 months after she started to receive the early retirement pension.<sup>5</sup>

[7] Unless the incapacity exception applies, the Claimant cannot cancel her retirement pension in favor of a disability pension since she made her disability application nine months after she had received 15 months of retirement benefits.

### *Does the incapacity exception apply?*

[8] There is an incapacity exception to the 15 months' time limit for applying for CPP disability after initially receiving a CPP retirement pension.<sup>6</sup> To satisfy the test for incapacity the Claimant must establish that it is more likely than not that she lacked the capacity to form or express an intention to apply for the benefit.

[9] If I find the Claimant was incapable of forming or expressing an intention to make an application for CPP disability before she made the application in January 2017, I can deem the application was made the month before her incapacity began.

[10] 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.<sup>7</sup>

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<sup>5</sup> See attached schedule of applicable CPP provisions.

<sup>6</sup> Sections 60(8) to 60(11) of the CPP

<sup>7</sup> *Sedrak v Canada (Social Development)*, 2008 FCA 86

[11] The meaning is precise and focused. It does not mean that I should 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.<sup>8</sup>

[12] Since she made the CPP disability application in January 2017, the relevant period of potential incapacity is from March 2015 (the month she began to receive the retirement pension) and January 2017 (the month the Minister received her disability application).

### ***The Claimant's position***

[13] The Claimant testified that she last worked a few months before she retired for medical reasons in August 2015.<sup>9</sup> The medical conditions that prevented her from continuing to work included major suicidal depression, high blood pressure, anxiety, and panic attacks as well as arthritis in her right shoulder and both knees.

[14] She was “suicidal” and suffered from “major depression.” She did not know right from wrong, nothing made sense to her, and she was not able to make decisions. She acknowledges that she initially applied for CPP disability in September 2015, and that she signed the application in August 2015. The application and questionnaire are in her handwriting. However, D. T., her mental health counselor “did everything.” D. T. helped her fill in the papers and went over the questions with her. The Claimant wasn’t able to do this on her own because she couldn’t remember things and wasn’t able to make decisions. She didn’t care, felt hopeless, and was like a “robot”. She wasn’t able to follow through with that application. She just filled in the form and that “was the end of it.”

[15] In September 2015, she shared a basement apartment with her son. He did the grocery shopping. She gave him her bankcard, and he took care of paying her expenses. In July 2016, she moved and started sharing a house with a girlfriend. She had the same arrangement with her girlfriend. She had numerous emergency mental health hospital admissions during the relevant period. The admissions were because of suicidal depression, and were for periods ranging from three to seven days. She saw the psychiatrist on duty and didn’t fill out any forms.

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<sup>8</sup> *Canada (Attorney General) v Danielson*, 2008 FCA 78

<sup>9</sup> Dr. Hussain’s August 2015 consultation report indicates that the Claimant had been off work since June 2015.

[16] She didn't want to leave her house. D. T. forced her to go out, so they could meet at Tim Horton's. Eventually D. T. "took the reigns" and followed through with the current application. The Claimant thought she was applying for the first time, since she didn't remember making the initial application.

***The Minister's position***

[17] The Claimant applied for the CPP retirement benefit in January 2015 and for CPP disability in September 2015. This confirms that she had the capacity to form or express the intent to apply for CPP benefits. She was able to sign and date her applications, appeal letters, and consents to obtain personal information.

[18] She was able to participate in individual therapy from January 2016 to January 2018. To do this, she must have provided consent and been able to communicate with the therapist. She consented to and attended for medical appointments when needed. She made a decision to move in July 2016.

***My findings***

[19] I have considered the medical evidence and Claimant's activities from March 2015 to January 2017.<sup>10</sup>

[20] The Claimant suffered from serious mental health issues. She was hospitalized for these on several occasions. I also accept that she required extensive assistance and encouragement from her mental health counselor to complete the CPP disability applications.<sup>11</sup> However, requiring assistance and encouragement to complete and pursue an application is not equivalent to an incapacity to form or express the intent to make the application.

[21] The Claimant was able to apply for the CPP retirement pension in March 2015. She was able to fill in and sign disability applications in August 2015 and December 2016. She was able to submit required follow up documentation for the applications. In July 2016, she was able to

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<sup>10</sup> *Slater v Canada (Attorney General)*, 2008 FCA 375

<sup>11</sup> GD14

decide to move into a basement apartment with a girlfriend because she believed her son was irresponsible.<sup>12</sup>

[22] She was also able to make decisions about pursuing medical treatment for both her mental health and physical conditions. She followed up with her family doctor, psychiatrist, and mental health counsellor. She participated in the Central West Concurrent Disorder Program from January 2016 to January 2019.<sup>13</sup> She attended for MRIs and an ultrasound in July and September 2016.<sup>14</sup> She consulted orthopaedic surgeons in June and September 2016.<sup>15</sup> She underwent cataract surgery in November 2016.<sup>16</sup> She went on her own volition to hospital emergency departments in March, August, and December 2015, and in September 2016.<sup>17</sup>

[23] In addition, the medical evidence does not support a lack of capacity to form or express an intent to apply for the disability benefit. In August 2015, Dr. Hussain, psychiatrist, stated that the Claimant's speech was clear and coherent, her thought process was logical and goal-directed, she was alert and oriented, there was no evidence of gross cognitive deficits, her abstract thinking was intact, and her judgment was fine.<sup>18</sup> In July 2016, Dr. Sood, psychiatrist, stated that she was doing reasonable well functionally and that she was able to control her diabetes, hypertension, elevated cholesterol, and gastroesophageal reflux disease with medications.<sup>19</sup>

[24] I find that the Claimant has failed to establish that it is more likely than not that she lacked the capacity to form or express the intent to apply for CPP disability during the period from March 2015 to January 2017.

## **CONCLUSION**

[25] Since the incapacity exception does not apply, the Claimant is not eligible for a CPP disability pension.

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<sup>12</sup> GD2-69

<sup>13</sup> GD14-1

<sup>14</sup> GD2-61 to 68

<sup>15</sup> GD2-60 & 71

<sup>16</sup> GD2-58

<sup>17</sup> GD2-55 & 133

<sup>18</sup> GD2-141

<sup>19</sup> GD2-69

[26] The appeal is dismissed

Raymond Raphael  
Member, General Division - Income Security

### **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.