



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. K. v Minister of Employment and Social Development*, 2019 SST 1525

Tribunal File Number: GP-19-945

BETWEEN:

L. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

In person hearing on: August 22, 2019

Date of decision: September 4, 2019

DECISION

[1] L. K. is the Claimant in this case. He applied for a *Canada Pension Plan* (CPP) disability pension in November 2018. The Minister denied his application, so the Claimant appealed to the Social Security Tribunal.

[2] I am dismissing the appeal, because I have decided the Claimant is not eligible for a disability pension. I have also decided the Claimant is not eligible for a new benefit called the post-retirement disability benefit. These reasons explain why.

OVERVIEW

[3] The Claimant was 62 years old when he applied for the CPP disability pension. He had not worked for several years because of illness.¹ His conditions included heart failure, atrial fibrillation, pulmonary embolism, urinary tract infection, ulcerative colitis, congenital right eye abnormality, osteoarthritis, depression and anxiety.²

[4] The Minister denied the application without reviewing the Claimant's medical condition. The reason was the Claimant was already receiving a CPP retirement pension. The CPP does not allow someone to receive both pensions at the same time.³ The Minister said the Claimant could not cancel the retirement pension to get the disability pension. That was because he had been getting the retirement pension for at least 15 months.

[5] The Claimant says his medical condition made him incapable of applying for the disability pension before November 2018. He also says he was never told about the 15-month time limit, and that if he had known he would have applied for a disability pension sooner.

ISSUES

[6] I have to decide if the Claimant can cancel his retirement pension so he can receive a disability pension. That includes deciding if he met the CPP's test for incapacity.

¹ Claimant's disability questionnaire, November 20, 2018, GD2-64-71

² Dr. Moulson, December 6, 2018, GD2-60-63

³ Paragraph 44(1)(b) *Canada Pension Plan*

[7] I also have to decide if the Claimant is eligible for the post-retirement disability benefit.

ANALYSIS

The Claimant cannot cancel his CPP retirement pension

i. The 15-month rule

[8] The CPP allows a person to cancel a retirement pension so he can receive a disability pension. That can only happen if he is deemed to have become disabled before he started getting the retirement pension.⁴ The earliest a person can be deemed to be disabled is 15 months before the date the Minister received the disability application.⁵

[9] The Claimant applied for a disability pension in November 2018, so the earliest he could be deemed disabled was August 2017. That is the same month he started getting his CPP retirement pension.⁶ It is therefore impossible for him to be deemed disabled before he started receiving the retirement pension. That means he can't cancel the retirement pension.

ii. The incapacity rule

[10] The 15-month rule does not operate against the Claimant if he is deemed to have applied for a disability pension before he actually did. For that to happen, he has to show he was “incapable of forming or expressing an intention to make an application” before November 2018.⁷ The incapacity must be continuous.⁸

[11] The test for incapacity is not whether a person has the capacity to make, prepare, process or complete an application for the benefit, but – as the CPP states – whether he has the capacity to form or express an intention to make an application. “Capacity” is given its ordinary meaning,

⁴ Subsection 66.1(1.1) *Canada Pension Plan*

⁵ Paragraph 42(2)(b); subsection 60(6) *Canada Pension Plan*; subsection 43(1) *Canada Pension Plan Regulations*
⁶ GD6-11

⁷ Subsections 60(8) and (9) *Canada Pension Plan*. The Claimant has to prove this on a balance of probabilities.

⁸ Subsection 60(10) *Canada Pension Plan*

so the capacity to form or express an intention to make a CPP application is the same as the capacity to form an intention with respect to other choices a person might face.⁹

[12] In deciding if the Claimant was incapacitated I have to consider the medical evidence, and any relevant evidence of his daily activities between the date he says the incapacity started, and the date he actually applied.¹⁰

iii. The Claimant's evidence of incapacity

[13] The Claimant told me his main problems began around September 2016. He was semi-retired from a career in construction management. He went to the hospital with kidney stones. He then went into septic shock and got pneumonia. He had atrial fibrillation, and a pulmonary embolism. For the next year he was in and out of the hospital. He had seven different procedures. He was heavily medicated, short of breath, and weak. He was depressed and could not focus. When he was not in the hospital he was living with his elderly mother so she could look after him.

[14] The Claimant told me he could not work after September 2016. He knew about the CPP disability pension, but he did not want to apply for it because he thought he would get better. He decided to apply for a CPP retirement pension in the summer of 2017. He went to a Service Canada Centre and explained his situation. They told him it would not be a problem if he wanted to apply for a disability pension later. No one told him about the 15-month rule.

[15] The Claimant told me he was supposed to start working on a new bridge project around this time, but it was cancelled. His heart got worse. He still had a blood clot. He had a rash of illnesses. He went to the ER by ambulance many times. He had medical appointments at least twice a week with his family doctor, cardiologists, urologists and other specialists. Besides his physical symptoms he was still anxious, depressed, and heavily medicated. He spent most of his

⁹ *Canada (Attorney General) v. Kirkland*, 2008 FCA 144; *Canada (Attorney General) v. Danielson*, 2008 FCA 78; *Sedrak v. Minister of Social Development*, 2008 FCA 86; *O'Rourke v. Canada (Attorney General)*, 2018 FC 498

¹⁰ *Canada (Attorney General) v. Kirkland*, 2008 FCA 144; *Canada (Attorney General) v. Danielson*, 2008 FCA 78; *Sedrak v. Minister of Social Development*, 2008 FCA 86; *O'Rourke v. Canada (Attorney General)*, 2018 FC 498

days lying down. He couldn't even walk a block. He couldn't spend much time on the computer, because he couldn't concentrate.

[16] The Claimant told me his son drove him to some of these appointments. He drove himself to others. He remembered his appointments because he wrote them down. He still lived with his mother. She looked after the house and meals, but he could go grocery shopping. He continued reaching out to friends looking for work, but they would not hire him because of his poor health. He told me he stopped doing this about a month before the hearing.

[17] The Claimant told me that after he applied for a retirement pension he sometimes thought about applying for disability, but he never got around to it because the paperwork was too complicated. He also considered himself a tough guy and he thought he would get better. By November 2018 he realized that was probably not going to happen. He decided to apply for a CPP disability pension. Because he could not concentrate, he could not complete the application himself. He got help from an employee at Service Canada. She asked him questions and he gave her the answers, which she filled in on the application form.

iv. Medical evidence of incapacity

[18] There are two Declarations of Incapacity in the file. One is dated February 20, 2019, and was completed by Dr. O'Briain. The other is dated April 11, 2019, and was completed by Dr. Moulson. Both doctors are the Claimant's primary care physicians. They both said he was incapacitated from June 11, 2018 to October 1, 2018, because of congestive heart failure, pulmonary edema, and depression and anxiety.¹¹

[19] Medical reports in the Tribunal file show the Claimant spent a lot of time in the hospital between June and November 2018. He was admitted twice for congestive heart failure. He had an echocardiogram and was scheduled to have a cardioversion. This was cancelled because of a blood clot. He had persistent atrial fibrillation.¹² He had also been diagnosed with ulcerative proctitis in May 2018.¹³

¹¹ GD2-92-93

¹² These are summarized by Dr. Bhagirath, November 9, 2018, GD2-72-74

¹³ Dr. Rosenfeld, October 3, 2018, GD2-79-80

[20] The Claimant brought a letter to the hearing, which I decided to admit because of its possible relevance. It is from a psychiatrist, Dr. Louw, dated May 15, 2019. The letter says the Claimant is under Dr. Louw's care and is unable to attend court proceedings due to a combination of mental health and complex physical health conditions.¹⁴ In retrospect, this letter is not relevant to the question of incapacity because it talks about the Claimant's condition in 2019, not up to November 2018.

[21] The Claimant also brought several hundred pages of other medical documents to the hearing. He said they were his hospital files. He wanted to impress upon me that his condition was serious and had been going on for years, but there were no particular documents he wanted me to see. I did not admit this evidence because I did not think it was necessary to get precise details of the Claimant's condition. I accept that he has had serious health concerns for several years. The problem is, as sick as he was, he did not meet the CPP's test for incapacity at any time up to and including November 2018.

v. Why the Claimant did not meet the test for incapacity

[22] I placed little weight on the Declarations of Incapacity. The Claimant told me a disability advocate advised him he would only need to prove incapacity from June to October 2018. The Claimant then asked his doctors to complete the forms and use these dates for his incapacity. He told me they would have put in any dates he asked them to. As a result, I can't view these declarations as careful medical assessments.

[23] Even if the Claimant's doctors had filled out these forms independently, the statements in them are not enough evidence of incapacity. The Claimant's regular activities tell a different story. Since the Claimant's health problems began in September 2016 he has managed his medical appointments, driven himself to them, looked after his personal care, and performed tasks like grocery shopping. He has contacted friends to look for work. He has consented to numerous medical procedures and hospital admissions.

[24] The Claimant told me he would have consented to anything and really didn't understand what was going on. I think if he truly lacked capacity to absorb information and make informed

¹⁴ GD7

decisions about his medical care, his son, his mother, or the many doctors he saw would have noticed this. But no one took any steps to have a substitute decision-maker or legal guardian appointed for him. There is no evidence of any concern about his capacity.

[25] There is a difference between being preoccupied or overwhelmed by medical concerns, and being incapacitated. The Claimant's condition between September 2016 and November 2018 involved the former, not the latter. I recognize that the Claimant has struggled with his health, and that it is one of the reasons he did not apply for a disability pension before November 2018. However, the evidence does not show he was continuously incapable of forming or expressing an intention to make a disability application before that date. He does not meet the test for incapacity, so I cannot deem him to have applied before November 2018.

No jurisdiction

[26] The Claimant is understandably upset about the 15-month rule. He told me it is an obvious effort to limit access to the CPP disability benefit. While I sympathize with the Claimant, I cannot help him. I have to apply the law as it is set out in the CPP and interpreted by court decisions that are binding on me. I cannot disregard it for compassionate reasons or because of extenuating circumstances.

[27] Nor can I do anything about the Claimant's complaint that no one at Service Canada told him about the 15-month rule, and that the written material contained no warning either. He said that if he had known, he would have applied sooner. The Minister can take remedial action where someone has been denied a benefit because of erroneous advice or administrative error.¹⁵ But only the Minister can decide what action to take, or whether to take any action at all. I cannot hear appeals from those decisions.¹⁶

Post Retirement Disability Benefit

[28] The post-retirement disability benefit came into effect in January 2019. It is meant for people who become disabled after they start receiving their retirement pension, but before they

¹⁵ Subsection 66(4) *Canada Pension Plan*

¹⁶ *Pincombe v. Canada (Attorney General)*, [1995] FCJ No. 320 (FCA)

turn 65.¹⁷ The Claimant did not apply for this benefit, but the Minister considered whether he might qualify for it anyway. The Minister decided, correctly, that the Claimant did not.

[29] The Claimant is not eligible for this benefit because it is not retroactive. He had to make CPP contributions in three of the last six years.¹⁸ The last six year period in which he had three years of contributions ended December 31, 2017.¹⁹ Since the benefit did not exist then, the Claimant does not qualify.

CONCLUSION

[30] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security

¹⁷ Paragraph 44(1)(h) *Canada Pension Plan*

¹⁸ Subsection 44(4) *Canada Pension Plan*

¹⁹ The Claimant's record of CPP contributions is at GD6-13.