



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. M. v Minister of Employment and Social Development*, 2019 SST 1536

Tribunal File Number: GP-18-2105

BETWEEN:

K. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Katherine Wallocha

Claimant represented by: Richard Cardamone

Teleconference hearing on: September 25, 2019

Date of decision: September 30, 2019

DECISION

[1] I have decided that the Claimant is not eligible for the *Canada Pension Plan* (CPP) disability pension. The evidence does not support that the Claimant was unable to file her application at an earlier date due to incapacity. However, I agree with the Minister that the evidence supports that the Claimant is entitled to the post-retirement disability benefit (PRDB). Here are the reasons why.

OVERVIEW

[2] The Claimant began receiving her CPP retirement pension on February 1, 2016. She applied for the CPP disability pension on February 5, 2018. This application was denied by the Minister because the Claimant had been receiving her pension for more than 15 months when her application for the CPP disability was received. The Minister maintained its decision upon reconsideration.

[3] The Claimant appealed to the Social Security Tribunal and stated that she was prevented from submitting her application for the disability pension at an earlier date due to incapacity.

[4] The Minister submitted that the Claimant was not incapacitated within the meaning of the CPP. However, the evidence supports that the Claimant meets the criteria for the new PRDB in January 2019.

THERE ARE THREE ISSUES IN THIS APPEAL

[5] The issues I have to decide are

1. Can the Claimant's retirement pension be cancelled for the disability pension?
2. If not, was the Claimant incapable of forming or expressing an intention to make an application on her own behalf?
3. If not, was the Claimant eligible for the PRDB.

The Claimant's retirement pension cannot be cancelled for the disability pension

[6] A person who starts to receive a retirement pension is not eligible for a disability pension under the CPP¹ unless the retirement pension can be cancelled. A retirement pension can be cancelled in favour of CPP disability pension if the Claimant is deemed to have become disabled in or after the month the retirement pension was first paid². However, the earliest a person can be deemed to have become disabled is 15 months before the date they apply for the disability pension³.

[7] The Claimant began receiving the CPP retirement pension on February 1, 2016.

[8] The Claimant applied for the CPP disability pension on February 5, 2018. This means the earliest date that the Claimant could be deemed disabled is November 2016. Since this date is after the date the Claimant first started receiving her CPP retirement pension in February 2016, her retirement pension cannot be cancelled in favour of the disability pension.

[9] The Claimant argued that she was advised by Work BC to apply for the disability pension when she was applying for the retirement pension in 2015. She told them that she had already applied for the disability pension and was denied, and she wanted to work. Now she feels she is being punished because of a 15-month clause and because she wanted to work.

[10] While I understand the Claimant's desire to continue to work, the CPP legislation does not allow the retirement pension to be cancelled in favour of the disability pension if the Claimant's retirement pension started more than 15 months before the application for a disability pension. The Claimant's retirement pension cannot be cancelled.

¹ This is found at s. 70(3) of the *Canada Pension Plan* (CPP).

² This is found at s. 66.1 of the CPP.

³ This is found at s. 42(2)(b) of the CPP.

The Claimant does not meet the test for incapacity

[11] There is an exception to the 15 months' time limit for applying for the CPP disability pension after initially receiving a CPP retirement pension⁴. The Claimant is required to prove that she lacked the capacity to form or express an intention to apply for the disability pension.

[12] The Claimant applied for the CPP disability pension twice before. She applied in January 2003, and again in April 2013. Therefore, I am satisfied that the Claimant was aware of the disability pension.

[13] In October 2015, the Claimant underwent a psychovocational assessment. This assessment was conducted just before the Claimant's 60th birthday, when she began receiving her retirement pension. This report indicated that two months before, she obtained part-time work as a cashier at a grocery store, but would prefer to be employed full-time. The observations during the study showed that the Claimant was not distracted by environmental stimuli and was able to focus her attention to the task. She demonstrated good problem solving, planning, and self-monitoring skills and strategies. Her vocational profile showed intellectual and academic capacity for employment and for vocational training programs. While the Claimant reported that she is no longer capable of physically demanding jobs, and she is not well suited for fast-paced work with conflicting priorities, she was best suited for service industry positions.

[14] The Claimant's employment record shows that she maintained her job at the grocery store from August 24, 2015, to December 19, 2017. She reported in her application for the disability pension that she was no longer able to work because of her disability on December 19, 2017.

[15] While I recognize that the Claimant is dealing with chronic medical conditions, I am unable to conclude that the Claimant was unable to form or express an intention to apply for the CPP disability. The Claimant was working during the period she was receiving the retirement

⁴ This is found at 60(8) to 60(11) of the CPP.

pension and therefore cannot be found to have been prevented from applying for the disability pension due to incapacity.

The Claimant is entitled to the PRDB

[16] Effective January 1, 2019, an individual in receipt of a CPP retirement pension, who becomes disabled on or after their retirement pension start date, but who has not reached the age of 65, and has a minimum qualifying period (MQP) in 2019 or later, may be entitled to a PRDB⁵. Since the PRDB came into effect in January 2019, the Claimant must have an MQP date after January 1, 2019, to be eligible⁶.

[17] The Claimant was 63 years old at the time of the hearing, and her MQP date is December 31, 2020. Therefore, she meets the criteria to qualify for the PRDB. I now must determine if the Claimant meets the definition of severe and prolonged.

[18] If the Claimant is incapable regularly of pursuing any substantially gainful occupation because of her disability, that is a severe⁷ disability. If the Claimant's disability is likely to be long continued and of indefinite duration, that is a prolonged⁸ disability. The Claimant's disability must be both severe and prolonged for the Claimant to receive a disability pension.

[19] The medical evidence shows the Claimant suffered a remote head injury when she was 12 years old after being hit by a vehicle. She was in a coma for two weeks and following that she developed increasing episodes of seizure activity. She was diagnosed at around 30 years old with epileptic seizure disorder.

[20] The medical report from the Claimant's family doctor dated February 6, 2018, reported that the Claimant suffers from a long history of seizure disorder. Lately she had become more treatment resistant with breakthrough seizure activity. This seizure activity frequently occurs seriously affecting her work and daily living. She made several visits to the emergency room for seizure activity.

⁵ This is found at s. 44(1)(h) of the CPP

⁶ This is found at s. 70.01 of the CPP.

⁷ The legal definition of "severe" is found at s.42(2)(a)(i) of the CPP.

⁸ The legal definition of "prolonged" is found at s.42(2)(a)(ii) of the CPP.

[21] The Claimant's family physician reported on February 6, 2019, that the Claimant has significant cognitive deficits and developmental delays. It is not uncommon for her to unintentionally fall asleep during the day, her balance is poor and she often requires support from another person or a cane. On a daily basis she becomes confused, lacks focus, forgets things and struggles with communication. It is almost impossible for her to complete tasks once started. She is unable to comprehend or retain written information or perform basic calculations without errors.

[22] The Claimant submitted she was repeatedly taken from work by ambulance or taxi to the hospital due to seizure complications, but she continued to try and work to support herself. She testified that she was having seizures and panic attacks at work and things were becoming more severe towards the end of her job. The medications were no longer working for her and she had a seizure or passed out at work four times. Her employer understood her disability and let her just stock shelves. She took two weeks off work but when she returned she started feeling funny again and could not work the rest of the day. She stated that she could not mentally handle the job. She was forced to stop working and has been unable to return to work since December 2017.

[23] In combination with her medical condition, I have to look at the Claimant's background (including age, level of education, language and past work and life experience) so I can get a realistic or "real world" picture of whether her disability is severe⁹.

[24] The Claimant was 63 years old at the time of the hearing. She reported a grade 12 education with no evidence that there is a language barrier. Her work history included mainly labour-intensive jobs and work in a retail environment suggesting limited work experience and transferable skills. The medical evidence supports the Claimant's testimony that her condition is no longer controlled with medication and her cognitive abilities continue to decline. I find that the Claimant's medical condition leaves her with little ability to retrain or engage in employment in a competitive workforce. The Claimant is unable regularly to pursue substantially gainful work.

⁹ The Federal Court of Appeal explains how to understand the concept of a "severe" disability in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

[25] Since the Claimant has become treatment resistant and there is no cure for epileptic seizure disorder, I further find the Claimant's disability is prolonged.

[26] I agree with the Minister that the Claimant's disability was severe and prolonged as defined under the PRDB legislation, with a date of onset of January 2019.

CONCLUSION

[27] The Claimant does not meet the legislative requirements to have her retirement pension cancelled. She has not demonstrated that she was prevented from applying for the disability pension due to incapacity. However, she does qualify for the PRDB.

[28] The appeal is dismissed.

K. Wallocha
Member, General Division - Income Security