



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. K. v Minister of Employment and Social Development*, 2019 SST 1364

Tribunal File Number: AD-19-438

BETWEEN:

B. K.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: November 27, 2019

DECISION AND REASONS

DECISION

[1] I have decided to dismiss this appeal.

OVERVIEW

[2] The Claimant, B. K., has worked in a series of administrative jobs, and she eventually became a X at a X. However, she was subjected to workplace harassment, which led her to leave the employment market. In November 2015, she applied for a Canada Pension Plan (CPP) disability pension, claiming that she was prevented from working by depression, anxiety, bipolar disorder, and post-traumatic stress disorder (PTSD).

[3] The Minister of Employment and Social Development approved the application and granted the Claimant a CPP disability pension. The Minister deemed the Claimant's disability to have begun in August 2014, and it ordered her pension to start as of December 2014—the maximum period of retroactivity ordinarily permitted under the law. The Claimant asked the Minister to reconsider the start date, claiming that her psychological condition had prevented her from applying earlier.

[4] The Minister refused to change its position because, in its view, the Claimant had not shown that she was incapable of forming or expressing an intention¹ to apply for a disability pension before November 2015—the date she actually applied for the disability pension. The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division conducted a hearing by teleconference and, in a decision dated March 26, 2019, dismissed the appeal, finding insufficient evidence that the Claimant was incapable of forming or expressing an intention to make an application during the 12 months before November 2015.

¹ According to section 60(9) of the *Canada Pension Plan*, the Minister may deem an earlier application date if it is satisfied that the claimant was incapable of forming or expressing an intention to make an application on the day on which the application was actually made.

[5] The Claimant applied for leave to appeal from the Appeal Division, alleging that the General Division committed various errors in coming to its decision. Last July, I granted leave to appeal because I saw a reasonable chance of success on appeal for at least one of the Claimant's arguments.

[6] I have now considered the parties' submissions and reviewed the file in detail. On balance, I agree with the Claimant that the General Division committed a significant error in coming to its decision. I have decided that the appropriate remedy in this case is to make my own assessment of the Claimant's incapacity and give the decision that the General Division should have given. As a result, I am overturning the General Division's decision, but I am substituting it with my own finding that the Claimant was not incapacitated from applying for the CPP disability pension earlier than November 2015. The Claimant is therefore not entitled to more than 11 months of retroactive payments.

ISSUES

[7] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.²

[8] The Claimant argued that the General Division made no less than seven errors when it found that she failed to meet the test for incapacity:

- (i) On February 19, 2019, Dr. Khan amended his Declaration of Incapacity form to clarify that, contrary to what he had said earlier, the Claimant *was* incapable of forming or expressing an intention to make an application. While the General Division referred to this amendment in its decision, it did not address the contents of Dr. Khan's accompanying letter, in which the psychiatrist admitted that he had checked the wrong box after a busy day.
- (ii) The hearing file contained a report in which Allison Ferreira, a registered nurse, found that the Claimant qualified for the CPP disability pension as of her last

² Section 58(1) of the *Department of Employment and Social Development Act*.

possible onset date of December 2011. The General Division did not address this report in its decision.

- (iii) The Minister specifically asked the Claimant's family physician, Dr. McLellan, about her condition during the relevant period of November 2014 to November 2015. However, the Minister did not make a similar request of the Claimant's primary care provider, Dr. Khan. The General Division should have considered this lapse.
- (iv) At the hearing, the General Division did not ask either the Claimant or her husband about the circumstances surrounding her medical appointments. The General Division proceeded to incorrectly assume that she had attended the sessions on her own and had understood and participated in ongoing treatment.
- (v) The General Division ignored the Minister's consistent lack of respect for the Claimant throughout the proceedings. For instance, the Minister repeatedly recommended that the hearing before the General Division proceed in writing, even though it was well documented that the Claimant struggled with paperwork.
- (vi) In its decision, the General Division wrote that the Claimant's husband merged his accounts with hers and began managing her financial affairs in 2010. In fact, he testified that he did not do either of these things until 2014.
- (vii) The General Division assumed that the Claimant had applied for CPP disability benefits on her own behalf. In fact, her husband and Dr. Khan played large roles in completing and submitting the November 2015 application.

Having considered these arguments, I am satisfied that the General Division erred in law by failing to consider the possibility that the Claimant never regained capacity prior to her application for disability benefits. Since the General Division's decision falls for this reason alone, I see no need to fully address the remaining issues in this decision.

ANALYSIS

[9] I see several indications that the General Division ignored evidence that the Claimant may have been incapacitated at the time of application and assumed that she applied for CPP

disability benefits on her own behalf. In doing so, the General Division neglected to consider an important part of the law on incapacity.

[10] It is important for the Claimant to be aware of the difference, under the *Canada Pension Plan*, between disability and incapacity. The former concept is defined as an inability to perform a substantially gainful occupation, and the Minister has already found that the Claimant met that definition during her eligibility period, which ended on December 31, 2011. The latter concept relates, not to an inability to *work*, but an inability to *form or express an intention*, and it only comes into play when a claimant seeks more retroactive benefits than the law ordinarily allows.

[11] When approved, a CPP pension usually commences no earlier than 11 months before the application date. The only exception to this rule can be found in section 60 of the *Canada Pension Plan*, and it applies when an applicant is mentally incapacitated and was unable to form or express the intention to make an application prior to the actual date of the application. In *Canada v Danielson*,³ the Federal Court of Appeal confirmed that section 60 does not require consideration of the capacity to make, prepare, process, or complete an application for disability benefits, but only the capacity to form or express an intention to make an application.

[12] Section 60(8) applies when a claimant has suffered a permanent incapacity, and the application is made by someone else on his or her behalf. Section 60(9) applies to a claimant who has suffered incapacity but has since recovered. It matters which section applies because, under section 60(9), a claimant who applies on his or her own behalf is presumed to have recovered but must have made the application within 12 months of that recovery.

[13] In this case, the General Division failed to consider whether the Claimant was, in fact, applying for CPP disability benefits on her own behalf. In its decision, the General Division appears to have taken it for granted that the Claimant, by virtue of the fact that she had signed her application for disability benefits, had recovered from whatever incapacity she may have had. In doing so, it assumed that section 60(9) was applicable and that it was under no obligation to consider whether the Claimant been incapacitated before November 2014.

³ *Canada (Attorney General) v Danielson*, 2008 FCA 78.

[14] At the General Division hearing, the Claimant and her husband testified about her claimed incapacity, although I suspect that neither appreciated the distinction created by sections 60(8) and 60(9). I did not hear the Claimant concede that she had ever recovered from her claimed incapacity or that she had applied for CPP disability benefits on her own. It is true that the Claimant signed her application, but there was also some evidence that her husband guided her in the claims process. At the hearing, he testified that, even if he did not have power of attorney over his wife's affairs, he had long managed their joint finances and had helped her to complete application for benefits in November 2015.

[15] There is no doubt that the General Division proceeded under the assumption that the Claimant, if she was ever incapacitated, had recovered to the point where was able to submit her own application. The General Division found that the Claimant "actually applied on November 4, 2015 and demonstrated capacity by doing so."⁴ The General Division's decision made no reference to section 60(8) and it was concerned only the Claimant's condition in the year leading up to the point when she finally applied for benefits:

Having considered the totality of the evidence, I am not persuaded that the Claimant was incapable of forming or expressing an intention to apply for CPP disability benefits at any time from November 3, 2014 to November 3, 2015. She may have been unable to complete the required paperwork, not been successful in her business ventures, accepted assistance to manage her affairs and have been disabled, but none of these equate to being incapable of forming or expressing an intention to apply. In fact, her activities during this period show that she was capable of forming or expressing an intention to apply for benefits.⁵

[16] In assuming that the Claimant's incapacity was temporary, the General Division took a restrictive view of the available medical evidence. This can be seen in how the General Division considered a Declaration of Incapacity, prepared by Dr. Sher Khan, indicating that the Claimant was *not* incapable of forming or expressing an intention to make an application.⁶ At the same time, Dr. Khan, a psychiatrist, stated that the Claimant's incapacity began on June 17, 2011. He later amended the declaration to clarify that, contrary to what he had said earlier, the Claimant

⁴ GD decision, para 6.

⁵ GD decision, para 10.

⁶ Declaration of Incapacity dated August 18, 2017, GD12-2.

had been incapable of forming or expressing an intention to make an application since June 17, 2011.⁷ Dr. Khan attached a letter in which he admitted that he had checked the wrong box on the form after a busy day and had always intended to say that his patient remained incapable and disabled.

[17] In its decision, the General Division acknowledged Dr. Khan's amendment⁸ but gave it little weight because of what it saw as a contradiction in the psychiatrist's evidence: If the Claimant's incapacity began in June 2011 and was still ongoing as of the date of the Declarations, how did she actually apply in November 2015? However, I do not necessarily see a contradiction if, as the Claimant argues, she had been continuously incapacitated since June 2011 and, her application for benefits notwithstanding, had never recovered.

[18] The General Division assumed that the Claimant's application meant that she had capacity at the time of her application. In making this assumption, the General Division gave little weight to evidence that the Claimant's husband managed her all of her affairs, including her claim for benefits. The General Division's failure to fully consider the Claimant's submissions, in turn, caused it to disregard the applicability of section 60(8) of the *Canada Pension Plan*.

REMEDY

There are three possible ways to fix the General Division's error

[19] The Appeal Division has the power to address whatever errors that the General Division may have committed.⁹ Under the *Department of Employment and Social Development Act* (DESDA), I can:

- confirm, rescind, or vary the General Division's decision;
- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

⁷ Amended Declaration of Incapacity dated February 13, 2019, GD21-2.

⁸ General Division decision, paras 6 and 7.

⁹ DESDA, s 59(1).

I also have the power to decide any question of fact or law necessary to carry out the above remedies.

[20] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. It has now been four years since the Claimant applied for a disability pension. If this matter were referred back to the General Division, it would only delay a final resolution.

[21] In their respective submissions, the Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the substance of the Claimant's incapacity claim. Of course, the parties had different views on what the outcome should be. The Claimant argued that, if the General Division had properly assessed the evidence, it would have concluded that she was continuously incapacitated from making an application and ordered payment of additional retroactive benefits. The Minister argued that, whatever General Division's errors, the Claimant had not met the burden of proving that she was ever incapable of forming or expressing an intention to make an application.

The record is complete enough to decide this case on its merits

[22] I am satisfied that the record before me is sufficiently complete to permit me to make an informed decision about the substance of this claim. The Claimant has had an opportunity to gather and submit evidence documenting her alleged incapacity. She has filed written statements arguing that she has been incapacitated since at least 2011. She and her husband have testified about her claimed incapacity before the General Division hearing, and I have listened to the audio recording of that hearing. I doubt that the Claimant's evidence would be materially different if this matter were reheard.

[23] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it would have given, had it not erred. In my view, even if the General Division had assessed the Claimant's incapacity through the lens of section

60(8), the result would have been the same. My own assessment of the record leads me to conclude that the Claimant never lacked the capacity to form or express an intention to make an application.

The evidence does not indicate the Claimant was ever incapacitated

[24] Much of the Claimant's submissions at the Appeal Division were devoted to criticizing the way in which the Minister handled her claim. She accused the Minister of selectively requesting medical evidence and of pushing for a hearing by written question and answers when it knew or should have known, that she struggled with paperwork. All this may be true, but it is ultimately irrelevant to the question of whether the available evidence supported the Claimant's claim that she was incapable of forming or expressing an intention to apply.

[25] I have reviewed the file, and I have concluded that the Claimant did not meet the burden of proving that she was ever incapacitated according to the definition set out in the DESDA. I have no doubt that the Claimant's psychological conditions robbed her of energy and lessened her ability to concentrate, but I simply did not find enough evidence to suggest that she was incapable of forming or expressing an intention to make an application for CPP disability benefits. I based this conclusion on the following factors:

The Claimant's activities suggested capacity

[26] The test for incapacity is strict and precise. As noted, section 60 of the DESDA does not require consideration of the capacity to make, prepare, process, or complete an application for disability benefits, but only the capacity to form or express an intention to make an application.¹⁰ Capacity must be considered in light of the ordinary meaning of the term. The test requires consideration of, not just medical evidence, but also a claimant's activities during the relevant period.¹¹ The fact that the Claimant has already been found disabled has little bearing on whether she was also incapacitated.

¹⁰ *Danielson*.

¹¹ *McDonald v Canada (Attorney General)*, 2013 FCA 37.

[27] The Claimant worked in a white collar position at X until 2002.¹² At that point, or shortly afterward, she developed depression, anxiety, and PTSD, but these psychological problems did not prevent her from pursuing various activities that required minimal levels of cognition, organizational ability, and executive functioning:

- She was a single mother until her remarriage in 2010.¹³
- She pursued wrongful dismissal litigation with X in a case that was settled October 2008;¹⁴
- She was employed as a part-time cashier in a X store from October 2008 to the spring of 2009;¹⁵
- She was employed with X for seven months in 2009;¹⁶
- She ran home-based businesses selling X and X products from 2009 to 2013;¹⁷
- She provided room and board to visiting hockey players and figure skaters from 1997 to 2013;¹⁸
- She worked part-time for X in 2015 and 2018;¹⁹ and
- She regularly attended medical appointments and consented to treatments from the time she stopped working to the date of her application for benefits.²⁰

[28] The Claimant testified that all of her post-X jobs were short-lived because she could not process information efficiently, but such an impairment falls well short of the standard for incapacity, which contemplates no more than a minimal level of cognition. The Claimant also testified that she was ultimately overwhelmed by the demands of her home-based business ventures, but even operating them at a loss for a short time would have required at least a basic

¹² Claimant's letter dated June 3, 2016, GD2-18.

¹³ Claimant's letter dated October 19, 2018, GD17-1.

¹⁴ Hearing recording at 11:30.

¹⁵ Claimant's letter dated June 3, 2016, GD2-21.

¹⁶ Claimant's letter dated June 3, 2016, GD2-22.

¹⁷ Claimant's letter dated June 3, 2016, GD2-23; hearing recording at 15:50.

¹⁸ Hearing recording at 19:50.

¹⁹ Hearing recording at 25:00.

²⁰ Hearing recording at 55:30.

level of functioning in a set of diverse tasks such as dealing with customers, keeping accounts, and paying taxes.

The Claimant's testimony suggested capacity

[29] Much of what the Claimant and her husband said at the hearing confirmed that she never met the threshold for incapacity in the years preceding her application for benefits. The evidence indicates that the Claimant was at least partly behind her November 2015 application for benefits. She wrote that she had asked Dr. Khan whether he thought that she qualified for the CPP disability pension, and she suggested that she completed her half of the paperwork.²¹ At the hearing, the Claimant confirmed that it was she who raised the possibility of applying for benefits: "I brought it up to him."²² She also testified:

When he [Dr. Khan] learned I was without income he said I'm going to do your CPP request and you are going to do it. So he made me sit there and fill out the paperwork for him. He did his stuff and I did mine and sent it in... I filled out a majority of it in his office... I can't remember if I gave it to him and he sent it in or if he gave me his and I sent it in... With my husband's help, I completed the form over several days, but Dr. Khan was the major push for it.²³

[30] The Claimant insisted that she had difficulty filling out the application form, but her testimony makes it clear that she had at least some ability, and more importantly, the intention, to do so:

GD: You said that you did not follow up in 2009 because you wanted to prove that you were still smart and you could work?

Claimant: That was one of the reasons. And I found the paperwork overwhelming. I did start to fill it out. I ended up sending in my package, the amount that I did fill out, but I just

²¹ Claimant's letter dated June 3, 2016, GD2-25-26.

²² Recording of hearing at 1:01:20.

²³ Recording of hearing at 37:45.

never mailed it. I just felt that I never completed it well enough. I just felt like a baby, I don't know why.

GD: So you started to fill it out. You had an intention to apply but you did not complete it.

Claimant: I had the intention. Like she told me how important it was to do it and then I would do it and put it down and then do it, and then I just didn't do it.²⁴

[...]

GD: I understand that you're saying that you were not capable of doing it. The intention to do it was there but you were not capable, is that what you are testifying to?

Claimant: I am testifying that, logically, the intention should be there to get it done, but I didn't have the ability, the strength, the concentration, the confidence to get it done. Logically in my head I know I should be doing all of this stuff, that money would come in... In answer to your question, yes, in my heart I had the intention to get it done. In my heart I knew I had to get it done like I had it in my heart I had the intention to get it done, just like I had it in my heart to get my taxes done but I could not do it. I just couldn't do it.²⁵

[31] The Claimant also testified that she regularly consulted her medical professionals and made her own decisions about her health care. Her husband may have helped her get to appointments, but once she was at the office, she spoke to her doctors, discussed options, and consented to treatment.²⁶

The Claimant's medical evidence did not rule out capacity to form or express an intention

[32] The Claimant points to the fact that she was found disabled by Allison Ferreira, the registered nurse who adjudicated her CPP disability claim for the Department of Employment and Social Development. As noted previously, the threshold for a finding of incapacity is higher than that of disability, and Ms. Ferreira's assessment therefore has limited relevance to the

²⁴ Recording of hearing at 1:02:00.

²⁵ Recording of hearing, 1:08:00.

²⁶ Recording of hearing at 1:49:15.

question of whether the Claimant was capable of forming or expressing an intention to make an application.

[33] The Claimant began receiving mental health care treatment in 2002, at a time when she was dealing with the end of her first marriage and her termination from her long-time job. She received regular mental health counselling at X Hospital, X, under the care of Dr. Ian Hector. She later saw Dr. Grasyana Romaniuk, another psychiatrist, until the latter's death in 2009. I have reviewed the available notes and records from that period²⁷ and found nothing to suggest that the Claimant was incapacitated according to the standard required by the *Canada Pension Plan*. Although she was anxious and depressed at the time as a result of the many stressors in her life, she was not prevented from forming or expressing an intention to make an application for disability benefits.

[34] Dr. Khan, the Claimant's current psychiatrist, strongly supported his patient's disability claim. He has also declared the Claimant incapacitated, but I find his evidence on this point less than compelling. It is important to keep in mind that incapacity, as defined by the *Canada Pension Plan*, is as much a legal concept as it is a medical one. A medical practitioner's opinion is important, but it is not definitive and must be weighed against other factors. This approach is supported by *Flaig v Canada*,²⁸ which held that a Declaration of Incapacity is not determinative in assessing incapacity under section 60.

[35] I think it is possible that Dr. Khan did not fully direct his mind to definition of incapacity, even though it was referred to on the Declaration of Capacity form that he completed on the Claimant's behalf. There is the fact that he amended the form two years after originally completing it, effectively reversing his initial finding. On the form, he listed the Claimant's diagnoses as refractory major depression, panic disorder with agoraphobia, and social anxiety disorder, but these are not conditions normally associated with the kind of cognitive dysfunction that would prevent an individual from forming an intention to seek benefits.²⁹

CONCLUSION

²⁷ Contained in GD5 and GD16.

²⁸ *Flaig v Canada (Attorney General)*, 2017 FC 531.

²⁹ Dr. Khan's amended Declaration of Capacity dated February 13, 2019, AD1-16.

[36] I know that the Claimant will be disappointed by my decision, but the *Canada Pension Plan* is drafted in a way that severely restricts the scope to backdate payments. Since the General Division committed related errors of fact and law, I had no choice but to overturn its decision. However, when I reviewed the evidence myself, I found little to suggest that the Claimant was ever incapacitated, as defined by the *Canada Pension Plan*. The Claimant may have been disabled, and she undoubtedly had difficulty completing the required paperwork, but that did not mean she was incapable of forming or expressing an intention to apply for disability benefits. In fact, her activities during this period suggest that, while she was struggling with depression, anxiety, and PTSD, she had control over many aspects of her life.

[37] The appeal is therefore dismissed.



Member, Appeal Division

HEARD ON:	October 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. K., Appellant Zev Wise, representative for the Appellant Viola Herbert, representative for the Respondent