



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. B. v Minister of Employment and Social Development*, 2019 SST 1500

Tribunal File Number: GP-18-1081

BETWEEN:

C. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Anna Szczurko

Minister represented by: Christian Malciw

Date of decision: December 2, 2019

DECISION

[1] The payment of the Claimant's *Canada Pension Plan* (CPP) disability pension starts as of April 2004.

OVERVIEW

[2] The Claimant was 48 years old when she applied for CPP disability in May 2016.¹ She stated that she last worked in June 1977 as the supervisor of a social skills program for disabled teens. She also stated that she had been unable to work because of post-traumatic stress disorder (PTSD), cognitive disorder, panic disorder with agoraphobia, multiple specific phobias, and insomnia.²

[3] The Minister allowed the application with payment starting as of June 2015. This is the maximum period of retroactivity permitted under the CPP based on the Claimant's application date.³ The Claimant requested a reconsideration of the start date for payment of her disability. The Minister denied the request for reconsideration, and the Claimant appealed to the Social Security Tribunal.

[4] The Claimant states her post-traumatic stress disorder rendered her incapable of forming or expressing the intent to apply for the CPP disability pension from April 2004 to April 2016. The Minister states the evidence does not support that the Claimant was continuously incapable of forming or expressing the intent to apply for CPP. The Minister relies on the Claimant's decision-making activities during this period to establish that she was able to form and express the intent to apply for CPP disability.

[5] In November 2017, the General Division dismissed the appeal. The Claimant appealed to the Appeal Division. In May 2018, the Appeal Division allowed the appeal and referred this matter back to the General Division for reconsideration. The Appeal Division also directed that the new hearing be held in writing.

¹ GD2R-34.

² GD2R-106 to 112

³ Paragraph 42(2)(b) of the CPP

[6] In view of the Appeal Division's direction, I decided this appeal based on the documents and submissions filed. I also used the recording of oral evidence from the initial General Division decision as part of the evidence before me.

ISSUES

1. Was the Claimant incapable of forming or expressing an intention to apply for a CPP disability pension prior to May 2016?
2. If so, when did her incapacity begin and when did it end?

ANALYSIS

Test for Incapacity

[7] 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.⁴

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

[9] The Claimant's position is that she was incapable of forming or expressing the intent to apply for CPP disability from April 2004 to April 2016.⁵ Since the Minister received her disability application in May 2016, the relevant period of potential incapacity is from April 2004 to April 2016 (the relevant period).

The Claimant's position

[10] Ms. Szczurko, the Claimant's representative submitted that incapacity is contextual rather than binary. The Claimant has suffered from PTSD 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. During the relevant period, her severe PTSD was triggered by, amongst other things, interaction with authority figures and disclosure of her medical status

⁴ Subsections 60(8) to 60(11) of the CPP

⁵ Declaration of incapacity: GD2R-85

to such figures. As a result, she could not think, without shutting down, about exposing her post-traumatic stress disorder and risking commitment.

[11] Ms. Szczurko acknowledges that the Claimant was able to make decisions with respect to other areas of her life. However, she submits that the Claimant was medically incapable of deciding to apply for CPP disability. She was not able to make that decision until she had undergone years of therapy with Dr. Benn.⁶

The Minister's position

[12] The Claimant's decisions, choices, and activities during the relevant period demonstrated that she had the capacity to form and express the intent to apply for CPP disability. 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.⁷

The Claimant's written evidence

[13] In her notice of appeal to the General Division⁸, the Claimant:

- Agreed that she was able to make some decisions for herself during the relevant period. However, these decisions were not “triggering.”
- Adamantly maintained that she was incapable of deciding to apply for the CPP disability pension because of the nature and severity of her PTSD.
- Stated that she lived in “abject terror of being imprisoned and abused in a psychiatric hospital again.”
- Stated that she associated acknowledging and disclosing her illness with the trauma of being caught and locked away.
- Stated that she had been “utterly incapable of making the decision to apply for a disability pension.”

⁶ IS1-5 to 6, paras 3 and 4; GD9-3 to 4, paras 2 and 3

⁷ IS4 and IS5

⁸ GD1-6 to 9

- Stated that her fear was only recently brought under control to the point that she was able to decide to apply for CPP disability.

[14] In her September 2018 written response to questions from the Minister,⁹ the Claimant stated, amongst other things:

- In 2003, her husband took over responsibility for taking their daughter to medical appointments after her (the Claimant's) PTSD was retriggered. She has not accompanied their daughter to medical appointments since.
- She could no longer drive or travel outside of a very circumscribed area after her PTSD recurred. Her husband started to take their daughter to most of her activities.
- She did not have a substitute decision maker during the relevant period.
- She was familiar with disability benefits through her work as a family support worker. She did not speak to Dr. Benn about applying for disability benefits until shortly before she applied. It was "impossible for [her] to discuss this issue before then."
- In 2004, she and her family moved from Vancouver to London when she realized she was ill again with PTSD, because she knew she would need family support. The Claimant and her family lived in an apartment until July 2007, when they moved into a house. She has lived in the house since.
- She made mortgage, utility, and therapy fee payments.
- She started to live alone with her daughter in April 2008, when her husband moved out. They then shared custody.
- She supported her daughter and herself on child support and financial assistance from family members.

Dr. Benn's evidence

[15] The Claimant relies on Dr. Benn's oral evidence at the initial hearing and her May 2, 2016, January 17, 2017, March 10, 2017, and November 23, 2018, reports.¹⁰

[16] In her May 2016 report, Dr. Benn attested that the Claimant had been continuously incapable until recently of forming or expressing the intent to apply for CPP disability because of

⁹ IS3

¹⁰ GD2R-100 to 105; GD2R-63 to 65; GD1-10 to 14; and IS9-5 to 6

the nature of her psychological disability. In her 20's, she had been involuntarily institutionalized, forcibly medicated, and suffered other abuses. Her intense fear of being involuntarily re-hospitalized prevented her from even considering making an application. The associated automatic terror and resulting dissociation (detachment from reality) consistently prohibited her from doing this.¹¹

[17] The Claimant's diagnoses included¹²:

1. post-traumatic stress disorder;
2. pain disorder with agoraphobia (fear and avoidance of situations that might cause a panic attack);
3. multiple specific phobias, including Nosocomophobia (intense and persistent fear of hospitals), Iatrophobia (intense and persistent fear of doctors), Telephobia (intense and persistent fear and avoidance of using telephone), Xenophobia (fear of strangers), Cleithrophobia (fear of being locked/trapped), Heliophobia (fear of sunlight, bright light), and Ophthalmophobia (fear of being stared at);
4. insomnia; and
5. cognitive disorder –not otherwise specified.

[18] Some significant excerpts from Dr. Benn's reports are set out below:

- The Claimant's PTSD was retriggered in 2003, and she has been unable to work since then.¹³
- Dr. Benn has treated Claimant in (mostly) weekly psychological treatment sessions since April 2004.¹⁴
- The Claimant's trauma history is the most complex and prolonged of any of Dr. Benn's patients, in her over 20 years of practice. The Claimant is "extremely phobic" of the medical field (as well as the psychiatric/mental health field). As a result, she is incapable of even contemplating medical involvement of any kind except under imminently and near-certainly life-threatening circumstances.¹⁵

¹¹ GD2R-103

¹² GD2R-104 to 105

¹³ GD2R-102

¹⁴ GD2R-100

¹⁵ GD2R-102

- When she began treatment, the Claimant was extremely distressed and barely functioning. She was frequently unable to talk for more than a few words or sentences at a time, and she frequently dissociated.¹⁶
- The Claimant was subject to numerous hospitalizations, surgeries, and medical procedures in childhood and in her early teens. These were undertaken in an atmosphere of confusion, fear, helplessness, and limited emotional or practical supports. She had very vivid and traumatic memories of various tremendously upsetting events relating to her medical treatment (including sexual abuse), as well as family experiences.¹⁷
- The Claimant was extremely fearful of strangers, authority figures, individuals in positions of power/authority, men generally, and anyone involved directly or indirectly with the medical, psychiatric, or mental health fields.¹⁸
- The Claimant had been consistently terrified at the prospect of anyone (especially organizations or systems of perceived authority) having detailed information about her psychological difficulties.¹⁹
- Although she was eventually capable of managing necessary day-to-day decisions and responsibilities, she remained incapable of undertaking actions that placed her at any sense of vulnerability, jeopardy, or intersection with medical or psychiatric contexts or personnel.²⁰
- She was incapable of applying for benefits because she believed this might lead to her being institutionalized.²¹
- There is a “germane distinction” between activities and decisions of non-traumatic relevance (such as managing finances, paying bills, cooking, writing, housekeeping, and giving guidance to her daughter) and those of traumatic relevance (such as attending for medical attention, going near psychiatric personnel or facilities, acknowledging her mental health issues to unknown others).²²

My Findings

[19] The word capacity should be given its ordinary meaning.²³ The meaning is precise and focused. It does not mean that I should consider the capacity to make, prepare, process, or

¹⁶ GDR-101

¹⁷ GD2R-101

¹⁸ GD2R-101

¹⁹ GD2R-103

²⁰ GD2R-63

²¹ GD2R-64

²² GD1-13

²³ *Sedrak v Canada (Social Development)*, 2008 FCA 86

complete an application for disability benefits. I must consider only the capacity, quite simply, of forming or expressing an intention to make an application.²⁴

[20] I must consider both the medical evidence and the Claimant's activities during the relevant period.²⁵

[21] The Pensions Appeal Board (PAB)²⁶ has addressed the notion of restricted incapacity for specific areas; in other words, a claimant may be incompetent in one or more areas of life but remain competent in others. The PAB stated that the medical community believes there are different types of incapacity. The PAB quoted medical guidelines as follows:

Competency is no longer viewed as a global state or condition (i.e., absence or presence of capacity for all tasks). Rather, the notion of restricted incapacity for specific areas has become generally accepted. In other words, we may be incompetent in one or more areas of life but remain competent in others...

[22] The Claimant does not dispute that she was able to make decisions and choices concerning several areas of her life during the relevant period. However, due to her unique incapacity, her ability to make decisions about other parts of her life does not reflect a capacity to form or express the intent to apply for CPP disability.

[23] In her March 2017 report, Dr. Benn explained the Claimant's PTSD trigger reflexes as follows:²⁷

... Activities, situations, or encounters which ... are not related to issues of traumatic vulnerability do not typically render her incapacitated. However, due to [her] quite complex and varied trauma history, there are a great number of situations that trigger unavoidable dissociation, paranoia, withdrawal and immutable avoidance. Included amongst such situations are those that involve risk of her mental health history becoming known or evident to others... She also consistently and absolutely has been unable to interact with the medical system broadly... [she] was incapable (instinctively, psychologically, cognitively etc.) of forming any intent whatsoever to disclose her mental health condition ... it was only recently, through our intensive work together, that [she] was capable of forming [the] intent to apply for CPP benefits...

²⁴ *Canada (Attorney General) v Danielson*, 2008 FCA 78

²⁵ *Canada (A.G.) v Hines*, 2016 FC 112

²⁶ *Williams v MSD* (April 11, 2005), CP 21005 (PAB). Although this decision is not binding, I find it persuasive.

²⁷ GD1-12

[24] At the October 2017 hearing, Dr. Benn testified that the Claimant could not have applied for CPP disability earlier because the suggestion of exposing her mental health conditions would have given rise to dissociation. This precluded any thoughts or expression of interest in making such an application. Dr. Benn stated that PTSD symptoms are reflexes. They are not controlled by cognition or neurologically based decision-making sequences. They are similar to the reflexive reaction to touching a hot stove, when a person automatically pulls their hand away. The reactions are “hard-wired... there is no conscious thought.”

[25] The Claimant was aware of the existence of the CPP disability benefit, but was not able to apply for the benefit until there had been significant progress in her treatment.²⁸ Dr. Benn stated, “why would the Claimant have put up with poverty...if she was capable of applying she would have done so.”

[26] Having regard to the oral and medical evidence from Dr. Benn, I am satisfied that the Claimant had a restricted incapacity. Although she was able to function and make decisions in other areas of her life, she lacked the capacity to form or express the intent to apply for CPP disability. This is not a situation in which a Claimant chose not to apply for the CPP benefit. She did not apply because she was not able to form or express the intent to do so due to her psychological impairment.

[27] The Claimant has established that it is more likely than not that she lacked the capacity to form or express the intent to apply for a CPP disability benefit during the period of April 2004 to April 2016.

CONCLUSION

[28] The Claimant’s application is deemed to have been made as of April 2004. I accept Dr. Benn’s statement that the Claimant’s post-traumatic stress disorder had been severely re-triggered in 2003, and she had been unable to work since that time.²⁹ I find that the she had a

²⁸ GD1-9

²⁹ GD2R-102

severe and prolonged disability in December 2003. Payments start four months after the date of disability.³⁰ Payments start as of April 2004.

[29] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

³⁰ Section 69 of the CPP