



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. C. v Minister of Employment and Social Development*, 2019 SST 1496

Tribunal File Number: GP-18-1873

BETWEEN:

W. C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Claimant represented by: Bruce MacDonald

Teleconference hearing on: November 20, 2019

Date of decision: December 10, 2019

DECISION

[1] The Claimant is entitled to have his *Canada Pension Plan* (CPP) disability pension start as of December 2012.

OVERVIEW

[2] In May 2017, at the age of 64, the Claimant applied for a CPP disability pension.¹ The Minister accepted that the Claimant was disabled by 1998, and allowed the application, with payment starting in June 2016.²

[3] The Claimant requested a reconsideration of the start date for payment. He thought he should receive payment retroactive to November 1997, when he had to stop working because of depression, chronic fatigue, and fibromyalgia. However, the Minister denied the request for reconsideration because the Claimant had received the maximum period of retroactivity permitted under the CPP based on his application date.³ The Claimant appealed to the Social Security Tribunal, stating that he had been incapable of applying for CPP disability since November 1997.

TEST FOR INCAPACITY

[4] To satisfy the test for incapacity, the Claimant must establish that it is more likely than not that he lacked the capacity to form or express an intention to apply for the benefit.⁴

[5] If I find the Claimant was incapable of forming or expressing an intention to apply for CPP disability for a period before the application was submitted in May 2017, I can deem that the application was made in the month that his period of incapacity began.⁵

¹ GD2-25

² GD2-4, CPP Record of Contributions. The Claimant had 24 years of valid contributions between 1972 and 1998. See also GD4-6.

³ Paragraph 42(2)(b) of the CPP

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

⁵ Subsection 60(8) of the CPP

[6] Since the Minister received the Claimant's application for CPP disability benefits in May 2017, the relevant period of incapacity is from November 1997 to May 2017.

ISSUES

[7] Was the Claimant incapable of forming or expressing an intention to apply for a CPP disability pension prior to May 2017?

[8] If so, when did his incapacity begin?

ANALYSIS

The Claimant's circumstances

[9] The Claimant testified that he had suffered from sleep difficulties and fatigue since his early teens. Dr. J. Crosby, psychiatrist, stated that the Claimant first sought treatment for depression in 1980. She provided him with psychotherapy from 1998 to 2014. His depression, however, did not improve. Throughout treatment, he suffered from depression, sleep disturbance, decreased energy, lack of motivation, and intermittent suicidal ideation.⁶

[10] The Claimant testified that he worked as an elementary school teacher for 20 years. He had to stop because of overwhelming fatigue. Since age 50, he has had trouble reading. He has suffered from cancer of the kidneys, but the symptoms went untreated for years. He began dialysis in late 2013.⁷ Since then, both kidneys have been removed and he is currently undergoing chemotherapy, as well as dialysis 3 times a week. The April 2017 CPP medical report of Dr. Elizabeth Layne, psychiatrist, stated that a kidney transplant would be considered in future.⁸

[11] The Claimant testified that in 1998 or 1999 he moved from an apartment in Mississauga to his father's home in Etobicoke (the family home). Shortly thereafter, his father went into long-term care and the Claimant was alone in the house. His father died in January 2005. Until recently, the Claimant has been very isolated. He has had

⁶ GD2-79, report of Dr. Crosby, July 2017

⁷ GD2-103

⁸ GD2-96

little social contact, apart from the pizza delivery people and a neighbour who cut his front lawn. He has been incapable of managing his activities of daily living. He was too tired to clean the house, and developed a hoarding problem. The family home became uninhabitable. He was so ashamed of its condition that on rare occasions when family members dropped off groceries, he would ask them to leave them at the door. It would take him half a day to make his way to the door to collect the groceries.

[12] In March 2017, the Claimant started to receive assistance from Wendy Luciano, a registered practical nurse who was a case manager at X. This organization helps people with serious ongoing mental illness deal with financial and other issues. In November 2017, Ms. Luciano wrote that while assisting the Claimant to clean up his house, she discovered the carcass of his cat in a filing cabinet. She also found evidence in his bedroom of a fire of which he was unaware. Luckily, it had smoldered out on its own. Ms. Luciano was spending 6 hours a week assisting him in organizing his finances and cleaning out the family home. She reported that he had difficulty even making phone calls.⁹

[13] In August 2018, Ms. Luciano stated that the Claimant was unable to complete any tasks because of chronic anxiety and depression. These mental health issues negatively affected his memory, motivation, and ability to organize his life. He did not open his mail for years, was chronically late for appointments, neglected to fill prescriptions on time, and missed many doctor's appointments. He lived on peanut butter sandwiches, pizza, and pop; his health suffered greatly as a result. The state of the family home was such that he had to move out. When she saw it, there was no running water or heat and the basement was full of mold. Piles of garbage made it impossible to get in the front door. At that point, because of the condition of his house, the Claimant had lived in a motel for two years. This lasted until Ms. Luciano arranged for him to move into a condo.¹⁰

[14] In her CPP medical report of May 2017, Dr. Elizabeth Layne, psychiatrist, supported this account. She stated that the Claimant had a "significantly diminished

⁹ GD2-21

¹⁰ GD1-6-7

level of function. His coping mechanisms became overwhelmed and he simply withdrew from life.” He required close supervision in a step-by-step fashion for management of his finances, housework, and home maintenance.¹¹

[15] Other evidence shows that from at least November 2013, when Dr. Layne began treating him, the Claimant was unable to ask for help – to deal with his finances, clean the house, or fix the furnace and the pipes. He failed to get himself to hospital as recommended for his very serious kidney disease.¹² Any improvement in his condition has been the result of intervention from others. For example, it was a social worker at the dialysis clinic who secured Ms. Luciano’s assistance for him.¹³

Where courts have found evidence of capacity

[16] The word capacity should be given its ordinary meaning.¹⁴ 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.¹⁵

[17] The courts tell us that the intention to apply for benefits is not different from the capacity to form an intention with respect to other choices.¹⁶ Further, the activities of a claimant during a period of claimed incapacity may be relevant to their capacity status.

[18] In one leading case, the Court found that activities such as the following showed capacity: liquidating and consolidating assets; applying for private disability benefits; battling for several years with insurance companies; hiring and instructing legal counsel; seeking out medical reports unassisted; and beginning a business.¹⁷

¹¹ GD2-97

¹² GD2-66

¹³ GD2-21

¹⁴ *Sedrak v Canada (Social Development)*, 2008 FCA 86

¹⁵ *Canada (Attorney General) v Danielson*, 2008 FCA 78

¹⁶ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

¹⁷ *Canada (Attorney General) v. Danielson*, 2008 FCA 78

[19] In another case, the claimant was able to care for her mother, apply for two types of federal government benefits, and work part-time for 8 months as a warehouse demonstrator during the relevant period. The Federal Court found there was no evidence in the appeal record to support a finding of incapacity.¹⁸

The Claimant was incapable of forming or expressing an intent to apply for CPP disability benefits by at least November 2013

[20] In the present case, the evidence shows that from at least November 2013 the Claimant was unable to perform activities that would demonstrate capacity, such as those listed in the previous section. He testified that he had been unable to do the following:

- a. Return to work;
- b. Perform his activities of daily living, including cooking and cleaning;
- c. Attend to his health;
- d. Look after the family home;
- e. Pay his taxes;
- f. Obtain his medication in timely fashion;
- g. Wind up his father's estate;
- h. Sell the family home; or
- i. Renew his driver's licence for 10 years.

[21] The Claimant also testified that he had never signed any agreement relating to property, such as a lease. In addition, there is no evidence that he applied for any

¹⁸ *Canada (A.G.) v. Hines*, 2016 FC 112

benefit prior to May 2017. Further, he did not start a business, look after an aging relative, or resume a job.

[22] In April 2017, Dr. Layne completed a Declaration of Incapacity. She had been treating the Claimant since November 2013. She reported that the medical conditions causing his incapacity were treatment-refractory depression, fibromyalgia, and renal cancer, which went untreated for years. Significantly, his incapacity was ongoing.¹⁹ The Minister submitted that, as Dr. Layne only began treating the Claimant in November 2013, the document cannot be used to support a finding of incapacity prior to that time. However, I find that it supports a finding of incapacity as of November 2013.

[23] The Minister submitted that there is no indication that the Claimant had a substitute decision maker between 1997 and 2016. Given his social isolation and inability to ask for help, this is not surprising. Ms. Luciano stated that if she had been involved with the Claimant before his dialysis started, she would have “had him formed [involuntarily committed for psychiatric care] under the Mental Health Act due to his inability to care for himself.”²⁰ Under the circumstances, the fact that he had no substitute decision maker is not proof of capacity.

[24] The Minister submitted that the Claimant signed the application for CPP disability benefits. However, Ms. Luciano reported that it was at her insistence that he apply for the CPP disability pension. She obtained a copy of the application form and helped him complete it.²¹ While he was capable of signing the form, Ms. Luciano’s account fails to support a finding that he did so as the result of forming or expressing an intention to make an application. Moreover, I find that the Claimant’s ability to sign the application does not prove capacity. Although the test for incapacity is a stringent one, it does not require a claimant to be without any cognitive capacity whatsoever.

[25] The Minister referenced Ms. Luciano’s statement that in March 2017 the Claimant was not aware of CPP disability benefits. Not knowing about a potential CPP disability

¹⁹ GD2-65

²⁰ GD2-22, November 2017

²¹ GD1-6, GD2-21

entitlement is insufficient to establish incapacity to form an intention to apply.²² The Claimant testified however that over the years various people had mentioned the possibility to him, but he was incapable of dealing with paperwork. While the availability of these benefits was periodically drawn to his attention, there is no indication that he formed or expressed an intention to apply for them after November 2013.

[26] From at least November 2013, the Claimant was living in social isolation and was unable to perform his activities of daily living, attend to his medical care, or manage his financial affairs. Taking into account the medical evidence and the reports of his activities, I find that it is more likely than not that he lacked the capacity within the meaning of the CPP to form or express the intent to apply for a CPP disability pension by November 2013.

CONCLUSION

[27] The Minister accepted that the Claimant was disabled by 1998. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension.²³ The Claimant's application is deemed received in November 2013, and the maximum period of retroactivity is 15 months before the date of the application, or August 2012. Payments start four months afterward, as of December 2012.²⁴

[28] The appeal is allowed in part.

Carol Wilton
Member, General Division - Income Security

²² *McDonald v. Canada (A.G.)*, 2013 FCA 37

²³ Paragraph 42(2)(b) *Canada Pension Plan*

²⁴ Section 69 *Canada Pension Plan*