



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. K. v Minister of Employment and Social Development*, 2020 SST 799

Tribunal File Number: GP-19-498

BETWEEN:

**K. K.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: George Tsakalis

Claimant represented by: D. K.

Minister represented by: Christopher Dolenuk

Teleconference hearing on: January 14, 2020

Date of decision: April 13, 2020

## **DECISION**

[1] I am partially allowing this appeal.

[2] K. K. is the Claimant in this case. The Claimant suffered a severe brain injury in a 1971 motorcycle accident. He sustained another brain injury in 1978. The Claimant's condition got worse with time. The Claimant was in a long-term care facility at the time of his hearing. His brother represented him at the hearing under a Power of Attorney (POA).

[3] The Claimant's brother applied for a Canada Pension Plan (CPP) disability pension on the Claimant's behalf in July 2017. The Minister of Employment and Social Development (the Minister) determined that he met the incapacity definition under the CPP. The Minister deemed his application to have been made in July 2013. The Minister granted the Claimant CPP disability benefits and awarded the maximum 15 months retroactivity allowable under the legislation from his deemed July 2013 application date, which was April 2012. The Claimant received payments four months after April 2012, which was August 2012.

[4] The Claimant's brother argued that the Claimant had incapacity under the CPP as of June 2000, when the Claimant initially applied for CPP disability.

[5] I disagree with the Minister's decision deeming the Claimant's application under the Canada Pension Plan (CPP) to have been made in July 2013. I also disagree that the Claimant was incapacitated under the CPP as of June 2000.

[6] I find that the evidence supports a finding that the Claimant's met the CPP incapacity definition as of February 2013. The Claimant is entitled to receive CPP disability payments as of March 2012.

[7] These reasons explain my findings.

## **ISSUE**

[8] Was the Claimant incapable of forming or expressing an intention to make an application for a disability pension before July 2013, and if so, what is the period of incapacity?

## ANALYSIS

[9] To satisfy the CPP's incapacity test, claimants must establish on a balance of probabilities that they lacked the capacity to form or express an intention to apply for a benefit.<sup>1</sup> The capacity to form or express an intention to apply for benefits is similar in kind to the capacity to form or express an intention with respect to other choices in life.<sup>2</sup>

[10] Capacity is to be considered in light of the ordinary meaning of the term and determined on the basis of the medical evidence and on the individual's activities. The CPP's incapacity provision is precise and focused. It does not require consideration of the capacity to make, prepare, process or complete an application for benefits but only the capacity of forming or expressing an intention to make an application.<sup>3</sup>

[11] I have to look at both the medical evidence and the relevant activities of the Claimant between the date he claims he became incapable of applying and the date he actually applied for the disability benefit which cast light on his capacity during that period of time to form or express the intent to apply.<sup>4</sup> The CPP incapacity provisions also requires claimants to show they were continuously incapable of forming or expressing an intention to make a CPP disability application during the entire period of the alleged incapacity.<sup>5</sup>

[12] In this case, the period of incapacity to be considered is between June 2000 (when the Claimant's incapacity allegedly began) and July 2013 (the deemed application date).

### **The Claimant was incapable of forming or expressing an intention to make a disability benefits application as of February 2013**

[13] The Minister argued that it properly provided the Claimant with a deemed date of application in July 2013. The Minister accepted that the Claimant suffered severe injuries in a 1971 motor vehicle accident and another injury a few years later. The Claimant ended up with memory problems because of his traumatic brain injury. But he managed to work until 1996. The Minister accepted that the Claimant experienced a cognitive and functional decline in around

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<sup>1</sup> See Subsection 60(8) *Canada Pension Plan*

<sup>2</sup> See *Sedrak v. Canada (Social Development)*, 2008 FCA 86

<sup>3</sup> See *Canada (Attorney General) v. Danielson*, 2008 FCA 78

<sup>4</sup> See *Slater v. Canada (Attorney General)*, 2008 FCA 375

<sup>5</sup> See *Flaig v. Canada (Attorney General)*, 2017 FC 531

2012 and 2013 that led to hospitalization and rehabilitation. The Claimant ended up appointing his brother and sister as POA. The Minister took the position that signing over a POA in April 2013 showed that the Claimant had mental and physical capacity. The Minister provided the Claimant with a deemed application date of July 2013, after reviewing the evidence provided.

[14] The Claimant's brother argued that the Minister's reliance on the signed April 2013 POA as evidence of capacity was a red herring. The Claimant suffered from a severe neurodegenerative disorder long before 2013. The Claimant had nothing to do with initiating the POA. The Claimant's signature on the POA was illegible. The Claimant knew nothing about the CPP because of his medical condition.

[15] The Claimant's brother gave evidence about the Claimant's medical condition and activities. The Claimant's brother learned that the Claimant applied for CPP disability in June 2000. The Claimant's mother completed the application. The Minister denied that disability application in November 2000. The Claimant's brother asked the Minister to reconsider that decision on June 28, 2017. The Claimant's mother was reluctant to pursue disability benefits because of the stigma she felt was associated with receiving such benefits.<sup>6</sup> The Minister denied his request on July 7, 2017.<sup>7</sup> The Claimant again applied for CPP disability in July 2017. But the Claimant did not complete any form in support of that application. The Claimant's brother signed the CPP disability application forms.<sup>8</sup> The Claimant's brother also completed the Claimant's *Old Age Security* and CPP retirement application forms around this time.

[16] The Claimant's brother argued that the Claimant's condition continuously deteriorated since 1971. The Claimant stopped working in 1996. The Claimant should have been on CPP disability in 2000. The work that the Claimant performed prior to 1996 was never substantially gainful. He worked for friends and relatives on a farm and golf course. His employers understood his condition. The Claimant performed labouring tasks. He had to be told what to do. He had no independent thought process. He had to be supervised. The Claimant's ability to make decisions on his own was gone by the mid to late 1980s. The Claimant never drove after his 1971 accident because of seizures. He never had a bank account. His mother took care of his finances

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<sup>6</sup> See GD2-70

<sup>7</sup> See GD2-34

<sup>8</sup> See GD2-29 and 187

because of his medical condition. He had difficulty using a television before 2013. The Claimant could answer a telephone. But he could not make telephone calls. The Claimant was incapable of going out on his own in the late 2000s. People took his money. The Claimant completely relied on his mother and family members to make decisions for him. They took him to medical appointments. His mother made medical appointments for him. The Claimant's sister completed the forms for the Claimant's Ontario Disability Support Program (ODSP) application in June 2013.<sup>9</sup>

***The evidence did not support a finding that the Claimant had incapacity under the CPP since June 2000.***

[17] The Claimant's brother argued that the medical and documentary evidence showed that the Claimant had incapacity under the CPP since at least June 2000.

[18] I disagree.

[19] I find that the medical and documentary evidence certainly showed that the Claimant had serious medical problems. But the medical and documentary evidence did not show that the Claimant had incapacity under the CPP prior to February 2013.

[20] The Claimant's family doctor completed a Declaration of Incapacity in November 2017. The Claimant's family doctor stated that the Claimant's incapacity began in 1971 and was ongoing. The family doctor stated that the Claimant experienced cognitive decline because of a traumatic brain injury in a 1971 accident. The Claimant sustained another traumatic brain injury in 1978. The Declaration of Incapacity stated that the Claimant suffered from normal pressure hydrocephalus (NPH), and impaired balance, judgment, and memory.<sup>10</sup>

[21] But I place little weight on the family doctor's opinion that the Claimant had a continuous incapacity since 1971. I do not believe that the Claimant's family doctor would have been aware of the Claimant's alleged incapacity in June 2000 because he did not begin treating the Claimant until 2015.<sup>11</sup>

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<sup>9</sup> See GD2-116

<sup>10</sup> See GD1-8

<sup>11</sup> See GD1-10

[22] The medical and documentary evidence before the July 2013 deemed application date is minimal. The Claimant's Record of Earnings shows that the Claimant had not worked since 1996.<sup>12</sup> But the CPP's incapacity test is not just based on an inability to work. For the Claimant to succeed in this appeal, the evidence must show that he lacked the capacity to form or express an intention to apply for a benefit before July 2013. I find that the evidence provided does not support such a finding prior to February 2013.

[23] The medical records confirm that the Claimant was hospitalized after a motorcycle accident in October 1971.<sup>13</sup> The Claimant's mother claimed a Disability Tax Credit on his behalf in 1998.<sup>14</sup>

[24] The Claimant saw Dr. S.C. Patel with his mother in 1996 with respect to a medical disability that arose from his brain injury. Dr. Patel advised the Minister in May 2018 that the Claimant's mother was his patient. The Claimant did not visit him often. Dr. Patel knew that the Claimant had been in a coma after a motor vehicle accident. Dr. Patel speculated that that the Claimant had an acquired brain injury that could lead to memory disorder and possibly dementia later in life. Dr. Patel's full records were no longer available.<sup>15</sup>

[25] The records that Dr. Patel did provide showed that the Claimant had an annual health exam on May 18, 2005. The Claimant was noted to have felt good at that time.<sup>16</sup> He saw Dr. Patel because of blood in his urine in November 2005.<sup>17</sup> He had an abdominal ultrasound in January 2006 that showed an enlarged spleen.<sup>18</sup> What is significant about Dr. Patel's records is that they do not refer to the Claimant having active treatment for cognitive problems prior to 2013.

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<sup>12</sup> See GD2-4

<sup>13</sup> See GD2-164

<sup>14</sup> See GD2-162

<sup>15</sup> See GD2-132

<sup>16</sup> See GD2-134

<sup>17</sup> See GD2-135

<sup>18</sup> See GD2-136

[26] Dr. L. Suryani, Neurologist referred the Claimant to a neurosurgeon on February 8, 2013. He noted the Claimant's memory problems had increased in the last few years. The Claimant's ability to walk had also decreased. The Claimant suffered from urinary incontinence.<sup>19</sup>

[27] Dr. Suryani in a report to another physician on February 8, 2013 noted that the Claimant had memory problems after his motorcycle accident, but he was able to function. However, Dr. Suryani noted that the Claimant's memory function had decreased. The Claimant was absent-minded and forgetful. The Claimant did not know the names of well-known people.<sup>20</sup>

[28] The Claimant saw a neurosurgeon in March 2013 because of possible NPH. The Claimant's brother told the neurosurgeon about a cognitive decline in the Claimant's language skills and memory in the past five years. The Claimant's mother was performing the Claimant's activities of daily living. The Claimant's cognitive decline was confirmed on testing. The Claimant only scored 19 out of 30 on a Mini-Mental State Examination.<sup>21</sup>

[29] I am satisfied that the Claimant lacked the capacity to form or express an intention to apply for a benefit under the CPP as of February 2013 because of his severe cognitive issues outlined by Dr. Suryani that were confirmed by the neurosurgeon in the March 2013 appointment.

[30] I am satisfied that the Claimant had cognitive issues prior to February 2013. But I cannot tell from the evidence whether those issues were severe enough that the Claimant met the incapacity definition under the CPP. I see mention of a November 2012 MRI of the brain that had positive findings, but I do not see a medical report from a treating physician that would suggest that the Claimant had incapacity prior to February 2013.

[31] The Claimant's brother testified that the Claimant was not seeing medical specialists before 2013. This suggests that the Claimant's condition worsened around that time.

[32] In making my decision that the Claimant had incapacity under the CPP as of February 2013, I am not minimizing the Claimant's health difficulties. I accept his brother's evidence that

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<sup>19</sup> See GD2-107

<sup>20</sup> See GD2-111

<sup>21</sup> See GD2-96-96

he had health issues for many years. I also read a letter from M. C. dated August 25, 2013. M. C. stated that he had known the Claimant and his family for 30 years. The Claimant completely relied on his mother for support.<sup>22</sup> But I also have to look at the medical evidence and the Claimant's activities during the period of the Claimant's alleged incapacity. Although the Claimant's brother and M. C. gave evidence about the Claimant's activities during his alleged period of incapacity, the Claimant has the burden of proving incapacity and he cannot do so without supporting medical evidence.<sup>23</sup>

***I accept that the Claimant was incapable under the CPP when he signed the POA in April 2013.***

[33] I accept that the Claimant did not have capacity under the CPP when he signed the POA in April 2013.

[34] The Minister argued that there is a presumption of capacity when a person signs a POA under Ontario's *Substitute Decision Act* (SDA).<sup>24</sup>

[35] Ontario's SDA is not binding upon me. I am deciding a case that deals with the incapacity provision under the CPP. I am satisfied that by February 2013, the Claimant lacked the capacity to form or express an intention to apply for a benefit because of his worsening cognitive difficulties.

***The Claimant's incapacity continued after February 2013.***

[36] The Claimant was eventually hospitalized later in 2013. He struggled with walking, urinary incontinence and cognitive decline.<sup>25</sup> His sister filled out his ODSP application forms. I do not see any evidence that the Claimant ever regained capacity under the CPP after February 2013.

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<sup>22</sup> See GD2-106

<sup>23</sup> See *P.P. v. Minister of Employment and Social Development*, 2018 SST 524. Although this Appeal Division Decision is not binding, I find it persuasive.

<sup>24</sup> See GD8-3

<sup>25</sup> See GD2-104-105 and 110



***The Claimant failed to establish an estoppel argument.***

[37] The Claimant's brother argued that the Minister accepted the Claimant's incapacity based on the family doctor's incapacity report, which said that the Claimant's incapacity began in 1971, and the other medical records. The Minister paid out benefits based on these reports in their reconsideration decision. The Minister is therefore in an estoppel situation and is prevented from denying that the Claimant had incapacity prior to July 2013.

[38] I disagree.

[39] Estoppel prevents or "estops" a party from making assertions or from going back on their word. The purpose of this doctrine is to avoid unfairness or injustice that would result to one party if the other party were to break its word.<sup>26</sup>

[40] The following elements must be proven to establish estoppel against a public authority:

- there must be proof of a clear and unambiguous promise made to a person by a public authority;
- the promise must have been made in order to induce the person to perform certain acts;
- the person must have relied on the promise and acted on it by changing his or her conduct.<sup>27</sup>

[41] After reviewing the file, I do not see any type of promise that the Minister made showing that it accepted an earlier incapacity date than July 2013. I do not see any promise the Minister made that induced the Claimant to perform certain acts. I also do not see that the Claimant or his Powers of Attorney relied on any promise made by the Minister and acted on it by changing their conduct.

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<sup>26</sup> See *Cowper-Smith v. Morgan*, 2017 SCC 61

<sup>27</sup> See *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34

***I find that the date of onset of the Claimant's disability under the CPP was in June 2000.***

[42] I have to find a date of onset of the Claimant's disability under the CPP in order to calculate when the Minister should start paying disability benefits.<sup>28</sup>

[43] In order to have a disability under the CPP, a claimant must have a disability that is both severe and prolonged. A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.<sup>29</sup>

[44] I am satisfied that the Claimant had a severe and prolonged disability in June 2000. He had not worked since 1996. The medical evidence also confirmed that the Claimant sustained a traumatic brain injury in his 1971 motorcycle accident.

[45] Having a disability under the CPP is not the same things as meeting the incapacity definition under the CPP. As stated above, the Claimant began having incapacity under the CPP in February 2013.

[46] When I select a deemed application date in this case, I have to choose February 2013 because it falls after the month preceding the first month in which the disability pension could have commenced to be paid.<sup>30</sup>

## **CONCLUSION**

[47] The Claimant was incapable of forming or expressing an intention to apply for a CPP disability pension from February 2013 to July 2017, when a CPP disability application was made on his behalf.

[48] I have to deem an earlier application date under the CPP, given that I have made an incapacity finding.<sup>31</sup> The deemed application date in this case would be February 2013, which

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<sup>28</sup> See subsection 60(8) *Canada Pension Plan*

<sup>29</sup> See subsection 42(2) *Canada Pension Plan*

<sup>30</sup> The earliest date the Claimant could have received a disability pension under subsection 60(8) of the CPP would have been September 2000. But I have to pick February 2013 as the deemed application date because it is later than September 2000.

<sup>31</sup> See subsection 60(8) *Canada Pension Plan*

the month the Claimant became incapable of applying for a CPP disability pension. To calculate the date of payment of the pension, a person cannot be deemed disabled more than 15 months before the Minister received the disability application.<sup>32</sup> The deemed date of application was February 2013, so the deemed disability date is November 2011. Payments start four months after the date of disability, as of March 2012.<sup>33</sup>

[49] The appeal is partially allowed.

George Tsakalis  
Member, General Division - Income Security

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<sup>32</sup> See paragraph 42(2)(b) *Canada Pension Plan*

<sup>33</sup> See section 69 *Canada Pension Plan*