



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. S. v Minister of Employment and Social Development*, 2020 SST 476

Tribunal File Number: GP-19-350

BETWEEN:

D. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Teleconference hearing on: April 8, 2020

Date of decision: May 5, 2020

DECISION

[1] The Claimant is not eligible for a *Canada Pension Plan* (CPP) disability pension. I do not have jurisdiction to make a decision about his eligibility for the post-retirement disability benefit (PRDB).

OVERVIEW

[2] The Claimant started to receive an early CPP retirement pension in January 2016, when he was 60 years old. In July 2018, he applied for a *Canada Pension Plan* (CPP) disability pension. He stated that he had been disabled since September 2009 by neuropathy, diabetes, shallow breathing, dizzy spells, and Dupuytren's contracture in his left hand.¹

[3] The Minister denied the application initially and upon reconsideration because the Claimant applied for CPP disability more than 15 months after he started to receive a CPP retirement benefit. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] The Claimant first attempted to apply for a CPP disability pension in December 2015. The Minister did not receive a completed CPP medical report and therefore did not approve the application.²

PRELIMINARY MATTER

[5] In its submissions, the Minister noted that new legislation, effective January 1, 2019, established a Post-Retirement Disability Benefit (PRDB). This provides disability protection for CPP retirement pensioners who become disabled after their retirement pension starts, but who have not reached age 65, and whose minimum qualifying period ends in January 2019 or later.³

¹ GD2-63

² GD2-23-24

³ An inference to be drawn from subsection 70.01 of the CPP. The minimum qualifying period is based on a claimant's contributions to the CPP arising from their employment. When a claimant has more than 25 years of contributions, as this Claimant does, the minimum qualifying period is based on the last three years of contributions out of six.

[6] The Minister submitted that the Claimant was not eligible for the PRDB because his minimum qualifying period is 2013, many years before 2019.⁴

[7] At the hearing, I did not hear any evidence on the Claimant's entitlement to the PRDB.

[8] I do not have the authority to decide whether the Claimant is entitled to the PRDB. This is because there is no reconsideration decision on the issue. Under the law, there must be a reconsideration decision about an issue before I can make a decision.⁵

ISSUE

[9] Is the Claimant eligible for a CPP disability pension when he applied for it more than 15 months after he started to receive a CPP retirement benefit?

ANALYSIS

[10] The CPP does not allow the cancellation of a retirement pension in favor of the disability pension if the claimant makes a disability application 15 months or more after the retirement pension started to be paid.⁶

[11] The Claimant began receiving the retirement pension in January 2016. He applied for CPP disability in July 2018, more than 2 years after he began receiving the retirement pension. Therefore, with one exception, he cannot cancel his retirement pension in favour of a disability pension.

[12] The exception is that the CPP provides for a claimant's application to be backdated if he can provide evidence that he was continuously incapable of forming or expressing an intention to make an application before the day the application was actually made.⁷ This is a very narrow test. It does not require consideration of the capacity to make, prepare, process or complete an

⁴ Record of Contributions, GD2-42-43

⁵ *Department of Employment and Social Development Act*, s. 58(1)(a); Sections 60, 81(1)(b), 81(2) of the CPP. See also *M.L. v. MESD*, AD-20-35, a decision of the Appeal Division of this Tribunal that is not binding on me but is persuasive.

⁶ See attached schedule of applicable CPP provisions.

⁷ Subsections 60(9) and (10) of the CPP

application for disability benefits.⁸ It only requires the capacity to form or express an intention to make an application. Both medical evidence and the activities of the claimant during the relevant period must be taken into account.

[13] The Claimant testified that he was unable to submit a complete application for CPP disability earlier than he did because he was very ill with diabetes for many years. He testified that his illness prevented him from understanding how to proceed with his CPP disability application.

[14] In order for the Claimant's incapacity argument to succeed, he would have to show incapacity during the relevant period: from January 2016, when he started to receive the CPP retirement pension, to July 2018, the date he submitted a completed the application to the Minister. There is limited medical evidence from before July 2018: a January 2018 imaging report on his lumbar spine, and a statement of chiropractic services he received in January 2018.⁹ These suggest that the Claimant retained the capacity to consent to medical treatment prior to July 2018. In addition, in his December 2015 and July 2018 CPP questionnaires, the Claimant stated that he was able to drive a vehicle.¹⁰ This evidence does not support a finding that he was continuously incapable of forming or expressing an intention to make an application for CPP disability before the day the application was actually made.¹¹

[15] There is some evidence in the file suggesting that the Claimant has experienced cognitive difficulties. His communications with the Minister in November 2018 and with this Tribunal in February 2019 significantly departed from the usual character of business correspondence.¹² In addition, in February 2020, correspondence from an employee of the X "to whom it may concern" stated that the Claimant had memory loss and a decline in cognition.¹³ This evidence, however, is dated after the Claimant submitted his July 2018 application for CPP disability. It

⁸ *Morrison v. MHRD* (May 4, 1997) (CPP04182 (PAB) (*Morrison*), cited in *Canada (Attorney General) v. Danielson*, 2008 FCA 78, at para. 5).

⁹ GD2-53-55

¹⁰ GD2-66, 82

¹¹ *Canada (Attorney General) v. Danielson*, 2008 FCA 78

¹² GD2-7 ff.; GD1-8

¹³ GD5-11

therefore does not speak to the Claimant's capacity to form or express the intention to apply for CPP disability before that date.

[16] The Claimant submitted that in his case I should waive the legislative requirement to submit an application for CPP disability within 15 months after he began receiving the CPP retirement pension. These were his reasons:

- He has been unable to obtain his medical records from before January 2018 because he cannot afford to pay for them;
- the law should be liberally interpreted to take account of his particular circumstances;
- the law relating to CPP disability is extremely difficult for non-lawyers to understand;
and
- He is in dire financial straits.

[17] While I am sympathetic to the Claimant's situation, I do not have the authority to make a decision based on compassion or extenuating circumstances. I must follow the CPP, which does not permit the grant of a disability pension if the claimant makes the application more than 15 months after he began receiving the CPP retirement pension.

CONCLUSION

[18] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security

Applicable CPP Provisions

The 15-month period

Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must not be in receipt of a CPP retirement pension.

Paragraph 42(2)(b) of the CPP provides that a person cannot be deemed disabled more than fifteen months before the Minister received the application for a disability pension.

The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension.

There is an exception to this provision and it is found in section 66.1 of the CPP. Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

If a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled before the month the retirement pension first became payable (subsection 66.1(1.1) of the CPP).

Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Minister.

The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

Incapacity

60 (9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

- (a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
- (b) the person had ceased to be so incapable before that day, and
- (c) the application was made
 - (i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

- **(ii)** where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.