



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Minister of Employment and Social Development v C. B.*, 2020 SST 415

Tribunal File Number: AD-20-383

BETWEEN:

**Minister of Employment and Social Development**

Appellant

and

**C. B.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 14, 2020

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The General Division made an error in law.

[2] The decision that the General Division should have given is made. The Claimant was not incapable of forming or expressing an intention to apply for the pension. Therefore, further pension retroactivity is refused.

### OVERVIEW

[3] C. B. (Claimant) applied for a Canada Pension Plan disability pension and claimed that she was disabled by post-traumatic stress disorder (PTSD), numerous specific phobias, insomnia and cognitive disorder. She was 48 years old when she applied, and had last worked as a supervisor of a social skills program for disabled teens.

[4] The Minister of Employment and Social Development granted the application with 15 months retroactive payment. The Claimant appealed the Minister's decision regarding when payment of the pension should start to the Tribunal. The Tribunal's General Division allowed the appeal and granted the Claimant further retroactive payment.<sup>1</sup> It decided that the Claimant was incapable of forming or expressing an intention to apply for the pension from December 2003 until she did so in 2016.

[5] The Minister requested leave to appeal this decision to the Tribunal's Appeal Division. Leave to appeal was granted because the appeal had a reasonable chance of success on the basis that the General Division had made an error in law when it found that the Claimant had a restricted incapacity to form or express an intention to apply for the pension.

[6] I have considered the General Division decision, the parties' written submissions to the Appeal Division and the evidence that was presented to the General Division. The General Division made this error in law. The decision that the General Division should have given is

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<sup>1</sup> This is the second General Division decision. The first decision was appealed to the Tribunal's Appeal Division. The Appeal Division returned the matter to the General Division for reconsideration because the General Division had failed to observe principles of natural justice by holding a hearing when the Claimant had clearly stated that she could not attend due to her mental illness.

made: The Claimant was not incapable of forming or expressing an intention to apply for the pension before she did so. Therefore, further retroactive payment of the pension is refused.

### **PRELIMINARY MATTERS**

[7] The appeal was decided on the basis of the documents filed with the Tribunal for the following reasons

- a) The Claimant and the Minister requested that the matter be decided on this basis;
- b) The Claimant has consistently stated that she is unable to attend a hearing because of her health;
- c) The legal issue to be decided is clear;
- d) The facts are agreed;
- e) The parties filed clear submissions on the legal issues;
- f) The *Department of Employment and Social Development Act* (DESD Act) states that the Tribunal can decide questions of law and fact necessary to finalize an appeal;<sup>2</sup>
- g) The *Social Security Tribunal Regulations* require that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit;<sup>3</sup>
- h) The Claimant applied for the disability pension in May 2016. Further delay would be incurred if this matter were again referred back to the General Division for reconsideration.

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<sup>2</sup> DESD Act s. 64

<sup>3</sup> *Social Security Tribunal Regulations* s. 3(1)

## ISSUE

[8] Did the General Division make an error in law when it decided that the Claimant had restricted incapacity to form or express an intention to make an application for the disability pension?

## ANALYSIS

[9] An appeal is not a re-hearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or
- d) based its decision on an important factual error.<sup>4</sup>

[10] This appeal turns on whether the General Division made an error in law by using the wrong legal test to decide whether the Claimant was incapable of forming or expressing an intention to apply for the disability pension.

[11] The *Canada Pension Plan* (CPP) states that a person cannot be found to be disabled more than 15 months before they applied for the disability pension.<sup>5</sup> It also provides an exception to this rule, if the claimant had been incapable of forming or expressing an intention to make an application for a continuous period before the application was made.<sup>6</sup> This exception to the maximum retroactivity rule has been described as narrow and focused.<sup>7</sup> It is a difficult legal test to meet.

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<sup>4</sup> This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

<sup>5</sup> CPP s. 42(2)(2)(b)

<sup>6</sup> CPP ss. 60(8) to 60(10)

<sup>7</sup> *Canada (Attorney General) v Danielson*, 2008 FCA 78.

[12] This legal test is not whether the claimant has the capacity to prepare, process or complete an application, but whether the claimant has capacity to form or express an intention to do so. This capacity is the same as forming or expressing an intention to do other things.

[13] Therefore, to decide whether a claimant was incapable of forming or expressing an intention to apply for the pension, the decision maker must examine medical evidence and evidence of the claimant's relevant activities.<sup>8</sup> The General Division did this.<sup>9</sup> It then concluded that although the Claimant was capable of making decisions regarding her treatment, to home school her child and to end her marriage, she was incapable of forming or expressing an intention to make an application for the pension because of her unique and complex mental illnesses.

[14] The Claimant's mental health illnesses are triggered by situations that involve risk of her mental health history becoming known to others, and an inability to interact with the medical system.<sup>10</sup> On this basis, the General Division decided that the Claimant had a restricted incapacity and she was incapable of forming or expressing an intention to apply for the disability pension while being capable of forming or expressing an intention to do other things.

[15] However, the Federal Court of Appeal states clearly that the capacity to form an intention to apply for the pension is not different in kind from the capacity to form an intention with respect to other choices that present themselves to a claimant.<sup>11</sup> Therefore, the General Division erred when it decided that the Claimant had a restricted incapacity.

[16] The General Division relied on a Pension Appeals Board decision that addressed the concept of restricted incapacity in certain areas of his/her life.<sup>12</sup> However, this decision is not binding on the Tribunal. The Federal Court of Appeal decision is binding. The Tribunal must follow it. The Federal Court of Appeal decision was also made after this PAB decision. Thus, the

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<sup>8</sup> *Ibid.*; *Sedrak v Minister of Social Development*, 2008 FCA 86

<sup>9</sup> General Division decision at paras. 11, 13 to 18

<sup>10</sup> *Ibid.* at para. 23

<sup>11</sup> *Sedrak*, above

<sup>12</sup> General Division decision at para. 21, where it relies on *Williams v. MSD* (April 11, 2005), CP 21005 as being persuasive

Federal Court of Appeal could have confirmed the Pension Appeals Board decision but it chose not to.

[17] Consequently, the General Division made an error in law when it relied on the Pension Appeals Board decision. The binding legal principle is that the capacity to form or express an intention to apply for the pension is no different than the capacity to form or express an intention to make other decisions.

[18] The appeal is allowed because the General Division made an error in law.

### **REMEDY**

[19] The Appeal Division can give different remedies when it allows an appeal. It is appropriate that the Appeal Division give the decision that the General Division should have given in this case. The reasons for this are as follows:

- a) The facts are undisputed;
- b) The written record is complete;
- c) The legal principles are clear;
- d) Both parties have requested that the Appeal Division give the decision that the General Division should have given;
- e) The DESD Act states that the Tribunal can decide questions of law or fact necessary to dispose of an appeal;<sup>13</sup>
- f) The *Social Security Tribunal Regulations* requires that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit; and

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<sup>13</sup> DESD Act s. 64

- g) There has already been considerable delay in this case, and further delay would be incurred if the matter were returned to the General Division for reconsideration.

**The Claimant was not incapable for forming or expressing an intention to make an application**

[20] The background facts are not in dispute. They are summarized below.

- a) The Claimant was 48 years old when she applied for the pension;
- b) The Claimant completed high school and a university degree in English literature;
- c) The Claimant last worked as a supervisor in a program for disabled teens;
- d) The Claimant is disabled by a number of mental health illnesses, including PTSD, cognitive disorder, panic disorder with agoraphobia, numerous specific phobias and insomnia.<sup>14</sup>
- e) The Minister decided that the Claimant is disabled and was entitled to begin to receive payment of the pension in June 2015;
- f) The Claimant says that she was incapable of forming or expressing an intention to make an application from when her conditions were triggered in December 2003 until she did so in 2016.

[21] To decide whether the Claimant was incapable of forming or expressing an intention to make an application during this time, the Tribunal must examine the medical evidence as well as evidence about the Claimant's activities and other decisions.

[22] Dr. Benn began to treat the Claimant for her mental health illnesses in 2004. She penned a number of reports that were filed with the Tribunal. She reported that:

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<sup>14</sup> GD2R-106 to 112

- a) Although the Claimant is capable of eventually managing necessary day-to-day decisions, she is incapable of getting herself to undertake actions which place her in any sense of vulnerability or intersection with medical or psychiatric personnel.<sup>15</sup>
- b) Completing a banking transaction is in no way comparable to a need to acknowledge, write out, make a formal statement of and provide support details of her condition. This was beyond her capacity until shortly before the doctor's report was written in January 2017.<sup>16</sup>
- c) The Claimant's attendance with the psychologist was difficult, and the Claimant was barely capable of bringing herself to go to appointments.<sup>17</sup>
- d) Due to severe PTSD triggers the Claimant was incapable of contemplating any medical involvement unless it was perceived to be imminently and near-certainly life-threatening.<sup>18</sup>
- e) the Claimant's fear of being involuntarily hospitalized precluded her ability to even consider the process of making an application for the pension.<sup>19</sup>

[23] In addition, evidence of the Claimant's activities is summarized as follows:

- a) The Claimant and her family relocated from Vancouver to Ontario in 2004;
- b) Despite her PTSD being triggered in 2003, the Claimant continued to take her daughter to activities close to her home;<sup>20</sup>
- c) The Claimant has not had anyone make decisions on her behalf by use of a Power of Attorney or other substitute decision maker;<sup>21</sup>

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<sup>15</sup> GD2R-63

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> GD2R-102

<sup>19</sup> *Ibid.*

<sup>20</sup> IS3

<sup>21</sup> IS3



- d) The Claimant was aware of disability benefits before she applied for the pension;
- e) The Claimant negotiated the terms of her separation from her husband, including shared custody and support;<sup>22</sup>
- f) The Claimant took on full custody of her daughter when she became older and decided to live with the Claimant;<sup>23</sup>
- g) The Claimant has looked after her household finances since her separation;<sup>24</sup>

[24] The capacity to form or express an intention to make an application for the pension is no different than the capacity to make other decisions. When the evidence is considered as a whole, it demonstrates that in spite of very severe mental health illness, the Claimant made a number of significant decisions during the time she says she was incapable. These decisions include moving from one province to another, seeking out and consenting to weekly psychological treatment sessions, ending her marriage, negotiating the terms of the separation, and raising a child. The Claimant made these decisions on her own, without intervention by any substitute decision maker.

[25] I place great weight on the Claimant's medical treatment decisions. I understand that because of her very traumatic medical history, it was exceedingly difficult to seek out and attend treatment. I commend the Claimant for overcoming very significant barriers to do so, and for continuing to do so over a very long period of time. The Claimant did so throughout the period of claimed incapacity.

[26] In addition to making these very difficult decisions regarding treatment, the Claimant was capable of dissolving her marriage and negotiating both shared custody and support issues. The shared custody arrangement would have required ongoing communication and decision-making with the Claimant's former spouse, and her child as she grew older. There is no evidence that the Claimant was unable to do this.

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<sup>22</sup> IS1

<sup>23</sup> IS3

<sup>24</sup> IS3

[27] Finally, the Claimant managed her own finances and her household. Again, there is no evidence that she was incapable of making these decisions.

[28] This evidence demonstrates that the Claimant was capable of forming and expressing the intention to make a number of decisions, many of them complex and difficult.

[29] In addition, the capacity to form or express an intention to apply for the pension is different than the capacity to fill out the forms, gather supporting evidence or the other steps needed to actually make the application. The Claimant's mental health illness may have prevented her from actually making the application. However, this is not the legal test for incapacity. Thus, the fact that she could not have completed the forms and/or gathered the necessary evidence for an application is not a relevant consideration.

[30] For these reasons, the evidence does not establish that the Claimant was incapable of forming or expressing an intention to make an application for the pension before she did so.

## **CONCLUSION**

[31] The appeal is allowed.

[32] The General Division made an error in law.

[33] The decision that the General Division should have given is made. The Claimant was not incapable of forming or expressing an intention to apply for the pension. Therefore, further retroactive payment of the disability pension is refused.

Valerie Hazlett Parker  
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	Anna Szczurko, Counsel for the Appellant

	Hilary Perry, Counsel for the Respondent
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