



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. H. v Minister of Employment and Social Development*, 2020 SST 717

Tribunal File Number: GP-19-499

BETWEEN:

M. H.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Patrick O'Neil

Claimant represented by: A. B.

Teleconference hearing on: July 22, 2020

Date of decision: July 27, 2020

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Minister received the Claimant's application for the disability pension on April 10, 2017. The Minister denied the application initially and on reconsideration. The Minister determined the Claimant did not qualify for a disability pension because she has been in receipt of her CPP retirement pension since October 2014. She appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] This appeal involves whether the Claimant is statute-barred from receiving a CPP disability pension because the Minister received her pension application more than 15 months after her CPP retirement pension started to be paid.

ISSUE

[4] Is the Claimant statute-barred from receiving a CPP disability pension because she applied for the pension more than 15 months after her CPP retirement pension started to be paid?

ANALYSIS

The Claimant is statute-barred from receiving the CPP disability pension.

[5] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP, including the requirement that she not be in receipt of the CPP retirement pension¹.

[6] Once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply for a disability pension² unless a request to cancel the retirement pension is made, in writing, within six (6) months after payment of the retirement pension has started³.

¹ Paragraph 44(1)(b) CPP

² Subsection 70(3) CPP

³ Section 66.1 CPP and CPP Regulation 46.2

[7] If a person does not cancel a retirement pension within six (6) months after payment of the pension has started, the only way a retirement pension can be cancelled in favour of a disability pension is if the person is deemed to be disabled *before* the month the retirement pension first became payable⁴.

[8] The earliest a person can be deemed to be disabled is fifteen (15) months *before* the date the disability application is received by the Minister⁵. As the Claimant's application for a disability pension was received in April 2017, the earliest the Claimant could be deemed to be disabled is January 2016.

[9] The effect of these provisions is that the CPP does not allow cancellation of a retirement pension in favor of the disability pension where the disability application is made 15 months or more after the retirement pension started to be paid.

[10] The Claimant's retirement pension started to be paid in October 2014, the month after she attained 60 years of age. She did not apply within six months after payment started to cancel the retirement pension.

[11] The Minister received the Claimant's application for a CPP disability pension in April 2017⁶, being more than 15 month after the month her retirement pension started to be paid.

[12] A person in receipt of a retirement pension is ineligible to receive a disability pension unless he or she could be deemed to have become disabled before the month the retirement pension became payable⁷.

[13] Because the Claimant's retirement pension started in October 2014, and because the earliest she could be deemed to be disabled is January 2016, it is not possible for her to be deemed to be disabled *before* October 2014. As a result, the law does not allow her to cancel her retirement pension in favour of the disability pension, *unless* she was incapable of forming or

⁴ Subsection 66.1(1.1) CPP

⁵ Paragraph 42(2)(b) CPP

⁶ GD2 pages 20-24

⁷ *Attorney General of Canada v. Zakaria*, 2011 FC 136

expressing an intention to make an application for the disability pension before the day she actually made her application⁸. The period of incapacity must be continuous⁹.

Was the Claimant incapable of forming or expressing an intention to make an application for a CPP disability pension before the day her application was actually made?

Test for incapacity

[14] The capacity to form or express an intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The word capacity should not be given a meaning other than its ordinary meaning.¹⁰

[15] The legislative test is precise and focused in that it does not require consideration of the capacity to make, prepare, process, or complete an application for disability benefits, but only the capacity, quite simply, of forming or expressing an intention to make an application¹¹.

[16] The activities of a Claimant during the period between the claimed date of commencement of disability and the date of application may be relevant to cast light on the Claimant's continuous incapacity to form or express the requisite intention, and should be considered¹².

The Claimant was not incapable of forming or expressing an intention to make an application for a CPP disability pension before the day her application was actually made.

[17] The Claimant was born September 25, 1954. She is currently sixty-five years old. She has been in receipt of a CPP retirement pension since October 2014, the month after she attained sixty years of age. She applied for a CPP disability pension in April 2017¹³. She completed the application with the help of her brother, A. B.¹⁴ who helped with technical interpretations. He informed her that she should apply for the CPP disability pension. She requested his help with

⁸ Paragraph 60(9) CPP

⁹ Paragraph 60(10) CPP

¹⁰ *Sedrak v Canada (Social Development)*, 2008 FCA 86

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

¹² *Canada (Attorney General) v. Kirkland*, 2008 FCA 144

¹³ GD2 pages 20-24

¹⁴ GD2 page 24

preparation of the application. The application and questionnaire¹⁵ are in A. B.'s handwriting. She signed and dated the documents. She provided A. B. the information required to fill-in the application and questionnaire.

[18] The Claimant worked as a childcare worker in Thunder Bay from 1996 until February 2003, and has not worked since. She stopped working as she was "burned out". She and her husband had separated in 1996. She lived by herself, except for a few months, in an apartment in Thunder Bay until she moved to Sudbury in 2005 to be closer to family. Save living with A. B. for four months when she first moved to Sudbury, and another brother for a few months, she has lived by herself in her own apartments since 1996.

[19] The Claimant has had bank accounts in her name only for years, including while she worked in Thunder Bay, and since. She paid/pays for her rent, groceries, and other expenses from the bank accounts, including monthly rent from her account with a debit card. She gave her brothers A. and A. B. a Power of Attorney for Property in August 2018¹⁶. She understood that would allow them to help pay bills if needed. She recently opened a joint bank account with A. B. Her CPP and OAS pension payments are deposited into the joint account. A. B. transfers money monthly from the joint account to the account that is still in her name only. She pays her expenses including rent from that account. She did not have a Power of Attorney for Property or joint bank account prior to 2018.

[20] The Claimant noted in questionnaire that she mostly eats at restaurants, and drives a car to run errands and visit family. She has had a valid driver's license for years, including since she lived/worked in Thunder Bay. She owned a car for many years. She currently rents a car from a brother. She has driven herself to restaurants, and stores, including a Value Village, daily when she lived in Thunder Bay, and since. She shops and eats at restaurants, usually by herself, most every day. She has no restrictions on her right to drive. She recently renewed her driver's license.

[21] Dr. Stirrett, family physician, completed a medical report dated May 15, 2017¹⁷. He noted as he first saw the Claimant that day he cannot provide information other than from reviewing

¹⁵ GD2 pages 296-302

¹⁶ GD2 pages 12-13

¹⁷ GD2 pages 66-69

her visits at his walk-in clinic, and by her report. She has no family physician. The walk-in clinic records document depression in 2017, which he reported is currently possibly stable.

[22] Dr. Stirrett completed a Declaration of Incapacity dated May 15, 2017¹⁸. He noted the Claimant's condition does not make her incapable of forming or expressing the intention to make an application.

[23] Dr. Abdulhusein, family physician, at Health Sciences North-Diabetes Care Center, reported September 21, 2017, the Claimant has a moderate impairment in psychosocial and occupational functioning. She was in hospital in February 2011 for an acetaminophen overdose. She is on a wait list to see a psychiatrist. He first saw the Claimant in July 2017.

[24] Ms. Clermont, nurse practitioner (NP), also at Health Sciences North-Diabetes Care Center, completed a Declaration of Incapacity dated May 28, 2018¹⁹. She noted the Claimant's condition does make her incapable of forming or expressing an intention to make an application. She indicated the Claimant's family states her incapacity began in 2003. The medical condition she noted as causing the Claimant's incapacity is the same as Dr. Abdulhusein noted in his report dated September 21, 2017.

[25] The onus is on the Claimant to prove on the balance of probabilities she was incapable of forming or expressing the intention to make an application for CPP disability benefits before the day her application was actually made.

[26] The Declaration of Incapacity completed by Dr. Stirrett in March 2017 indicated the Claimant's condition did not make her incapable of forming or expressing the intention to make an application. That declaration is consistent with the evidence of the Claimant to the effect she lived alone in her own apartments prior to stopping work in 2003 and since, save for short periods when she lived with her brothers. She paid rent and other expenses from her own bank account including recently with a debit card. She has had a driver's license, and has driven her car or a rental car for years prior to February 2003, when she stopped working, and since. She

¹⁸ GD2 page 70

¹⁹

has no restrictions on her driver's license. She drives to restaurants, to shops, to doctor's appointments, and family visits alone at least 90% of the time.

[27] I find the Declaration of Incapacity completed by Ms. Clermont (NP), in May 2018 inconsistent with the evidence of the Claimant that substantiates she has made her own decisions, including where she lived, since she stopped working in 2003, albeit at times with the encouragement and assistance of her brothers. She noted the Claimant's incapacity began in 2003, based solely on information provided by her family, and without any medical information predating 2011. The doctor at the Diabetes Center where Ms. Clermont worked reported September 21, 2017 the Claimant's psychosocial and occupational functioning was only moderately impaired, being a level of impairment that would not render her incapable of forming or expressing the intention to make an application.

[28] I find the activities of the Claimant between February 2003, the claimed date of commencement of disability, and April 2017, when she made her application for a CPP disability pension, clear evidence of her capacity during that time to make choices including financial decisions. I find such activity demonstrated a level of capacity during that period beyond that which is necessary to form or express an intention to make an application.

[29] The Claimant managed her own affairs including banking, rental payments, attendance at appointments, renewing driver's licenses, and completing applications, albeit at times with assistance. Her physicians have never taken action to restrict her driving privileges. While she possibly lacked the requisite capacity briefly when in hospital in 2011, the evidence does not substantiate her incapacity, if any, has been continuous. I find the Claimant was capable of forming or expressing an intention to make an application for CPP disability benefits before the day she actually made her application.

[30] Accordingly, I find the Claimant is statute-barred from receiving the CPP disability pension as she made her application more than 15 months after her CPP retirement pension started to be paid, and was not incapable of forming or expressing an intention to make an application for a CPP disability pension before the day the application was actually made.

[31] The Tribunal is created by legislation and, as such, I only have the powers granted to it by its governing statute. I am required to interpret and apply the provisions set out in the CPP, and Federal Court (FC and FCA) decisions. I cannot use the principles of fairness or equity or consider extenuating circumstances, such as financial hardship, to allow a Claimant to cancel a retirement pension other than as prescribed by the CPP, and Federal Court decisions.

CONCLUSION

[32] The appeal is dismissed.

Patrick O'Neil
Member, General Division - Income Security