



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Minister of Employment and Social Development v K. K.*, 2020 SST 795

Tribunal File Number: AD-20-691

BETWEEN:

**Minister of Employment and Social Development**

Appellant

and

**K. K.**

Respondent

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

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: September 21, 2020

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed.

[2] The decision that the General Division should have given is made. The Claimant was disabled in 1997. He has been incapable of forming or expressing an intention to make an application continuously from June 2000. The application for the disability pension is deemed to have been made then.

[3] Disability pension payments start July 1999.

### OVERVIEW

[4] K. K. (Claimant) had a brain injury in 1971 when he was in a motorcycle accident, and another head injury in 1978. Despite this, he worked in unskilled jobs until 1996. He now resides in a long-term care facility.

[5] The Claimant's mother applied for a Canada Pension Plan disability pension on the Claimant's behalf in 2000. The Minister of Employment and Social Development (as it is now called) refused the application.

[6] The Claimant's brother applied for this pension on his behalf in 2017. The Minister granted this application on the basis that the Claimant became disabled in December 1997. It also decided that the Claimant met the *Canada Pension Plan* test for incapacity and deemed his application to have been made in July 2013.

[7] The Claimant appealed the Minister's decision about when he met the test for incapacity to the Tribunal. The Tribunal's General Division allowed the appeal. It decided that the Claimant became disabled in June 2000, and deemed his application to have been made in February 2013 because he was incapable of forming or expressing an intention to make an application at that time.

[8] Both parties requested leave to appeal the General Division's 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 made an error in law when it decided that the Claimant became disabled in 2000.

[9] I have now read the parties' written submissions and heard oral argument on appeal. I have also read the documents filed with the Tribunal and listened to the recording of the General Division hearing. The appeal is allowed. The General Division made an error in law when it decided that the Claimant became disabled in 2000. It also erred in law when it analyzed only medical evidence to decide when the Claimant met the test for incapacity. The decision that the General Division should have given is made. The Claimant became incapable of forming or expressing an intention to make the application in June 2000. The application is deemed to have been made then.

[10] The disability pension payments start July 1999.

## **ISSUES**

[11] Did the General Division make an error in law or fail to provide a fair process when it decided that the Claimant became disabled in 2000?

[12] Did the General Division make an error in law by failing to analyze the evidence, including that of the Claimant's activities, when deciding when he became incapacitated?

[13] Did the General Division base its decision on at least one of the following important factual errors

- a) It failed to recognize that there was sufficient evidence to find that the Claimant was incapable in 2000;
- b) It inferred that an absence of treatment of cognitive issues meant that the Claimant had capacity; or
- c) It disregarded uncontested medical evidence of incapacity.

## **ANALYSIS**

An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only 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>1</sup>

The parties' grounds of appeal are considered below in this context.

### **Date of disability**

[14] To be disabled under the *Canada Pension Plan*, a claimant must prove that they have a severe and prolonged disability before the end of the minimum qualifying period (MQP). The Claimant's MQP is December 31, 1997. However, the General Division decided that the Claimant was disabled in 2000, which is over 2 years after the MQP.

[15] This is an error in law. A claimant cannot receive a disability pension if they become disabled after the MQP.

[16] The appeal must be allowed on this basis.

### **Analyzing only medical evidence**

[17] The incapacity sections of the *Canada Pension Plan* state that where an application for a benefit is made and the Minister is satisfied that the person had been incapable of forming or

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<sup>1</sup> This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*

expressing an intention to make an application, the Minister may deem the application to have been made on an earlier date.<sup>2</sup>

[18] The Federal Court of Appeal has decided that the capacity to form the 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 a claimant.<sup>3</sup> Further, medical reports and evidence of the Claimant's activities are fundamental to this determination.<sup>4</sup>

[19] This is correctly set out in the General Division decision.<sup>5</sup> The General Division decision states that the Claimant's mother applied for the disability pension on his behalf in 2000 but did not appeal the Minister's refusal because of the stigma she feared was associated with receiving this.<sup>6</sup> This finding does not address the legal test for incapacity.

[20] The decision also summarizes the evidence regarding the Claimant's daily activities, including

- a) the Claimant worked until 1996; this was working on a farm and at a golf course with close supervision doing tasks that did not require independent thinking;
- b) the Claimant did not drive after 1971;
- c) The Claimant did not have a bank account and was not able to manage his finances;
- d) The Claimant had difficulty using a television before 2013;
- e) The Claimant could answer the phone, but not make a telephone call;
- f) The Claimant could not go out on his own, including to medical appointments; and

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<sup>2</sup> *Canada Pension Plan* s. 60(8)

<sup>3</sup> *Sedrak v. Minister of Social Development*, 2008 FCA 86

<sup>4</sup> *Canada (Attorney General) v. Poon*, 2009 FCA 654 at para. 29

<sup>5</sup> General Division decision at para. 11

<sup>6</sup> General Division decision at para. 15

- g) The Claimant's sister completed the forms for him to obtain Ontario disability benefits.<sup>7</sup>

However, the General Division did not analyze the evidence about the Claimant's activities. The decision draws no conclusions from this evidence, nor does it give any explanation for not giving weight to it. In fact, the decision states

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.<sup>8</sup>

The General Division's failure to analyze the non-medical evidence is an error in law. The appeal is allowed on this basis also.

### **Other issues**

[21] The Claimant also argues that the General Division based its decision on a number of important factual errors. However, since I have decided that the Appeal Division must intervene for the reasons set out above, I need not consider these arguments.

### **REMEDY**

[22] The Appeal Division can give the decision that the General Division should have given when it allows an appeal. This is the appropriate remedy in this case because

- a) The record is complete;
- b) There are no gaps in the evidence;
- c) Both parties request that the Appeal Division give the decision that the General Division should have given;

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<sup>7</sup> General Division decision para. 16

<sup>8</sup> General Division decision at para. 19

- d) The *Department of Employment and Social Development Act* states that the Tribunal can decide questions of law and fact necessary to conclude an appeal;<sup>9</sup>
- e) The *Social Security Tribunal Regulations* require that appeals be concluded as quickly as the considerations of fairness and natural justice permit;<sup>10</sup> and
- f) This appeal began in 2017. Further delay would be incurred if the matter were referred back to the General Division for reconsideration.

### **The Claimant was disabled in 1997**

[23] The parties agreed that the Claimant was disabled in 1997 before the end of the MQP.

[24] The Claimant had a tragic motorcycle accident in 1971 and was in a coma for about three months. He returned to work after her recovered. Unfortunately, in 1978 he fell out of a pick up truck and again injured his head. After this injury, the Claimant resided with his mother until he moved to a long-term care facility. He was unable to work after 1996 when the farmer who closely supervised him passed away. No other employer would hire the Claimant due to job site safety concerns.

[25] On balance, the evidence demonstrates that the Claimant was disabled in 1997.

### **The Claimant was incapable of forming or expressing an intention to make an application in 2000**

[26] The Claimant's legal position is that he was incapable of forming or expressing an intention to make an application for the disability pension from June 2000 (when his mother first applied for the pension on his behalf) continuously until the application was made in 2017.

[27] The legal test for incapacity is difficult to meet. To be found incapable, the Claimant need not be able to fill out and process an application, but must be incapable of forming or expressing an intention to do so. This intention is the same as an intention to do other things.

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<sup>9</sup> *Department of Employment and Social Development Act* s. 64(1)

<sup>10</sup> *Social Security Tribunal Regulations* s. 3(1)

Therefore, it is necessary to look at medical evidence as well as evidence of a claimant's activities at the relevant time.

[28] There is no medical evidence about the Claimant cognitive condition in or around 2000. This does not hurt the Claimant's legal case. It is clear that he had two significant head injuries. The medical evidence filed with the Tribunal related to the motorcycle accident in 1971 proves this. The Claimant's condition was not one that was expected to change significantly with time or treatment.

[29] The Claimant was physically healthy otherwise.<sup>11</sup> Therefore, there was no reason for him to see a medical professional. A claimant is not required to continue to seek out medical advice or treatment for a condition that cannot be improved. Therefore, I draw no negative inference from the lack of medical evidence at the time the Claimant says that he became incapable of forming or expressing an intention to make an application.

[30] The bulk of the medical evidence filed with the Tribunal is regarding the Claimant's condition in 2013. At that time, the Claimant was having increased gait issues, incontinence and further cognitive decline.<sup>12</sup> Treatment was tried, and the Claimant discharged from the hospital to a rehabilitation facility. When the Claimant left this facility, his physical abilities had improved to some extent. However, this does not demonstrate that the Claimant had regained any cognitive abilities, or that he was then capable of forming or expressing an intention to make an application.

[31] I place great weight on D. K.'s testimony. He is the Claimant's brother. He has had contact with his brother over the years. He testified in a straightforward and honest fashion. He has no direct interest in the outcome of this proceeding. The Minister did not challenge his evidence.

[32] D. K. testified that the Claimant's cognitive abilities began to decline approximately ten years after the accident, and by the mid 1980s or early 1990s the Claimant was incapable of

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<sup>11</sup> General Division hearing recording approximate time 53:00 although the exact time on the recording may vary depending on the device used to listen to the recording

<sup>12</sup> GD2-96; GF2-107



forming or expressing an intention to make an application. He gave examples of the Claimant's limitations, which are listed above.

[33] D. K. also testified about the Claimant's work after his accidents. He testified that the Claimant worked for a relative on a farm, doing tasks that he was familiar with from having worked there as a teenager. These tasks were simple and did not involve driving or using power tools. For example, the Claimant fed livestock and shovelled manure. The Claimant was not able to exercise judgment, even to decide what the next task should be once one was finished.<sup>13</sup>

[34] The Claimant's work on the farm ended in 1996 when the farmer died, and the next owner was unwilling to closely supervise the Claimant. The Claimant then tried to work doing unskilled tasks at a golf course and in firefighting. These positions were short-lived because of concerns about job site safety, and the Claimant's lack of judgment.<sup>14</sup>

[35] The Claimant's income, as shown in the Record of Earnings,<sup>15</sup> supports the Claimant's limited employment history. He made minimal contributions to the Plan after the accident. He made no contributions after 1996 when he stopped working at the farm.

[36] When the evidence is considered as a whole, it demonstrates that the Claimant was incapable of forming or expressing an intention to do most things by the late 1990s. For example, he could not make appointments, make a phone call, or manage his finances. He did not live independently. He did not drive. He could not obtain work.

[37] It is difficult to pinpoint exactly when the Claimant became so incapable. I rely on D. K.'s testimony that the Claimant's capacity gradually declined beginning approximately ten years after his accident. The Claimant's family first applied for the disability pension in June 2000. I am satisfied that the Claimant was incapable of forming or expressing an intention to make an application at this time.

[38] None of the evidence demonstrates that the Claimant has regained capacity to form or express an intention to make an application. Therefore, The Claimant was incapable of forming

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<sup>13</sup> General Division hearing recording at approximate time 28:50

<sup>14</sup> Ibid. at approximate time 32:00 and 33:00

<sup>15</sup> GD2-4

or expressing an intention to make an application for the disability pension from June 2000 until his family did so on his behalf in 2017. The application is therefore deemed to have been made in June 2000.

## CONCLUSION

[39] The appeal is allowed.

[40] The Claimant was disabled in December 1997.

[41] The application is deemed to have been made in June 2000. However, a claimant cannot be found to be disabled more than 15 months before an application was made. Therefore, the Claimant is deemed to be disabled in March 1999.

[42] Payment of the disability pension starts four months after a person is disabled. Payment of the disability pension starts July 1999.<sup>16</sup>

Valerie Hazlett Parker  
Member, Appeal Division

HEARD ON:	September 10, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. K., Representative for the Appellant  Viola Herbert, Representative for the Respondent

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<sup>16</sup> Canada Pension Plan s. 69