



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MS v Minister of Employment and Social Development*, 2020 SST 1151

Tribunal File Number: GP-18-2659

BETWEEN:

M. S.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Antoinette Cardillo

Teleconference hearing on: December 9, 2020

Date of decision: December 23, 2020

DECISION

The Appellant does meet the definition of incapacity as provided in the Canada Pension Plan (CPP) and he is eligible to receive retroactive disability benefits beyond those already paid by the Minister.

OVERVIEW

[1] The Minister received the Appellant's application for the disability pension on March 25, 2013¹. He was 27 years old with 1.5 years of post-secondary education when he applied for the benefits. The Appellant described his main disabling conditions as schizophrenia and psychosis, including a drug induced psychosis. He indicated he was self-employed and stopped working in September 2009 due to his medical condition and the effects of medication. However, on the Questionnaire for disability benefits², he indicated he felt he could no longer work as of October 2001.

[2] The Minister approved the disability pension application with an effective date of December 2011 (maximum 15 months retroactivity) and a payment date of April 2012 (four (4) month waiting period). The Appellant requested a reconsideration of the Minister's decision claiming incapacity and asking for greater retroactivity to 1987. The Minister maintained its original decision and denied the reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

PRELIMINARY MATTERS

[3] A teleconference hearing was scheduled on June 24, 2020 but the Appellant did not show. The Tribunal was not able to reach the Appellant until July 2, 2020. The Appellant said that he thought he was going to be called on the day of the hearing; he did not realize he had to dial in to attend the hearing. Between July and October 2020, the Tribunal made several attempts at rescheduling the hearing. The Appellant was very difficult to reach and did not respond to letters or emails from the Tribunal except at the end of August 2020. He indicated that he might seek representation. The Tribunal sent him the form to be filled out by his representative and to be returned to the Tribunal. The form was never received. A new hearing was scheduled for

¹ GD2-47

² GD2-95

December 9, 2020. At the hearing, I asked the Appellant if he wanted to proceed without representation and he stated that he did.

APPLICABLE LAWS

[4] To meet the definition of incapacity under subsection 60(9) of the CPP, the Appellant must have met each of the following three components: (i) been incapable of forming or expressing an intention to make an application before the day on which the application was actually made; (ii) ceased to be so incapable before that day; and (iii) the application was made within the period that begins on the day on which he had ceased to be so incapable that is the same number of days as the period of incapacity, not exceeding twelve months; or if the period of incapacity is fewer than thirty days, the application must have been made not more than one month after the month in which the person had ceased to be so incapable.

[5] Subsection 60(10) of the CPP provides that, for the purposes of subsection 60(9), the period of incapacity must be a continuous period.

ISSUE

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

ANALYSIS

[7] 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. 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 life³.

[8] 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

³ *Sedrak v. Canada (Social Development)*, 2008 FCA 86

provisions are precise and focused. They do 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 application⁴.

[9] I have to look at both the medical evidence and the relevant activities of the Appellant 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 to form or express the intent to apply⁵. The CPP incapacity provisions also require 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 incapacity⁶.

[10] In this case, the period of incapacity to be considered is between 1987 (when the Appellant's incapacity allegedly began) and March 2013 (the deemed application date).

i. Medical Evidence

[11] A report dated January 25, 2010⁷ by Dr. Hastings, Psychiatrist, stated that he knew the Appellant through follow-ups in the Halton Region Early Intervention in Psychosis Programme/Phoenix Programme. He was admitted to the hospital from October 26 to December 14, 2009. On discharge, he remained incapable of consenting to treatment and remained incapable during the follow-ups under his care. The incapacity finding was specifically related to antipsychotic medications. This finding was initially made on October 28, 2008. The Appellant's mother was his substitute decision maker, as he was incapable of consenting to antipsychotic medication.

[12] A report dated December 15, 2011 by Dr. Girgla⁸, Psychiatrist, indicated that the Appellant was admitted to hospital on October 26, 2009 and discharged on December 14, 2009 with a diagnosis of schizophrenia and marijuana use. Upon discharge, his mother was his

⁴ *Canada (Attorney General) v. Danielson*, 2008 FCA 78

⁵ *Slater v. Canada (Attorney General)*, 2008 FCA 375

⁶ Subsection 60(10) of the CPP

⁷ GD2-83

⁸ GD2-89

substitute decision maker. The Appellant was found to be incapable of managing finances; there was ongoing evidence of psychosis and he remained incapable of consenting to treatment with antipsychotic medications. He was readmitted on January 25, 2010 and discharged on February 5, 2010. The diagnosis remained the same. In addition, the Appellant was noncompliant with medication and there was mental deterioration and marijuana abuse. He was found to remain incapable to consent to treatment with antipsychotic medication and his mother remained his substitute decision maker.

[13] The medical report in support of the Appellant's disability application⁹ dated January 23, 2013 from Dr. Girgla indicated that the Appellant suffered from schizophrenia and was part of an outpatient clinical program that assisted patients and families with episodes of psychosis. The Appellant was also a patient at the medication clinic. He was hospitalized in January 2010, for 12 days and in April 2012, for 57 days for schizophrenia. He had delusional ideas, paranoia, poor motivation and focus, lack of energy as well as mood fluctuations. He was taking medication every two (2) weeks by injection and was seen by a psychiatrist and community support worker. His prognosis was guarded and chronic and no significant improvement was expected to return to a functional role.

[14] On March 11, 2014¹⁰, the Office of the Public Guardian and Trustee found the Appellant capable.

[15] A declaration of incapacity¹¹ dated February 14, 2018 completed by Dr. Kantor, Psychiatrist, stated that the Appellant became incapacitated in 2009. His incapacity was continuous due to schizophrenia, delusions and disorganized thinking despite treatment. The physician responded "yes" to the question as to whether the Appellant's condition rendered him incapable of forming or expressing an intention to make an application.

ii. Testimony / Appellant's activities

⁹ GD2-94

¹⁰ GD2-39

¹¹ GD2-37

[16] The Appellant testified that he had cognitive issues since he fell and hit his head when he was two (2) years old. Since then, he has always heard voices and had hallucinations. However, until 2009, he was able to work. In 2009, he became very depressed and could no longer function. His mother brought him to the hospital. He was discharged but within one month, he was readmitted. He was readmitted several times after that. He has not been able to return to work since 2009.

[17] He explained that he has always lived with his mother. She takes care of him. He has a driver's license but does not have a car. He has not driven in the past seven (7) years due to his condition and the medication he takes. His mother or grandfather drive him to medical appointments or to the bank. The Appellant said that he does not pay bills, does very little during the day except at times cook meals and does laundry. His mother managed his affairs because he could not while he was been admitted to the hospital and because of the medication. She continues to have oversight, although he wants to be in control of his finances.

[18] He was made aware of the disability pension application by his mother and doctors. He said that he believes he may have partially filled out the form but does not remember if he signed it or not.

[19] He has memory and concentration issues. As mentioned, he has always heard voices in his head and had hallucinations. Although they are now better controlled with medication, he continues to struggle and cannot function properly in the workforce.

[20] He has been seeing a psychiatrist every four (4) to six (6) weeks since 2009. A nurse also goes to his home once every week to administer injections.

iii. Incapacity

[21] The Minister submitted that in order to qualify under the CPP incapacity provision, there must be evidence to show that the Appellant is incapable or forming or expressing the intent to

make an application for benefits and that this incapacity has been continuous. In this case, the information on file did not support incapacity as per CPP legislation for the missed benefit period requested. The following was considered:

- the Appellant was able to sign all required documents to apply for CPP disability benefits including consent. Further, he submitted his own request for reconsideration and signed it, supporting capacity;
- the Appellant maintained his driver's license as noted on the questionnaire and he was able to drive, indicating that he had the cognitive capability to safely operate a motor vehicle; and
- the Appellant had the capability to contact CPP and to send in the required documents independently. Further, there was no evidence on file to support that he had a Public Guardian or Trustee or a Power of Attorney to handle his affairs at this time. On March 11, 2014, a letter from his Public Guardian and Trustee indicated that he had been found capable.

[22] I disagree with the Minister's submission. I find that, on a balance of probabilities, the evidence does support a finding that the Appellant was incapable of forming or expressing an intention to make a disability pension application between October 2009 and March 2013.

[23] I base my finding on the following facts:

- the Appellant has been admitted to the hospital on several occasions and for long periods of time between October 2009 and April 2012 for schizophrenia;
- he has been declared by doctors unable to give consent to treatment or medication;
- his mother was appointment substitute decision maker from 2009 until he was found capable in March 2014;
- a declaration of incapacity¹² dated February 14, 2018 completed by Dr. Kantor, Psychiatrist, stated that the Appellant became incapacitated in 2009 and his incapacity was continuous due to schizophrenia, delusions and disorganized thinking even with treatment; and
- the Appellant always lived with his mother who took care of him, he did not manage his affairs or pay bills, he has not driven in seven (7) years and his mother or grandfather take him to appointments or to the bank.

[24] I am satisfied that the Appellant lacked the capacity to form or express an intention to apply for a benefit under the CPP as of October 2009 when he could no longer function, had stop working and was hospitalized. I am satisfied that the Appellant had cognitive issues prior to

¹² GD2-37

October 2009. However, I cannot determine from the evidence whether those issues were severe enough that the Appellant met the incapacity definition under the CPP.

iv. Disability

[25] 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 duration¹³.

[26] Having a disability under the CPP is not the same thing as meeting the incapacity definition under the CPP. As stated above, the Appellant's incapacity began in October 2009.

[27] The Appellant's disability is not in dispute. The Minister agreed he is entitled to disability benefits within the meaning of the CPP.

CONCLUSION

[28] I find that the Appellant does meet the incapacity criterion set out in the CPP and he is eligible to receive retroactive disability benefits beyond those already paid by the Minister. The Appellant was incapacitated between October 2009 and March 2013.

[29] I also find that the Appellant was disabled in October 2009 (date of onset of disability). Pursuant to subsection 60(9), the deemed date of application is the earlier of the month before the first month the disability could be paid or when the incapacity started. In this case, the incapacity and the disability started at the same time so the deemed date of application is January 2010 (the month before the first month the disability could be paid). In light of the date of onset of the disability being October 2009, the date of payment of the disability pension is February 2010 since payments start four months after the deemed date of disability.

[30] The appeal is allowed.

Antoinette Cardillo
Member, General Division - Income Security

¹³ Subsection 42(2) *Canada Pension Plan*