



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *DO v Minister of Employment and Social Development*, 2021 SST 147

Tribunal File Number: GP-20-1399

BETWEEN:

**D. O.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Shannon Russell

Minister represented by: John Gebara

Teleconference hearing on: February 22, 2021

Date of decision: March 14, 2021

## **Decision**

[1] The Claimant is not entitled to Canada Pension Plan (CPP) disability benefits earlier than March 2016. This decision explains why I am dismissing the appeal.

## **Overview**

[2] The Claimant is a 63-year-old woman who, by all accounts, led a happy and successful life until 2004. In May 2004, the Claimant was shot during a home invasion. Since then, the Claimant has had a number of illnesses including PTSD, anxiety and depression.

[3] The Claimant applied for CPP disability benefits in February 2017. The Minister approved her application, and awarded her benefits retroactive to March 2016.

[4] The Claimant asked the Minister to reconsider the effective date of her payment, as she believed she should have received benefits back to 2004. She explained that she has had PTSD since 2004, and that she was unable to prepare the forms to apply for benefits sooner.

[5] The Minister reconsidered, and decided to maintain the original payment date of March 2016. The Minister explained that it paid the Claimant the most retroactivity allowed under the legislation. The Claimant appealed the Minister's reconsideration decision to the General Division of the Social Security Tribunal.

[6] After the Claimant appealed to the Tribunal, the Minister filed written submissions asking for the appeal to be dismissed. The Minister explained that it considered whether the Claimant was unable (by reason of incapacity) to apply for disability benefits sooner, but decided that she was not incapable of forming or expressing the intention to apply for benefits.

[7] In February 2019, a Tribunal Member decided to summarily dismiss the Claimant's appeal. That member explained that the Claimant's appeal did not have a reasonable chance of success because the evidence did not show she was incapable of forming or expressing the intention to apply for benefits sooner.

[8] The Claimant appealed the member's decision to the Tribunal's Appeal Division. However, before the Appeal Division heard the Claimant's appeal, the Claimant filed an application to rescind or amend the General Division's decision of February 2019. Another Tribunal Member dismissed the Claimant's application to rescind or amend in July 2020 because the Claimant did not establish a new material fact.

[9] The Appeal Division then heard the Claimant's appeal with respect to the General Division's decision of February 2019. In September 2020, the Appeal Division allowed the appeal. It allowed the appeal for two reasons. First, the Appeal Division held that the General Division did not give the Claimant a full opportunity to present her case. Second, the Appeal Division held that the General Division made an error of law because the General Division did not refer to any evidence about the Claimant's activities during the period of claimed incapacity. As a remedy, the Appeal Division referred the matter back to the General Division for reconsideration.

### **The CPP legislation limits retroactive payments to 11 months**

[10] When a person is awarded CPP disability benefits, there are limits on how far back payments can go. The legislation says that the earliest a person can be deemed to be disabled, for payment purposes, is 15 months before the date of application<sup>1</sup>. This rule applies even if the person was disabled for many years before applying for benefits. The legislation also says that there is a 4-month waiting period before payments begin<sup>2</sup>. When these rules are read together, it means that the most retroactive payments a person can receive is 11 months of benefits.

[11] The Claimant has received 11 months of retroactive payments. She applied for disability benefits in February 2017. She was deemed disabled in November 2015 (15 months before the date of her application). Her benefits started as of March 2016 (4 months after November 2015).

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<sup>1</sup> Paragraph 42(2)(b) of the *Canada Pension Plan*

<sup>2</sup> Section 69 of the *Canada Pension Plan*

## **The 11-month limit on retroactive benefits does not apply if the application was delayed because of incapacity**

[12] If a person's application for benefits was delayed because of incapacity, then the person may be eligible for more than 11 months of retroactive benefits.

[13] Incapacity means that a person was **incapable of forming or expressing an intention** to make an application before the day on which the application was actually made<sup>3</sup>. A period of incapacity must be a **continuous** period<sup>4</sup>.

[14] The legal test for incapacity is precise and focused. The test is not about whether a person knows about the benefits in question<sup>5</sup>. The test is also not about whether the person can make, prepare, process or complete an application<sup>6</sup> or whether the person is able to deal with the consequences of making an application<sup>7</sup>.

## **What the Claimant must prove**

[15] There is no dispute that the Claimant is disabled. There is also no dispute that her disability is severe and prolonged<sup>8</sup>, and has been so for many years.

[16] What is in dispute is whether the Claimant was unable to apply for benefits before February 2017. To be successful with her appeal, the Claimant needs to show that she was incapable of forming or expressing the intention to apply for benefits before February 2017.

## **The claimed period of incapacity is not well defined**

[17] The Claimant told me that she believes her incapacity began in 2004. The Claimant was unable to tell me when the incapacity stopped (or when she regained capacity). She said she may

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<sup>3</sup> Subsection 60(9) of the *Canada Pension Plan*

<sup>4</sup> Subsection 60(10) of the *Canada Pension Plan*

<sup>5</sup> This is explained in *Canada (Attorney General) v. Hines*, 2016 FC 112

<sup>6</sup> This is explained in *Canada (Attorney General) v. Danielson*, 2008 FCA 78

<sup>7</sup> This is explained in *Canada (Attorney General) v. Poon*, 2009 FC 654

<sup>8</sup> The words "severe" and "prolonged" are defined in paragraph 42(2)(a) of the *Canada Pension Plan*. A disability is severe if it renders a person incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

have regained her capacity a year before she applied for benefits in February 2017, but she was not really sure.

**The Claimant was not incapable of forming or expressing the intention to apply for benefits before February 2017**

[18] The evidence does not show that the Claimant was incapable of forming or expressing the intention to apply for benefits before February 2017. I say this for six main reasons.

**a. The Claimant did not have a Power of Attorney**

[19] The Claimant testified that she did not have a Power of Attorney during the period of claimed incapacity. This is significant, as it shows that the Claimant was able to make decisions and sign documents on her own. It is also significant because the Claimant was seeing a number of health care practitioners throughout the period of claimed incapacity and those practitioners seem not to have been concerned about the Claimant attending consultations or consenting to treatment without a Power of Attorney.

**b. Incapacity is not about the ability to fill out forms or write letters**

[20] The Claimant explained that she was unable to apply for benefits sooner because she was unable to complete forms or do the necessary paperwork<sup>9</sup>.

[21] As I explained previously, the legal test for incapacity is not about whether a person can make, prepare, process or complete an application. It is also not about whether a person can write a letter explaining why they are eligible for benefits. The legal test is simply about whether the person could **form or express the intention** to apply for benefits.

**c. The Claimant was able to apply for disability benefits from her insurer**

[22] The evidence shows that the Claimant was able to sign the documents needed to obtain disability benefits from her insurer. For example, she signed insurance-related authorizations in

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<sup>9</sup> Pages GD1-3, GD1-5, GD5-2, GD5-3 and AD1D-1

August 2004<sup>10</sup> and July 2005<sup>11</sup>. This is not consistent with a finding that, during the same period of time, the Claimant was incapable of forming or expressing an intention to apply for CPP disability benefits.

**d. The Claimant's activities during the claimed period of incapacity are not consistent with a finding of incapacity**

[23] When I am assessing whether a person was incapable of forming or expressing an intention to apply for benefits, I must think about what kinds of activities that person did during the period of claimed incapacity. This is because the intention to apply for benefits is not that different from the capacity to form an intention about other things in one's life<sup>12</sup>.

[24] Not one of the Claimant's activities is determinative. However, taken as a whole, the Claimant's activities since 2004 are not supportive of a finding that she was continuously incapable of forming or expressing the intention to apply for benefits. These activities include:

- The Claimant moved to a different home in or about December 2004. I know this because in January 2005 Dr. William Gnam, Psychiatrist, reported that the Claimant told him she had recently moved after discovering that the young men who attacked her lived in the neighbourhood and were out on bail<sup>13</sup>. The ability to decide to leave one neighborhood for another and to do what was needed to physically relocate and to be able to explain the rationale for the move to a psychiatrist are not indicative of a finding of incapacity.
- The Claimant was able to drive a motor vehicle during the period of claimed incapacity<sup>14</sup>. The ability to drive requires a high level of cognitive functioning, and is not consistent with a finding of incapacity.

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<sup>10</sup> Page GD2-82

<sup>11</sup> Page GD2-88

<sup>12</sup> This is explained in *Canada (Attorney General) v. Kirkland*, 2008 FCA 144 and *Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86.

<sup>13</sup> Pages GD2-124 to GD2-125

<sup>14</sup> Pages GD2-125 and GD2-127

- The Claimant was able to go and play bingo on numerous occasions<sup>15</sup>. This is relevant because it shows the ability to decide to participate in a pastime that has the potential for financial reward. It also requires the ability to buy bingo cards, pay attention to the numbers called, mark the called numbers on the bingo cards and communicate a win (if applicable).
- The Claimant declared bankruptcy in 2007/2008<sup>16</sup>. The declaration of bankruptcy and the signing of the relevant documents are not supportive of a finding of incapacity to form or express an intention to apply for benefits.
- In May 2009, the Claimant told one of her health care practitioners that in September 2009 she would be called as a witness in the trial of her attacker<sup>17</sup>. The Claimant's health care practitioner noted that this would require more in-patient treatment, but he did not indicate or suggest that the Claimant lacked the competency to testify in court.
- In 2013, Dr. Paul Mulzer, Psychiatrist, assessed the Claimant and he wrote that the Claimant engaged readily in the clinical interview, was able to provide information in a reliable manner, had normal thought form and content with no perceptual disturbances, had good insight and judgment, had intact cognition, and exhibited an excellent knowledge base<sup>18</sup>. None of this is supportive of a finding of incapacity.
- In February 2014, Dr. Mulzer reported that he saw the Claimant in follow up, and she was quite insightful and intelligent, and was exhibiting good judgement. He also said her thoughts, form and content, were intact<sup>19</sup>.
- The Claimant participated in several treatment programs during the period of claimed incapacity. While there may have been an occasion when the Claimant was admitted to a facility involuntarily (on a Form 1)<sup>20</sup>, participation in most of the programs appears to

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<sup>15</sup> Page GD2-127

<sup>16</sup> Page IS7-27

<sup>17</sup> Page GD2-95

<sup>18</sup> Page IS7-29

<sup>19</sup> Page IS7-24

<sup>20</sup> There is mention of a suicide attempt in 2009 and a subsequent referral to hospital in X where the Claimant was placed on a Form 1 (page IS7-27).

have been voluntary. The Claimant says that a counsellor completed the forms for the treatment programs<sup>21</sup>. This may be true. However, the Claimant would still have needed to consent to participate in the programs. The ability to consent to participate in these programs, and the ability to actively take steps towards recovery are not consistent with a finding of incapacity. Some of the treatment programs include:

- August 2007 to October 2007: Homewood, the Substance Abuse and Trauma Safety (SATS) program<sup>22</sup>.
- June 21, 2011 to August 11, 2011: The SATS program<sup>23</sup>.
- September 2012: Windsor Regional Hospital Problem Gambling Services Program, 21-day residential treatment<sup>24</sup>.

**e. The Claimant said she does not know if she could have decided to apply for benefits before February 2017**

[25] During the hearing, I asked the Claimant an important question. I asked her what she would have said if someone had asked her (before 2017) if she wanted to apply for a monthly disability benefit. Specifically, I asked the Claimant if she would have been able to tell the person that she wanted to apply for the benefit. The Claimant told me that she does not know what she would have said. She explained that she did not open her mail for a long time and that years later she got someone to open her mail for her. However, she added that she has no idea how she would have replied to a question about benefits.

[26] The Claimant's uncertainty about whether she could have expressed an intention to apply for benefits is not very supportive of a finding of incapacity, particularly in light of the other reasons I have provided for why I am unable to find in the Claimant's favour.

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<sup>21</sup> Page AD1D-2

<sup>22</sup> Page IS7-27

<sup>23</sup> Page IS7-27

<sup>24</sup> Page IS7-32



**f. The Declaration of Incapacity of July 2019 is not persuasive**

[27] In July 2019, the Claimant's family physician (Dr. Tung-Barnett) completed a Declaration of Incapacity form. In that form, Dr. Tung-Barnett reported that, from May 2004 to May 2017, the Claimant was incapable of forming or expressing the intention to make an application<sup>25</sup>.

[28] I do not find this Declaration of Incapacity to be persuasive. As such, I have not given it much weight. Here are my reasons why.

[29] First, Dr. Tung-Barnett first completed a Declaration of Incapacity in April 2018 and at that time she reported that the Claimant's condition did not make her incapable of forming or expressing the intention to make an application<sup>26</sup>. Since then, Dr. Tung-Barnett has not really explained what caused her to change her opinion, except to say there was a misunderstanding about the first question on the original Declaration of Incapacity form<sup>27</sup>.

[30] Second, Dr. Tung-Barnett did not clearly explain **why** she believed the Claimant was incapable of forming or expressing the intention to make an application. She explained that the Claimant was diagnosed with PTSD, depression and anxiety, but she did not explain **why** these conditions rendered the Claimant incapable.

[31] Third, there is some suggestion in Dr. Tung-Barnett's reports that she believes that incapacity means an inability to fill out forms. For example, in May 2019, Dr. Tung-Barnett wrote that the Claimant had only recently been able to complete forms in an effort to receive some sort of compensation<sup>28</sup>. As I explained earlier, incapacity does not mean an inability to fill out and/or submit forms.

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<sup>25</sup> Page AD6-3

<sup>26</sup> Page GD3-2

<sup>27</sup> Page AD6-2

<sup>28</sup> Page AD1C-2

[32] Fourth, Dr. Tung-Barnett's opinion that the Claimant's incapacity ended in May 2017 is inconsistent with the fact that the Claimant was able to apply for disability benefits before then. The Claimant signed her application for CPP disability benefits on February 6, 2017<sup>29</sup>.

## **CONCLUSION**

[33] The appeal is dismissed.

Shannon Russell  
Member, General Division - Income Security

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<sup>29</sup> Page GD2-104