



Citation: *SB v Minister of Employment and Social Development*, 2021 SST 934

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant/Claimant: S. B.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated November 20, 2020 (issued
by Service Canada)

Tribunal member: Thomas Vulpe

Type of hearing: Teleconference

Hearing date: October 5, 2021

Hearing participants: S. B. (Appellant/Claimant)
H. B. (spouse of Appellant/Claimant)

Decision date: December 15, 2021

File number: GP-21-340

Decision

[1] The appeal is dismissed. The Appellant, S. B., is not entitled to payment of his Canada Pension Plan (CPP) disability benefit before March 2019. This decision explains why I am dismissing his appeal.

Overview

[2] The Appellant applied for a CPP Disability benefit on February 24, 2020.¹ The Minister of Employment and Social Development (Minister) granted a disability benefit on May 4, 2020. Payment started in March 2019. This is the maximum retroactivity allowed by the *Canada Pension Plan*.

[3] The Appellant asked for his disability benefit to start in January 2016. He submitted a Declaration of Incapacity dated July 22, 2020² The Minister refused his claim of incapacity.³ The Appellant requested a reconsideration of this decision. The Minister denied the reconsideration.

[4] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Tribunal held a pre-hearing conference with the Appellant, his wife and a representative of the Minister on July 8, 2021. The purpose of the pre-hearing conference was to explain the incapacity provisions in the *Canada Pension Plan*.⁴

[6] A hearing took place on October 5, 2021. Following the hearing, the Tribunal allowed the Appellant to send in a revised Declaration of Incapacity.⁵ The Minister provided revised submissions on December 13, 2021.⁶

¹ See GD2R-55.

² See GD2R-51-52.

³ See GD2R-7-11.

⁴ See GD10.

⁵ GD16

⁶ GD17

What I Have To Decide

[7] Is the Appellant entitled to payment of his CPP disability benefit before March 2019?

[8] This includes deciding if the Appellant met the test for incapacity – that is, was he incapable of forming or expressing an intention to make an application before February 2020?

Reasons For My Decision

[9] I have decided the Minister was right to start paying the Appellant's CPP disability benefit in March 2019. The Appellant did not meet the test for incapacity, so his disability benefit could not be paid before that date. I reached that decision by considering the following issues.

The Minister was right to start payment to the Appellant in March 2019

[10] The earliest a CPP disability benefit can be paid is four months after the person became disabled.⁷ Furthermore, a person can't be considered disabled more than 15 months before the Minister received their application.⁸

[11] The Minister received the Appellant's application for a CPP disability benefit on February 24, 2020. Fifteen months before the application date of February 2020 is November 2018. The Minister decided that the Appellant is considered to have become disabled in November 2018. Four months after November 2018 is March 2019. The Minister began paying the Appellant's CPP disability benefit in March 2019. The Minister correctly followed the law as set out in the *Canada Pension Plan*.

[12] In summary, the Minister was correct to begin payment of the Appellant's CPP disability benefit as of March 2019.

⁷ Section 69 of the *Canada Pension Plan* sets out this rule.

⁸ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.)

The incapacity provision does not apply to the Appellant

[13] The *Canada Pension Plan* has an exception to this rule about retroactivity. It is called the incapacity provision.⁹ When it applies, it means a person's CPP application can be treated as if they applied before they actually did.

[14] To be able to use the incapacity provision, the Appellant had to prove it is more likely than not that he was continuously incapable of forming or expressing an intention to make an application between January 2016 and February 2020. I have a lot of sympathy for the Appellant. I know he has considerable health problems and challenges. But he does not meet the test for incapacity. Here is why.

[15] It is not easy to prove incapacity. It does not matter if the Appellant did not know he had to apply, or could not fill out the application form. He had to be incapable of forming or expressing an intention to apply. This is no different than having the capacity to form an intention to make other relevant choices in life.¹⁰

[16] In deciding if the Appellant met the test for incapacity, I had to look at medical evidence, as well as evidence of what else he was doing during the period he says he did not have capacity to apply for his CPP disability benefit.¹¹

Medical evidence does not support a finding of incapacity

[17] I find that neither the Declarations of Incapacity nor the medical evidence support a finding of incapacity.

[18] I find that the Declarations of Incapacity don't support a finding of incapacity for two reasons:

- The medical condition described by the doctor is not consistent with a person being incapable of forming or expressing the intention to apply for CPP

⁹ See sections 60(8), (9) and (10) of the *Canada Pension Plan*.

¹⁰ See *Canada (Attorney General) v. Kirkland*, 2008 FCA 144.

¹¹ See *Attorney General of Canada v Danielson*, 2008 FCA 78; *Grosvenor v Attorney General of Canada*, 2018 FC 36.

- The incapacity is described as ongoing; however, the Appellant engaged in activities inconsistent with a finding of incapacity during the stated period of incapacity

[19] Dr. Neumann completed a Declaration of Incapacity on July 22, 2020¹² and provided a revised Declaration on November 3, 2021¹³ at the request of the Appellant. Dr. Neumann states in both forms that the Appellant's main disabling medical condition causing incapacity is bilateral rotary cuff ruptures that were not fully repaired through surgery.

[20] There is no doubt that the Appellant has a significant disabling condition which has led to considerable pain and limitations of day-to-day activities. The Appellant also suffered from prostate issues and a hernia, both resulting in surgery. He also has other ailments, suffers considerable pain and is on medications to relieve his pain. There is indication he suffers from and has been treated for depression. The Minister agreed that the Appellant is disabled. However, **a disability is not the same as incapacity**.¹⁴

[21] Despite Dr. Neumann's declaration, I do not find that a medical diagnosis of bilateral rotary cuff ruptures describes a medical condition that would render the Appellant incapable of forming or expressing an intention to apply for the benefit. There is no medical evidence that this physical condition or any of his other conditions or their treatments impaired the Appellant's capacity to think and form or express the intention to make an application for a CPP disability benefit in the period January 2016 to February 2020.

[22] **Incapacity must also be continuous**.¹⁵ The Appellant applied for a CPP disability benefit in February 2020.¹⁶ He signed the form; an authorized representative did not complete his application. No power of attorney exists or existed for the Appellant. The Appellant also signed his request for Reconsideration, received

¹² See GD2R-106-114

¹³ GD16

¹⁴ See *O'Rourke v. Canada (Attorney General)*, 2018 FC 498.

¹⁵ See Section 60(10) of the Canada Pension Plan

¹⁶ GD2R-55

November 12, 2020¹⁷, and his Notice of Appeal at the Tribunal received February 11, 2021¹⁸. Furthermore, the Appellant demonstrated full capacity to participate in the pre-hearing conference (July 8, 2021) and hearing (October 5, 2021). The Appellant engaged in all of these during the alleged period of ongoing incapacity.

[23] Dr. Neumann states in the Declarations of July 22, 2020 and November 3, 2021 that the Appellant's incapacity began on January 5, 2016 and is ongoing. I find that the Appellant cannot be both incapacitated from January 2016 to July 2020 (and ongoing) or November 2021 (and ongoing) and engage in numerous activities that are not consistent with continuous incapacity.

[24] For these reasons, I give very little weight to Dr. Neumann's Declaration of Incapacity as providing support for a finding of incapacity of the Appellant.

[25] The Appellant asserts that the constant pain of his condition and the medications for pain treatment made him incapable of applying earlier. He further states that his emotional and psychological state of mind meant he was incapable of applying earlier. The medical evidence does not support a finding that the pain or the treatment for pain resulted in the Appellant being incapable of applying. While again I recognize that the Appellant has experienced considerable hardship because of his disabling conditions, I cannot conclude that these medical conditions made him unable to form or express the intention to apply.

[26] I also have to look at the Appellant's activities between January 2016 and February 2020 to see what they show about his capacity.

The Appellant's activities do not support a finding of incapacity

[27] The Appellant attended numerous medical appointments as part of his diagnosis and treatment of his various medical conditions from January 2016 to February 2020.

¹⁷ GD2R-21-23

¹⁸ GDI-1-6

He also received medical treatments for other ailments which involved appointments and decisions regarding his care and recovery.¹⁹

[28] Attending these medical appointments and participating in decisions about his medical care are not consistent with a finding of incapacity under the CPP.

[29] In his testimony the Appellant insisted that his wife and children were the ones who responded to all questions and made all decisions regarding his care and treatment at all his medical appointments through the period of alleged incapacity. I do not find this argument credible or believable.

[30] In August 2017, the Appellant attended an appointment with Dr. Chin²⁰. At this appointment, Dr. Chin discussed treatment options with the Appellant. The notes of this appointment are quite extensive and nothing in them gives any indication from the doctor that the Appellant was not involved in decisions related to his own care and treatment. On the contrary, the notes of this appointment tell of an extensive discussion of options of how to proceed with his care involving two primary options. The doctor speaks clearly in his notes to the Appellant (“He”) taking time to consider his options, including taking a trip to India to see how things evolve as the treatment is somewhat at a standstill. I agree with the Minister that the Appellant’s engagement in this appointment is not consistent with a finding of incapacity.

[31] In addition to the numerous medical appointments, in November 2018, the Appellant underwent a Functional Capacity Evaluation.²¹ The Appellant participated actively in the range of assessment activities. This functional capacity assessment involves a series of tasks that required the Appellant to comply with instructions as well as provide answers to questions related to his functional limitations. I agree with the Minister that the Appellant’s ability to participate in this assessment is inconsistent with a finding of incapacity.

¹⁹ July 13, 2016 – Medical imaging; April 4, 2017 – Dr. Chin; September 17, 2018 – TURP Surgery, university Urology Associates; May 6, 2019 – Hernia Surgery, Dr. Meloche

²⁰ See GD2R-120-121

²¹ See GD2R-128-132

[32] When I raised these appointments with the Appellant as evidence of his capacity, he and his wife explained that his wife took care of all of his care, attended all his medical appointments and spoke on his behalf. I am certain that the Appellant received considerable assistance with managing aspects of his life during this period of time, however, his wife could not have completed the Functional Capacity Evaluation on his behalf. Nor do I find it credible that the Appellant did not engage in the discussion of his own medical care with Dr. Chin given the evidence before me.

[33] The test for incapacity is stringent, and I find that the Appellant's activities described above are not consistent with a finding of incapacity under the *Canada Pension Plan*.

The Appellant stated that he did not know he could apply

[34] On at least three occasions, the Appellant or his wife made a statement to the effect that, "if we had known about the CPP disability benefit we would have applied".²² I agree with the Minister that a lack of knowledge of a benefit is not the same as not having the capacity to form or express the intention to make an application for a benefit. The law is quite clear in this regard.²³ In all three of these instances the Appellant or his wife made these statements spontaneously.

[35] When I asked the Appellant and his wife about why they made these statements, they stated that this is not what they meant. The Appellant did not answer my question directly but rather explained the pain and challenges of his condition and multiple medical conditions at the time, both of which are accepted as facts. I find that their statements to be a straightforward admission of their disappointment with the fact that they did not know about CPP disability benefits and because of this the Appellant had not applied earlier.

²² See the letter of August 15, 2020 sent by the Appellant's wife at GD2R-51-52, Recordings of pre-hearing conference and hearing.

²³ See *Canada (Attorney General) v. Hines*, 2016 FC 112

Conclusion

[36] I sympathize with the Appellant. He has suffered a tremendous amount from his disabling conditions. I understand that he believes that his conditions and circumstances left him incapable of applying earlier. However, the law about incapacity is narrowly defined as having the capacity to form or express the intention to apply. Unfortunately, I cannot help him. I have applied the law as it is set out in the *Canada Pension Plan*. I can't disregard the law for compassionate reasons.

[37] I find it more likely than not that the Appellant was not continuously incapable of forming or expressing an intention to make a disability application between January 2016 and February 2020. He does not meet the test for incapacity, so I cannot deem him to have applied before February 2020. Payment cannot start before March 2019.

[38] The appeal is dismissed.

Thomas Vulpe
Member, General Division – Income Security Section