



Citation: *DK v Minister of Employment and Social Development*, 2021 SST 960

**Social Security Tribunal of Canada  
General Division – Income Security Section**

## Decision

**Appellant:** D. K.  
**Representative:** M. K.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated January 6, 2021 (issued by  
Service Canada)

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**Tribunal member:** George Tsakalis

**Type of hearing:** Teleconference  
**Hearing date:** August 26, 2021  
**Hearing participant:** Marilyn Kemp  
**Decision date:** September 24, 2021  
**File number:** GP-21-726

## Decision

[1] I am dismissing the Claimant's appeal.

## Overview

[2] D. K. is the Claimant in this case. He applied for a Canada Pension Plan (CPP) disability pension on May 11, 2020. The Minister of Employment and Social Development (the Minister) accepted his application. The Minister granted him a disability pension with the maximum retroactive date for the start of his disability, which was February 2019. The Claimant began receiving disability pension payments as of June 2019.<sup>1</sup>

[3] The Claimant appeals the start date of his disability pension payments. He says that he was incapable of applying for a CPP disability pension before May 2020. He says that he had incapacity under the CPP since February 2008.

[4] The Claimant says that he could not apply for a CPP disability pension before May 2020 because of an extreme mental incapacity caused by post-traumatic stress disorder (PTSD) and severe depression.

[5] The Claimant was born in 1971. His health problems began in February 2008, after he received a death threat while working as a bus driver. The Claimant says he was incapable of applying for a CPP disability pension as of February 2008 because he could not function in everyday life. He needed daily support and supervision and the medical evidence supports a finding of incapacity under the CPP. The Claimant's representative argued that he did not make decisions on his own. She was the one who applied for the disability pension because he could not do so.

[6] The Minister says the Claimant did not have incapacity under the CPP. The Claimant took 15 days off work after receiving a threat in February 2008. He continued working as a bus driver until October 2008. He also worked for four months as a

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<sup>1</sup> Under paragraph 42(2)(b) of the CPP, in order to calculate the date of payment of the pension, a person cannot be deemed disabled more than 15 months before the Minister received the pension application. The Minister received the Claimant's disability pension in May 2020, so the Claimant's deemed date of disability was February 2019. Under section 69 of the CPP, disability pension payments start four months after the deemed date of disability, which in this case was June 2019.

maintenance worker in 2017. Although, the Claimant may have needed the help of his representative to fill our forms, he signed them.<sup>2</sup>

## **What the Claimant must prove**

[7] For the Claimant to succeed on this appeal, he must show that it was more likely than not that he lacked the capacity to form or express an intention to apply for a benefit.<sup>3</sup> The capacity to form or express an intention to apply for benefits is similar to the capacity to form or express an intention with respect to other life choices.<sup>4</sup>

[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 provision is precise and focused. It does 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 application.<sup>5</sup> I have to consider the Claimant's capacity to make decisions.

[9] I have to look at both the medical evidence and the relevant activities of the Claimant 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 of time to form or express the intent to apply for a disability benefit.<sup>6</sup>

[10] In this case, the incapacity period to be considered is between February 2008 (when the Claimant's alleged incapacity began) and May 2020 (when the Claimant applied for the CPP disability pension).

[11] The CPP incapacity provisions also require the Claimant to show that he was continuously incapable of forming or expressing an intention to make a CPP disability application during the entire period of the alleged incapacity.<sup>7</sup>

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<sup>2</sup> See GD06-9

<sup>3</sup> See subsection 60(8) CPP

<sup>4</sup> See *Sedrak v. Canada (Social Development)*, 2008 FCA 86

<sup>5</sup> See *Canada (Attorney General) v. Danielson*, 2008 FCA 78

<sup>6</sup> See *Slater v. Canada (Attorney General)*, 2008 FCA 375

<sup>7</sup> See subsection 60(10) CPP and *Flaig v. Canada (Attorney General)*, 2017 FC 531

## **Matters I have to consider first**

[12] A Case Conference was held on June 18, 2021. The legal test for incapacity was discussed at the Case Conference, as well as procedural issues.

[13] I gave the parties a deadline to make submissions before the hearing.<sup>8</sup> The Minister missed a July 26, 2021 deadline and did not provide submissions to the Tribunal until August 16, 2021.<sup>9</sup> The Claimant's provided submissions to the Tribunal on August 17, 23, 24, and 25, 2021.<sup>10</sup>

[14] The Claimant's representative stated at the hearing that she had time to respond to the Minister's submissions and she agreed to proceed with the hearing on August 26, 2021.

[15] The Claimant's representative is the Claimant's mother. She gave testimony on the Claimant's behalf because his medical condition prevented him from testifying.

## **Reasons for my decision**

[16] I find the Claimant did not have incapacity under the CPP before May 2020.

### **The Claimant failed to prove he had incapacity under the CPP from February 2008 to May 2020**

[17] The Claimant's representative testified that the Claimant has lived alone since his wife left him in 2016. The Claimant's representative sees him every day. She and her husband have been buying his groceries since 2016. She says that the Claimant will not leave the house. He sleeps during the day and stays up at night. The Claimant's wife handled his finances before 2016 and she pays his mortgage. The Claimant suffers from nightmares and anxiety.

[18] The Claimant will not make medical appointments. The Claimant's representative has to make medical appointments for him. The Claimant was diagnosed with a

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<sup>8</sup> See GD05

<sup>9</sup> See GD06

<sup>10</sup> See GD07, 08, 09, and 10

malignant melanoma in June 2018.<sup>11</sup> He refuses treatment for his skin cancer and this has placed his life in danger.

[19] The Claimant's representative says that the Claimant cannot work. He tried working as a caretaker from February to June 2017. But that effort ended in failure. His wife came up with the idea to work and got him the job. The Claimant did not make the choice to work. He did what his wife told him. The Claimant drank on the job. His work was unsatisfactory and he was eventually terminated.

[20] The Claimant's representative says the Claimant cannot make decisions outside the home. He does not care about or understand what he signs. She decided to apply for the CPP disability pension after she learned about it from the Claimant's family doctor. The Claimant did not come up with the idea of applying for the disability pension.

[21] The Claimant's representative says that the Claimant has not done his own banking since February 2008. The Claimant's representative made arrangements with the Claimant's bank manager where she would use the money from the CPP disability pension to buy food.

[22] The Claimant's representative says she was appointed as the Claimant's Power of Attorney in October 2020. The Claimant was involved in matrimonial litigation with his former spouse. The Claimant's legal aid lawyers would not speak to her until she obtained a Power of Attorney. She also acts as his litigation guardian.

[23] I accept that the Claimant has medical issues after hearing the evidence of the Claimant's representative. But I do not believe that the evidence showed the Claimant had incapacity under the CPP before May 2020.

[24] The Claimant's representative said that the Claimant does not understand or care about what he signs. She completed his CPP disability application, and the Claimant just signed it. She would prepare the forms and tell the Claimant where to

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<sup>11</sup> See GD2-201

sign. However, the fact that the Claimant was able to sign a CPP disability application form shows that he has some capacity to make choices in his life.

[25] The Claimant's representative said the Claimant worked for a few months in 2017. The Claimant's wife came up with the idea to work. However, the Claimant chose to work, which shows that he had capacity under the CPP. The Claimant's representative also confirmed that the Claimant drove when he worked in 2017. The Claimant does some housekeeping and he can dress himself if he wants to do so. The Claimant's representative also confirmed that the Claimant consented to some medical treatment after 2008.

[26] I am satisfied that the Claimant did not have incapacity after reviewing the evidence of the Claimant's representative. After considering what she said about the Claimant's activities since February 2008, I do not believe that the evidence showed incapacity under the CPP.

**The documents do not support a finding that the Claimant had incapacity under the CPP from February 2008 to May 2020**

[27] The Claimant's family doctor completed a declaration and certificate of incapacity, as well as a report in support of this appeal.<sup>12</sup> The Claimant's family doctor said the Claimant's incapacity started in February 2008 and was ongoing. The Claimant suffered from post-traumatic stress disorder (PTSD) and depression that began in February 2008. The Claimant suffered from anxiety and poor concentration. He could not pay bills on his own. He could not make decisions on his own and his judgment was impaired. The Claimant relied on his representative to pay his bills and manage his affairs.

[28] However, the Federal Court has said that a declaration of incapacity is not the determinative factor in concluding whether someone has incapacity under the CPP.<sup>13</sup>

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<sup>12</sup> See GD2-23, 35-36, 139-147, and GD4-17

<sup>13</sup> See *Flaig v. Canada (Attorney General)*, 2017 FC 531

[29] When I look at documents in the file, I believe that the Claimant had the capacity to form or express an intention to apply for a CPP disability pension.

[30] The medical evidence showed that the Claimant saw a psychologist in November 2008. The psychologist confirmed that the Claimant had been threatened with a gun while working as a bus driver in February 2008. The Claimant went off work for one month. He returned to work, but he had to go on stress leave in October 2008. The Claimant suffered from severe PTSD symptoms and could not work.<sup>14</sup>

[31] The Claimant received psychological counselling in 2009 for depression and PTSD.<sup>15</sup> He also saw psychiatrists in 2009 and took anti-depressant medications.<sup>16</sup> I see nothing in the evidence that shows that the Claimant could not consent to medical treatment.

[32] The Claimant's family doctor completed a Disability Tax Certificate form in November 2010.<sup>17</sup> The family doctor said the Claimant's PTSD led to severe anxiety that affected the Claimant's concentration, judgment, and problem solving. The Claimant could not work. The family doctor said the Claimant did not have the capacity to live independently without daily supervision and support from others. However, the family doctor also said the Claimant did not have a severe memory impairment. He also said the Claimant had the capacity and insight to take his medication independently, which shows that the Claimant had the capacity to make life choices

[33] The documents show that the Claimant had a child in 2011.<sup>18</sup> The Claimant's family doctor completed a Disability Tax Certificate in April 2014, saying that the Claimant suffered from poor concentration, and panic attacks. He was unable to go outside his home and had poor judgment.

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<sup>14</sup> See GD1-23-24

<sup>15</sup> See GD1-27-30

<sup>16</sup> See GD1-25-26

<sup>17</sup> See GD1-17-19

<sup>18</sup> See GD2-155

[34] The Claimant's employer completed a questionnaire for the Minister confirming that the Claimant worked at a school as a maintenance worker from February to June 2017. The Claimant worked full-time. But the Claimant was fired before his contract expired. There were occasions where the Claimant was intoxicated at work and his father would have to pick him up.<sup>19</sup>

[35] I find that the Claimant's work effort in 2017 showed that he had the capacity to make choices. The Claimant's representative testified that it was his wife's idea to work. But she also provided written submissions where she stated that the Claimant took this job because wife had left him 2017 and he had no money or future.<sup>20</sup> This submission suggests that the Claimant made a decision to return to work.

[36] The Claimant saw a psychiatrist in May 2018.<sup>21</sup> The psychiatrist saw the Claimant and his representative to confirm a PTSD diagnosis. The psychiatrist said that the Claimant and his mother advised her that a new law had been passed that allowed PTSD to be considered an occupational disease which may be covered by the workers' compensation board. This comment by the psychiatrist suggests that the Claimant made a decision and had the awareness to pursue a workers' compensation claim.

[37] The medical evidence shows that the Claimant underwent skin cancer treatment in June 2018. There is nothing in that record that suggests the Claimant was incapable of consenting to medical treatment.<sup>22</sup>

[38] The Claimant's family doctor completed another Disability Tax Certificate form in March 2019. The family doctor said that the Claimant's PTSD and depression affected his mental functioning, problem solving, decision making, and judgment.<sup>23</sup> However, I do not believe that this form showed that the Claimant had incapacity under the CPP.

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<sup>19</sup> See GD2-41-43

<sup>20</sup> See GD2-21-22

<sup>21</sup> See GD2-31-35

<sup>22</sup> See GD1-36

<sup>23</sup> See GD1-21



This is because the Claimant's family doctor said the Claimant could make appropriate decisions and judgments in day-to-day situations.<sup>24</sup>

[39] The Claimant's May 2020 disability application said that he could look after his personal needs. It also said he could clean his house or do his laundry and dishes on a good day. The Claimant said that this medical condition interfered with his judgment and problem solving.<sup>25</sup>

[40] I do accept that the Claimant has serious health problems that stop him from working. He is also in receipt of a Disability Tax Credit. But the CPP incapacity test is based on whether a Claimant is capable making a decision to form or express an intention to apply for a benefit. After reviewing the evidence and the Claimant's activities from February 2008 to May 2020, I agree with the Minister that the Claimant did not have incapacity under the CPP.

[41] I agree with the Minister that the Claimant was able to occasionally drive, occasionally shop, and attend medical appointments from February 2008 to May 2020. The Claimant consented to medical treatment and took medications. His family doctor confirmed that the Claimant could make decisions and judgments in day-to-day situations as of May 2019. The Claimant had a child in 2011. He worked in 2017.

[42] I also agree with the Minister that while the Claimant's representative may have completed forms and letters on behalf of the Claimant, the Claimant signed multiple forms. The Claimant signed his CPP disability application, consent forms and letters, a request for a reconsideration of the Minister's decision, a Notice of Appeal to the Social Security Tribunal, and a Power of Attorney.<sup>26</sup> The Claimant's representative said that the Claimant would simply sign documents she told him to sign. However, his ability to sign forms shows that he had capacity to make decisions on his own behalf.

[43] I therefore find that the evidence did not show that the Claimant had a continuous incapacity to form or express an intention to apply for a benefit from February 2008 to

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<sup>24</sup> See GD2-26

<sup>25</sup> See GD2-78-96

<sup>26</sup> See GD6-8-9

May 2020. This means that the Claimant did not have incapacity under the CPP, which means that the Minister made the proper decision in awarding the Claimant a CPP disability pension with payments starting in June 2019.

## **Conclusion**

[44] The appeal is dismissed.

George Tsakalis  
Member, General Division – Income Security Section