



Citation: *NS v Minister of Employment and Social Development*, 2022 SST 718

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: N. S.
Representative: T. S.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 9, 2020 (issued by
Service Canada)

Tribunal member: Carol Wilton
Type of hearing: Teleconference
Hearing date: April 28, 2022
Hearing participant: Appellant's trustee
Decision date: July 12, 2022
File number: GP-20-1781

Decision

[1] The appeal is dismissed.

[2] The Appellant, N. S. is not entitled to payment of her *Canada Pension Plan* (CPP) disability pension before February 2018.

[3] This decision explains why I am dismissing the appeal.

Overview

[4] The Appellant was 57 years old in January 2019, when the Minister received an application on her behalf for a CPP disability pension. She had worked from 2005 to 2011 as a merchandise stocker at a grocery store. Her application stated that her main medical conditions were paranoid schizophrenia, major depression, delusions, and post-traumatic stress disorder (PTSD).¹ She also suffered from chronic hip pain, chronic bronchitis, and an inability to focus or concentrate. Since 2011, she has never returned to full-time work.

[5] The Appellant believed that in 2009 she was assaulted by her manager at work. Afterwards, she suffered workplace harassment and bullying. In November 2011, she could no longer tolerate this and left her job. She became determined to obtain “justice”.² She worked with her union until March 2016, when the union decided not to pursue her case against her employer.³ However, she continued to be preoccupied with her grievances against her former employer.⁴

[6] In March 2019, T. S., the Appellant’s son, submitted an application to become his mother’s trustee.⁵ By August 2019, the Minister had accepted his application.⁶

¹ In his CPP medical report of January 2019, Dr. Emmanuel Persad, psychiatrist diagnosed only depression. He did not endorse paranoid schizophrenia or PTSD.

² GD2-325-326, office notes of Dr. Persad, July 2014.

³ GD2-245

⁴ GD2-241

⁵ GD2-54

⁶ GD2-40

[7] Based on her date of application, the Minister determined that the Appellant became disabled in October 2017. The pension became payable four months later, in February 2018.⁷

[8] T. S. asked the Minister to reconsider the application, based on his claim that the Appellant has suffered from incapacity since 2011.⁸ That is, he stated that her paranoia meant that she could not make a rational decision to apply for disability benefits.⁹

[9] On reconsideration, the Minister stated that the Appellant's medical condition did not prevent her from applying earlier for CPP disability.

[10] The Appellant appealed the reconsideration to the General Division of the Social Security Tribunal (Tribunal).

Matters I must consider first

[11] The Appellant did not appear at the hearing. T. S. is listed as her representative, and also as her trustee. For the purposes of the hearing, I considered him to be an administrative representative so that he could testify.

What I have to decide

[12] Is the Appellant entitled to payment of her CPP disability pension before February 2018?

[13] This includes deciding the following matters: Did the Appellant meet the test for incapacity? Was it more likely than not that she was incapable of forming or expressing an intention to make an application before her son applied on her behalf in January 2019?¹⁰

⁷ GD5-3

⁸ GD2-18, 103

⁹ GD2-22

¹⁰ Subsection 28.1(2) of the OAS

Reasons for my decision

[14] I have decided that the Minister was right to start paying the Appellant's CPP disability as of February 2018. The Appellant did not meet the test for incapacity, so her benefit could not be paid before that date.

[15] A person can't be considered disabled more than fifteen months before the Minister received their application. The pension starts four months after the person became disabled. This means that the earliest a CPP disability claimant can receive payment of the pension is 11 months before the Minister received their application (the 11-month rule).¹¹

[16] So, because the Appellant applied for her benefit in January 2019, payment would start as of February 2018, 11 months before.

The incapacity provision does not apply to the Appellant

[17] There is an exception to the 11-month rule. It is called the incapacity provision. When it applies, it means a person's CPP disability application can be treated as if they applied before they actually did.

[18] To be able to use the incapacity provision, the Appellant had to prove it is more likely than not that she was **continuously** incapable of forming or expressing an intention to make an application before January 2019.¹² I have a lot of sympathy for the Appellant. I know she has health problems and challenges. But she does not meet the test for incapacity. Here is why.

[19] It is not easy to prove incapacity. It does not matter if the Appellant did not know she had to apply, or could not fill out the application form. Literacy is not a consideration either. She had to be incapable of forming or expressing an intention to apply. This is no

¹¹ Sections 42(2)(b) and 69 of the CPP

¹² Subsections 60(8) to 60(11) of the CPP

different than having the capacity to form an intention to make other relevant choices in life.¹³

[20] The onus is on the Appellant to establish her claim of incapacity.¹⁴

[21] In deciding whether the Appellant met the test for incapacity, I had to look at the following factors:

1. The Appellant's evidence about the nature and extent of her physical and mental limitations;
2. Any medical, psychological or other evidence the Appellant provided in support of their claim of incapacity;
3. Evidence of activities in which the Appellant may have been engaged during the relevant period; and
4. The extent to which these other activities cast light on the capacity of the Appellant to form or express an intention to apply for disability benefits during that period.¹⁵

[22] If I find the Appellant was incapable of forming or expressing an intention to apply for the CPP disability pension for a period before T. S. submitted the application in January 2019, I can deem that the application was made in the month that her period of incapacity began.¹⁶

The family's evidence

[23] The Appellant was not present to testify. T. S. was a witness at the hearing. I also relied on written documents he prepared. He explained his familiarity with the Appellant's circumstances. He testified that he lived at home until 2016 or 2017. After

¹³ *Sedrak v. Canada (Social Development)*, 2008 FCA 86. A recent decision of the Federal Court of Appeal carves out a narrow exception to this rule in a CPP disability case: *Blue v. Canada (Attorney General)*, 2021 FCA 211.

¹⁴ *Grosvenor v. Attorney General of Canada*, 2018 FC 36

¹⁵ *Blue v. Canada (Attorney General)*, 2021 FCA 211. See also *Attorney General of Canada v. Danielson*, 2008 FCA 78.

¹⁶ Subsection 60(8) of the CPP

that, he went home for dinner once or twice a week. For the last couple of years, he has gone home for dinner once or twice a month.

[24] In addition, his sister S. S., a 24-year-old student, submitted a 3-page single-spaced letter about her mother's condition on her own behalf and that of her brothers.¹⁷

[25] In March 2019 and January 2020, T. S. stated that the Appellant did not apply for any government benefits after 2011. This was because she felt that accepting any financial payments would affect her case against her employer. She thought that government money was a type of settlement to keep her quiet.¹⁸ In addition, she did not apply for benefits because she did not believe she was suffering from a disease.¹⁹

[26] T. S. stated that the Appellant's doctors and family members believed that her sexual assault complaint was being investigated and that she was in control of the process. It took many years before they realized that she was delusional. Her doctors were unable to disclose her mental health condition to her family because of confidentiality concerns.²⁰

[27] At the hearing, T. S. stated that the Appellant is heavily medicated and is no longer paranoid. She is more level-headed than she used to be, but speaks very slowly.

[28] T. S.'s letter stated that she still lived at home. She and her brothers thought that the Appellant's mental health issues started before the Appellant stopped working in 2011. After she stopped work, the Appellant believed that she was the victim of a conspiracy involving telecommunications vans, her former employer, her doctors, her children, and radio stations. She thought people were bugging her phone and following her.²¹

The medical evidence

¹⁷ GD11

¹⁸ GD2-20

¹⁹ GD2-20, 69. See also GD2-102, correspondence from T. S., January 2019.

²⁰ GD2-102. S. S. stated that the Appellant only went to see her doctors to find out what information she could get from them: GD11-3.

²¹ GD11-3

- **Office notes**

[29] The Appellant has received intermittent psychiatric care since 2012. She has seen three psychiatrists on referral from Dr. Basel Bari, her family doctor since 2000, and/or Gary Edney, her social worker off and on since 2014.²²

[30] The office notes of the Appellant's psychiatrists fail to show that she was incapable of forming or expressing an intention to apply for a CPP disability pension from 2011 to January 2019.

[31] The earliest medical documents in the appeal file relating to the Appellant's mental health are dated only in January 2013.²³

[32] Dr. Emmanuel Persad, the Appellant's psychiatrist from 2014 to 2018, recorded several times that the Appellant's cognitive functions were intact.²⁴ There is no record of her ever having been hospitalized for mental health reasons. She usually received referrals for out-patient psychiatric care only when she went off her psychiatric medication. This happened, for example, in June 2014, October 2016, early 2017 (January-June), and October 2018.²⁵ It appears that she stabilized between these episodes.

[33] Until October 2016, the Appellant's diagnoses were adjustment disorder and a depressed mood. In October 2016, Dr. Persad reported that she had attacks of anxiety and panic. She felt she was being followed. She also stated that she received messages from radio and television. For example, she reported hearing on the radio that the RCMP had apologized to her for workplace harassment. She was not on any psychiatric medication. However, Dr. Persad persuaded her to accept a prescription for Risperidone (an anti-psychotic).²⁶ He stated that she was now delusional.²⁷

²² The first psychiatrist, whom she saw in 2012-2013, was Dr. Herman Gelber: GD2-259. There are no records in the appeal file from him.

²³ GD2-179, office notes of Dr. Bari

²⁴ For example, GD2-55, 318

²⁵ GD2-239, 327, 236, 232

²⁶ GD2-241, office notes of Dr. Persad

²⁷ GD2-237, 241

[34] In December 2016, the Appellant told Dr. Bari that there were a lot of people involved in her case, including the RCMP, the police, and the government. A movie was being made about her. Dr. Bari increased her Risperidone dosage and referred her to Dr. Persad for re-assessment.²⁸

[35] The Appellant saw Dr. Persad four times between January and June 2017. Initially, she wasn't taking her medication consistently.²⁹ By June 2017, however, she was apparently doing so.³⁰

[36] In October 2018, the Appellant visited Dr. Persad again. She was not taking her medication and was becoming more and more delusional. A week later, she consented to receive an injection of an anti-psychotic medication. She then seemed significantly more cooperative and less driven by her delusional ideas.³¹ At the end of October 2018, she and her son asked Dr. Persad to complete the CPP medical report.³²

[37] In September 2019, Dr. Kola Oyewumi, the Appellant's new psychiatrist, reported that she was stabilized on monthly injections of antipsychotic medication and psychotherapy.³³

- Family doctor's statement

[38] In December 2019, Dr. Bari stated that the Appellant had a paranoid delusion that the Government of Canada was against her. This resulted in her delaying her application for CPP disability. She should have applied for it in 2012, when she was unable to return to any form of gainful employment because of her mental illness.³⁴ Dr. Bari seemed to be confusing the tests for employability and incapacity. She may not have been able to work in 2012, but medical evidence is lacking to show that she was incapable of forming or expressing the intent to apply for a CPP disability pension. In

²⁸ GD2-155-156

²⁹ GD2-232-239

³⁰ GD2-232

³¹ GD2-212, 213

³² GD2-219

³³ GD2-19

³⁴ GD2-27

addition, Dr. Bari's office notes do not state that she thought the Government of Canada was against her.³⁵ Therefore I give little weight to his statement.

- Medical incapacity statements

[39] In January 2019, the Minister received Dr. Bari's Certificate of Incapability. Dr. Bari stated that the Appellant had a good general knowledge of what was happening to her money, but she was incapable of managing her affairs. She had major depression with psychotic features and a delusional paranoid disorder.³⁶

[40] In March 2019, Dr. Bari completed a Declaration of Incapacity for the Appellant. He ticked off a box stating that the Appellant's condition made her incapable of forming or expressing the intention to make an application. Her incapacity began in January 2012 and was ongoing.³⁷ Again, Dr. Bari appears to be confusing the tests for employability and incapacity.

[41] In September 2019, Dr. Oyewumi stated that the Appellant's illness started in about 2010. It became increasingly severe. She had to quit her job in 2011.³⁸ However, Dr. Oyewumi did not see the Appellant until 2019. He evidently was not entirely familiar with her file before then. T. S. testified that this psychiatrist was unwilling to review all of the Appellant's psychiatric notes for the purpose of her appeal. I therefore attach little weight to his Dr. Oyewumi's observation.

The Appellant's activities March 2011-January 2019

[42] The Minister argued that the Appellant was unable to work, but she was able to perform a number of normal life activities on an ongoing basis.

[43] At the hearing, T. S. stated that the Appellant was able to do the following:

- Apply for her driver's licence and drive the car.

³⁵ See, for example, his office notes of April 12, 2016 at GD2-158. The Appellant expressed a lot of paranoid ideas on that occasion, but none involved the Government of Canada.

³⁶ GD2-79-80

³⁷ GD2-53

³⁸ GD2-19

- Make routine medical appointments.
- Clean the house.
- Travel to Cyprus in 2018 by herself. She stayed with her Cypriot family members for a month.
- Work on a newspaper route with some of her six children. She helped put the newspapers together and drove the children around. This work brought in \$200-\$300 a month. The money went into a joint account held by the Appellant and her daughter.³⁹

[44] T. S. stated that after 2011, the Appellant's contribution to running the household was haphazard. In 2011, she stopped cooking dinner consistently. She mismanaged the family finances and put the family in heavy debt.⁴⁰

[45] S. S. reported that the Appellant became incapable of consistently managing many aspects of her children's daily lives, including meal preparation, driving them to school, and organizing family finances. The Appellant was unaware that she was sick.⁴¹

[46] As the Minister submitted, the Appellant's medical records show that in 2012-2019, the Appellant provided consent for treatment, declined treatment options, attended medical appointments by herself, and maintained her driver's licence.⁴² She has never had an attorney for property or personal care.⁴³

³⁹ No financial records of this activity, which was ongoing until at least 2017, were before me. Dr. Persad recorded that the Appellant reported this job to him in June 2017: GD2-232.

⁴⁰ GD2-103, January 2019. He stated that for the previous two years, the family had not allowed her to control the family finances.

⁴¹ GD11-4

⁴² GD5-6

⁴³ GD5-8. T. S. confirmed this.

[47] Information in the file shows that the Appellant was able to speak with a lawyer and pursue a workplace investigation.⁴⁴ She was able to contact union representatives and take meetings with them.⁴⁵

The relevance of the Appellant's activities to the incapacity claim

[48] There is no doubt that the Appellant in the present case has suffered from a serious mental health condition for many years. I agree with the Minister, however, that the evidence fails to show that she is entitled to a CPP disability pension before February 2018.

[49] The first reason for my conclusion is that the Appellant was able to deal with the government in keeping her driver's licence up to date and attending to her taxes.⁴⁶ I am therefore not convinced by the arguments of T. S. and Dr. Bari that the Appellant was incapable of forming or expressing the intention to apply for CPP disability because she was suspicious of the government. In addition, the Appellant's other activities, including caring for her children⁴⁷ and pursuing a case against her former employer, show that she was capable of forming an intention to perform various acts.

[50] Further, if the Appellant had the capacity to decide not to apply for CPP disability, she had the capacity to form or express the intention to apply for it.

[51] Second, the medical evidence doesn't fully support T. S.'s statement that the Appellant didn't apply for CPP disability because she didn't know she was ill. In July 2021, Mr. Edney, her counsellor, stated that she did see him and Dr. Persad on her own. He stated that she identified with feeling depressed and anxious. However, she was unaware that some of her thinking was delusional. She was reluctant to take her

⁴⁴ In July 2014, the Appellant told her psychiatrist that she had hired a lawyer for her workplace issue: GD2-325. In October 2016, she told Dr. Persad that her lawyer told her that it was the union that should be pursuing her claim against her employer: GD2-241. T. S. denied that she had hired a lawyer. However, it seems likely that she consulted one and was told that she should work with her union instead.

⁴⁵ GD2-24, 158, 243-245, 162-163

⁴⁶ Testimony of T. S. An aunt did the Appellant's tax forms, presumably with her consent. Although the Minister stated that the Appellant signed the application for CPP disability, she did not do so. T. S. testified that he did not tell her that he was applying on her behalf.

⁴⁷ The children were born between 1983 and 2002. Most of them seem to have lived with the Appellant and her husband. See GD2-215, November 2018.

anti-psychotic medications.⁴⁸ The Appellant may not have understood that she had delusions involving her former workplace. However, the fact that she was voluntarily seeing two mental health professionals for many years strongly suggests that she knew she had mental health difficulties.

[52] Third, it is not clear when the Appellant learned about CPP disability. Not knowing about CPP disability is a different thing from not being able to form or express the intention to apply for the benefit.

[53] The first evidence of the Appellant being told about CPP disability was not until March 2016, when a union official suggested in a handwritten note that she explore whether she were eligible for the benefit.⁴⁹ She had been angry at her union because her former employer wanted to close the grievance.⁵⁰ This may explain why the Appellant failed to act on the suggestion.

[54] The Appellant's family evidently did not know about CPP disability either. So they were not in a position to advise her to apply. T. S. testified that he was unaware for some time that the Appellant could apply for CPP disability. It was only in October 2018 that Dr. Persad and Mr. Edney discussed between themselves that she should apply for the provincial disability pension (ODSP). Dr. Persad provided her with some information about it and suggested that her son submit an application online.⁵¹ In October 2018, the Appellant's son accompanied her to see Dr. Persad. They asked him to complete the CPP medical report.⁵² Evidently, once the Appellant became aware of the benefit, she agreed to apply for it.

[55] Fourth, it appears that the Appellant's ability to manage her activities of daily living was somewhat haphazard.⁵³ However, this does not show that she lacked the

⁴⁸ GD6-2. In 2018, she told her psychiatrist and her family doctor that she didn't want to take Risperidone because she thought it would make her gain weight: GD2-150, 315

⁴⁹ GD2-244. The note come right after a March 2016 note in her file from the union.

⁵⁰ GD2-163, office notes of Dr. Bari, May 2015.

⁵¹ GD2-210.

⁵² GD2-220

⁵³ Perhaps this is not surprising in a household with six children, a disabled husband, and a tenant in the home.

capacity to form or express an intention to apply for CPP disability benefits. More relevant to the issue of her capacity are her activities in consenting to treatment, obtaining a driver's licence, consulting a lawyer, and working with her union. It is also relevant that she never had an attorney for personal care or property.

[56] Finally, as I find that the Appellant failed to show that she lacked the capacity to form or express an intention to apply for CPP disability before January 2019, it follows from this that there is no evidence of **continuous** incapacity.

Conclusion

[57] The Appellant has failed to prove it is more likely than not that she lacked the capacity to form or express the intention to apply for a CPP disability benefit before January 2019.

[58] The appeal is dismissed.

Carol Wilton
General Division – Income Security Section