



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *GS v Minister of Employment and Social Development*, 2020 SST 1258

Tribunal File Number: GP-19-1297

BETWEEN:

G. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Angela Ryan Bourgeois

Claimant represented by: T. S.

Teleconference hearing on: September 29, 2020

Date of decision: October 23, 2020

DECISION

[1] I am allowing the appeal. The Claimant was incapable of forming an intention to apply for a disability pension continuously between January 2007, and November 2018. I deem his application to have been made in January 2007, the month his incapacity started. His disability pension payments start as of May 2007.

OVERVIEW

[2] The Claimant stopped working in February 2006, when he injured his hand at work. However, he only applied for a *Canada Pension Plan* (CPP) disability pension in November 2018. The Minister decided he qualified for the pension.

[3] The minister backdated his disability payments the maximum period allowed. Since the Claimant turned 65 that month, (when the CPP disability pension ends), he was not entitled to any future payments.

[4] The claimant thinks his payments should start earlier because his mental health conditions delayed his application. He says he satisfies the incapacity test that would allow the Minister to deem his application to have been as of January 2007, when his incapacity started.

[5] The Minister refused. He said the Claimant did not meet the incapacity test; he did not prove that he continuously lacked the capacity to form or express an intention to apply for the disability pension. The Minister notes the Claimant did not have a power of attorney and signed all the documents for his disability and retirement pension applications on his own behalf.

[6] The claimant's son, who represented the Claimant in this appeal, says his father met, and continues to meet the incapacity test.

[7] For the reasons below, I find the Claimant lacked the capacity to form or express an intention to apply for the disability pension between January 2007, and November 2018, when he actually applied. His incapacity was continuous during this period.

ISSUE

[8] Does the Claimant meet the incapacity criteria from January 2007 until November 2018?

ANALYSIS

[9] The claimant says his incapacity started in January 2007, and continues. Therefore, the period of incapacity in question is from January 2007, to November 2018, when he applied for benefits.¹

[10] To satisfy the test for incapacity, the Claimant has to prove it is more likely than not he was incapable of forming or expressing an intention to make an application for a disability pension continuously between January 2007, and November 2018.²

[11] If successful, his disability application can be deemed to have been made in January 2007, the month his incapacity started. Payments would start as of May 2007 – four months after the application date.

Declaration of Incapacity and Medical Evidence

[12] In July 2019, Dr. Kakar, the Claimant's long-time psychiatrist, completed a Declaration of Incapacity. He reported that the Claimant was incapable of forming or expressing the intention to make an application as of January 9, 2007, and that his incapacity was ongoing. The reason for his incapacity was severe major depression and PTSD. He confirmed that he was treating the Claimant when the incapacity began.

[13] In May 2007, Dr. Kakar, Psychiatrist, reported that the Claimant had major severe depression, posttraumatic stress disorder and chronic pain syndrome. He had symptoms of feeling down, anxious, nervous, upset, irritated and hopelessness. He was weepy. He had no interest in doing things or socializing. He stopped driving. He could not sleep. He had no appetite. He had no energy. He had poor concentration and memory. He was losing track of day-to-day life. He was not bathing or changing his clothes for days. Despite medication and regular

¹ CPP, s 60(8).

² CPP, s 60.

intensive cognitive and supportive psychotherapy, he was totally disabled and unable to do any work. Dr. Kakar's subsequent reports confirm that his condition has not improved.³

[14] In February 2009, Dr. Kiraly, Psychiatrist, confirmed that the Claimant continued to have chronic, severe, treatment resistant, major depression, symptoms of posttraumatic stress disorder, and chronic pain syndrome.

[15] In June 2018, Dr. Kakar reported that the Claimant's severe depression and pain continued. Although he was showering and changing his clothes daily, Dr. Kakar confirmed that he needed a lot of help with both his activities and instrumental activities of daily living. The Claimant continued to be easily confused and preoccupied. He laid around all day, sleeping or doing nothing (not even watching TV or listening to music).

[16] Dr. Dhaliwal, family doctor, reported in February 2019, that the Claimant has been severely depressed since his hand injury. He reported that his condition was progressively worsening of pain and mood symptoms, with a progressive decline of cognitive function. Despite psychiatric care, treatments, and medication, his condition continued to deteriorate.

[17] Functionally, his family doctor reported that the Claimant had severe apathy and anhedonia, needed help with almost all daily functions, such as dressing, picking clothes, grooming, bathing, and taking his medication and diabetes injections. He noted he was mainly homebound and dependant on his wife and son for most daily mental and physical functions.

[18] In April 2019, the Claimant completed the WHO DAS 2.0, which is a standardized 36-item self-report questionnaire about his functioning. His score showed extreme impairment in functioning.

What the Claimant and his son say.

[19] The Claimant's son lives with the Claimant and his mother. He testified that since January 2007, his father has been unable to do anything for himself. He arranges and takes his father to all of his medical appointments. He goes into the examination room with him, and helps him answer questions. He manages his medication. He takes care of all the finances, paying bills

³ GD2-95, GD2-132 and GD2-138

and banking. Sometimes, he has to tell him to shower and put on clean clothes. He described how his father cannot follow directions. Sometimes he tells him to go upstairs only later to find him wandering around downstairs, unsure of what he is supposed to be doing, and where he is supposed to go. I found this particularly telling of the Claimant's incapacity because the fact that the Claimant had to be "told" when to go upstairs and shower shows a significant inability to plan and make his own personal care decisions.

[20] The Claimant's son testified that he completed all the CPP forms and wrote the letters. He explained that he would have applied for the CPP disability pension earlier on his father's behalf had he known about it. He only became aware of the disability pension when he started to look into what benefits might be available to his father as he was approaching 65. His father did not ask him to apply for the CPP benefits for him. Again, it is telling that it was the Claimant's son, not the Claimant, who was planning for his retirement income, and who initiated the benefit applications.

[21] I believe him when he says he completed all the CPP forms and documents on his father's behalf. In reviewing the file, it is clear that the Claimant's son, not his father, was moving the file forward. In fact, the Minister's agents spoke to the Claimant's son, not the Claimant, on the telephone.⁴

[22] I found the testimony of the Claimant's son very credible. His evidence is inline with the significant functional impairments described in the medical evidence, including the over-sedation because of psychotropic medication mentioned by Dr. Kakar.⁵

[23] The Claimant testified that he could not remember completing the CPP forms. He confirmed that it would have been his son who wrote the letters to the Minister and filled in the information. I found he was sincere and honest in his testimony. I believed him when he said: "I know very little about this."

⁴ GD2-17, GD2-26.

⁵ GD2-132.

What the Minister says.

[24] The Minister says that although the Claimant's son may have helped him navigate and understand the process, and translated documents, it is not enough to show incapacity. I find the Claimant's son did more than that—it was he who had the intention to apply for both the CPP disability and retirement pensions for his father. Despite the Claimant's signature, I find that the CPP disability application was made by the son on his father's behalf. If it were not for his son, it is likely the Claimant would not have applied for these benefits. At no point from January 2007, to November 2018, has the Claimant had the capacity to form an intention to apply.

[25] The Minister says the Claimant reported on his application form that he had a "fair" ability to do the following:

- Take his medication as directed
- Answer the phone
- Open and sort mail
- Manage his budget and pay bills.

[26] I find it unlikely the Claimant had a "fair" ability to do these tasks at any time since January 2007. I find the Claimant's letter, which was written by the Claimant's son, is better evidence of his abilities. It said the Claimant could not keep track of time, could not plan anything, and needed help with his daily necessities, including his personal affairs.⁶

[27] The functional limitations described in this letter are consistent with the medical evidence, which shows that the Claimant relies on others for his daily mental and physical functions. The Claimant testified that his son takes care of everything for him. When I asked him about opening mail, he said he opens it and leaves it for his son to handle. I asked him if he knew approximately how much money he had in his bank account. He did not know. He told me his son takes care of all that.

⁶ GD2-16.

[28] The Minister points out that the Claimant consented to Dr. Kakar's April 2019 assessment and medical treatment.⁷ Consenting to an assessment and to taking medication, when his son arranges the medical appointment and takes him to it, does not show that he had the capacity to form an intention to apply for a CPP disability pension. If it did, I find it likely that Dr. Kakar would not have completed the Declaration of Incapacity since the report (done at the same time) was for the sole purpose of proving the Claimant's incapacity to the Minister.⁸ Dr. Kakar would have known what it means to be incapacitated because it is explained in the Declaration of Incapacity.

[29] The Minister says the Claimant did not have a power of attorney. This is just one piece of evidence that I have to consider. Not having a power of attorney could suggest that the Claimant has the capacity to make decisions. It could equally show that the Claimant does not have the capacity to form an intention to have such a document prepared. The Claimant's son explained that his father does not have a power of attorney because he did not realize that his father should have one. This is another example of the extent to which the Claimant's son is managing the Claimant's affairs with little to no input from his father. It supports my finding that the Claimant meets the incapacity test.

The Claimant meets the incapacity test from January 2007, to November 2018.

[30] The capacity to form an intention to apply for benefits is similar to the capacity to form an intention in other life choices. Capacity is considered within the ordinary meaning of the word and based on medical evidence and the claimant's other activities.⁹ It is not the same as being unable to make, prepare, process and complete the application form. It is a more significant incapacity, where one is incapable of forming or expressing an intention to apply.

[31] Considering the medical evidence and the testimony, I find the Claimant has not had the capacity to form or express an intention to apply for the disability pension since January 2007, until November 2018. Since his accident, his functioning on a day-to-day basis has been severely

⁷ GD5-3

⁸ GD1-28.

⁹ *Sedrak v Canada (Minister of Social Development)*, 2008 FCA 86.

impaired. The Claimant relies on others, most notably his son, to look after him. He has no interest in managing his own affairs, and makes no efforts to do so.

[32] As mentioned above, I find that the Claimant's application for disability pension, although signed by the Claimant, was made on his behalf by his son. This is because I find that at the time the Claimant signed the application, he still did not have the capacity to form an intention to apply. Dr. Kakar's July 2019 report shows that the incapacity continued until at least April 2019, well after November 2018, when the application was made. Further, in the Declaration of Incapacity (dated July 2019), Dr. Kakar reported that the incapacity was ongoing.

[33] Since the Claimant meets the incapacity test, I deem his disability application to have been made in January 2007, the month his incapacity started. Payments start four months later—as of May 2007.¹⁰

CONCLUSION

[34] The appeal is allowed. The Claimant's CPP disability payments start as of May 2007.¹¹

Angela Ryan Bourgeois
Member, General Division - Income Security

¹⁰ S 69 of the CPP.

¹¹ The Minister did not argue that the Claimant was not disabled within the meaning of the CPP by January 2007 — only that he did not meet the incapacity test. If the issue of the Claimant's disability was before me, I would find that he also had a severe and prolonged disability by January 2007.