



Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: S. N.
Representative: K. R.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated January 12, 2023 (issued
by Service Canada)

Tribunal member: Adam Picotte

Type of hearing: Teleconference

Hearing date: September 15, 2023

Hearing participants: Appellant
Appellant's Representative

Decision date: September 18, 2023

File number: GP-23-691

Decision

[1] The appeal is dismissed.

[2] The Appellant, S. N., isn't eligible for a longer period of retroactive Canada pension Plan (CPP) disability benefits. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant was severely injured in the spring of 2015, and requested permanent disability help in March of 2017. He was extremely and permanently injured and with the additional issues of epilepsy seizures and heavy medications, he was no longer able to have an income of any kind despite his best efforts. As a result, he was unable to support himself.

[4] The Appellant initially applied for a CPP disability benefit on March 7, 2017. The Minister denied this decision.

[5] On February 28, 2022, the Appellant applied again for a benefit. This time, the Minister allowed the decision. The Appellant made a request for reconsideration on the basis that he had been disabled since March 2017. This was denied by the Minister.

[6] The Appellant says that he suffered a period of incapacity that entitled him to a further period of retroactivity than is allowed under the CPP.

[7] The Minister says that although the Appellant had a severe and prolonged disability, he was not incapacitated. As a result, he has been provided with the maximum allowable period of retroactive benefits under the CPP.

The Appellant is disabled

[8] There is no question that the Appellant has a disability and that he has been disabled for some time.

What the law says about when disability payments start

[9] When a person's application for disability benefits is approved, there are limits on how far back payments can go. The CPP legislation says that the earliest a person can receive their benefits is 11 months before the date of application.¹

[10] The Appellant received 11 months of retroactive payments. He applied for his disability benefits in February 2022, and he was awarded the benefits with the date of onset of disability of November 2020, 15 months prior to the date of application. His benefits commenced in March 2021.

The legal test for Incapacity

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

[12] [17] Incapacity means that the person was incapable of forming or expressing an intention to make an application before the day on which the application was actually made.² A period of incapacity must be a continuous period.³

[13] The legal test for incapacity is strict. It isn't the same as the test for disability. Under the test for incapacity, it doesn't matter if the Appellant:⁴

- didn't know about the CPP disability benefits
- didn't know he had to apply for disability benefits
- couldn't fill out the application form by himself or
- couldn't deal with the consequences of applying for the benefits.

¹ Paragraph 42(2)(b) and section 69 of the *Canada Pension Plan*.

² Subsections 60(8) and (9) of the *Canada Pension Plan*.

³ Subsection 60(10) of the *Canada Pension Plan*.

⁴ *Canada (Attorney General) v Hines*, 2016 FC 112, *Canada (Attorney General) v Danielson*, 2008 FCA 78, and *Canada (Attorney General) v Poon*, 2009 FC 654

[14] The focus of the test is on the Appellant's capacity to form or express an intention to apply. This is generally no different than having the capacity to form or express an intention to make other decisions in life.⁵

What the Appellant must prove

[15] To be successful with his appeal, the Appellant needs to show that he was incapable of forming or expressing the intention to apply for benefits before February 2022.

Reasons for my decision

[16] As I said before, the Appellant is disabled and is unable to work. However, there is a difference between being disabled and being incapacitated. I am unable to find that the Appellant is or was incapacitated.

The factors I must consider

[17] When I am deciding if the Appellant met the incapacity test, I have to look at the following factors:⁶

- the Appellant's evidence about the nature and extent of his physical and mental limitations
- any medical, psychological or other evidence provided in support of the incapacity claim
- evidence of activities in which the Appellant may have been engaging during the period of claimed incapacity
- the extent to which these activities cast light on the Appellant's capacity to form or express an intention to apply for benefits during that period

⁵ *Sedrak v Canada (Social Development)*, 2008 FCA 86; *Canada (Attorney General) v Kirkland*, 2008 FCA 144; and *Blue v Canada (Attorney General)*, 2021 FCA 211.

⁶ *Blue v Canada (Attorney General)*, 2021 FCA 211.

What the Appellant says about being incapacitated

[18] The Appellant told me that since he started to have seizures and his medication has been increased he has been drowsy. He told me that he is in daily pain. He is 53 and feels like he is 70 years old. He cannot golf or do the things he used to. He misses working but after 2-3 hours on his feet he is in pain for the next few days. Even Sleeping is challenging.

[19] I asked the Appellant about his interactions with the health care system. As this may shed light on whether he experienced a period of incapacity.

[20] He told me that he had never had a committee of estate with the public guardian and trustee in his home province. He also told me that he had never been placed under the care of a mental health facility. I also asked if the Appellant still held a valid driver's license. He confirmed that he did.

[21] These facts, and related independence all illustrate a level of capacity for the Appellant. I find this factor does not favour a finding of incapacity.

[22] In the Appellant's application for a CPP disability benefit, he detailed the extent of his functional impairments. He wrote that he had some impairments with communication and thinking. However, he also noted that he had either a good or fair ability to do the following:

- Recollect words;
- Find his way to familiar places;
- Concentrate and focus;
- Prioritize and plan his day;
- Decide between options;
- Draft a shopping list;

- Read short messages;
- Write emails; and
- Add or subtract numbers.

[23] While I acknowledge that the Appellant's ability to recollect, stay focused and not feel fatigued have been impaired since his seizure in May 2021, These facts do not support a finding of incapacity going back to 2017.

What the medical evidence says about the Appellant being incapacitated

[24] In a February 28, 2022, medical report, the Appellant's family physician reported that he developed epilepsy in May 2021. As a result of this condition, the Appellant had a poor short-term memory, poor decision making, and drowsiness.⁷ This is insufficient evidence to demonstrate incapacity.

Conclusion

[25] The Appellant wasn't incapacitated and so he isn't eligible for disability benefits earlier than March 2021

[26] This means the appeal is dismissed.

Adam Picotte
Member, General Division – Income Security Section

⁷ GD2-64