



Citation: *LS v Minister of Employment and Social Development*, 2023 SST 1830

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant: L. S.

Respondent: Minister of Employment and Social Development
Representative: Dylan Edmonds

Decision under appeal: General Division decision dated June 3, 2023
(GP-21-2460)

Tribunal member: Neil Nawaz

Type of hearing: Teleconference

Hearing date: December 11, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: December 22, 2023

File number: AD-23-661

Decision

[1] I am dismissing this appeal. The Appellant was not incapacitated from applying for a Canada Pension Plan (CPP) disability pension between May 2012 and August 2019.

Overview

[2] The Appellant is a 53-year-old former kitchen helper with a history of mental illness and depression. She hasn't worked since April 2017.

[3] The Appellant applied for a CPP disability pension in August 2019.¹ Service Canada, the Minister's public-facing agency, approved the application effective June 2019, which it said was the earliest first payment date allowed under the law.²

[4] The Appellant thought that she should have received pension payments going back to May 2012, when she claims to have actually become disabled. She appealed the Minister's determination of her first payment date to the Social Security Tribunal's General Division. She said that she had been previously incapacitated from applying for the disability pension.

[5] The General Division held a hearing by teleconference and dismissed the appeal. The General Division found insufficient evidence to show that the Appellant was incapable of forming or expressing an intention to make an application before August 2019. In particular, the General Division relied on evidence that the Appellant had worked and consented to medical treatment during the seven years in question.

[6] The Appellant then applied for permission to appeal to the Appeal Division. In April, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Earlier this month, I held a hearing to discuss her incapacity claim in full.

¹ See the Appellant's application for CPP disability benefits dated August 26, 2019, GD2-23.

² Under section 42(2)(b) of the *Canada Pension Plan*, the earliest a person can be deemed disabled is 15 months before the date of application. Under section 69, payment of an approved disability pension starts four months after the deemed date of disability.

Issue

[7] In this appeal, I had to decide whether the Appellant was incapacitated from applying for the CPP disability pension between May 2012 and August 2019.

Analysis

[8] Persons claiming incapacity must prove that they were unable to form or express an intention to apply for disability benefits.³ That inability must be continuous from the date that they claim to have become incapacitated to the date that they actually submitted an application.⁴ I have reviewed the information on file, and I have concluded that the Appellant did not meet these tests. I have no doubt that the Appellant suffers from disabling mental health conditions, but I simply didn't find enough evidence to suggest that they prevented her from making an application sooner.

The evidence does not point to incapacity

[9] The Appellant clearly has significant problems. She has been diagnosed with severe anxiety and depression, among other psychological illnesses. She has a history of alcohol abuse and has attempted suicide at least four times. She relies on her husband to manage her personal and financial affairs. She appears to lack the drive or initiative to perform many of the tasks that are part of everyday life.

[10] However, none of these things necessarily means that the Appellant was unable to form or express an intention to make an application for the disability pension.

The test for incapacity is strict

[11] Under the *Canada Pension Plan*, disability and incapacity are two different concepts. One is an inability to regularly pursue a substantially gainful occupation; the other is an inability to form or express an intention to make an application for disability benefits. The second is generally much harder to prove than the first.

³ See *Canada Pension Plan*, section 60(8).

⁴ See *Canada Pension Plan*, section 60(10).

[12] The *Canada Pension Plan*'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 ability to make or communicate a decision to do so.⁵ Capacity is to be considered in light of the ordinary meaning of the term and determined based on the medical evidence and on the claimant's activities. That capacity is similar to the capacity to form or express an intention with respect to other life choices.⁶

[13] At the hearing, we discussed a recent Federal Court of Appeal case called *Blue*, which involved a claimant who was functional in many ways (for instance, she was raising her young daughter as a single mother), yet was still found to be incapacitated for CPP purposes.⁷ However, *Blue* differs from the Appellant's case in one key aspect. Ms. Blue introduced specific psychiatric evidence that the very thought of having to formally document her mental health issues before a government authority sent her into a paralyzing dissociative state. The Appellant in this case has no comparable evidence.

[14] The Court made it clear that *Blue* was exceptional:

Before concluding, it must be noted that this is a most unusual case. In many cases, the ability of an individual to carry on ordinary life activities may well be indicative of their capacity to formulate or express the intent to apply for a disability pension. However, in this case, Ms. Blue's disability, while severe, is narrowly focussed, with both her trauma and her mental health issues arising out of or relating to engagement with hospitals, the medical profession and persons in authority.⁸

[15] As if to reinforce that point, the Federal Court of Appeal soon issued a decision in a case called *Walls* that upheld a finding of capacity even though the claimant suffered from physical and mental impairments that put him into a "vegetative zombie-like mental state."⁹ In that case, the Court found that Mr. Walls, unlike Ms. Blue, did not produce the

⁵ See *Canada (Attorney General) v Danielson*, 2008 FCA 78.

⁶ See *Sedrak v Canada (Minister of Social Development)*, 2008 FCA 86.

⁷ See *Blue v Canada (Attorney General)*, 2021 FCA 211.

⁸ See *Blue*, *supra*, paragraph 45.

⁹ See *Walls v Canada (Attorney General)*, 2022 FCA 47, paragraph 12.

kind of psychological evidence needed to discount his day-to-day activities during his claimed period of incapacity.

[16] That is true of this case too. The Appellant has produced a considerable volume of psychiatric and other medical evidence indicating that she is severely depressed and anxious, but it does not show that she lacked the ability, when presented with specific options, to make informed life choices during the relevant period. As we will see, the Appellant may not have had the **desire** or the **will** to manage her life, but those are not the same things as **capacity**.

[17] The available written and oral evidence suggests that the Appellant was capable of everyday activities and life choices that were not dissimilar from forming an intention to make an application for benefits.

A declaration of incapacity does not determine this matter

[18] In December 2022, Dr. Tolulope Akinola completed and signed a declaration of incapacity form on the Appellant's behalf. Dr. Akinola selected "yes" to the question of whether the Appellant's condition made her incapable of forming or expressing the intention to make an application. She said that the Appellant's incapacity began in May 2012.¹⁰

[19] I realize that Dr. Akinola knows the Appellant as well, or better, than any of her other treatment providers, but I can only give this declaration so much weight. First, Dr. Akinola's opinion is only one of many that I must consider, including others that show the Appellant to be more functional than she admits.¹¹ Second, Dr. Akinole had been treating the Appellant for only 3½ years at the time of her declaration and thus didn't know her during most of her claimed period of incapacity.¹² Third, Dr. Akinole herself made earlier findings that raise questions about the extent of the Appellant's incapacity. For instance, her CPP medical questionnaire attributed the Appellant's disability to

¹⁰ See Declaration of Incapacity completed by Dr. Tolulope Akinola, general practitioner, on December 6, 2022, GD9-1.

¹¹ This approach is endorsed in a case called *Flaig v Canada (Attorney General)*, 2017 FC 531.

¹² In her CPP medical report, Dr. Akinola said that she began treating the Appellant in May 2019. See GD2-73.

depression and degenerative disc disease, but those conditions by themselves would not necessarily impair an individual from making important life choices.¹³

The Appellant's medical reports do not indicate incapacity

[20] The Appellant maintains that she has been incapacitated for many years. She testified that she has always had difficulty getting and keeping a job. She said that she has always relied on others to do simple tasks such as filling out paperwork or driving to appointments. She described herself as a “basket case.”

[21] However, none of the available medical evidence suggests that the Appellant lacked capacity:

- In April 2017, the Appellant spent a week in hospital following a drug overdose. At the time, she was noted to have a history of depression and anxiety, alcohol abuse, as well a previous suicide attempt. She had also been diagnosed with hypothyroidism, polycystic ovarian disease, irritable bowel syndrome, hypertension, and obesity with a previous gastric bypass. However, psychiatry decided that she was not suicidal and was safe for discharge.¹⁴
- In May 2017, a psychiatrist found that the Appellant displayed signs of borderline personality pathology. The Appellant described chronic feelings of emptiness and inadequacy, and she related a history of intense and destructive relationships. She had a history of two hospital and two non-hospital suicide attempts.¹⁵
- In November 2017, another psychiatrist saw the Appellant for mental health and substance abuse issues. He noted that she had been jailed for domestic abuse several years previously and had recently lost her job as a caterer for absenteeism. Alcohol was a factor on both occasions. However, the psychiatrist stated that the Appellant's judgment and insight appeared

¹³ See Dr. Akinola's CPP medical report dated September 10, 2019, GD2-74.

¹⁴ See discharge summary dated April 23, 2017 by Dr. Shelley Duggan, attending physician, GD2-84.

¹⁵ See report dated May 26, 2017 by Dr. Debarshi Das, psychiatrist, GD2-98.

reasonable and there was no sign of mania or psychosis. He also said that the Appellant's cognition was "grossly intact."¹⁶

- In August 2018, a psychiatrist diagnosed the Appellant with major depression, social anxiety disorder, generalized anxiety disorder, borderline personality disorder, and alcohol use disorder, in remission. The psychiatrist also thought it possible the Appellant had attention deficit and hyperactivity disorder, but he did not mention any other potential cognitive disorders.¹⁷
- In September 2019, the Appellant's family doctor completed a medical report in support of her CPP disability application. Dr. Akinola reported that the Appellant had been diagnosed with depression, degenerative disc disease, and knee osteoarthritis. She also noted that the Appellant had low concentration, lack of motivation, and difficulty starting or finishing tasks. However, Dr. Akinola said nothing about mental or psychological conditions that might have interfered with the Appellant's ability to reason.¹⁸

[22] The Appellant's capacity can also be detected elsewhere in her medical file:

- She regularly saw her family doctor for ailments as varied as back pain, a right thumb laceration, and a left knee sprain;¹⁹
- She attended the Royal Alexandra Hospital on six occasions between 2012 and 2018 for, among other medical interventions, a gastroscopy, and several orthopedic consultations;²⁰
- She attended a Weight Wise adult bariatric revision clinic five times in 2012–13;²¹
- She saw a psychologist in March 2014 and a psychiatrist in October 2014;

¹⁶ See report dated November 28, 2017 by Dr. Tashi Gordon Kinjo, psychiatrist, GD2-80.

¹⁷ See report dated August 8, 2018 by Dr. Jean-Michel Le Mellédo, psychiatrist, GD2-100.

¹⁸ See Dr. Akinola's CPP medical report dated September 10, 2019, GD2-70.

¹⁹ See office notes by Dr. Nandanie Weerasinghe dated November 19, 2012 to October 30, 2014, GD4-2 to GD4-11.

²⁰ See letter dated March 27, 2018 by Karen Toovey, access and disclosure specialist, Alberta Health Services, GD4-28.

²¹ See Karen Toovey's letter of March 27, 2018, GD4-28.

- She received treatment at the Claresholme Centre for Mental Health and Addictions from November 28, 2017;²² and
- She was in hospital for four days in February 2018 with a post-operative wound infection.²³

[23] I saw no indication that anyone other than the Appellant consented to the above medical interventions. There was nothing in the many doctors' reports on file to suggest that the Appellant was incapable of managing her own healthcare. In my view, if the Appellant had the capacity to seek and receive treatment from 2012–19, she likely also had the capacity to form or express an intention to apply for the CPP disability pension.

The Appellant's disclosures indicate capacity

[24] Some of the Appellant's own statements suggest that she did not meet the statutory threshold for incapacity before August 2019. She admitted that she has a valid driver's license and was driving during the period in question. She testified that she uses banks cards to withdraw money from her account. She said that she applied for Employment Insurance after getting laid off from some of her jobs. These are all everyday activities that suggest that the Appellant had the capacity to make life choices.

[25] In her application for the CPP disability pension, the Appellant rated as "good" her ability to do the following activities:

- Work in a team;
- Ask for help from co-workers when needed;
- Do what people in authority ask you to do;
- Handle being in public places or situations
- Understand what people say in everyday situations;
- Keep track of what you are doing, even if interrupted;

²² See Dr. Kinjo's letter dated November 28, 2017, GD2-80.

²³ See Karen Toovey's letter of March 27, 2018, GD4-28.

- Open and sort mail arriving at your home;
- Prioritize and plan your day.

[26] It is true that the Appellant rated her ability to perform a few other tasks as “poor.” For instance, she indicated that she had trouble remembering to do important things, managing a budget, and adding and subtracting numbers. However, the overall impression conveyed by the Appellant’s application disclosures was a reasonably high level of mental competence — certainly well above the CPP’s threshold for incapacity.²⁴

The Appellant had several jobs between May 2012 and August 2019

[27] The Appellant didn’t just make medical decisions between 2012 and 2019; she also had a series of jobs during that period. In support of her disability application, the Appellant listed several short-lived occupations:²⁵

X	Order picker	June 2013 to July 2013
X	Deli worker	October 2012 to April 2013
X	Kitchen helper	October 2015 to February 2016
X	Dishwasher	October 2015 to October 2015
X	Dishwasher	April 2015 to August 2015
X	Dishwasher	November 2014 to February 2015
X	Back house production	March 2014 to June 2014
X	Vending machine operator	August 2013 to September 2013

[28] It is true that none of these jobs lasted more than six months, but the Appellant’s failure to sustain employment does not necessarily mean she was incapacitated. In fact, it suggests otherwise.

[29] The Appellant testified that she always needed help in seeking and securing employment. She said that her husband filled out most of her applications and drove her to many of the interviews. That may be so, but it still suggests that the Appellant herself played at least some role in getting her jobs. It happened at least eight times between 2012 and 2019, and it suggests a capacity to form or express an intention to work for pay.

²⁴ See Appellant’s application for CPP disability benefits, GD2-32.

²⁵ See job list prepared by the Appellant AD-14.

[30] Whenever she was hired for a job, the Appellant presumably made an attempt to carry out the duties that were expected of her. For each job, there would have been no one else to do the work for her. She would have had to take directions from a boss and perform specific tasks to keep her job. Her ability to do these things suggests that she had a capacity to form an intention to maintain employment.

[31] It doesn't matter if the Appellant did these things at the suggestion of someone else. What matters is that the Appellant, perhaps responding to external pressure, voluntarily accepted a job, and then made an effort — however unsuccessful it ultimately turned out to be — to do the job.

[32] All of this suggests a level of functionality incompatible with the statutory definition of incapacity. There is no question that the Appellant's jobs ended badly. But she failed because she was disabled, not because she was incapacitated. There is at least one indication in the file that the Appellant was let go, not because of any mental incapacity, but because she was frequently absent, possibly due to intoxication. The Appellant may have been abusing alcohol, but I find it unlikely that such abuse would have continuously interfered with her ability to make basic decisions.

The Appellant formed a specific intention to apply for disability benefits

[33] The *Blue* and *Wall* cases require an assessment of whether a claimant's activities cast light on his or her capacity to form or express an intention to apply for disability benefits.²⁶ The implication is that the activities must be **relevant** to the incapacity claimed during the period in question.

[34] In this case, I find that the Appellant's activities — her consultations with her doctors, her efforts to resume employment — were relevant to her ability to form or express an intention to apply for benefits. It must be remembered that "forming" an intention calls for mental activity only. The Appellant's diagnosed conditions — depression, anxiety, alcoholism — may have interfered with the Appellant's **will** to make

²⁶ See case citations at notes 7 and 9.

an application, but I don't see how they diminished her essential **cognitive powers** to form an intention to make an application. The record shows that, when the Appellant was given options and advised which one to choose, she formed a specific intention to accomplish a specific action.²⁷

[35] I don't deny that the Appellant's husband made many decisions and performed many tasks on his wife's behalf, but those acts by themselves don't prove that the Appellant was incapacitated. While the Appellant may not have had the drive or initiative to apply for disability benefits, she did have the mental capacity to do so.

The Appellant's delay was caused by doctors, not a mental condition

[36] It appears that the Appellant's delay in applying for the CPP disability pension wasn't because she was incapacitated but because she couldn't get three successive family doctors to fill out forms on her behalf.

[37] In testimony and in writing, the Appellant described her former family doctors' dismissive reactions when she approached them about helping her apply for CPP disability. According to the Appellant, Dr. King, Dr. Weerasinghe, and Dr. Siddique all flatly refused to complete medical reports on her behalf.²⁸

[38] Only when she became Dr. Akinola's patient in May 2019 did things change. The Appellant testified that, after looking at her medical and vocational history, Dr. Akinola said, "That's not normal, you should be getting CPP disability benefits."

[39] The Appellant described going from doctor to doctor in a years-long struggle to get the CPP disability pension, but this account did little more than undermine her own case. It is hard to imagine a narrative that could more vividly demonstrate the Appellant's ongoing intention — or better yet, **determination** — to make an application for benefits.

²⁷ See *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

²⁸ See Appellant's handwritten submissions dated June 22, 2023, AD13.

[40] It is telling that the Appellant was unable to describe what change occurred in her mental condition that finally permitted her to apply for the CPP disability pension in August 2019. I suspect that there was no change in her mental condition. Instead, the thing that changed was her family doctor, who the Appellant sought out at her own initiative.

Conclusion

[41] The Appellant has failed to prove that, more likely than not, she lacked the capacity to form or express the intention to apply for a CPP disability pension before August 2019, the date on which she actually did apply. For that reason, she is not entitled to additional retroactive pension payments.

[42] The appeal is dismissed.



Member, Appeal Division