



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of D. F. v. Minister of Employment and Social Development*, 2017
SSTGDIS 122

Tribunal File Number: GP-16-712

BETWEEN:

The Estate of D. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Joanne Sajtos

DATE OF DECISION: August 27, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the deceased Appellant's application for a *Canada Pension Plan* (CPP) disability pension on June 30, 2015. The deceased Appellant based her request for benefits on a diagnosis of endometrial cancer. The Respondent allowed the application with a date of onset of March 2014. In September 2015, the deceased Appellant requested that the CPP benefits be made retroactive to April 2012, which was denied by the Respondent in November 2015.

[2] The Appellant died in September 2015 and her estate appealed the reconsideration decision to the Social Security Tribunal (Tribunal) in February 2016. It is the estate's position that the deceased Appellant was incapable of forming or expressing the intention to apply for CPP benefits while disabled from June 2006 until 2008, and again in April 2012 when diagnosed with endometrial cancer.

[3] The appeal was decided on the record based on the totality of the documents and submissions.

[4] The Tribunal has decided that the Appellant's estate is not entitled to retroactive benefits based on a finding that the deceased Appellant was not continuously incapable of forming or expressing an intention to make an application for CPP disability benefits prior to April 2015, in accordance with subsections 60 (9) and (10) of the CPP.

ISSUE

[5] The Tribunal must determine whether the Appellant was capable of forming or expressing an intention to apply for CPP disability benefits prior to April 2015?

EVIDENCE

[6] The deceased Appellant was self-employed in sales from 2002 until she stopped work due to illness in June 2006 until 2008, and again on April 15, 2012.

Documentary Evidence

[7] In correspondence to the Respondent, dated September 15, 2015, signed by the deceased Appellant, she stated that she would appreciate having the effective date of disability benefits be made retroactive to April 2012, which was consistent with her diagnosis and ability to earn an income.

[8] An Application for Disability Benefits, Canada Pension Plan, received by the Respondent on June 30, 2015, was signed by the deceased Appellant.

[9] In a report of June 4, 2015, Dr. Oza wrote that the deceased Appellant was initially diagnosed with carcinoma of the right breast in 2006. She underwent a lumpectomy and treatment. In May 2012, the deceased Appellant was diagnosed with endometrioid adenocarcinoma.

[10] In a Service Canada, Medical Report, dated May 27, 2015, Dr. L'Heureux, an oncologist, wrote that the deceased Appellant suffered from fatigue and pain. The deceased Appellant had undergone surgeries, chemotherapy and other treatment since 2012.

[11] The deceased Appellant signed a Questionnaire for Disability Benefits, Canada Pension Plan dated May 26, 2015, which indicated that she was self-employed from August 1996 to April 2012, when she stopped work due to endometrial cancer. Her functional limitations included "some memory lapses" and an inability to concentrate.

SUBMISSIONS

[12] The estate's representative submitted in writing on February 15, 2016 that the estate qualifies for retroactive benefits because:

- a) It was submitted that the CPP disability benefits should be retroactively assessed from June 2006 to 2008 pursuant to section 60(9) of the CPP. The deceased Appellant was diagnosed with invasive breast cancer in 2006, and she subsequently commenced an invasive treatment plan that left her forgetful, constantly fatigued, belaboured with side effects and generally incapacitated. Due to her physical and mental state during this time, she was neither capable of work nor capable of expressing an intention to apply for CPP

disability benefits. The deceased Appellant was able to return to work in a very limited capacity from 2008 to 2012, although her income at this time was mostly attributed to salary continuance and income splitting with her husband.

- b) In April 2012, the deceased Appellant was diagnosed with metastatic endometrial cancer. Once again, she underwent a brutal treatment program that included two surgeries, brachytherapy, fifteen cycles of Carboplatin / Taxol chemotherapy and a clinical trial. She suffered a saddle lung pulmonary embolism and was hospitalized for three weeks in 2014, and again in July 2015 while enduring a further 28 days of additional radiation over the summer of 2015. During the course of this illness, she was on a variety of medications that had a debilitating effect on her mind and body. The deceased Appellant was fighting for her life and was incapable of expressing an intention to apply for CPP disability benefits. She was hospitalized again in August 2015 until she died on September 29, 2015.
- c) In *Weisberg v. Canada (Minister of Social Development)*, 2004 LNC PEN 31, Appeal No. CP21943, the Board noted the difference between being able to form and express an intention, and found that the incapability of doing either is enough to meet the test posed by section 60(9) of the CPP. The Board concluded that the Appellant's incapacity to appreciate his own deficits rendered him incapable of forming the intent to apply for a disability pension. In *J.F. v Minister of Human Resources and Skills Development*, 2014 SSTAD 34, the Tribunal stated that "The Appellant must prove on a balance of probabilities that he was incapable of forming or expressing the intention to apply for CPP disability benefits ... " The estate has established its case based on a balance of probabilities.

[13] The Respondent submitted in writing on May 10, 2017 that the Appellant's estate does not qualify for a retroactive payment of the deceased Appellant's disability pension because:

- a) To meet the definition of incapacity under subsection 60(8) of the Plan, the application would have had to have been made on behalf of the deceased Appellant and the evidence would need to show that she was incapable of forming or expressing an intention to make an application on her own behalf, earlier than the day the application was actually made.

- b) To meet the definition of incapacity under subsection 60(9) of the Plan, the deceased Appellant must have met each of the following three components: (i) been incapable of forming or expressing an intention to make an application before the day on which the application was actually made; (ii) ceased to be so incapable before that day; and (iii) the application was made within the period that begins on the day on which she had ceased to be so incapable that is the same number of days as the period of incapacity, not exceeding twelve months; or if the period of incapacity is fewer than thirty days, the application must have been made not more than one month after the month in which the person had ceased to be so incapable. As per subsection 60(10) of the Plan, for the purposes of both subsection 60(8) and 60(9), the period of incapacity must be a continuous period.
- c) As noted by the estate's representative, the deceased Appellant underwent a barrage of various treatments to treat her endometrial cancer. But there is no indication that she required a Power of Attorney or Public Guardian and Trustee to make medical decisions on her behalf. Dr. Maureen Trudeau, Oncologist, reported an initial diagnosis of breast cancer in 2006 and endometrial cancer in 2012. She would have had to provide informed consent to undergo all investigations and treatment measures.

THE LAW

[14] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) be under 65 years of age;
- b) not be in receipt of the CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[15] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[16] In the event that the Appellant is found to be incapable, the issue of disability will then be addressed in accordance with paragraph 42(2)(a) of the CPP. Subsection 42(2)(a) defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[17] In order to establish incapacity subsection 60(9) of the CPP indicates that an applicant must have met each of the following three components: (i) been incapable of forming or expressing an intention to make an application before the day on which the application was actually made; (ii) ceased to be so incapable before that day; and (iii) the application was made within the period that begins on the day on which he had ceased to be so incapable that is the same number of days as the period of incapacity, not exceeding twelve months; or if the period of incapacity is fewer than thirty days, the application must have been made not more than one month after the month in which the person had ceased to be so incapable.

[18] Subsection 60 (10) states that a period of incapacity must be “continuous.”

ANALYSIS

[19] The estate must establish, on a balance of probabilities, that the deceased Appellant was incapable of forming or expressing an intention to apply for CPP disability benefits from June 2006 until 2008 and again from April 2012 until April 2015, when the deceased Appellant did apply. Her incapacity must have been continuous during the dates requested. In *McDonald v. Canada (Attorney General)*, 2013 FCA 37, at paragraph 5, the court wrote:

The approach to capacity to form or express an intention within the meaning of subsections 60(8) and (9) of the Plan is now well-established. This Court has affirmed that the Board is to consider capacity in light of the ordinary meaning of the term (*Sedrak v. Canada (Social Development)*, 2008 FCA 86 at paragraphs 3-4). It must consider the medical evidence and the applicant’s activities which cast light on his capacity, between the claimed date of commencement of disability and the date of application (*Canada (Attorney General) v. Danielson*, 2008 FCA 78 at paragraph 7; *Canada (Attorney General) v. Kirkland*, 2008 FCA 144 at paragraph 7.)

[20] The Tribunal notes that there is no evidence from a physician that the deceased Appellant was incapacitated. Of note, no “Declaration of Incapacity” was provided by the family physician or treating specialists, despite the fact that the estate requested and was granted additional time to obtain medical evidence in support of its case. In a report of April 26, 2015, the oncologist wrote that the deceased Appellant and her husband had planned to travel to the holy land when her treatment was complete. The Tribunal understands that this may have been related to the deceased Appellant’s prognosis and spirituality; however, it does indicate that she was capable of decision making with respect to significant issues. As noted by the Federal Court of Appeal in *Sedrak* (supra), “The capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant.” As noted by the court, although the deceased Appellant was seriously ill on or before April 2015, this did not mean that she was incapable.

[21] The Tribunal notes that the deceased Appellant wrote in her Questionnaire for Disability Benefits, Canada Pension Plan in May 2015 that she was suffering from “some memory loss” and was “unable to concentrate.” Neither of these limitations supports a finding of incapacity; rather they suggest symptoms or side-effects, which may have resulted in some limitations, but did not render the deceased Appellant incapable of forming or expressing an intention to make a disability application. The written record verifies that many visits, treatments and procedures were performed by the physicians, which supports a positive inference that they were aware of the Appellant’s mental health and cognitive abilities throughout the treatment period. Yet, there is no evidence suggesting that the deceased Appellant did not make decisions with respect to her treatment and healthcare. As noted by the Respondent, a Power of Attorney was not required, nor was a Public Guardian or Trustee appointed to make medical decisions on her behalf. In addition, the deceased Appellant signed all relevant documentation related to April 2015 request for CPP disability benefits and only requested retroactive benefits from the date that she stopped working in April 2012, but her representative, upon appealing to the Tribunal requested that the benefits should be retroactive from June 2006 until 2008, and again in April 2012. The Tribunal notes that the Appellant returned to self-employment for six or seven years from 2008 until April 2012 with no evidence to corroborate the representative’s argument that she was incapacitated from June 2006 until 2008 despite the fact that she was receiving medical treatment at that time. Alternatively, the fact that the deceased Appellant was able to return to work in 2008 and to

function, demonstrates that she was not incapable of forming or expressing an intention according to the definition of the CPP.

[22] Due to the ongoing treatment provided by the oncologist, the Tribunal is satisfied that the physician was aware of the deceased Appellant's physical and mental status during the relevant periods of time. Knowledge of the physical and mental status is imperative with respect to measuring the objectivity of the evidence. In this case, the doctor did not ever confirm or even suggest that the deceased Appellant was incapable of forming the intent to apply for benefits subsequent to June 2006 or April 2012.

[23] The Tribunal notes that there was no evidence to suggest that the deceased Appellant was incapacitated from acting on behalf of her own affairs on a continuous basis during the relevant time periods. Nor was she treated by a psychiatrist or therapist for any psychological or mental health disorders or issues. In her Questionnaire for Disability Benefits, Canada Pension Plan, signed by the deceased Appellant on May 26, 2015, it states that she was not actively running her agency (employment) due to illness, but she had not yet determined whether she would continue to receive royalties or sell her book of clients. This level of decision-making strongly supports a finding that the Appellant was capable of forming or expressing an intention with respect to her employment and was therefore also capable of forming or expressing an intention to make an application for CPP disability benefits in accordance with the definition found at subsection 60(9) CPP. The estate has failed to establish that the deceased Appellant was "continuously" incapacitated at any point subsequent to June 2006 to 2008 and again from April 2012. The Tribunal notes that subsection 60(10) requires that the period of incapacity be continuous, which was not the case as the deceased Appellant returned to employment in 2008.

[24] Based on medical reporting and the deceased Appellant's noted cognitive abilities, the Tribunal finds that the deceased Appellant was not continuously incapable of forming or expressing an intention to make an application for CPP disability benefits on or after June 2006 or April 2012, in accordance with subsections 60 (9) and (10) of the CPP.

CONCLUSION

[25] The appeal is dismissed.

Joanne Sajtos
Member, General Division - Income Security