

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20211102**

**Docket: A-259-20**

**Citation: 2021 FCA 211**

**CORAM: RENNIE J.A.  
LASKIN J.A.  
MACTAVISH J.A.**

**BETWEEN:**

**CATE BLUE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard by online video conference hosted by the Registry on October 19, 2021.

Judgment delivered at Ottawa, Ontario, on November 2, 2021.

**REASONS FOR JUDGMENT BY:**

**MACTAVISH J.A.**

**CONCURRED IN BY:**

**RENNIE J.A.  
LASKIN J.A.**

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**REASONS FOR JUDGMENT**

**MACTAVISH J.A.**

[1] Cate Blue applied for a Canada Pension Plan disability pension in May of 2016. The Minister of Employment and Social Development granted her application with payments starting as of June 2015, allowing her the maximum period of retroactivity ordinarily available under the Plan.

[2] The Canada Pension Plan permits a longer period of retroactive entitlement in cases where a claimant had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made. Ms. Blue claims that her post-traumatic stress disorder and other psychological conditions rendered her incapable of forming or expressing the intent to apply for a disability pension prior to May of 2016.

[3] The General Division of the Social Security Tribunal accepted Ms. Blue's arguments, finding that because of her psychological impairments, she had lacked the capacity to form or express the intent to apply for a disability pension during the period from April of 2004 to April of 2016. Consequently, her application for disability benefits was deemed to have been made as of April of 2004, with payments to commence from that date.

[4] The Tribunal's Appeal Division overturned this decision, finding that the General Division had erred in law by using the wrong test in determining whether Ms. Blue had been incapable of forming or expressing the intent to apply for a disability pension.

[5] For the reasons that follow, I am satisfied that the General Division did not err as alleged by the Appeal Division. Consequently, I would allow the appeal.

## **I. Ms. Blue's Background**

[6] Ms. Blue suffers from a number of psychological conditions including chronic and severe post-traumatic stress disorder, cognitive disorder, panic disorder with agoraphobia, multiple

specific phobias and insomnia. These are the result of her childhood home life, as well as the numerous painful surgeries and other medical procedures that she experienced as a child and young teen, and the various forms of abuse that she suffered in the course of these treatments. Ms. Blue suffered further medically related traumas when she was in her early 20s, which led to her involuntary detainment in a psychiatric hospital for a number of months. While in the hospital, Ms. Blue suffered significant further trauma, leaving her with an intense fear of hospitals and the medical profession, amongst others.

[7] Ms. Blue's psychological condition was sufficiently stabilized later in her 20s as to allow her to work for a period as the supervisor of a program for disabled teens. Through this job, she became aware of the CPP disability benefit plan. During this period, Ms. Blue also entered into what became an abusive marriage.

[8] Ms. Blue's PTSD was severely re-triggered in 2003, however, and she has been unable to work since that time, other than assisting her husband in his home-based business with some filing and simple bookkeeping for a couple of hours a week, at most, in the years prior to the breakdown of her marriage in 2008.

[9] I have intentionally kept my description of Ms. Blue's history brief, not to minimize the severity of the trauma that she has suffered in any way, but rather to protect her privacy to the extent possible. What is important here is not so much the source of her trauma, but the consequences that Ms. Blue's experiences have had for her mental health. While I will discuss the evidence of her treating psychologist later on in these reasons, suffice it to say that Ms.

Blue's psychologist describes her trauma history as "by far the most complex and prolonged of any of [her] patients" in her 20 years of private practice.

## **II. Ms. Blue's Application for Disability Benefits**

[10] Ms. Blue applied for disability benefits in May of 2016. As noted earlier, her application was successful, and she was awarded benefits as of June of 2015. Ms. Blue was denied further retroactive benefits, however, on the basis that she had not established that she was incapable of forming or expressing an intention to make such an application prior to May of 2016.

[11] Ms. Blue sought reconsideration of the decision regarding the start date for the payment of her disability benefits. When this request was denied, she appealed the Minister's decision to the Social Security Tribunal. The Tribunal's General Division initially dismissed her appeal. The Appeal Division subsequently overturned this decision on procedural fairness grounds, referring the matter back to the General Division with the direction that it hold its new hearing in writing, in order to accommodate Ms. Blue's disability.

## **III. The Psychological Evidence**

[12] Before the General Division was a lengthy report from Dr. Kelly Benn, Ms. Blue's treating psychologist. The General Division also had the transcript of the testimony that Dr. Benn had provided to the General Division at its initial hearing.

[13] Dr. Benn is a licensed psychologist, who has been engaged in private practice for 20 years. Her practice has focussed primarily in the area of clinical and rehabilitation psychology, including disability disputes, assessment, treatment and consultation. She says that she has been involved in hundreds of disability assessments over the course of her career.

[14] Dr. Benn is a member of the Canadian Academy of Psychologists in Disability Assessment, the Vocational Rehabilitation Association of Canada and the Association for Scientific Advancement in Psychological Injury and the Law, amongst other credentials. Dr. Benn has been accepted as an expert witness in various courts, providing her expertise in trauma and PTSD, as well as personal injury, disability and rehabilitation, on behalf of both plaintiffs and defendants.

[15] Dr. Benn has been treating Ms. Blue, usually on a weekly basis, since April of 2004. It is necessary to review Dr. Benn's evidence in some detail, in order to put the issues in this case into context.

[16] According to Dr. Benn, Ms. Blue was extremely distressed and was barely functioning when she first came to see Dr. Benn. Ms. Blue was frequently unable to say more than a few words at a time. Instead, she would cry and rock back and forth and she dissociated frequently during their sessions. Dr. Benn was unable to obtain a clear clinical picture of Ms. Blue's condition for several years, because of her inability to discuss her life experiences, her faulty memory and her frequent periods of dissociation.

[17] While Dr. Benn was able to gain Ms. Blue's trust after several years of treatment, Ms. Blue remains extremely fearful of strangers, authority figures, individuals in positions of power and anyone involved directly or indirectly in the medical or mental health fields, amongst others.

[18] Dr. Benn further asserts that Ms. Blue has been psychologically incapable of any employment since 2004, apart from the occasional bookkeeping work that she performed for her husband in the home. While she can carry out the basic activities of daily living for herself and her daughter, Ms. Blue is extremely vulnerable to numerous and varied psychological triggers that arise in the context of any form of reminder of her traumatic experiences.

[19] Despite the severity of Ms. Blue's mental health challenges, Dr. Benn states that she has worked hard to take responsibility for her life. However, she remains severely psychologically impaired, and is extremely phobic of the medical and the mental health professions. Importantly, Dr. Benn states that due to the severity of her PTSD triggers, Ms. Blue remained incapable of even contemplating medical involvement of any kind prior to May of 2016, unless she was facing an imminent and almost certain threat to her life.

[20] Dr. Benn says that she had previously considered supporting Ms. Blue in seeking government benefits, but Ms. Blue had, since Dr. Benn started seeing her in 2004, "been consistently terrified at the prospect of anyone (especially organizations or systems of perceived authority) having detailed information about her psychological difficulties".

[21] Dr. Benn concludes her report with her opinion, based on her 12 years treating Ms. Blue, that Ms. Blue had been “incapable, continuously and up to this point in time, of forming the intent of undertaking [an] application for Disability Benefits by virtue of the nature of her psychological disability”. Dr. Benn goes on to state that Ms. Blue’s “intense fear of being involuntarily re-hospitalized precluded her ability to even consider the process of applying” and that “[t]he associated automatic terror and resulting dissociation has been consistently prohibitive of such initiative or intent”.

[22] Dr. Benn describes Ms. Blue as being “instinctively and uncontrollably incapable of electing to place herself in the vulnerable position of having to outline, specify, or formally document her mental health issues, especially so to any perceived powerful authoritative organization”. Dr. Benn confirms that it was only recently (as of May of 2016) that Ms. Blue’s condition had improved to the extent that she was now able to even contemplate such a thing.

#### **IV. The General Division’s Decision**

[23] The General Division started its analysis by stating that the issue that it had to decide was whether it was more likely than not that Ms. Blue lacked the capacity to form or express an intention to apply for disability benefits within the meaning of subsection 60(9) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8.

[24] The Minister took the position before the General Division that Ms. Blue’s decision-making activities during the period between April of 2004 and April of 2016 demonstrated that



she was able to form and express the intent to apply for disability benefits. In support of this contention, the Minister pointed out that Ms. Blue had been able to live on her own, manage her own financial affairs, raise her daughter, make decisions related to the breakup of her marriage and attend weekly sessions with Dr. Benn.

[25] Ms. Blue acknowledged that she had been able to make some decisions for herself during the relevant period. However, she maintained that the nature and severity of her psychological impairments rendered her utterly incapable of making the decision to apply for disability benefits.

[26] Citing this Court's decision in *Sedrak v. Minister of Social Development*, 2008 FCA 86, 377 N.R. 216, the General Division observed that the word "capacity" had to be given its ordinary meaning. The General Division's task was to determine – not whether Ms. Blue had the capacity to complete an application for disability benefits – but rather whether she had the capacity to form or express the intent to make such an application. To do this, the General Division stated that it was required to look at both the medical evidence and Ms. Blue's activities during the relevant period.

[27] The General Division noted that in *Williams v. M.S.D.*, (11 April 2005), CP 21005 (PAB), the Pension Appeals Board held that capacity was no longer considered to be a global condition or state, and that a claimant may be incompetent in one or more areas of life, while remaining competent in others. While expressly acknowledging that the PAB's decision was not binding on it, the General Division nevertheless found it to be persuasive.

[28] After reviewing the evidence before it, including Dr. Benn's evidence with respect to Ms. Blue's psychological condition, the General Division observed that although Ms. Blue had been aware of the existence of Canada Pension Plan disability benefits, she had been unable to apply for them until there had been a significant improvement in her condition. The General Division then referenced the rhetorical question posed by Dr. Benn: "why would [Ms. Blue] have put up with poverty ... if she was capable of applying, she would have done so".

[29] The General Division concluded that Ms. Blue had established that it was more likely than not that she had a restricted incapacity. While she was able to function in some areas of her life, she lacked the capacity to form or express the intent to apply for benefits during the period between April of 2004 and April of 2016. Consequently, it directed that Ms. Blue's disability payments should be made retroactive to April 2004.

## **V. The Appeal Division's Decision**

[30] The Appeal Division granted the Minister's appeal, finding that the General Division had erred in law by applying the wrong legal test when it found that Ms. Blue had a restricted incapacity preventing her from forming or expressing the intent to apply for disability benefits.

[31] Citing this Court's decision in *Sedrak*, above, the Appeal Division held that the capacity necessary to form or express the intent to apply for disability benefits was no different in kind than the capacity required to form an intent with respect to other life choices. Consequently, the

Appeal Division concluded that the General Division had erred in finding that Ms. Blue lacked capacity in some areas of her life and not in others.

[32] According to the Appeal Division, the General Division further erred in law in adopting the concept of “restricted incapacity” from the Pension Appeals Board’s decision in *Williams*, as that decision was not binding on the General Division. The General Division was instead bound by this Court’s decision in *Sedrak*.

[33] The Appeal Division accepted that Ms. Blue’s psychological condition may have prevented her from actually completing an application for disability benefits. That was not, however, the test for incapacity. Because Ms. Blue was able to make other types of life decisions, such as those involved in raising her child and managing her finances, the Appeal Division found that she did not lack the capacity to form or express the intent to apply for disability benefits during the relevant period.

[34] The Appeal Division thus allowed the appeal. Making the decision it said that the General Division should have made, the Appeal Division held that Ms. Blue was not incapable of forming or expressing the intent to apply for disability benefits prior to May of 2016. As a result, the payment of further retroactive benefits was quashed.

## VI. Analysis

[35] The standard of review applicable to decisions of the Appeal Division is reasonableness: *Cameron v. Canada (Attorney General)*, 2018 FCA 100, 292 A.C.W.S. (3d) 564 at para. 3.

[36] It is the responsibility of the General Division of the Social Security Tribunal to assess the facts, and then, taking the relevant legal principles into account, to determine on the basis of its findings whether the test for disability – or, as in this case, the test for incapacity – has been met: *Hillier v. Canada (Attorney General)*, 2020 FCA 11, 315 A.C.W.S. (3d) 408 at para. 2.

[37] The powers of the Appeal Division are more restricted. In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, the Appeal Division may only intervene in a decision of the General Division in one of three situations:

- (1) Where the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (2) Where it erred in law in making its decision; or
- (3) Where it based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[38] In this case, the Appeal Division found that the General Division had erred in law by applying the wrong legal test for incapacity. I do not agree. It was the Appeal Division that erred

by interpreting this Court's decision in *Sedrak* to mean that an individual who has the capacity to carry out some activities necessarily has the capacity to form or express the intention to apply for disability benefits.

[39] It is true that in *Sedrak*, this Court stated that “[t]he 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”: at para. 3. It does not however follow from this that the ability of an individual to carry out certain activities necessarily means that they have the capacity to form or express an intention to apply for disability benefits.

[40] This was made clear in *Canada (Attorney General) v. Danielson*, 2008 FCA 78, 165 A.C.W.S. (3d) 560 at para. 7. There, this Court stated that “the activities of a claimant during [the relevant] period may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered” [my emphasis].

[41] It is implicit in the Court's use of the phrase “may be relevant” in *Danielson* that while some activities will be relevant to the question of capacity in certain cases, others will not. Indeed, the Court went on in *Danielson* to say that the Board had to consider “whether these events at the time they occurred evidenced a capacity to form or express an intention to make an application for benefits”, above at para. 11. This analytical framework was subsequently adopted by this Court in *Canada (Attorney General) v. Kirkland*, 2008 FCA 144, 167 A.C.W.S. (3d) 417.

[42] From this, it appears that the test for incapacity for the purposes of subsection 60(9) of the *Canada Pension Plan* involves consideration of the following matters, at a minimum:

- (1) The applicant's evidence with respect to the nature and extent of his or her physical and/or mental limitations;
- (2) Any medical, psychological or other evidence adduced by an applicant in support of their claim of incapacity;
- (3) Evidence of other activities in which an applicant may have been engaged during the relevant period; and
- (4) The extent to which these other activities cast light on the capacity of the applicant to form or express an intention to apply for disability benefits during that period.

[43] The General Division considered this last question at paragraphs 20 to 26 of its decision. After assessing the extent to which Ms. Blue's ability to carry out normal life activities was indicative of her capacity to form or express an intention to apply for disability benefits in the years between 2004 and 2016, the General Division concluded that Ms. Blue had established that it was more likely than not that she lacked the capacity to do so.

[44] Based on the error noted earlier, the Appeal Division concluded its analysis after the third step. It simply assumed that because Ms. Blue had the capacity to carry out certain life activities, it necessarily followed that she had the requisite capacity to form or express an intention to apply

for disability benefits. The Appeal Division did not consider whether Ms. Blue's ability to carry out activities such as paying her bills or raising her daughter was in fact indicative of her capacity to formulate or express the intent to apply for a disability pension.

[45] 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.

[46] The General Division carefully considered the nature and focus of Ms. Blue's disability, concluding that it precluded her from formulating or expressing the intent to apply for a disability pension during the relevant period. The General Division did not err in coming to this conclusion, particularly in light of Dr. Benn's evidence with respect to the specific focus and paralyzing nature of Ms. Blue's fears.

[47] In the absence of an error of law on the part of the General Division, it was unreasonable for the Appeal Division to have intervened.

## VII. Remedy

[48] For these reasons, I would allow the application, with costs, and set the Appeal Division's decision aside.

[49] Ms. Blue's appeal has now been through both the General Division and Appeal Division processes on two separate occasions. Sending the matter back to the Appeal Division for a third redetermination would give rise to what the Supreme Court described as an "endless merry-go-round of judicial reviews and subsequent reconsiderations": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 142.

[50] It is true that courts should generally respect Parliament's intention to entrust matters to administrative decision-makers: *Vavilov*, above at para. 142. That said, in this case, the General Division has already carefully examined the evidence adduced by Ms. Blue. It then applied the appropriate legal test in determining that it was more likely than not that she lacked the capacity to formulate or express the intent to apply for a disability pension in the period between April of 2004 and April of 2016.

[51] Thus, the first-instance administrative decision-maker has already had a genuine opportunity to weigh in on the issue in question. Considering this, as well as other factors identified by the Supreme Court at paragraph 142 of *Vavilov* such as concerns about delay, fairness to the parties, costs to the parties and the efficient use of public resources, I would



exercise my discretion to decline to remit the matter to the Appeal Division for redetermination, leaving the decision of the General Division in place.

“Anne L. Mactavish”

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J.A.

“I agree.

Donald J. Rennie J.A.”

“I agree.

J.B. Laskin J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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LASKIN J.A.

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