

**Citation: *D. C. v. Minister of Employment and Social Development*, 2015 SSTGDIS 46**

**Date: May 22, 2015**

**File number: GT-122769**

**GENERAL DIVISION- Income Security Section**

**Between:**

**D. C.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Raymond Raphael, Member, General Division - Income Security Section**

**Heard by Teleconference on May 21, 2015**

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

D. C.: Appellant

Arnab Quadry: Appellant's representative

### INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 27, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was by Teleconference for the following reasons:

- a) The issues under appeal are not complex;
- b) There are gaps in the information in the file and/or a need for clarification; and
- c) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

### THE LAW

[3] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[4] 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).

[5] 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.

[6] Paragraph 42(2)(a) of the CPP 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.

## **ISSUE**

[7] The Tribunal finds that the MQP date is December 31, 2009.

[8] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

## **BACKGROUND**

[9] The Appellant was 38 years old on the December 31, 2009 MQP date; he is now 44 years old. He last worked as a materials manager in September 2007, and stop working because his company was being downsized. He was involved in two motor vehicle accidents (MVAs) in June 2009, and claims chronic back pain (because of an L1 burst fracture) and depression as his main disabling conditions. He is presently on Ontario Works and his application for ODSP was denied. He is separated and lives alone in a government subsidized townhouse. He has a six year old daughter who he sees every other day.

## **APPLICATION MATERIALS**

[10] In his CPP disability questionnaire, date stamped by the Respondent on October 27, 2011, the Appellant indicated that he has a grade 12 education as well as three years of college business administration and materials management (still requires two credits). He noted that he last worked as a materials manager for Caledon Tubing from January 18, 1999 until September 30, 2008 and that he stopped working because the company was reorganized. *In his oral*

*evidence at the hearing, the Appellant testified that he last worked in September 2007. He claimed to be disabled as of June 18, 2009 and indicated that his main disabling condition was a fractured L1 lumbar disc which causes chronic back pain. He further noted that he suffers from depression because of his disability.*

[11] A report dated September 20, 2011 from Dr. Hiscock, the Appellant's family doctor, accompanied the CPP application. The report diagnoses a burst L1 fracture, chronic pain, and depression. The report notes that the Appellant has an addiction history involving cocaine, cigarettes, and alcohol. The prognosis is unsure and indicates that a chronic pain clinic might relieve the Appellant's pain. The report also notes that the Appellant suffers from depression "off and on" because of no work and marriage problems, and that two drug tests were positive for cocaine.

## **ORAL EVIDENCE**

[12] The Appellant described his education and employment history. He was born in England, move to Canada when he was two years old and then back to England. In England he worked as an apprentice mechanical engineer and then returned to Canada when he was 19. In 1995 he obtained a college diploma from Conestoga College in business administration and production management; he has also attended seminars and taken upgrading courses in purchasing management. In his last work as a materials manager he oversaw the flow of production including ordering raw materials and supervising the shipping and customer service. There were five department heads working under him, and his salary was \$68,000 in his last year. He had started as a purchasing agent and worked his way up to materials manager. The Appellant stated that he had no significant medical issues prior to June 2009.

[13] The Appellant described the second MVA in June 2009 in which his car flipped over seven times. When he got out of the car he couldn't move and felt a shooting pain up his back. He was taken to the hospital emergency department in "excruciating pain", was given a "shot" to knock him out, and on the next day he was told that he had a fracture in his lower back – the doctors did not want to operate because of the risk. He stated that after the MVA he couldn't move at all for six months – he needed crutches, he was on pain killers, he relied on help from others, and he couldn't be a proper father for this young daughter. He was on OxyContin,

couldn't even pick up his new born daughter, and was waking up in the middle of the night because of the pain.

[14] Now his back pain is not as severe, but he has constant pain and is only able to manage the pain by using hydromorphone (both breakthrough and longstanding). He sometimes experiences drowsiness because of the medications but in describing the side effects of the medication he stated that they were "nothing too major." He is not taking any other medications now, and last took anti-depressants about two years ago. He stated that he has good days and bad days (50-50) and that on bad days he isn't able to move at all; if he has his daughter on a bad day she has to stay inside and watch television because he isn't able to play with her. On good days he is able to be up and about, go outside for a couple of hours with his daughter, and watch television. He tries to do stretches and exercises, but sometimes the exercise makes him worse. He tried swimming but could only do it for a very short time.

[15] When describing his depression he stated that it "comes and goes." When he experiences depression he doesn't want to do much, feels sad, and feels like he isn't part of society. The depression has affected his memory and concentration. He tried different anti-depressants prescribed by Dr. Hiscock but the side effects outweighed any benefit – they upset his stomach and caused mood swings. He hasn't seen any mental health specialists for his depression. He stated that Dr. Hiscock had no recommendations for treating his depression.

[16] He switched family doctors to Dr. Prout at the beginning of this year, and stated that he saw Dr. Hiscock every three weeks between 2009 and 2011. He claims that he saw Dr. Stevenson on two occasions, and missed the appointments with him in October and November 2009 because he wasn't able to arrange transportation to X. It took a year to arrange the appointment with Dr. Kamath, the pain specialist; but he only saw Dr. Kamath on one occasion and didn't pursue injections because of transportation issues and they (Dr. Hiscock and him) not being sure that this was the route he should go. He has not gone for any treatment modalities such as physiotherapy.

[17] When asked about Dr. Hiscock's reference in her September 2011 report to his having an addiction history involving cocaine, alcohol, and cigarettes and to two positive drug tests for cocaine he stated that he did some "self-medicating after the accident" and that last year he may

have done cocaine three or four times. He stated that he doesn't think he has used any other illicit drugs but stated that "if you use a street drug, you don't know for sure what you are taking." He denied alcohol dependency and stated that he has "one or two beers, here or there." He has recently reduced his cigarette use to five a day from twenty a day. Dr. Trout sent him for a pain assessment by a nurse at a wellness centre and she suggested that he quit smoking and go to a pain clinic. Dr. Trout has now put him on a waiting list for a pain clinic and he is now ready to try injections. Several years ago, Dr. Hiscock sent him to a choice for change program, and he went for seven or eight times. He stated that he stopped going because "he has no addiction issues."

[18] When describing his activities and limitations he stated: he can't stand for more than 20-30 minutes; he can sit for a couple of hours as long as he changes position and gets up and down to stretch; he can walk for four blocks (20-30 minutes); he can usually drive for about an hour; he wakes up in the middle of the night and has difficulty getting back to sleep – he sleeps for five hours a night at most and this affects his mood and makes him tired and irritable; he can bend somewhat but not to the extent that he used to be able to do; he has difficulty getting out of bed in the morning (2-3 times a month it takes him an hour) because of stiffness. He also stated that he is able to attend to his personal care; that he cooks and does dishes with difficulty; he does his own housecleaning because he has no choice; his ability to play with his daughter has been impacted; and that he has no social life.

[19] He stated that he isn't sure whether he can work because he would have difficulty being there every day on time and he wouldn't be able to concentrate. He stated that he wasn't able to find work between September 2007 and June 2009, although he acknowledges that he was capable of working at that time. He was on Employment Insurance and obtained a paternity leave extension when his daughter was born in July 2008. He stated that he has pursued work after June 2009 but he believes no one would hire him after he told them about his disability. In 2011 he made it to a third interview to be a factory material coordinator and he also made it to a second interview to be a purchasing manager for a steel company. He has also applied for a job as a purchasing agent. When asked whether he would have been able to do these jobs if hired, he stated, "I am not sure that I could have done the work...I can't be in the same spot for long...I can't get to the materials." He did volunteer work at a food centre last year helping

in the warehouse twice a week for three months. He stated that this was good “to an extent” but he was tired at the end of the day. He also worked in his mother’s business selling collectibles for a couple of months – but he was just an in between person to whom items were shipped (he was just there to sign) and he made sure they were delivered. His mother lives in England and has now stopped doing business in Canada.

## **MEDICAL EVIDENCE**

[20] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[21] On August 6, 2009 Dr. Stevenson, orthopaedic surgeon, related that on June 4<sup>th</sup> the Appellant rolled his Jetta car, that he was doing reasonably okay following this, and that on June 18<sup>th</sup> he rolled a rental car. The Appellant had been admitted to Grand River Hospital but had not been seen by any of the orthopaedic surgeons. Dr. Stevenson opined that due to the length of time following the injury there was no point in instituting a brace or other supportive device, that the Appellant was not a candidate for surgical intervention, and that he would be best served by ongoing core muscle strengthening and use of medications. Dr. Stevenson was to arrange a CT scan of the lumbar spine.

[22] An x-ray of the lumbar spine on September 24, 2009 revealed anterior compression deformity with approximately 50% loss of vertebral body height anteriorly.

[23] A MRI of the lumbar spine on the same date revealed anterior depression deformity with approximately 50% loss of vertebral height anteriorly.

[24] On October 20, 2009 Dr. Stevenson noted that unfortunately the Appellant couldn’t make his appointment again today. He noted that the CT scan showed a fracture and that healing seems to be occurring. The only surgical treatment he could recommend would be a vertebrectomy and posterior fusion with anterior support, which is very major surgery and is unlikely to make him any better. Dr. Stevenson suggested continuing pain medications as necessary, core muscle strengthening, and activities as tolerated.

[25] On November 3, 2009 Dr. Stevenson once again reported that the Appellant was not able to make his appointment.

[26] A drug test on May 16, 2011 detected cocaine.

[27] On June 28, 2011 Dr. Kamath, from the Alexandra Hospital pain clinic, reported that the Appellant was seen in the pain clinic. The Appellant advised that he had run out of Oxycontin.

[28] On July 5, 2011 Dr. Kamath related that the Appellant reported constant pain that was well controlled when he was taking OxyContin. Dr. Kamath reported that the Appellant likely had myofascial and mechanical back pain. He discussed local trigger point injections with the Appellant. When the Appellant indicated that he had run out of his OxyContin and was expecting to get a prescription, Dr. Namath advised him that he does not prescribe narcotic medications. Dr. Namath recommended various medication changes.

## **SUBMISSIONS**

[29] Mr. Quadry submitted that the Appellant qualifies for a disability pension because:

- a) The Appellant has made unsuccessful attempts to return to work after June 2009, and these attempts indicate that he wants to return to work;
- b) The Appellant's inconsistency (good days and bad days as per his oral testimony) indicate that he could not be a consistent and regular employee who is regularly capable of substantially gainful employment;
- c) The Appellant's oral evidence describes his numerous limitations and the difficulties that he has with activities of daily living;
- d) The Tribunal should consider the cumulative effect of the Appellant's conditions and limitations.

[30] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) The Appellant stopped working in September 2007 for non-medical reasons;



- b) Although the Appellant has a significant back injury related to his accidents, Dr. Stevenson's November 30, 2009 report indicates that the fracture is healing, surgery is not recommended, and that the Appellant should be managed conservatively with medication and core strengthening exercises;
- c) Although the Appellant may not be able to do physical work or heavy lifting, he is not precluded from all types of work.

## **ANALYSIS**

[31] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2009.

### **Severe**

[32] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

### ***Guiding Principles***

[33] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[34] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2009 he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[35] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and

maintaining employment that were unsuccessful by reason of his health: *Inclima v Canada (Attorney General)*, 2003 FCA 117. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

[36] The measure of whether a disability is “severe” is not whether the Appellant suffers from severe impairments, but whether his disability “prevents him from earning a living:” *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703. It is the Appellant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (MSD)*, [2008] FCA 33.

[37] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP: (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[38] It is not sufficient for chronic pain to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation. It is also incumbent upon a person who has applied for benefits, to show that treatment has been sought and that efforts have been made to cope with the pain: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB).

### ***Application of Guiding Principles***

[39] It is clear from both the oral and medical evidence, that the Appellant suffers from longstanding chronic back pain and that as a result he has limitations. The Tribunal is satisfied that the Appellant would not be able to pursue physically demanding employment. However, the Tribunal is not satisfied, on the balance of probabilities, that the Appellant lacks the capacity to work at light moderate levels.

[40] Mr. Quadry relies on the Appellant's unsuccessful efforts to obtain employment as demonstrated by his failure to obtain employment after the employment interviews (see paragraph 19, supra). However, the inability to obtain employment is not equivalent to the

incapacity to pursue employment, and there is no evidence that the Appellant's failure to successfully pursue employment since June 2009 has been caused by his medical conditions. There is no evidence of serious efforts by the Appellant to pursue light moderate employment. Although the Appellant has limitations (see paragraph 18, supra), the Tribunal noted that he is able to sit for two hours and to drive for an hour. The Appellant is young, well educated, and has many transferable skills. The Tribunal is not satisfied that his limitations preclude all forms of gainful employment.

[41] The Tribunal also noted the minimal treatment that has been sought by the Appellant. He missed two appointments with Dr. Stephenson and hasn't seen him since August 2009. He only saw Dr. Kamath at the pain clinic on one occasion (June 2011), and he declined the suggestion of injections. He has not pursued any treatment modalities and his only ongoing treatment is pain medication. He has not seen any mental health specialists for his depression, and has not taken any anti-depressant medications for two years. He has made minimal efforts to address the addiction issues noted by Dr. Hiscock in her September 2011 report.

[42] The Appellant has the burden of proof and the Tribunal is not satisfied, on the balance of probabilities, that the Appellant suffers from a severe disability in accordance with the CPP criteria.

### **Prolonged**

[43] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

### **CONCLUSION**

[44] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security