

Citation: *W. S. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 7

Appeal No: GT-119119

BETWEEN:

W. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Virginia Saunders

HEARING DATE: December 10, 2013

TYPE OF HEARING: Teleconference
Written Questions and Answers

DATE OF DECISION: March 27, 2014

PERSONS IN ATTENDANCE

Appellant W. S.

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is not payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on January 1, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal began by teleconference for the reasons given in the Notice of Hearing dated November 25, 2013. At the hearing, the Appellant called into question the entry in his Record of Earnings for 2009 and 2010. The Tribunal heard the Appellant's oral testimony, and then adjourned. The hearing was later continued by way of written questions and answers to obtain evidence from the Respondent on the issue of the Appellant's Record of Earnings. The Respondent's written answers were provided to the Appellant, who submitted a written reply on February 20, 2014.

THE LAW

[4] 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 Social Security Tribunal.

[5] 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).

[6] 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.

[7] 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 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

[8] The Tribunal must first consider whether the Appellant made sufficient contributions to the CPP to qualify for a disability pension, and decide when his minimum qualifying period (MQP) ended.

[9] The Tribunal must then determine if the Appellant's disability was severe and prolonged by the end of the MQP and, if so, when he became disabled and when payment of his disability pension is to begin.

EVIDENCE

[10] The Appellant is 53 years old, with a Grade 12 education. He completed a questionnaire that accompanied his disability application on June 20, 2011, in which he stated that his most recent job was as a mechanic and truck driver. It began on January 1, 2010, and ended on May 6, 2011. He stated that he stopped working in May 2011 because of a bad shoulder, back and knees. In the same document, the Appellant stated that he could no longer work because of his medical condition on October 5, 2010, and

that the illnesses and impairments that prevented him from working were “Back spurs both side spine and disc lower back gone. Rotator cuff (left arm) not repairable surgeon said. [No] cartilage in both knees. [Osteo] arthritis. Diabetic.” He stated that, because of these, he had inflammation in the knees, back and shoulder; he was unable to lift very high; arthritis hurt his joints; and he could not stand or sit too long. He noted that he was diabetic (pp. GT1-52- 58).

[11] In the Appellant’s Notice of Appeal to the OCRT, he denied working from January 2010 to May 2011. He stated that he had not worked since April 2010, that he only went back to work after December 2009 because he had no choice, and that he only worked one week (pp. GT1-99-100).

[12] The Appellant testified that throughout his working life, all his jobs were as a mechanic or a truck driver. His Record of Earnings at p. GT1-122 shows several gaps in earnings, and the Appellant explained that these were due in part to hospitalization and difficulties he encountered because of a broken ankle in the 1980s. He did not know why he had almost no earnings between 1990 and 2003, and speculated that it was because he was often sick because of diabetes that was not well-managed. He testified that he did not work in 2005 because he was divorced and wanted to get away, so he moved to Ontario.

[13] The Appellant called into question the entries in his Record of Earnings for 2009 and 2010, which show that he earned below the Year’s Basic Exemption of \$4600.00 (2009) and \$4700.00 (2010) and that his CPP contributions were refunded to him.

[14] The Appellant testified that the Notices of Reassessment by the Canada Revenue Agency (CRA) for 2003-2005 and 2007-2009 (pp. GT1-112-117) were done in 2012 so that he could apply for a medical tax credit. The adjustment was prepared for him by H & R Block, which also prepared his 2010 income tax return in early 2011.

[15] The Appellant’s Notice of Reassessment for 2009 shows income of \$7020.00 for 2009, unchanged from the previous assessment (p. GT1-112). The Appellant testified that this must have been income from employment, as he had no other source of income. He

could not recall who his employer was. He did not understand why there were no CPP contributions posted for him for that year.

[16] An Earnings Details report from the Respondent indicates that the Appellant earned \$2054.00 in 2010 (p. GT1-121). The Respondent gave evidence that the amount of income posted was provided by Revenue Canada (p. GT3-1).

[17] The Appellant's testimony regarding his income is as follows:

a) He worked as a long-haul truck driver for Atlantic Alliance from January 2010 to August 2010. His route was Vancouver to Montreal and back, working 45 to 50 hours per week. He was paid by the mile. The \$2054.00 posted as his earnings for 2010 amounted to one month's pay. He estimated that he would have earned about \$16,000.00 that year. His employer had 4 or 5 trucks, and would provide drivers with a credit card to use while they were on the road. The employer would then deduct from their pay whatever personal expenses they had charged to the credit card. The Appellant would usually be shown a printout of the accounting, but he was not given a copy.

b) In a reply to the Tribunal's written questions, the Appellant stated that he worked from January 2010 to August 30, 2010. He submitted a copy of a Statement of Contributory Salary and Wages for 2010 and 2011 for himself, with Atlantic Alliance named as the employer (p. GT4-4). The statement is a duplicate of one already in the file (p. GT1-14), except that the contributory earnings portion for 2010 has been filled in on the newer copy, showing earnings of \$2100.00 per month from January to July, and Employment Insurance (EI) earnings of \$914.00 per month from August to December. Neither copy contains any other information or signatures in the portion that is to be completed by the employer, and it is clear that the information contained in the form was provided by the Appellant and not by the employer.

c) In the summer of 2010 the Appellant fell off a chair and injured his shoulder. He had a pre-existing condition from another shoulder injury long ago. Shortly after this, in August 2010, he went to an EI office to apply for sickness benefits. He did not have any documentation for his employment, other than proof of earning \$2054.00. By this time,

Atlantic Alliance appeared to have gone out of business and he could not get hold of anyone at the employer's previous address. The clerk at EI took down the company's name and advised him that the government would track down the employer. He received EI benefits based on an estimate of what he had earned.

d) He stopped working for Atlantic Alliance because he was not being paid on time. He did not look for more work, because in addition to the shoulder injury he was feeling unwell as a result of his diabetes and what was eventually diagnosed as chronic obstructive pulmonary disease (COPD). He was short of breath, had no energy and felt physically sick. He had these symptoms while he was working, but was not managing well. He does not think he would have been able to continue even if he was working for an employer who paid him on schedule.

e) He thought his employer was deducting CPP and E I contributions from his income in 2010. He thinks he may have called EI once to follow up with the issue of his 2010 income, but he did not hear anything back. Because he was receiving his EI benefits he did not pursue it. He did not understand the implications it had for his CPP entitlement until this hearing.

f) He does not know why he stated in his Notice of Appeal to the OCRT that he had not worked since April 2010, that he only went back to work after December 2009 because he had no choice, and that he only worked one week. He chose these dates "off the top of my head."

g) He does not know why he stated on his CPP disability application that he could no longer work because of his medical condition in October 2010. He believes that he just guessed at that date, as he did not realize "it was going to be so technical."

h) He does not know why he stated in his Disability Questionnaire that he had worked for Atlantic Alliance until May 2011. He is not sure if he worked in 2011.

[18] A record of EI payments to the Appellant indicates that he received sickness benefits from August 1 to November 27, 2010, and regular benefits from November 28, 2010 to June 4, 2011. The Appellant testified that EI switched him to regular benefits

knowing that he was still unable to work. He admitted to submitting statements that he was willing and able to work, but stated that he had to do so because his other option was to go on welfare and receive about \$500 less each month.

[19] An ultrasound of the Appellant's left shoulder on August 20, 2010 showed a massive rotator cuff tendon tear (p. GT1-45).

[20] An x-ray of the Appellant's left shoulder on September 13, 2010 showed advanced osteoarthritis in the glenohumeral joint, with almost bone on bone contact, and suggestion of longstanding rotator cuff disease and tear (p. GT1-46).

[21] A report by an orthopedic surgeon, Dr. Sohmer, dated January 21, 2011 indicates that the Appellant saw him for left shoulder complaints that had been going on for some time. The Appellant had "kind of recovered" from some major injuries when he was younger, but had had increasing symptoms since falling out of a chair in the summer. Dr. Sohmer noted that the Appellant works as a mechanic and stated "[c]urrently he is doing well and he is still at work and doing all his regular stuff however he finds some days he over does it and is a bit sore and will take Oxycodone occasionally for that. Sometimes he has trouble sleeping as well but he is still functioning at quite a reasonable level." He indicated that the Appellant had developed rotator cuff arthropathy, but that "currently his symptoms are not too bad and he is being treated symptomatically quite appropriately." Dr. Sohmer stated that he suspected that the Appellant would ultimately need an arthroplasty or some other procedure, but because he was "currently functioning quite well we will hold off any type of further procedure for now." He noted that the tear itself was asymptomatic so did not need to be addressed, and was likely not amenable to repair in any event (pp. GT1-47-48).

[22] The Appellant testified that he did not see Dr. Sohmer until January 2011 because there was a long waiting list. He does not know why Dr. Sohmer stated that he was still at work, because he was on EI at the time. He questioned why Dr. Sohmer would have stated that he was fine, since he would not have been to see him if he was all right.

[23] Dr. Jensen is the locum for the Appellant's family doctor, Dr. Phipps. He completed a medical report to accompany the Appellant's disability application on June 15, 2011. Dr. Jensen stated that he had known the Appellant since the week before, but that he had been a patient of Dr. Phipps since 1976. He stated that the Appellant had diabetes, a chronic rotator cuff tear, and osteoarthritis in both knees, resulting in chronic pain. He stated that the Appellant walked with a limp and was unable to elevate his left shoulder above horizontal. He took opiates for pain with a poor response, and his condition was inoperable (pp. GT1-39-42).

[24] A report from Dr. Dhansay, an internist, dated January 17, 2013, indicates that the Appellant had a recent episode of rapid atrial flutter. Dr. Dhansay noted that the Appellant had significant COPD (pp. GT1-60-61).

[25] An Internal Medicine Consult with Dr. Shanks on May 17, 2013 indicates that the Appellant went to the emergency department with fast atrial fibrillation. Dr. Shanks concluded that this was due to non-compliance with his medications (pp. GT1-62-63).

[26] There is no evidence as to when the Appellant was diagnosed with COPD. He testified that he had symptoms while he was working. The Appellant stated in a letter that is not dated but was stamped received by the Respondent in October 2011, that since he applied for CPP he has come down with COPD. He enclosed documents called "COPD Action Plan" and "COPD Maintenance Medication Record" (pp. GT1-9, 33-34).

SUBMISSIONS

[27] The Appellant submitted that:

- a) His Record of Earnings is incorrect for 2009 and 2010, and should show sufficient earnings for him to have made valid CPP contributions in those years;
- b) He became disabled before he began receiving EI sick benefits on August 1, 2010;
- c) His shoulder is inoperable; and

- d) His COPD, osteoarthritis, diabetes and shoulder issues leave him with a disability that is severe and prolonged.

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

- a) The Appellant's MQP ended December 31, 2009;
- b) Although the Appellant may have been unable to perform heavy work, there is no evidence that he could not perform light work suited to his condition;
- c) The information on file does not support a finding that the Appellant's condition was "severe and prolonged" when his MQP ended; and
- d) The information on file does not support a finding that the Appellant's condition was "severe and prolonged" by the end of May 2010, and so pro-rating is not available to him.

ANALYSIS

Minimum Qualifying Period (MQP)

[29] Disability benefits under the CPP are only available when contributions to the Plan have been made on earnings above a certain amount, known as the Year's Basic Exemption (YBE), and for a certain number of years, within a period of time known as the contributory period. Those years are referred to as the minimum qualifying period or MQP. A person must be found to have become disabled by the end of his MQP in order to qualify for a CPP disability pension.

[30] The CPP provides for a Record of Earnings to be kept to record information about the earnings and contributions of each person who contributes to the CPP. The Appellant's Record of Earnings is at pp. GT1-121-122.

[31] The Appellant's Record of Earnings shows that he made contributions to the CPP in 1978-1982, 1987-1989, 2003, 2004, and 2006-2008; and that he had income but

earned below the YBE for disability benefits in 1983, 1990, 1993, 2002, 2009 and 2010. If a person's earnings for a year are below the YBE, his CPP contributions are refunded and no contribution is considered to have been made for that year.

[32] The MQP requirements that are currently in place are set out in section 44(2) (a) of the CPP. In the Appellant's case, they require contributions to have been made in four of the last six years in the contributory period. According to the Record of Earnings, the last six year period in which the Appellant had four years of contributions began on January 1, 2004 and ended on December 31, 2009.

[33] Section 96 of the CPP provides that if a person is not satisfied with the statement of unadjusted pensionable earnings shown in the Record of Earnings, he may request that it be reconsidered by the Minister. Subsection 97(1) of the CPP provides that, notwithstanding section 96, any entry in the Record of Earnings is conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made.

[34] This means that the Tribunal must use the Record of Earnings as it now stands in deciding the Appellant's MQP. It does not have authority to attribute income to the Appellant. Rectification of the Record of Earnings can only be done by the Minister of Employment and Social Development at the request of the Appellant.

[35] The Tribunal finds that the Appellant made sufficient contributions to qualify for a CPP disability pension with an MQP ending December 31, 2009, which means that the Tribunal must find that he was disabled at that date in order for him to be eligible to receive CPP disability benefits.

[36] However, the Appellant also made contributions to the CPP in 2010. These contributions were reimbursed to him because he had earned less than the YBE for that year. Section 19 of the CPP allows proration of earnings for the year the contributory period ends because of disability. The prorated amount is established by dividing the YBE by 12 months and using the monthly amount to determine when the MQP ends. The YBE for 2010 is \$4700.00: divided by 12 it gives a pro-rated monthly amount of

\$391.00. Dividing the Appellant's earnings of \$2054.00 by \$391.00 allows him five months of prorated earnings. This means that if the Appellant is able to establish that he was disabled, as that term is defined in the CPP, by May 31, 2010, and that he continues to be disabled, he is entitled to disability benefits.

[37] The Tribunal considered adjourning the hearing further to allow the Appellant time to formally pursue the questions he raised regarding his earnings for 2009 and 2010. If he was found to have made valid contributions to the CPP in one or both of those years, his MQP would extend to at least December 31, 2011. The Tribunal noted that the Appellant's tax returns were professionally prepared. He has been aware of the amount of earnings reported for 2009 and 2010 for several years, yet he failed to call them into question until the date of the hearing. He was aware that he did not receive T4 slips or other documents to indicate earnings beyond \$2054.00 in 2010, but he did not follow up with EI to ensure his earnings were reported accurately. He has no explanation at all for why his income in 2009 was not considered to be income from employment, but neither can he remember who his employer might have been that year. His hearing file, containing his Record of Earnings as well as several explanations as to how his MQP was calculated, was sent to him in March 2012. A letter from the OCRT was sent to him in May 2012 explaining the calculation of his MQP and the importance of that date, and asking him to contact the OCRT if he had a different calculation. He did not question the discrepancy or take any steps to correct it until his hearing in December 2013.

[38] Section 2 of the *Social Security Tribunal Regulations* provides that they must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications. Subsection 3(1) provides that the Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[39] Considering the likelihood of the Appellant's pursuing this issue, as well as the evidence on file concerning the Appellant's medical condition, the Tribunal concluded that a further adjournment would unnecessarily prolong the determination of this appeal, without advancing the Appellant's position. If the Appellant takes up the earnings issue

with the CRA or the Minister and is successful in having his Record of Earnings rectified, he can make a new application for disability benefits based on a new MQP. This Tribunal's finding that he was not disabled by May 2010 will have no effect on the issue of whether he may have become disabled after that date.

[2] **Severe and prolonged by the MQP or by May 31, 2010**

[40] The Appellant appeared to be making an honest effort to tell the truth at the hearing. However, he had great difficulty remembering dates and events, and admitted that he was not careful about the accuracy of things he had written down in the past. The Tribunal did not accept his testimony as reliable, unless it was consistent or was confirmed by other more reliable evidence.

[41] In his oral testimony and in documents filed in support of his disability application, there are four different time frames during which the Applicant says he worked in 2010:

1. Only one week before April 2010;
2. 45 to 50 hours per week, regularly, between January and either July or August 2010;
3. Until October 2010;
4. Throughout 2010 and up until May 2011.

[42] The Appellant admitted that he likely guessed at the dates in 1 and 3. The dates in 4 are consistent with what he told Dr. Sohmer. His testimony regarding the dates in 2 was consistent throughout the hearing, and with what he says he told EI.

[43] The Tribunal finds that the Appellant worked regularly at least up to the end of July 2010. This date is supported by his reasonably consistent statements, and by the evidence that he applied for and began to receive EI sickness benefits in early August and then regular benefits immediately after those ended. Presumably if the Appellant had stopped working sooner than July 2010, he would have applied for EI benefits sooner.

[44] The Tribunal's finding that the Appellant was working regularly up to at least July 2010 does not affect the finding with respect to the MQP. As stated above, the Record of Earnings is conclusive, and the Tribunal has no authority to change it. The issue before the Tribunal is whether the Appellant regularly had the capacity to work at the relevant time, not whether he made contributions to the CPP.

[45] The Appellant's own testimony is that he worked regularly up to July 2010. The medical evidence indicates that his shoulder injury occurred in the summer of 2010, and that his symptoms increased after that. In January 2011 his symptoms were not too bad and he was carrying on with his usual activities. Although Dr. Sohmer stated that the Appellant's shoulder was inoperable, he was referring to the actual rotator cuff tear, which he stated did not cause symptoms for the Appellant in any event. The osteoarthritis resulting from the tear was acknowledged to be an issue for the Appellant, but Dr. Sohmer stated that surgery would not be considered at the time because the Appellant was managing well. Dr. Jensen's assessment of the Appellant's condition was made in June 2011, and does not suggest in any way that the Appellant was unable to work at the relevant dates of December 31, 2009 and May 31, 2010.

[46] With respect to the Appellant's other conditions, there is no evidence that diabetes caused symptoms that had any impact on the Appellant's ability to work. The medical reports from Dr. Jensen and Dr. Sohmer were completed well after the Appellant's MQP or his pro-rated date, and they make no mention of a COPD diagnosis or of any breathing, fatigue or other issues that might be connected to COPD. His cardiac issues occurred well after those dates.

[47] While the Tribunal acknowledges that the Appellant has medical issues, the only evidence that suggests that he had difficulty before December 31, 2009 and May 31, 2010 is his own testimony. That testimony is unreliable and is contradicted by all of the medical evidence, which indicates that the issues that the Appellant claims are disabling were not a significant problem for him at those times.

[48] The medical evidence, as well as the most consistent of the Appellant's evidence, does not support a finding that the Appellant was incapable regularly of pursuing any

substantially gainful occupation by December 31, 2009, or that he became disabled in May 2010. His condition is therefore not “severe” as that term is defined in the CPP, and he cannot be considered to have become disabled at those dates.

[49] Because the Tribunal found that the Appellant’s condition was not “severe”, it did not go on to determine whether or not it was also “prolonged.”

CONCLUSION

[50] The appeal is dismissed.

Virginia Saunders

Member, General Division