

Citation: *L. E. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 11

Appeal No: GT-125034

BETWEEN:

L. E.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

HEARING DATE: April 30, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: May 13, 2014

PERSONS IN ATTENDANCE

L. E.: Appellant

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on December 14, 2011. 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 was by teleconference for the reasons given in the Notice of Hearing dated April 9, 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] 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

[8] There was no issue regarding the MQP and the Tribunal finds that the MQP date is December 31, 2014.

[9] Since this date is in the future, 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 hearing.

EVIDENCE

[10] The Appellant is 55 years old. He has a grade 12 education, and certificates as a welder and motor operator. When working as a cement truck driver, he initially injured his neck in October 2005, and re-injured it on February 14, 2011. He hasn't worked since that date, and is receiving Long Term Disability (LTD) benefits from Sun Life.

[11] In his CPP disability questionnaire date stamped on December 4, 2011, the Appellant indicated that he last worked as a cement truck driver for Ontario Redimix from November 6, 2006 until February 14, 2011. He noted that he stopped working because he re-injured his neck and suffered a massive headache with dizzy spells. He also noted that he had initially injured his neck in October 2005. He claimed to be disabled as of February 15, 2011 and listed the illnesses preventing him from working to include massive headaches and neck pain, and dysphagia/choking. He indicated that he had to increase his pain medications because the pain is always severe. He listed his medications to include Percocet (2 tablets every six hours), aspirin, Crestor, and occasional OxyContin.

[12] In his oral evidence at the hearing, the Appellant described in detail his initial workplace injury in October 2005, and the re-injury of his neck in February 2011; both of these injuries occurred while he was working as a cement truck driver. After the October 2005 accident, he was off work for 3 ½ months. He returned to work the following February on modified duties and hours, and after a couple of months he returned to full- time duties. He continued taking pain medications, and on a few occasions he had to stop working because of severe headaches. He re-injured his neck when he jumped down from the “crow’s nest” of the cement truck, and ran and jumped into the cab in order to shut the switch to stop a pour of frozen concrete.

[13] He testified that when he was lying over the seat and reaching down to the control, he suddenly felt “extremely ill” in his whole body, especially in his head and neck. Everyone was yelling and screaming that the concrete was cold, and he was able to drive the load back to the yard. His wife had come to pick him up, and when she looked at him she said he looked terribly grave and ill, and she drove him home. That night he fell out of bed, and wasn’t able to stand up. His wife took him to the hospital, and he hasn’t work since this accident. He stated that he hasn’t been able to recover, and that he spent almost the entire next year in bed.

[14] He stated that he has had to detox himself in order to get better. He mentioned his going to a sleep clinic in order to take a test for a CPAP machine, and stated that when the clinician put the machine on, tons of air poured out, and he woke up cold; he believes the clinician was trying to kill him. He also mentioned two incidents while he was working as a cement truck driver, when he believes the company tried to poison him because they were trying to get rid of him. He mentioned that when he became involved with the Roman Catholic Church, they took him into a basement and attacked him spiritually. He stated, “Every time I try to get healthy, someone hurts me.” He stated that he has suffered many betrayals and offenses, and that the righteous are under attack. He stated that he now has an enlightened spirit, that he has had many enlightening experiences and discussions with g-d, and that he believes that g-d has promised him that he will come through.

[15] When describing why he is unable to work, he stated that he has been “struggling terribly” since he became sick. He has difficulty retaining information, he has difficulty learning anything, and if he writes a word today, he won’t be able to write it tomorrow. He suffers constant severe pain in his neck, arms, shoulder, lower back, and legs. He suffers severe headaches. He stated that he has learned over the years to push himself, but since he was poisoned by his employer, he no longer has the energy to push his body. He stated that his pain has intensified since his injury, and that he has “too many problems.”

[16] The Appellant testified that he had a grade 12 education. He stated that when he was eight years old he was hit by car; that when he was 12 he was hit by a milk truck; and that when he was 16 his home burnt down in a house fire. He testified that he lived as a vagabond for a couple of years after the house fire. He joined the navy after high school, and worked as an electrician in the navy. He had to quit the navy after two years because he was sea sick. He then operated a driveway sealing business for three years, and after that a chimney sweep business for one year. He was an apartment building superintendent, and worked in unionized factory manufacturing electrical distribution equipment. He started as an assembler, but hurt his back when he fell out of a transformer cell. He was then on light duties working with transformers until the factory closed in 2002. He then drove trucks for landscaping, and after that started working as a cement truck driver. He worked as a cement truck driver until he re-injured his neck in February 2011.

[17] When asked about pursuing alternative employment, he testified, “It is a shame the way people have treated me... the only relief is my hunger for the word of g-d...studying the bible... and trying to find out why I am struggling.” He wants to be a pastor and would like to take a course starting in the fall, but he will have to come up with four thousand dollars to pay the fee. He testified that he hasn’t looked for other work because, “I can’t do it” ... I will crash... My only hope is to work for g-d, because I would not be working... Christ would be working.” He also mentioned hopefully going to a Rehabilitation Centre through the church, where they will work on him one on one. He is hopeful that if he can go through this program, he might be able to do some type of work through the church. He testified, “I don’t have enough strength to bounce back on my own... my only hope is through g-d...I am now 55... you can’t flog a dead dog.”

[18] He sees Dr. Jalaill for his pain medication. He now takes six Percocets a day; in the winter he was taking eight. When asked whether he saw a psychiatrist through Dr. Jailall's May 15, 2012 referral, he stated that he didn't, and that he does not know why this wasn't followed up. He claimed that he did not refuse to see a psychiatrist. He stated that about one year ago, he went to the emergency department at Brampton Civic Hospital because he wasn't feeling well. He told them that he needed to talk to someone, that he was sick, and that he was constantly fighting just trying to get medications. He stated that they gave him 2000 mg of Ativan, and that this knocked him out cold. He was in the emergency department for 12 hours, and then he was taken to the "mental ward." The psychiatrist told his wife that he was homicidal because he supposedly wanted to stay at Bear Lake where he wanted the bears to eat him. This wasn't what he said; all he wanted to do was to make an appointment, and the next thing he knew was that they called the crisis centre. He was supposed to be in the crisis centre for 72 hours, but when he refused to take the medication, they wanted him to stay for another couple of weeks. He was only in the hospital for 24 hours, because his wife came and took him out.

[19] He sleeps with a breathing machine and covers himself in a prayer shawl. Although he sleeps for a lot of hours, he is tired when he wakes up. On a typical day, his wife brings him coffee and a muffin when he wakes up, so he can take his medication. Once his medication starts working, he gets dressed which takes him a long time. He then takes his dog for a walk for thirty minutes to an hour, and he incorporates prayer time as he walks. When he gets home, he has another coffee, takes more medication, and then has to lie down for thirty minutes to an hour. He then reads the bible and watches Christian programming on television. He can't sit in front of a computer because of his neck pain, and because he can't concentrate. He lives in a town house with his wife and two of his children who are now 21 and 23. He doesn't eat a lot, and they have no regular eating pattern. His children do the laundry, dishes, and household maintenance. He sometimes does the grocery shopping, and stated that he is able to do some basic things as long as this isn't for long and isn't repetitious. After he does something like snow shoveling or going shopping, he has to lie down. He stated that he is tired all of the time.

[20] In a medical report dated September 12, 2011, which accompanied the CPP application, Dr. Jailall, the Appellant's family doctor, diagnosed cervical spine strain/injury and chronic pain. He noted that the Appellant suffered a neck injury when he fell at work in 2005, that his condition was deemed inoperable, and that he has required pain management since the injury. Dr. Jailall also noted that the Appellant has decreased range of neck motion; that he suffers occasional choking; that he suffers from chronic pain in his neck and back; and that he requires pain medications to function. In his prognosis, Dr. Jailall opined that the Appellant's condition was very difficult to treat, that his pain is debilitating, and that the resultant anxiety causes a great deal of stress.

[21] In a psychiatric referral dated May 15, 2012 Dr. Jailall indicated that the Appellant has persecutory ideation and is a highly suspicious individual at baseline. He noted that the Appellant had recently been suffering 'choking episodes' where he feels he cannot get enough air. Dr. Jailall queried whether the Appellant had a panic or anxiety disorder.

[22] On May 15, 2012 Dr. Jailall reported to the CPP that from a chronic pain standpoint, the Appellant is unable to return to work. Dr. Jailall noted that the Appellant's mobility is extremely limited due to decreased range of motion in his back, right knee, and neck; that he requires Percocet which is sedating; and that he has not been driving because of syncopal episodes.

[23] On June 13, 2011 Dr. Marmor, neurosurgeon, reported that there was no clinical evidence of significant radiculopathy or myelopathy; that the imaging studies were unremarkable; that the Appellant's history was very unusual; and that despite spending considerable time with him, it was difficult to get clarification of all of the details. Dr. Marmor ordered a MRI and a CT, and was to see the Appellant once the investigations were completed. He concluded that it was unlikely that the Appellant would require any surgical intervention.

[24] On August 12, 2011 Dr. Marmor saw the Appellant for a follow up appointment. He noted that a recent MRI of the cervical spine showed only relatively mild diffuse degenerative changes, and that a recent CT scan of the brain was normal. Dr. Marmor noted

that the Appellant presents with a wide variety of symptoms including headaches, neck pain, feelings of weakness in his arms and legs; that overall he has remained stable; that his neurological examination is unremarkable; and that his imaging studies do not show any concerning findings. Dr. Marmor concluded that he was uncertain as to the cause of the Appellant's symptoms, but there clearly was no indication for surgical intervention.

[25] In an Employment Questionnaire dated April 19, 2012, Dana McNeely, Human Resources advisor for Ontario Redimix, noted that the Appellant was unable to handle the demands of his job as a Readymix Driver delivering cement loads to job sites.

SUBMISSIONS

[26] The Appellant submitted that he qualifies for a disability pension because:

- a) He suffers from constant severe chronic pain in his head, neck, throat, and shoulders;
- b) The medication relieves but never eliminates his pain and choking;
- c) The pain affects every aspect of his life including his lack of concentration.

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

- a) Although he may not be able to return to his job as a cement truck driver, he has not attempted to return to the workforce in any other capacity;
- b) The clinical and radiological evidence do not identify any serious pathology which would preclude the Appellant from employment within his limitations;
- c) The Appellant's pain is treatable through conservative options many of which remain outstanding at this time.

ANALYSIS

[28] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before the date of hearing.

Severe

[29] 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.

[30] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of hearing, 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.

[31] The Tribunal must consider whether the Appellant's refusal to pursue a recommended treatment is unreasonable and what impact the refusal might have on the Appellant's disability status should the refusal be considered unreasonable: *Lalonde v Canada (MHRD)*, 2002 FCA 211. Each case must be considered on its own particular facts, and the test in each case is whether the Appellant has acted reasonably having regard to his own particular circumstances and capabilities: *Bulger v MHRD*, (May 18, 2000) CP 9164 (PAB). The issue to be determined is whether it was reasonable in the context of the Appellant's particular circumstances for the Appellant not to have followed the recommended medical advice.

[32] There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress,

and that the disability they experience is real: *Nova Scotia (Worker's Compensation Board) v Martin* [2003] SCC 54.

[33] The Appellant has a long work history, and it is clear that he has a strong work ethic. His training and varied work history demonstrates that he is a capable individual with many transferable skills. The Tribunal is mindful of the Respondent's submission that the Appellant has not made efforts to pursue alternative lighter employment; however, the Tribunal is satisfied that because of the cumulative effect of the Appellant's physical and psychological conditions, he lacks the capacity to do so.

[34] The Appellant's major physical limitations are constant severe pain, severe headaches, fatigue, and a choking sensation. Although there are no objective findings to explain these conditions, they are real and the Appellant is genuinely "suffering and in distress." In this regard the Tribunal has considered the *Martin* decision (supra). These physical conditions are compounded by the Appellant's obvious psychiatric and psychological conditions.

[35] The Tribunal placed substantial reliance on the reports from Dr. Jalaill, the Appellant's family doctor, which confirm the Appellant's physical and psychological conditions. The report dated September 12, 2011 indicates that the Appellant suffers from chronic pain in his neck and back, that he suffers from occasional choking, and that he requires pain medications to function. Dr. Jalaill indicates that the Appellant's pain is debilitating. Dr. Jalaill's psychiatric referral dated May 15, 2012 indicates that the Appellant has persecutory ideation and that he is a highly suspicious individual at baseline. The referral also noted that the Appellant has been suffering "choking episodes."

[36] The Tribunal also considered the Respondent's submissions concerning the Appellant not having explored treatment modalities such as a chronic pain program or psychiatric interventions. In this regard, the Tribunal was guided by the *Bulger* case (supra). The Appellant's particular circumstances and capabilities should be considered, and having regard to the Appellant's perception of and reaction to medical treatment, as revealed by his evidence concerning the sleep clinic and concerning his attendance at the Brampton Civic

Hospital emergency department, it is not realistic to expect the Appellant to be able to successfully engage in such programs or interventions. It is difficult to envision how this individual, who believes that someone hurts him every time he tries to get healthy, could successfully participate in such programs or interventions.

[37] The Tribunal is satisfied on the balanced of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[38] Having determined that the Appellant's disability is severe, the Tribunal must also determine whether it is prolonged.

[39] The Appellant's disabling conditions have persisted since at least February 2011, and unfortunately both his disabling physical and psychological symptoms have been intensifying.

[40] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[41] The Tribunal finds that the Appellant had a severe and prolonged disability in February 2011, when he re-injured his neck. According to section 69 of the CPP, payments start four months after the date of disability. Payments will start as of June 2011.

[42] The appeal is allowed.

Raymond Raphael
Member, General Division