

Citation: *Minister of Human Resources and Skills Development v. C. B.*, 2014 SSTAD 117

Appeal No: CP 29022

BETWEEN:

Minister of Human Resources and Skills Development

Appellant

and

C. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

HEARING DATE : May 6, 2014

TYPE OF HEARING In Person

DATE OF DECISION: May 22, 2014

PERSONS IN ATTENDANCE

Counsel for the Appellant

Ketia Calix

Witness for the Appellant

Dr. Violet Gonsalves

Respondent

C. B.

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] On August 9, 2012, a Review Tribunal determined that the Minister's decision to terminate a *Canada Pension Plan* (the "CPP") disability pension was incorrect and that the pension was payable to the Respondent.

[3] The Appellant originally filed an Application for Leave to Appeal that Review Tribunal decision (the "Leave Application") with the Pension Appeal Board (PAB) on December 8, 2011 (sic).

[4] The PAB granted leave to appeal on January 15, 2013. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[5] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated February 7, 2014.

THE LAW

[6] To ensure fairness, the Appeal will be examined based on the Appellant's legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the *Canada Pension Plan* (CPP) as it read immediately before April 1, 2013.

[7] 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).

[8] 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.

[9] 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.

[10] Subparagraph 70(1)(a) of the CPP provides that a disability pension ceases to be payable with the payment for the month in which the beneficiary ceases to be disabled.

[11] Paragraph 70.1 of the *Canada Pension Plan Regulations* (CPP Regulations) provides that if a person who has been determined to be disabled within the meaning of the Act returns to work, the person shall so inform the Minister without delay.

ISSUE

[12] The Tribunal must determine whether it has authority to reduce or rescind an overpayment of disability pension.

[13] The Tribunal must decide whether the Respondent ceased to be disabled within the meaning of the CPP.

EVIDENCE

[14] The Respondent suffers from schizophrenia, paranoid type. He has also broken his elbow and his ankle which impair his physical function to some degree. He was determined to be disabled within the meaning of the CPP, and began to receive CPP disability pension as of April 2000. The Appellant reassessed his pension in 2009 and determined that he was no longer disabled. It terminated his CPP disability pension as of April 2009.

[15] The Respondent testified that he began to work in 2009. He worked for Swiss Chalet, and subsequently for Sobey's. He began to work for Sobey's in 2009, and in 2012 when that store closed, was hired by another Sobey's store. He works on a part-time casual basis. Currently his job is to make fresh fruit kits. He works normally from 28 to 32 hours each week. His work hours are posted each week, with some variation from week to week depending on the store needs and his co-workers' schedules.

[16] The Respondent testified that he has asked to not work more than 32 hours each week as this is the limit he is permitted to work and still receive provincial disability benefits.

[17] The Respondent was asked to review the Record of Earnings, Exhibit 4. He was asked to confirm what he earned in each year from 2009 to 2012. He could not confirm the exact amount earned each year. He did confirm, however, that the hourly wage reported by each of his employers in the Employer Questionnaires was correct.

[18] The Respondent testified adamantly that he has never worked for Second Cup or Canada Safeway, so any income attributed to him from these companies has been done in error.

[19] The Respondent testified that he is able to work on a part-time basis. He can do modified light duty work. He is unable to work full-time. He suffers from a serious and chronic mental illness. In addition, he suffers residual symptoms from having broken his ankle and elbow. His condition is deteriorating, and he may not be able to work as he is

currently in the future. He has researched his condition on the internet and believes that Alzheimer's and dementia are "setting in".

[20] The Respondent testified that he currently sees his Psychiatrist once every three to six months. He spends a few minutes with him, to have his medication reviewed. The psychiatrist determines when next to see the Appellant at each appointment depending on what he reports to the doctor.

[21] The Respondent also testified that he did not understand that CPP disability would require him to repay any overpayment made to him on account of his ability to work part-time. He feels strongly that someone should be held accountable for not explaining this to him. He believed that he could work part-time, as his provincial disability benefits permit this.

[22] In addition, he is frustrated that the overpayment was not drawn to his attention when it first accrued. If it had been, he would have paid it immediately and withdrawn from the CPP disability program.

[23] Dr. Gonsalves testified for the Appellant. She was accepted as an expert witness in general medicine. She had not examined the Respondent, and her opinions were based on a thorough review of the medical evidence.

[24] Dr. Gonsalves testified that the Appellant has been treated by Dr. Gandemann, psychiatrist since he was first diagnosed with schizophrenia, paranoid type in 1992. He was hospitalized at that time, and then released with medication. He continues to take the same medication now.

[25] Dr. Gonsalves summarized the reports written by Dr. Gandemann found in Exhibit 1. On April 10, 2001 he reported that the Respondent was diagnosed with chronic schizophrenia, paranoid type. His prognosis was poor, with likely deterioration.

[26] On July 30, 2010 Dr. Gandemann confirmed the same diagnosis. At that time he saw the Respondent every six to eight weeks. Dr. Gonsalves testified that as he now sees the Respondent once every three to six months the Respondent's condition must be stable.

[27] On July 12, 2011 Dr. Gandemann reported that the Respondent was able to do some part-time menial work to support his provincial disability income.

[28] Dr. Gonsalves also testified that the Respondent has been compliant with treatment. The Employer Questionnaires state that the Respondent has satisfactory attendance, he works without accommodation, and that his work is satisfactory. This indicates, in her opinion, that the medical condition continues to be stable, and that the Respondent is able to work part-time.

SUBMISSIONS

[29] The Appellant submitted that the Respondent is no longer disabled because:

- a) He has been able to work at steady part time employment since 2009;
- b) The Respondent's psychiatrist does not rule out his ability to work part-time;
- c) The Respondent's part-time work is substantially gainful;
- d) The Appellant had no obligation to remind him of his obligation to report a return to work.

[30] The Respondent submitted that he continues to be disabled and should not have to repay any overpayment because:

- a) His condition is deteriorating;
- b) He is able to work part-time now, but may not be able to in the future;
- c) He did not understand that he had to report his return to work and that he would have to repay any overpayment paid to him.

ANALYSIS

[31] The Appellant must prove on a balance of probabilities that the Respondent is no longer disabled.

[32] There was no real dispute about the evidence. It is clear from the Respondent's testimony, the Employer Questionnaires in Exhibit 1, and the medical reports that the Respondent returned to work in 2009. He worked for Cara Operations (Swiss Chalet), then for Sobey's where he continues to work, albeit at a different store since 2012.

[33] The evidence was also clear that the Respondent's work is satisfactory. He does not require any special accommodations. He is not unduly absent from work, and does not require undue supervision to complete his tasks.

[34] The CPP is clear. In order for a person to be disabled under this legislation, he must have a severe and prolonged disability that renders him unable regularly to pursue any substantially gainful occupation. The Respondent did not argue that his part-time work was not substantially gainful. The Federal Court of Appeal, in *Ferreira v. Attorney General of Canada* 2013 FCA 81 concluded that part-time work can be substantially gainful in some cases. The Pension Appeals Board also reached this conclusion in *G.L.v. Minister of Social Development* (October 17, 2007 CP24673).

[35] While each case depends on its own facts, I am persuaded by these decisions that part-time work can be substantially gainful. The Pension Appeals Board has consistently concluded that the term substantially gainful includes occupations where the remuneration for the services rendered is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate award for the nature of the work performed (*Poole v. The Minister of Human Resources Development* CP20748, 2003).

[36] I find that the Respondent is working in a substantially gainful occupation. He is paid well for work well done. It is not illusory or token employment. He is commended for working despite his physical and mental limitations.

[37] I find that the Respondent began substantially gainful work in early 2009. He has worked steadily since then. The Appellant claimed that the Respondent ceased to be disabled three months after he began to work which was April 2009. I agree. Therefore, he was no longer eligible to receive CPP disability pension commencing April 2009.

[38] Section 70.1 of the CPP Regulations is clear that a disability pension recipient is obliged to report any return to work to the Minister without delay. The application form for CPP disability also contains an acknowledgement by the Respondent that he understood this obligation. Neither the CPP nor its Regulations place an obligation on the Minister to remind a disability pension recipient of this obligation.

[39] The Respondent has asked that I rescind or reduce the overpayment of disability pension paid to him. I am without legal authority to do so. The Social Security Tribunal is a statutory tribunal. It only has the legal authority granted to it in its enabling legislation, in this case the *Department of Employment and Social Development Act*. Section 64 of this Act sets out what the SST can decide in a disability case. It does not include any authority to reduce or rescind an overpayment. Therefore, I make no determination on this issue.

CONCLUSION

[40] The appeal is allowed for the reasons set out above.

Valerie Hazlett Parker
Member, Appeal Division