Citation: *K. Y. v. Minister of Employment and Social Development*, 2014 SSTAD 292

Appeal No: CP 29156

BETWEEN:

K. Y.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: VALERIE HAZLETT PARKER

HEARING DATE: October 7, 2014

TYPE OF HEARING: In Person

DATE OF DECISION: October 14, 2014

PERSONS IN ATTENDANCE

Appellant	K. Y.
Counsel for the Respondent	Nancy Luitwieler
Expert Witness	Dr. Martha Harczy
Observer	Linda Pedersen

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 9, 2012, a Review Tribunal determined that a *Canada Pension Plan* (the "CPP") disability pension was not payable.

[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 January 11, 2013.

[4] The PAB granted leave to appeal on February 10, 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 July 29, 2014. The form of hearing was determined after considering the legitimate expectations of the parties, the complexity of the issues, the fact that credibility may be an issue and the number of witnesses that may be asked to testify.

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] Section 70(1)(a) of the *Canada Pension Plan* provides that a disability pension ceases to be payable for the month in which a beneficiary ceases to be disabled.

[11] Section 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] In this case, the Tribunal must decide if it is more likely than not that the Appellant ceased to be disabled as of October 2007.

EVIDENCE

[13] The Appellant was born in September, 1959. He completed Grade 9. He worked for many years in the construction industry. He applied for CPP disability pension on September 4, 2003 based on chronic back pain and digestive issues. He had back surgery in 1989, 1992 and 1998 that were unsuccessful. He was granted a CPP disability pension, with payments commencing October, 2002.

[14] The Appellant testified that he continued to struggle with back pain without any significant relief until he attended for spinal decompression treatments in 2006. He remortgaged his home to pay for treatments, and after 20 treatments his back pain subsided. He then found that he had an addiction to narcotic pain medication, which he weaned himself from. The Appellant testified that now he manages his pain and sleep issues with medical marijuana.

[15] The Appellant confirmed in his testimony that he returned to work as an excavator operator in 2007. His plan was to gradually re-enter the workforce over a two year period. He began to work in 2007 for Fire Watch where he worked for two weeks, then had a week off on a rotating basis. He then worked as an excavator operator building roads for a mine.

[16] The Appellant testified that he notified Service Canada of his return to work in 2007, but never received any acknowledgement that he did so, nor any response to his calls.

[17] The Appellant testified that he worked each year after 2007 as an excavator operator. He worked for different companies, taking on smaller projects so that he worked only for a month or so, and then had some time off. He testified that he continued to work until the date of the hearing, on the same basis. He also stated that he has worked “illegally” because most of the companies he has worked for prohibit marijuana use when working.

[18] The Appellant also testified that he left work with Nohels Group in 2011 because the work was too strenuous for him. He had advised them, and his other employers, that he required modified work where he was not required to shovel out tracks or perform other maintenance on his machine. He was hired on this basis, but after he began to work, more and harder work was given to him, which he could not perform.

[19] The Appellant also testified that he is no longer able to walk long distances (i.e. two miles) to a work site so this limits where he can work.

[20] The Appellant confirmed that he received regular Employment Insurance benefits in 2007, 2008, 2009, 2011, 2012 and 2013-2014. He reported to the Employment Insurance Commission that he was ready, willing and able to work in order to receive these benefits.

[21] The Appellant also confirmed in testimony that he earned the following income:

2007 - $33, 820

2008 - $66, 033

2009 - $18, 264

2010 - $$27, 433

2011 - $40, 000 approximately

2012 - $38, 000 approximately

2013 - $65, 000 approximately

[22] The Appellant was asked about the Employer Questionnaires that were filed in evidence. He testified that his medical condition did affect his ability to do his job, and that the questionnaires were completed by office administrators, not those who worked with the Appellant in the field and saw his work.

[23] A completed Employer Questionnaire dated July 9, 2010 was filed in evidence. It reported that the Appellant worked there seasonally in 2007 and 2008. He used heavy machinery to build roads at a mine, and he had fair attendance. The employer would not offer him full time work because he had many illnesses and injuries.

[24] When asked, the Appellant also testified that he would be willing to be retrained for another job. He has tried to have workers' compensation arrange this for him but they have not. He did not know where else to look for such retraining.

[25] The Appellant has been treated by a number of medical professionals. On November 22, 1999 an Occupational Rehabilitation Discharge Report recommends that the Appellant return to modified duties, in the medium weight work category. The Appellant then had increased pain after going up 100 steps, holding the handrail. He was also limited to sitting for two hours, standing for one hour and walking for thirty minutes.

[26] On December 28, 2010 Dr. Botha, the Appellant's family physician, reported that he had seen the Appellant three times since September 2009. He had ongoing lower back pain and muscle spasm which were fairly well controlled by modified duties and spinal decompression therapy monthly. The Appellant worked full time in a coal mine from 2007 to 2009, at another employer from January to July 2010, and returned to full time work modified duties on November 28, 2010. The Appellant rarely used any medication and had modified duties.

[27] Dr. Botha wrote a prescription note on August 20, 2009 restricting the Appellant from working in extreme and rocky areas.

[28] Dr. Harczy was accepted as an expert witness in internal medicine. She has no chiropractic qualifications. She adopted Exhibit 6 as her testimony. Dr. Harczy reviewed the medical records presented at the hearing. She testified that the MRI scans consistently showed that the Appellant had problems in L4-5 and L5-S1, with severe degenerative disc disease and moderate osteoarthritis.

[29] Dr. Harczy also testified that in 1999 the Appellant underwent a functional capacity evaluation which recommended that he return to work on modified duties, and participate in vocational rehabilitation.

[30] In testimony, Dr. Harczy noted that on September 18, 2007 Dr. Watt, chiropractor, reported that the Appellant was pain free and ready to return to work.

[31] Dr. Harczy summarized Dr. Botha's reports and opined that the Appellant's pain must have been manageable in 2010 as there was no change in treatment, and the Appellant visited him infrequently. Therefore the Appellant must have been able to work with what pain he had.

SUBMISSIONS

[32] The Appellant made no submissions in support of his claim apart from his testimony.

[33] The Respondent submitted that the Appellant ceased to be disabled under the CPP because:

a) The Appellant's testimony demonstrated that he had capacity to work in 2007 and thereafter;

b) The Appellant was engaged in a substantially gainful occupation as his income was above the Respondent's guideline amounts for what is substantially gainful; and

c) The Appellant reported to Employment Insurance Commission that he was ready, willing and able to work each year, which he could not be if disabled.

ANALYSIS

[34] The Respondent must prove, on a balance of probabilities, that the Appellant ceased to suffer from a severe and prolonged disability as of September 30, 2007.

Severe

[35] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Appellant was 48 years of age when the Respondent stopped paying him a CPP disability pension. He finished Grade 9. He has a wealth of work experience as an excavator operator. He also testified that he was willing to undergo retraining for another job.

[36] I find that the Appellant was a very credible witness. He answered questions honestly. He provided testimony that was forthright even when it was not in his interest to do so. For example, the Appellant testified clearly about when he worked, who he worked for, and the amount that he earned in each job.

[37] It was not disputed that the Appellant became disabled in October 2002 and was entitled to receive CPP disability pension payments at that time. The evidence was also clear that after the Appellant received 20 sessions of spinal decompression treatment from Dr. Watt his pain subsided. He was able to return to work, as reported by Dr. Watt in 2007, and as clearly demonstrated by the Appellant's testimony. The Appellant worked from 2007 until the date of the hearing, taking on construction projects with various employers as an excavator operator. There was no evidence that he was fired from any job for poor performance, or that any employer had any complaints about his work. The Appellant testified that in most cases, he stopped work at the end of a project.

[38] The Appellant also testified that when he received Employment Insurance benefits he reported to the Commission that he was ready, willing and able to work. Counsel for the Respondent urged me to find that the Appellant was not disabled on that basis alone, relying on the decision of the Pension Appeals Board in *Bidlofsky v. Minister of Social Development* (December 2, 2004, CP19015). In that case, the Pension Appeals Board concluded that an Appellant cannot, on one hand, say that he is capable of employment in order to benefit from employment insurance and then take the position that at the same time he is too disabled to work and needs income replacement help from CPP disability. While this

decision is not binding on me, I find it persuasive in this case when examined with all of the facts.

[39] The Appellant clearly worked each year from 2007 to the present. He testified that he chose to work on shorter projects so that he could rest between jobs. He applied for and received Employment Insurance benefits during some of these periods. If he was ready, willing and able to work during these times, he must not have been disabled under the CPP.

[40] In addition, counsel for the Respondent argued that because the Appellant's income was higher than that set out in its policy guidelines for what it considers substantially gainful, the Appellant's employment was substantially gainful. While I understand the logic to this argument, I am not persuaded that the determination of what is substantially gainful employment under the CPP can be determined based on a policy document.

[41] The term "substantially gainful" is not defined in the CPP. The Pension Appeals Board has consistently concluded that this term 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). The Appellant made significant income in 2007 and thereafter. He provided no evidence that his income was less than others who performed the same job. I find therefore that he was paid well for valuable work, and his income was not nominal, or illusory.

[42] In addition, the *Minister of Human Resource Development v. Porter* (PAB CP05616 December 3, 1998) decision, the Pension Appeals Board concluded that while the amount earned is not determinative of whether employment is substantially gainful, it is a factor to consider. In this case, the Appellant earned significant income in some years. I also note that the Appellant has been able to obtain and finish a number of jobs in his field. Most of the work is seasonal. He has been hired by the same employers for more than one project. He finished most projects without complaints regarding his work. For these reasons I am satisfied that the work done by the Appellant from 2007 to the date of the hearing was substantially gainful.

[43] For the reasons set out above I find that the Appellant ceased to be disabled on September 30, 2007 when the Respondent ceased payment of CPP disability pension to him.

[44] The Appellant testified that he notified Service Canada of his return to work, and received no acknowledgement or response to this. In the *Bidlofsky* case, the Pension Appeals Board clearly stated that Service Canada, short of negligence, bears no duty of care to an Appellant regarding their claim. I accept this statement of the law as correct. The Appellant therefore cannot obtain any relief on this basis.

CONCLUSION

[45] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division