Citation: *S. W. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 44

Appeal No: GT-119250

BETWEEN:

S. W.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Carol Wilton
HEARING DATE:	December 1, 2014
TYPE OF HEARING:	In person
DATE OF DECISION:	December 30, 2014

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 benefit was date stamped by the Respondent on August 6, 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 was in person for the reasons given in the Notice of Hearing dated August 26, 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 because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[9] 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.

EVIDENCE

[10] The Appellant is 58 years old, has a Grade 8 education and was employed as a unionized ironworker. His principal medical complaints as of the date of his application were pain in his lower back, right lower arm, right leg, and left knee.

[11] The Appellant has a varied work history. In 1980 to 1983, he testified, he worked as an ironworker in Western Canada. After he moved back to Ontario, he renovated and sold houses, buying a gas bar in 1986 with the proceeds. However, he testified, a relative embezzled from the business and put him on the street.

[12] The Appellant testified that in 1988 he fell at work, breaking his wrist and injuring his back. He received a Workplace Safety & Insurance Board (WSIB) disability pension as a

result, half of which is payable to his ex-wife. A letter to the Appellant from the WSIB confirms the payment to him of monthly benefits. (GT1-63).

[13] The Appellant sustained injuries in a motor vehicle accident in May 1993, primarily a fracture of the left kneecap and right thigh bone, according to orthopaedic surgeon Dr. R.J. Lachowski's medical report dated February 15, 2011. (GT1-65ff) The Appellant testified that in that accident he also broke his ankle and his tibia. He attended physiotherapy at that time, he said, and afterwards did home exercises. By 1996, he testified, he was well enough to work for a contractor in X, doing temporary work that involved remodeling a car plant during a shutdown. This type of work, performed on a temporary basis during plant shutdowns, appears to have been his principal means of support after 1996. At various other times the Appellant also ran a restaurant and did construction work involving "structural steel."

[14] The Appellant's Record of Earnings (ROE) shows pensionable earnings for 1996-1997, 2002-2005, 2007-2008, and 2012. In those years, the lowest amount he earned was $4,517 in 2002 and the highest was $22,945 in 2008. In the years when he had pensionable earnings after 1996 (excluding 2012), his average yearly income was approximately $14,000 (GT3-1).

[15] The Appellant reported living on the street between 2003 and 2011 or 2012, sleeping in abandoned houses and eating at soup kitchens. For three months in 2011 he lived at the Salvation Army. He testified that he had applied for benefits under the Ontario Disability Support Program but had been turned down because of his pension from WSIB. He had not told the provincial authorities that his ex-wife collected half of that pension.

[16] The Appellant stopped working in 2008 because of pain in his legs, according to his questionnaire dated August 6, 2010. (GT1-69FF). He testified that this was following a workplace accident in which he was hit on the side of his knee with an angle iron. He said that the company paid him for a while for light duties - sitting in a trailer. The only medication he reported taking in August 2010 was an occasional cortisone injection. He

also indicated that he needed a cane, and that it was hard to work. At the hearing he indicated that after his 2008 injury incident he could not really walk, and that there is a lot of walking involved in ironworking at a plant shutdown – walking in front of a forklift, for example.

[17] The Appellant's witness, a cousin, stated that he had known him all his life, but had not been in contact with him between about 2000 and 2010.

[18] There are no medical reports for the Appellant prior to 2011. Dr. Lachowski, who had seen him in 1993, recorded in February 2011 that the Appellant continued to suffer from chronic pain in both legs but was able to walk, though with pain. He stated that he received cortisone injections every few years in his left knee, and occasionally took Percocet for pain; he might require a knee replacement and removal of a nail in his thigh bone in future. The plan was to continue to treat the Appellant's conditions conservatively. (GT1-65ff) At the hearing, the Appellant stated that Dr. Lachowski had advised him not to work.

[19] The Appellant testified that in 2011 he tripped on the sidewalk, dislocating his shoulder and breaking his arm. Two weeks later he tripped on the sidewalk again and broke his arm a second time.

[20] In December 2011, Dr. Khurram Khan, a gastroenterologist and heptologist, completed a medical report on the Appellant's behalf. Dr. Khan indicated that the Appellant suffered from alcoholic liver cirrhosis, and a history of a fracture of his right thigh bone, shoulder dislocation, and anemia. He had been admitted to hospital at least 4 times in 2011 and had undergone a TIPS procedure on his liver to reduce the risk of bleeding. The Appellant was taking Prevacid and up to 8 Percocet a day. Dr. Khan noted that the Appellant's medical conditions might worsen in future and require a transplant assessment. Serious as the Appellant's liver condition may be at present, it appears to have manifested itself after his MQP, and thus is not relevant to the determination of the issue before this Tribunal.

[21] The Appellant stated that he had not seen specialists other than Dr. Khan and Dr. Lachowski. He testified that he always followed recommended treatments. (GT1-7 ff).

[22] The Appellant testified that he started drinking as a teenager. He continued to drink throughout his working life; he stated that it never interfered with his work. After his injuries, he stated, he used alcohol as a pain reliever. He stopped drinking in 2011 without going to Alcoholics Anonymous.

[23] In 2012 the Appellant was employed as an ironworker in Mississauga, but stopped work after a few months because, he said, he was in too much pain. His Record of Earnings for 2012 shows that he made $10,132 that year. He further testified that the last time he had been able to work was earlier in 2014. He stated that he worked for 16 days in 2014; his witness gave evidence that he was making $75 or $150 a day at this job. The Appellant stated that he had left it because he was in too much pain to continue.

[24] The Appellant testified that he now has a family physician who told him that there is nothing he can do except take pain medication. The Appellant takes Percocet because he says he has a clearer head with it than with Oxycontin.

[25] The Appellant's witness testified that he had worked with him on an ironworking project earlier in 2014. He also provided information about the Appellant's present living conditions. The Appellant had moved to his mother's former home on the reserve about three months ago. It had heat and hydro but no stove, fridge, or running water. The Appellant lives by himself and relies on relatives to check on his well-being and to drive him where he needs to go, since he has no car. The witness testified that the Appellant is unable to lift anything. He had tried to cut some wood a few days before the hearing, with the result that he was throwing up blood; he was reluctant to eat because he was afraid of further vomiting.

[26] At the hearing the Appellant was clearly unwell. He used a walker, and shifted positions frequently during the hearing because, he said, of pain in his back. He tired

quickly. His witness indicated that he was taking him to the hospital immediately for the treatment of his stomach condition.

SUBMISSIONS

[27] The Appellant submitted that he was entitled to a CPP disability pension because he had a disability that was severe and prolonged as of his MQP.

[28] The Respondent submitted that the Appellant was not entitled to a CPP disability pension because:

a) There is no indication that he has tried lighter or modified work either as an ironworker or otherwise;

b) He had earnings of more than $10,000 in 2012, after his MQP;

c) There are no medical reports to support his having severe low back pain and right lower arm condition;

d) There is no medical information to support severe limitations resulting from fractures in May 1993 to the Appellant's left knee and right thigh;

e) The Appellant's cirrhosis postdates his MQP; and

f) There is no information to indicate severe changes in the Appellant's shoulders in 2009 that would have prevented him performing all types of work. (GT2).

ANALYSIS

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

Severe

[30] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when assessing whether a person's disability is severe, the Tribunal must keep in mind factors "such as age, level of education, language proficiency, and past work and life experience."

[31] As the Court stated in *Villani*, this "does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed." (*Villani* at paras. 38 and 50).

[32] In this case, the balance of the evidence persuaded the Tribunal that a CPP disability pension is not payable to the Appellant.

[33] The Tribunal recognizes that the Appellant made a considerable effort to attend the hearing. Unfortunately, however, he was not an entirely credible witness. He was unclear on many of the details of his work history. In addition, he initially denied working in 2014. Further, although the Appellant stated that he had followed all treatment recommendations, he also said that Dr. Lachowski had told him not to work in 2011, when he clearly worked in 2012. The Appellant's witness was credible, but he was unable to offer first-hand information on the Appellant's condition between 2000 and 2010.

[34] A key question is whether the Appellant suffered an injury in 2008 that prevented him regularly from pursuing substantially gainful employment thereafter. There is no medical or other information in the file to support his claim that it did. As indicated above, there is no medical evidence from before 2011, three years after he maintains that he was injured and two years after his MQP. Neither of the doctors who prepared reports for him in 2011 mentioned an injury in 2008. This is particularly surprising in the case of Dr. Lachowski, an orthopaedic surgeon. If he were aware that the Appellant had sustained a serious injury to his leg in addition to his 1993 injuries, he would reasonably be expected to refer to it in his notes. Taking all the circumstances into account, the Tribunal does not find that the Appellant met his onus of proving on a balance of probabilities that his leg injury of 2008 was so severe as to make him incapable regularly of pursuing any substantially gainful occupation. Further, there is no medical information in the file that he was incapacitated from working in 2009 or suffered further injury after 2008 and before his MQP date.

[35] The Tribunal also notes that the Appellant had earnings of $10,132 in 2012, three years after his MQP. It is worth restating the proposition that every case turns on its own facts. In this case, the amount represents about 70% of the Appellant's average earnings for the years he was working between 1999 and 2008. The question is whether $10,132 was "substantially gainful." A decision of the Pension Appeals Board, though not binding on this tribunal, is helpful on this point. It defined as "substantial" an occupation where the compensation reflects an appropriate reward for the nature of the work performed, and indicated that the amount was not nominal or illusory (*Boles v. MEI*, (June 30,1994) CP02794). In this case, the amount was not a nominal one for the services the Appellant performed as an ironworker.

[36] A decision of the Federal Court of Appeal casts some light on the issue of incapacity in relation to substantially gainful employment:

> As noted above, the test of whether a disability is "severe", the issue here, is stated by the statute to be whether that person "is incapable regularly of pursuing any substantially gainful occupation . . . ." It is the incapacity, not the employment, which must be "regular" and the employment can be "any substantially gainful occupation". (*MHRD v. Scott*, 2003 FCA 34).

In this Appellant's case, his disability did not prevent him at all times from undertaking temporary but substantially gainful employment after the date of his MQP. Such work was in keeping with his prior employment history of a series of short-term jobs.

[37] For the foregoing reasons, the Tribunal finds that the Appellant's disability was not, on the balance of probabilities, severe by his MQP of December 31, 2009.

[38] While it was clear to the Tribunal that the Appellant was in poor health at the date of the hearing, the Tribunal has no discretion to grant a CPP disability pension for compassionate reasons.

Prolonged

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

CONCLUSION

[40] The appeal is dismissed.

Carol Wilton
Member, General Division