

Citation: *M. F. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 8

Appeal No: GT-118583

BETWEEN:

M. F.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Pamila Ahlfeld
HEARING DATE: January 13, 2015
TYPE OF HEARING: Videoconference
DATE OF DECISION: January 29, 2015

PERSONS IN ATTENDANCE

The Appellant, M. F.

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 May 30, 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 in person for the reasons given in the Notice of Hearing dated October 2, 2014. The forum was then changed to video conferencing by the Member due to unforeseen circumstances.

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

Oral Testimony

[10] The Appellant was 55 years of age at the time of his MQP. He is from Newfoundland and he completed grade 11 in that province. He moved to Toronto in 1971.

[11] The Appellant worked as a gas station attendant for the first four years after he came to Toronto. After that, he became involved in the plastics business where he worked “slave work” as a labourer with different companies up until 2005. His work duties focused on plastic moulds and required a considerable amount of physical labour.

[12] In 1979, the Appellant was in a serious accident at work whereby a mould fell upon both legs and tore his arm. As a result, his legs were crushed and he later had to have two surgeries for his arm.

[13] The Appellant returned to work sometime in 1982. He had received benefits from the Worker's Safety and Insurance Board (WSIB) and continued to pursue benefits into the 1990's.

[14] The Appellant returned to his regular duties at work until 2005. He stated that he was laid off at that time and he was unable to find further employment.

[15] He stated that it was around 2006 or 2007 that his girlfriend with whom he resided became ill with cancer and he had to look after her. He stated that he was her caregiver up until 2011. He would wash her, bathe her, buy the groceries, do the vacuuming and walk the dog. His girlfriend also had a woman friend that would come in and assist with the bathing, laundry and ironing.

[16] According to the Appellant, his legs started hurting him worse in 2009. He stated that when things got bad, he would go to the Emergency Ward at the hospital. He did not have a family doctor until 2010.

[17] He started to see Dr. Praglowski in 2010. She prescribed Percocet and medication for his thyroid. He stated that he stopped seeing Dr. Praglowski in 2013 because they got into a dispute regarding his WSIB file. He stated he does not have a doctor now because he can't afford medication so there is no point in going.

[18] Since the Appellant's girlfriend passed away in 2011, he has lived alone with his dog in an apartment building. He stated that his pain has become significantly worse but he can't afford to do anything about it. He has friends in the building who sometimes assist him but he stated that his legs are now so bad that he can't even walk across the street. He uses a walker.

[19] The Appellant saw Dr. Silverberg, a rheumatologist, in 2013 and he was told that he has arthritis in his left elbow. He has had cortisone injections but they have not assisted him.

[20] Since 2011, the Appellant can barely stand or walk. He suffers pain in both legs and his arms sometimes radiating into his back.

[21] The Appellant has not sought employment since 2006. He stated initially he did not seek employment because he had to care for his girlfriend and after she passed away, his pain had increased significantly such that he could no longer walk long distances

Documentary Evidence

[22] The Appellant suffered a work related injury in March 1979. A report from Dr. Lacuesta, an orthopaedic surgeon on January 8, 1980 reports that the Appellant had a crush injury to his left arm and left leg. He had a repair of two flexor tendons and an extensor tendon and also the cutaneous branch to the radial nerve.¹

[23] The Appellant was diagnosed with hypothyroidism after the accident. A letter from Dr. Birkin, an endocrinologist reported on September 9, 1983 that the Appellant appeared well.²

[24] The Appellant has submitted a significant amount of documents relating to his conditions that led to his Worker's Safety and Insurance Board claims in the 1980's and 1990's.³

[25] A Medical Report, Service Canada was completed by the Appellant's family doctor on April 6, 2011. Dr. Praglowski lists the following diagnoses: degenerative disc disease; benign protstrate hypertrophy, thyroid, and pain from a WBC leg injury and early osteoarthritis.⁴ She indicated that in 2010, the Appellant complained about severe pain in his legs and he could not walk.

[26] An x-ray of the Appellant's left foot and ankle dated August 30, 2010 shows a prominent plantar spur in the calcaneus with moderate osteoarthritis within the first MTP joint.⁵

¹ See GT-1, p. 126.

² See GT-1, Vol. 2, p. 71.

³ See GT-1, Volumes 1, 2, 3, 4, 5, 6.

⁴ See GT1, Volume 1, pp. 48, 49.

⁵ See GT-1, Vol., 1, p. 63.

[27] X-rays of the Appellant's lumbar spine on October 10, 2010 showed moderate facet joint degenerative change "with quite extensive atherosclerotic change in the aorta, an unusual finding in a patient of this age."⁶The x-ray of his pelvis right hip was normal.⁷

[28] The Doppler-Arterial/Peripheral of on November 10, 2010 was normal.⁸ The Pelvic Ultrasound of September 22, 2010 showed that the Appellant's prostate was minimally enlarged.⁹

[29] The Questionnaire for Disability Benefits submitted by the Appellant states that the Appellant was laid off his last job on June 5, 2006. He stated that he has "severe pain in legs & back. Bone spurs in left leg & foot. Very very painful. Always swelling." [sic]¹⁰ The Appellant indicated he cannot stand for more than 5 minute because of pain; he can't even walk across the street and he can't lift or carry because of back pain.¹¹

[30] A report from Dr. Silverberg, a rheumatologist, who saw the Appellant on November 24, 2011, indicated that the Appellant came to see him for musculoskeletal pain. He stated that for the last 5 years the Appellant has had pain in the low back with radiation to the right hip, right thigh and right calf, and the pain has been more severe for the last 2 months, and he has required a cane to walk for the last 5 days.¹² At that time, the Appellant reported not being unable to walk more than 3 minutes, shop or walk his dog. From his examination, Dr. Silverberg opined that the Appellant has post-traumatic arthritis of the left ankle and lumbosacral soft tissue strain. He found no evidence of hip arthritis and stated that he may have chronic right trochanteric bursitis to account for his right thigh pain.¹³

[31] Dr. Praglowski's letter of May 2013 reports that for the last six to seven years, the Appellant has had pain in his lower back, hips and feet which keep him up from sleep. She indicates that the Appellant cannot walk his dog or shop for longer than five to ten minutes

⁶ See GT-1, Vol. 1, p. 50.

⁷ *Ibid.*

⁸ See GT-1, Vol. 1, p. 52.

⁹ See GT-1, Vol. 1, p. 54.

¹⁰ See GT-1, Vol. 1, P. 68.

¹¹ See GT-1, Vol. 1, p. 69.

¹² See GT1, Vol 2, p. 3.

¹³ See GT-1, Vol. 2, p. 4.

and he is using a cane. She further reports that he has difficulties getting in and out of the shower.¹⁴

SUBMISSIONS

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

- a) He had a very serious work-related accident in 1979 that he has never recovered from. He has suffered ongoing pain since that time but it became worse in 2009.
- b) In 2009, the pain in his legs and arm became worse to a point that he had problems walking. He sought medical attention.
- c) He now has difficulty ambulating even a block. He cannot stand or walk for long periods of time and he is in constant pain. He requires the assistance of his neighbours from time to time and it is difficult for him to walk his dog. He wants to get better but he doesn't have the money to buy prescription medication or seek another form of treatment.

[33] The Respondent in written submissions argued that the Appellant does not qualify for a disability pension because:

- a) The Appellant's family doctor indicated that he first presented in January 2010 and he has been followed for complaints of severe pain in his legs. Vascular problems were ruled out through x-rays and Doppler studies. Blood work revealed hypothyroidism but he has no symptoms. There were no records provided by the Appellant's family doctor pertaining to his MQP date of 2009.
- b) The October 2010 x-ray of the Appellant's lumbar spine revealed moderate facet degenerative changes but disc spaces were noted to be well maintained with no report of spinal stenosis or nerve root compromise. An x-ray of the

¹⁴ See GT-7 p. 4.

left foot and ankle showed a prominent plantar spur in the calcareous which is probably the cause of the Appellant's leg and foot pain. There were reports indicating that the Appellant has not explored the option of treatment with a foot specialist.¹⁵

- c) The rheumatologist who saw the Appellant did not recommend any treatment or follow up. Dr. Praglowski was going to refer the Appellant to an orthopedic surgeon but she felt he was not a surgical candidate. This does not support a severe pathology of impairment that would preclude the Appellant from all types of work. Furthermore, the Appellant did not follow through on the pain management recommended by Dr. Praglowski which might have assisted him.¹⁶

ANALYSIS

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

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 deciding 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.

[36] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[37] I have no doubts that the Appellant suffered a very severe injury back in 1979 and since that time he has experienced pain. He has submitted a significant amount of documents both from doctors and from his claims back as far as 1979 in six volumes of

¹⁵ See GT-1, Vol 1, p. 137.

¹⁶ See GT-8, p. 2.

disclosure. The documents are relevant in that they support the seriousness of the Appellant's accident and document his surgeries. However, putting everything into context, the Appellant was able to return to his regular duties from 1982 up until his lay-off in 2005.

[38] The Appellant's testimony revealed that after he was laid off, he looked for work but he was unable to find any. He further stated that since approximately 2006 or 2007, he was caring for his girlfriend full-time and his duties included washing, bathing, shopping and vacuuming. He stated that these activities continued until she passed away.

[39] I recognize that the Appellant felt a duty towards his girlfriend and his assistance with her care is admirable. However, spousal care is not a factor to be considered with respect to entitlement to CPP disability benefits.

[40] At the time of his MQP, the Appellant was 55 years of age and English is his mother tongue. While he only has a grade 11 education, he does have a significant amount of experience in plastics. He did not end his employment in 2005 because of disability but rather because he was laid off. He has not in my view demonstrated that he could not have worked in 2009 and in fact as stated above, he already indicated that he possessed capacity to look after his girlfriend. Given that he was able to complete these tasks up until 2011, I am persuaded that he possessed some capacity to work in 2009, albeit perhaps not in his former position which required mostly heavy physical labour.

[41] The Appellant did not provide persuasive evidence that he was receiving ongoing treatment from a doctor prior to 2009. The Appellant stated that he was going to the Emergency room at the hospital when required prior to getting a family doctor in 2010 but he has not provided medical records to indicate why and when he went.

[42] I am persuaded by his testimony and the doctor's letters since 2010, that the Appellant's condition *vis a vis* his walking became worse but there is nothing in any of the medical documents that would suggest that he was unable to perform any type of employment. While that may be the case presently, I do not have any persuasive evidence

before me that would suggest the Appellant was unable to work in any capacity back in 2009.

[43] Although the Appellant has not sought ongoing treatment since he left his doctor in 2013, it is difficult to give any weight to that factor given his financial constraints. As he indicated in his testimony, he cannot even afford to pay for prescription medication at this time.

[44] The Appellant has a legal duty to establish his claim for CPP benefits. The onus is on the Appellant to provide evidence that is relevant and persuasive to his disability. Having considered all of the evidence in its entirety, I am not persuaded that Appellant's total personal profile combined with his medical condition demonstrates that he was incapable of regularly of pursuing any substantially gainful occupation in accordance with section 42(2)(a)(ii) of the CPP.

Prolonged

[45] Having determined that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criteria.

CONCLUSION

[46] The appeal is dismissed.

Pamila Ahlfeld

Member, General Division