

Citation: *P. Q. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 19

Appeal No: GT-123159

BETWEEN:

P. Q.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Jane Galbraith

TYPE OF HEARING: Questions and answers

DATE OF DECISION: March 5, 2015

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 June 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 questions and answers for the reasons given in the Notice of Hearing dated December 23, 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] The Tribunal finds that the MQP date is December 31, 2014.

[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 was 59 on the date of his MQP. He completed Grade 12 and taken a course in forklift operation, WHIMIS training and a supervisory course. He worked at Dofasco from September 1973 to January 2010 and stopped due to his cardiac condition and shoulder pain.

[11] In 1972 the Appellant had a crush injury to his right shoulder, which mostly resolved leaving some residual nerve damage that he was able to live with. The Appellant had a workplace injury in September 2007, which affected his right shoulder. (GT3-18) He had several surgeries including the excision of his first rib due to thoracic outlet syndrome. (GT3-44)

[12] The Appellant has undergone many physiotherapy treatments both before and after his shoulder surgeries.

[13] The Appellant had rotator cuff surgery in January 2011 as he had a tear and adhesive capsulitis. Dr. Wong, orthopedic surgeon indicated in March 2011 that the Appellant would be able to return to work in 3-6 months with modified duties, which would include no overhead activity, lifting or repetitive shoulder movements. (GT3-77)

[14] In May 2011 in a follow-up visit with his cardiologist, Dr. Curnew, he was still experiencing chest pain a few times a week and an irregular heart beat. He indicated to Dr. Curnew that he was off on leave as a crane operator but hoped to return to a desk job. (GT1-62)

[15] In June 2011 Dr. Greenspoon, Family Physician, completed the CPP medical report. He has known the Appellant since 1999. His diagnosis includes coronary heart disease, chest pains and a right rotator cuff repair. He indicates the Appellant had a stent inserted in July 1010 after having a myocardial infarction. He notes the Appellant has cardiomyopathy, which has left him weak and having dyspnea on exertion and limits his activities of daily living. (GT1-61)

[16] In June 2011 the Appellant reported in the CPP questionnaire that he could only sit or stand for 10 -15 min and walk approximately 6 blocks or 15 minutes. He is only able to sleep for 45-90 min until his pain wakes him up. He has been easily distracted and having intermittent short-term memory issues due to his pain. (GT1-76)

[17] The Appellant reported in his answers that the difficulties and functional limitations he wrote in his questionnaire in June 2011 had not changed. He indicates that the biggest difference from 2011 to 2014 is an increase in his pain levels and a decrease in the lateral mobility of his right arm. He has had to increase his pain medication and uses a sleeping medication to assist him to sleep. Even with the use of a sleep aid he gets an uninterrupted sleep of only 1 ½ hours before he wakes with pain. (GT5-4)

[18] The Appellant writes that he cannot predict his pain or mobility level from day to day. Some days are a lot worse than others. (GT5-3)

[19] In January 2013 an MRI showed a rotator cuff tear in the left shoulder, which requires surgery. (GT1-65) Dates proposed for the surgery in 2013 were cancelled due to the stents in the Appellant's heart and his cardiac status. As of March 4, 2014 this surgery was still pending.

[20] The Appellant reports that he has limited computer skills. He can play a few games and follows Facebook a little.

[21] The most administrative work the Appellant has done was working in the plant office to assist with the development of a job safe practice manual. The rest of his work was in the Dofasco plant.

SUBMISSIONS

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

- a) Surgery on his left shoulder is pending depending on his pre-operative examination.
- b) His pain and sleeping medication has been increased due to the inability to sleep for extended periods due to the pain in his shoulders.
- c) He cannot predict his level of pain or mobility from day to day.

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

- a) Although it is recognized that the Appellant could not do heavy work due to his condition, the medical evidence does not show any serious pathology that would prevent him from doing suitable lighter work. The Appellant was hoping to return to a desk job.
- b) The cardiologist does not opine that work is contraindicated.
- c) There is evidence of work capacity and he would be able to resume modified activities with the avoidance of heavy lifting, pushing or pulling.

ANALYSIS

[24] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2014.

Severe

[25] The Tribunal found the evidence provided by the Appellant in written form to be clear and concise in describing his condition and its effect on his life and ability to work. His answers are consistent with the other evidence from numerous health care professionals provided throughout the hearing file.

[26] 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.

[27] The Appellant was 59 years old at the time of his MQP. His whole work life experience had been at Dofasco, mainly as a forklift operator. He had a history of over 25 years of earnings. He completed Grade 12 and some forklift and supervisory courses but did not have many transferrable skills for a sedentary position through his work or personal life. He has minimal contact with a computer at home and it has been mainly to play games. The Appellant now has to undergo additional surgery to his left shoulder and how he recovers from that is unknown.

[28] The Tribunal puts a significant amount of weight to the application of the factors discussed in *Villani* in determining if the Appellant meets the test for the severe criteria. The Tribunal finds it is not reasonable, given the Appellant's pain, lack of sleep, limitations to normal activities of daily living and past work history, to assume that he would easily be able to move into a sedentary type job or retrain for one at this age.

[29] The Tribunal notes *Bungay v. Canada (Attorney General)*, 2011 FCA 47 where it states that employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories:

- (a) The claimant's "background." Matters such as "age, education level, language proficiency and past work and life experience" are relevant here (*Villani*, supra at paragraph 38).

(b) The claimant's "medical condition." This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the Plan, which requires claimants to submit highly particular information concerning "any physical or mental impairment," not just what the claimant might believe is the dominant impairment.

[30] The Tribunal is satisfied after reviewing the Appellant's personal characteristics described in Villani, his functional limitations and employability that he has met the criteria for a severe disability.

[31] 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).

[32] The Respondent noted that the Appellant mentioned to his cardiologist that he hoped to return to a desk job. He had no training or work experience to do a sedentary job other than 1-year office work assisting on a job safety manual. He is not able to sleep for more than 90 min maximum without disruption and requires pain and sleep medication to accomplish this amount of sleep. The Appellant describes significant limitations of sitting, standing and walking which would make even a sedentary position difficult from a physical perspective. It is clear from the evidence that the Appellant's functional abilities have declined due to the pain in his shoulders, the chest pain and dyspnea due to his cardiac issues. This statement was made to the cardiologist in May 2011, over three years prior to his MQP.

[33] The Pension Appeals Board has also found appellants' expressions of optimism not to equate to work capacity. (*MHRD v. Ethier* (July 24, 1998), CP 6086 (PAB))

[34] The Tribunal does not place significant weight to a hope expressed by the Appellant several years prior to his MQP. Considering the Appellant's long work history it is reasonable to conclude that if the Appellant could work at any job he would. The Tribunal finds the Appellant did not have the capacity to work at the time of his MQP.

As such the Appellant did not have the obligation to demonstrate his inability to obtain and maintain work.

[35] The Respondent submits the cardiologist did not indicate work was contraindicated for the Appellant. The cardiologist only notes the Appellant's optimistic statement about working. He does indicate in this report that the test results represent a vasodepressive syndrome and his dizzy spells are less frequent.

[36] Medical reports do not always contain words contained in the statute. The Tribunal notes that this issue was addressed in *Cehade v. MHRD* (November 14, 2000), CP 14165 (PAB) which states:

With respect, the Review Tribunal erred by placing undue weight on the absence in the medical reports of the words contained in the statute. The only reasonable conclusion from the medical reports is that the Appellant is probably incapable of pursuing any gainful occupation, or of being successfully retrained. While use of statutory wording provides greater certainty, it is not essential if compliance with the statutory requirements has been clearly shown. That is the situation in this case.

[37] The Tribunal does not place any weight on the lack of opinion of employability by Dr. Curnew in May 2011's report. The Appellant's cardiac status is also only one of his medical issues and it has to be considered with the other conditions and the totality of their effects on the Appellant's functioning.

[38] The Tribunal has carefully reviewed the medical reports and reviewed the evidence of the Appellant in the form of the answers provided to the questions asked by the Tribunal Member. The Tribunal finds that, on a balance of probabilities, the Appellant does have a severe disability within the meaning of the Act.

Prolonged

[39] For the Appellant to qualify for a disability benefit, the Tribunal must be satisfied not only that the mental or physical disability is "severe", but also that it is "prolonged." To make such a finding, there must be sufficient evidence to establish that the disability is both "long continued" and "of indefinite duration", or is likely to result in death.

[40] The Appellant is still waiting for another surgery on his left shoulder. He has continued restrictions on his functioning due to pain and decreased range of motion.

[41] The Appellant's surgery had to be delayed several times for surgery due to the instability of his cardiac status.

[42] There is no indication that the Appellant's functioning will significantly improve in the foreseeable future. His levels of pain have increased over the years and he cannot predict his level of pain or his mobility from day to day.

[43] Therefore the Tribunal agrees that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[44] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2010 when the Appellant stopped working. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in June 2011; therefore the Appellant is deemed disabled in March 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of July 2010.

[45] The appeal is allowed.

Jane Galbraith

Member, General Division