Citation: ***I. M. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 30**

Date: April 15, 2015

File number: GT-117615

GENERAL DIVISION- Income Security Section

Between:

I. M.

Appellant

and

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

Respondent

Decision by: Lucie Leduc, Member, General Division - Income Security Section

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant did not appear for his hearing.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 20, 2010. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was by Teleconference for the following reasons:

- The information in the file, including the nature of gaps or need for clarification in the information
- The fact the Appellant will be the only party in attendance
- The fact that the party is represented
- The complexity of the issue under appeal
- The cost-effectiveness and expediency of the hearing choice
- The requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[3] The Appellant did not show for his scheduled hearing on January 27, 2015 at 10:00 a.m. Section 12 (1) of the Social Security Tribunal Regulations provides that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received the Notice of Hearing.

[4] A Notice of Hearing was sent to the Appellant's representative, Mr. P. S., from Meducation Services PC, on August 8, 2014 by Express Post. The notice was accepted by the representative on August 11, 2014. Further, a phone call was made to Mr. P. S., on

January 12, 2015, to remind him of this hearing and he confirmed that he would attend. Another phone call was made to the Appellant's representative the day of the hearing; he said that he knew about the hearing but was under the impression that the file was handled by his colleague and advised that he would call back. Almost 2 months later, the Tribunal has not heard back from Mr. P. S.

[5] The Tribunal is satisfied that the Appellant was given notice of the hearing via his representative. Given that the Appellant or his representative did not appear for this hearing or contact the Tribunal to adjourn the proceedings, the Tribunal decided to proceed in the Appellant's absence to make a determination on the basis of the documentary evidence and submissions.

PRELIMINARY MATTER

[6] On March 27, 2015, the Appellant's representative submitted new medical evidence to the Tribunal. It was mentioned that the scheduled hearing of January 27, 2015 was adjourned. However, this is not the case. No request for adjournment was filed with the Tribunal as per Section 11 of the *Social Security Tribunal Regulations*. The Tribunal has already dealt with the failure to appear of the Appellant and his representative and finds the new medical evidence to be post-hearing documents and will treat them as such.

[7] In accordance with the Federal Court in *Murray* 2013 FC 49, there are three factors to consider when assessing the relevancy of documents filed after a hearing. They are the following:

1. It must be shown the evidence could not have been obtained with a reasonable diligence for use at the trial;

2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

3. The evidence must be such as presumably to be believed, or in other words, it must be credible, although it need not be incontrovertible.

[8] The Tribunal finds that the third criterion of the test was met. However, it is not the case for the first and second criteria.

[9] On July 4, 2014, the Appellant's representative was sent a letter stating that the appeal was considered ready to proceed and invited the Appellant to submit any additional documents or submission that has not already been sent to the Tribunal. On August 8, 2014, the notice of hearing was sent to the Appellant's representative with clear instructions on the filling periods. The correspondence stated that the parties had until November 28, 2014 to file additional documents or submissions. It was also stated on the notice of hearing that if documents were filed late, they would be considered only at the Tribunal Member's discretion. The Tribunal finds that, on several occasions, the Appellant had the opportunity to file additional documents. Thus, the Tribunal is not satisfied that the post-hearing documents could not have been obtained with a reasonable diligence for use at or before the hearing.

[10] Moreover, the Tribunal finds that no conclusions can be drawn from the new documents to support the Appellant's case. The majority of the documents submitted were dated in 2015, more than 5 years after the Appellant's MQP. Such medical evidence refers to the Appellant's current medical condition and does not make retrospective findings. Therefore, it would only be relevant to determine if the disability was prolonged. However, in the case at hand, the Appellant's disability was not deemed severe and therefore, there is no need to consider the prolonged criterion. For these reasons, the Tribunal finds that the new documents would probably not have an important influence on the result of the case.

[11] The Tribunal finds that the new documents do not meet the relevancy test set out in *Murray* for reopening a tribunal hearing prior to a decision being rendered. As such, the new documents are not admitted as evidence.

THE LAW

[12] 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 Tribunal.

[13] 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).

[14] 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.

[15] 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

[16] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[17] 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

[18] The Appellant was 57 years old when he applied for CPP disability benefits. He is married and father to 3 children. He has the equivalent of a Canadian grade 12 education. He worked in a packaging factory from June 1994 to June 2005. In the CPP questionnaire for disability benefits, the Appellant wrote that he stopped working due to back pain and numbness of his legs.

[19] A CT scan of the lumbar spine, done on July 5, 2005, shows multilevel degenerative disc disease of the lumbar spine. Spinal stenosis of moderate severity was noted at the L4-5 level with left sided lateral recess and neuro foraminal stenosis with encroachment at the traversing left L5 and exiting left L4 root suspected.

[20] A letter from Dr. Grant, orthopaedic surgeon, dated August 2, 2007 stated that the Appellant was seen a year and a half prior regarding his back pain. Dr. Grant diagnosed the Appellant with degenerative disc disease and spinal stenosis. He sent the Appellant for steroid injection and noted that it helped temporarily. Dr. Grant stated that, during the last visit, he revisited with the Appellant the possibility of decompression surgery to mitigate the Appellant's symptoms. The Appellant was not keen on proceeding with the surgery at the time. Dr. Grant offered the surgical option once again. He explained to the Appellant that there was an 80% chance of improving his pain with surgery, but the Appellant remained not keen on having the surgery.

[21] On July 21, 2008, the Appellant had a lumbar steroid injection to help with his back pain. He was advised by Dr. Kachooie to continue with the active rehabilitation program for optimal pain management response. Follow-up was noted as 2-3 months or as required.

[22] An MRI of the Appellant's lumbar spine, done on November 8, 2008, found that degenerative disc changes were present at the L1-2 level with mild bilateral facet arthropathy and possibly a borderline canal stenosis. There was no evidence of disc protusion at this level. There was a mild bilateral facet arthropathy at the L2-3 level but no protusion or definite nerve root impingement. There were degenerative disc changes at the L3-4 level with bilateral facet arthropathy and a borderline canal stenosis at this level. The MRI also revealed degenerative disc changes at L4-5 level, marked bilateral facet arthropathy with narrowing of the lateral recesses, a broad based bulging associated with a central protusion and a severe canal stenosis at this level.

[23] A letter, dated February 9, 2009 from Dr. Grant, orthopaedic surgeon, mentioned that the Appellant has a long history of progressively worsening back and now bilateral leg dominant pain. He further noted that the Appellant's degenerative spondylolisthesis could be contributing to his low back pain. It was noted that the Appellant "had stenosis at this level that

is the likely etiology of his bilateral leg pain". Dr. Grant discussed with the Appellant of treating him with posterior decompression and instrumented fusion but the Appellant was reluctant to go ahead with surgery.

[24] In the CPP questionnaire for disability benefits, dated December 13, 2010, the Appellant described his functional limitations as follows: Difficulty standing 4-5 minutes, difficulty walking about ¼ of a mile, can carry only 12-13 pounds for 2 minutes, can bend for one minute, can sweep floors for about 2-3 minutes, wash dishes for 5 minutes, has difficulty sleeping, can drive short distances about 5 minutes but most of the time, his wife drives the car. The Appellant noted that his medication was Lipitor, Rasilez and Diovan. He further noted that in 2008 he underwent a series of epidural injections that did not help. In 2007, he went to rehabilitation and physiotherapy and it did not help. The Appellant state that he declined back surgery from Dr. Grant because there was no guarantee the pain would go away. The Appellant described that his back pain and numbness of the legs prevented him from working because he cannot do repetitive bending, heavy lifting and wrote that it was worst with prolonged walking.

[25] In the Service Canada Medical Report, dated June 8, 2011, Dr. Medina diagnosed the Appellant with spinal stenosis L4-L5 with compression of L5 nerve root. The medication mentioned was Arthrotec. It is noted that, the Appellant has persistent back pain with numbness of the extremities. Treatment was noted to be exercise. The Prognosis was guarded. (GT1-69)

SUBMISSIONS

[26] There was no submission provided by the Appellant or his representative. However, in his letter of appeal, dated November 14, 2010, the Appellant submitted the following: "Due to my identified limitations, I'm unable to do some types of work nor regular work"

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

a) Based on the information provided, the Appellant has degenerative changes in his lumbar spine, most pronounced at L4-5 level. However, the medical evidence available shows that he does not have significant neurological impairment.

b) He does not appear to require narcotic analgesia for pain.

c) Surgery was discussed but the Appellant has declined.

d) While the Appellant may be unable to perform heavy manual labour, the evidence does not support an inability for all work.

ANALYSIS

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

Severe

[29] Within the meaning of the CPP legislation, the Appellant's disability will be deemed severe if it renders him incapable regularly of pursuing any substantially gainful occupation as of his MQP date. In the case at hand, the Tribunal finds that based on the totality of the evidence and on the balance of probabilities, the Appellant's disability was not severe on or before December 31, 2009.

[30] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (A.G.), 2001 FCA 248). The Federal Court, in *Villani*, set forth the principle that the severe criterion must be assessed in a real world context. Thus, a decision maker when deciding whether a person's disability is severe, must consider factors such as age, level of education, language proficiency, and past work and life experience. This, in the Tribunal's view, does not mean that everyone with a medical condition, who may not be able to return to a pre-injury employment, is entitled to disability benefits. An Appellant must demonstrate that he or she suffers from a serious and prolonged disability that renders them incapable of regularly pursuing any substantially gainful occupation. Both medical evidence and evidence of employment efforts and possibilities may be required.

[31] The onus is on the Appellant to demonstrate that, in a real world context, his medical condition prevents him from regularly pursuing any substantially gainful occupation. In this case, The Tribunal is not satisfied that the Appellant has met his onus.

[32] The Appellant suffers from back pain, specifically from degenerative disc disease at L4-5 level. The Tribunal recognizes that the Appellant's condition caused him some pain. However, there is no medical report on file stating that the Appellant has functional limitations, nor is there any evidence that the Appellant has taken pain medication. According to the medical evidence on file, the Appellant saw his orthopedic specialist at intervals of 1year to 1.5 years. These elements are not indicative that he was unable to do any type of work. Moreover, there is no suggestion in any of the medical report on file that the Appellant's back pain precludes him from pursuing gainful employment.

[33] The Tribunal recognizes that the Appellant may be unable to return to his previous employment. However, the Tribunal is not satisfied that there is sufficient evidence to support a finding that the Appellant's back condition prevents him from engaging regularly in any substantially gainful occupation. In his letter dated November 14, 2010, the Appellant himself admitted that he was unable to do "some type of work or regular work". Such a statement is indicative of some capacity to work.

[34] An essential element of qualifying for a disability pension is evidence of serious efforts by the Appellant to help himself. This requirement extends to both the obligation to aggressively seek treatment and to the burden which accrues to all Appellants of establishing that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and her employability: *A.P.* v *MHRSD* (December 15, 2009) CP 26308 (PAB). It is also incumbent upon a person who has applied for benefits, to show that treatment has been sought and that efforts have been made to cope with the pain: *MNH* v. *Densmore* (June 2, 1993), CP 2389 (PAB). In this case, the Appellant stated that he received physiotherapy and rehabilitation in 2007 and received steroid injections in 2008. Those treatments appeared to not have helped him or helped him temporarily. Dr. Grant, the Appellant's orthopedic surgeon, recommended, on different occasions over the course of 5 years, that the Appellant undergo surgery. The Appellant declined this option on every occasion. The Tribunal accepts the evidence of Dr. Grant, an expert in his field, stating that the surgery had 80% chance of success. Given that the Appellant is fairly young and that the chances of success of the operation are significantly high, the Tribunal is of the view that the Appellant's refusal to undergo the surgery was unreasonable: *MSD* v. *Gregory* (October 28,

2005), CP 22759 (PAB). Therefore, the Tribunal finds that the Appellant has not exhausted all reasonable treatment options.

[35] 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). In this case, the Appellant has not provided the Tribunal with any evidence that he has attempted to obtain alternative and less physically demanding work than his previous employment. In addition, there is no evidence of any attempt by the Appellant to be retrained so that he could apply for other work.

[36] In these circumstances, the Tribunal concludes that on the balance of probabilities, the Appellant was not disabled within the meaning of paragraph 42(2)(a) of the CPP, on or before December 31, 2009.

Prolonged

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

CONCLUSION

[38] The appeal is dismissed.

Lucie Leduc
Member, General Division - Income Security