

Citation: *G. R. v. Minister of Employment and Social Development*, 2015 SSTGDIS 55

Date: June 8, 2015

File number: GT-123139

GENERAL DIVISION - Income Security Section

Between:

G. R.

Appellant

and

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

Respondent

Decision by: Neil Nawaz, Member, General Division - Income Security Section

Heard by Teleconference on June 4, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

G. R. , the Appellant;

Jennifer Pothier, the Appellant's representative;

D. C., addictions counsellor, friend of, and witness for, the Appellant; N. B., law student in Ms. Pothier's office (observer only).

DECISION

[1] The Social Security Tribunal (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 October 6, 2011. 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.

[3] As explained in the Notice of Hearing dated February 18, 2015, this appeal was heard by teleconference for the following reasons:

- The Appellant was to be the only party attending the hearing;
- The issues under appeal were not expected to be complex;
- There were gaps in the information in the file and/or a need for clarification;
- Credibility was not expected to be a prevailing issue; and
- The form of hearing respected the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

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 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.

ISSUES

[8] The Tribunal must determine whether:

- (a) The Appellant's contributions during his contributory period established a Minimum Qualifying Period ("MQP") and
- (b) The Appellant has a disability that is "severe and prolonged" and that consequently prevents him regularly from performing any kind of "substantially gainful" work.

EVIDENCE

Documents

[9] In his Questionnaire for CPP Disability Benefits dated October 4, 2011 (p. GT1-51), the Appellant disclosed that he has been diagnosed with ankylosing spondylitis and hepatitis C, as well as possible cirrhosis as a result of prolonged substance abuse, conditions that he claimed disabled him from all forms of work. He reported that he suffered from constant pain, fatigue, headaches and nausea. He was unable to sit, stand or bend for any length of time. He could walk for no more than four blocks. He was able to raise his arms slowly but could not lift anything without pain. Sometimes the only way to stop the pain was to lie down.

[10] He was born in September 1959 and attended high school up to grade 12. In 1985, he earned a certificate in auto body finishing from Fanshawe College. He worked as an industrial painter for many years, most recently with Commercial Sandblasting in Saskatoon, a job he held until December 2006, when he was laid off for the winter. He listed among his medications Arthrotec, an anti-inflammatory pain reliever.

[11] In the initial CPP Medical Questionnaire dated August 12, 2011 (p. GT1-47), Muftiah Belgasem, family physician, reported that the Appellant had been diagnosed with ankylosing spondylitis and hepatitis C. His functional limitations included chronic back pain, limited bending and an inability to walk or stand for extended periods. A hepatology consultation was pending. He was taking Arthrotec and his pain was improving with medication. The prognosis was stable.

[12] In a letter dated November 24, 2011 (p. GT1-41), K.M. Ibrahim, a gastroenterologist, wrote that the Appellant was seen for a recent diagnosis of hepatitis C and was referred for further management. He had been having chronic back pain for the previous three years but was not reporting any liver related symptoms. He denied any nausea, vomiting, right upper quadrant pain, sicca symptoms, itching, change in bowel habits, leg swelling or increase in abdominal girth. He felt tired and fatigued, but that had been the case for many years. He denied black stools, a prior history of depression, renal disease or cardiac disease. He had no stigmata of chronic liver disease. The Appellant's hepatitis C was likely acquired through IV

drug use 30 years ago. He was also a heavy drinker for many years up until last year. Dr. Ibrahim planned to proceed toward liver function tests and hepatitis C serology.

[13] In a letter dated May 11, 2011 (p. GT1-37), Gregory Griffiths, a rheumatologist, wrote that he was seeing the Appellant for possible spondylitis. He had experienced stiffness in his lower back since his twenties or thirties but was not functionally limited. In past few years, he had more mechanical back symptoms when he did a lot of physical work. He stopped working about two years ago—he was working in the potash mines out west, maintaining and painting trucks, and he found it very hard to get up and down ladders. He suffered an ankle fracture two or three years ago. On examination, his cervical range of motion was 45 degrees of rotation. He had good range in the shoulders. There were no findings of synovitis peripherally with the fingers or into the lower extremities. His lumbar spine movement was restricted in extension for perhaps five or ten degrees and flexion was minimal. Forward flexion showed lumbar opening for two centimetres. His hips showed good functional range. X-rays of lumbar spine taken in January showed some abnormalities in the SI joints and the CT scan showed bilateral sacroiliitis with some lumbar abnormalities. Dr. Ibrahim concluded that the Appellant's history and findings were compatible with spondylitis, as well as some possible lumbar involvement. He suggested physiotherapy and additional blood tests.

[14] In a letter dated July 25, 2011 (p. GT1-39), Dr. Griffiths wrote that the Appellant was using Arthrotec and feeling well. He had minimal complaints of stiffness, although he still had mechanical back pain. He remained restricted with limited extension for about five degrees limited side flexion and forward flexion for two centimetres. There was no root joint involvement. His cervical spine range was fairly well maintained. There was no edema. Although the Appellant had a history of spondylitis, Dr. Griffiths did not think there was "much that is actually active at this point in time." His symptoms were more mechanical than inflammatory. Dr. Griffiths advised him to continue with Arthrotec and encouraged him to abstain from alcohol completely given the hepatitis C diagnosis. There was no indication for biologic treatment.

[15] A CT scan of the lumbar spine dated January 17, 2011 (p. GT1-44) indicated minimal disc bulging at L3-S1. There was bilateral sacroiliitis with associated lumbar spine changes.

The primary differential diagnosis was ankylosing spondylitis. There was also evidence of psoriatic arthritis, Reiter's syndrome or changes associated with inflammatory bowel disease.

[16] An x-ray of the lumbar spine dated January 6, 2011 (p. GT1-46) showed a normal alignment, with well-maintained disc spaces. There was some anterolateral osteophyte formation at L4-5, as well as some degenerative change in the lower lumbar area posteriorly. No acute changes were seen. There was calcification of the aorta. No aneurysms were present. There appeared to be some osteitis condensation ilii about both the SI joint areas, more on the left side than the right.

[17] In a letter dated May 22, 2012 (p. GT2-8), Dr. Ibrahim wrote that the Appellant was currently asymptomatic. His physical examination was quite unremarkable.

[18] In a letter written in support of the Appellant's application for Ontario Disability Support Program and dated September 21, 2012 (p. GT2-12), M.P. Ravindran, a general practitioner, wrote that the Appellant had been diagnosed with chronic hepatitis C, active since June 2011, as well as ankylosing spondylitis causing chronic low back pain. He also suffered symptoms of nausea and fatigue. The prognosis was poor to guarded.

[19] In a letter dated January 7, 2013 (p. GT2-5), Dr. Ibrahim wrote that the Appellant's fibroscan showed only F0-F1, which was not enough to qualify him for triple therapy. He declined the option of a liver biopsy and did not seem to be interested in further treatment of his hepatitis C.

[20] In a letter dated October 31, 2013 (p. GT2-3), Dr. Ibrahim wrote that repeat blood work for hepatitis C showed that the Appellant's ferritin level was 360. His fibroscan previously showed only F0-F1, so he was at low risk of progression.

[21] In a letter dated December 9, 2013 (p. GT2-17), Dr. Griffiths wrote that the Appellant's symptoms were by and large mechanical. He had no night time pain or stiffness in the morning. Clinically he looked well. Dr. Griffiths' impression was that the Appellant was suffering from stable spondylitis with minimal disease activity. He was advised to continue with Arthrotec.

[22] In a letter dated April 30, 2014 (p. GT5-15), Dr. Ibrahim wrote that the Appellant remained asymptomatic with respect to hepatitis C.

[23] In a letter dated June 23, 2014 (p. GT5-9), Dr. Griffiths wrote that the Appellant showed no signs of progression of spondylitis.

[24] In a letter dated June 23, 2014 (p. GT5-10), Dr. Griffiths wrote that no progression of inflammatory joint disease was seen. "We are dealing with mechanical back pain."

[25] In a Letter to the Appellant's representative dated March 9, 2015 (p. GT5-11), Dr. Griffiths wrote that the Appellant suffered from ongoing pain precluding work. On balance, his symptoms were essentially those of chronic mechanical back pain that would restrict him from work involving repetitive bending, lifting, twisting and prolonged positioning of the spine. Of perhaps more concern, he had active hepatitis C and might well require more definitive antiviral treatment. He was getting to be of an age where full retraining would be a significant undertaking.

[26] In an Affidavit dated March 31, 2015 (p. GT5-2) the Appellant wrote that his last job was in 2007 as part of the painters' union in Saskatchewan, where he painted windmills and then steel beams in the potash mines. He had been working with back pain for the previous ten years. He never went to doctors but instead drank to medicate the pain. He drank before work, at work and after work. He was drinking at least a case of 24 beers per day. He also smoked marijuana daily in an effort to address his pain. After he was laid off in 2007, he spent three years drinking in his trailer before returning home to Ontario to die. After drying out, he was left in severe pain and he finally made an appointment with Dr. Belgasum, who sent him for an MRI and CT scan, which indicated ankylosing spondylitis. Dr. Griffiths later confirmed this diagnosis. Later, concerned with his past drug history and tattoos. Dr. Belgasum sent him to a liver specialist, who diagnosed him with hepatitis C. His blood work fluctuated. There are two types of treatment available for his variant of hepatitis C: Interferon, which is administered over nine months and is 60 percent effective, and so-called "triple therapy," which is 80 percent effective with a much shortened treatment time of three months and with fewer side effects. He decided to wait for the second treatment. Both treatments are very expensive and would require an application for funding. He did not want to take the first

treatment and, if it was unsuccessful, have to try again to get the funding for the second treatment.

[27] In an affidavit dated March 31, 2015 (p. GT5-6), D. C., an addictions counselor, wrote that she had known the Appellant since she was sixteen and were involved for several years. She did not see him for about 30 years until he came back to town in 2010. When they rekindled their friendship, she realized that he had severe drinking problem, as well as possible mental health issues.

Testimony

[28] The Appellant told the Tribunal that he earned a certificate in auto body finishing and collision repair at Fanshawe College in the 1980s. He has done this kind of work ever since and was mainly employed as an industrial painter for the last three or five years of his career in the potash mines of Saskatchewan. It was a physical job, requiring him to handle industrial paint guns spraying I-beams on high scaffolds.

[29] He had been feeling back pain for more than ten years. He dealt with this pain through drinking—morning, afternoon and evening. He would drink a whole case of beer until he passed out. If he didn't drink, he couldn't move. He was often late for work and took time off. He is pretty sure his bosses noticed, but he was never given a formal reprimand. At the end of 2006, he was laid off because winter was approaching and there was a shortage of work. He expected to be called back in the spring but wasn't. He believes it is possible his work performance had something to do with not getting rehired. If they had recalled him, he would have gone back and carried on self-medicating with alcohol. Asked whether he thought he could have managed some other job at that time, he replied that it would not have been possible because he was drunk all the time.

[30] Dearing this time, it never occurred to see him to seek medical help. He never used pain pills but just relied on alcohol and sometimes marijuana. The last time he saw a doctor was when he was working at a uranium mine at Key Lake. In order to get the job he had to take a physical from the company physician. That was around 2005.

[31] After he got laid off, his drinking got worse. He drank every day for three or four years. He sold all of his possessions, including his car, his motorcycle and his tools. In 2010, he moved back to his hometown in Ontario and went on social assistance. He became reacquainted with D., who encouraged him to start seeing doctors. As a recipient of Ontario Works, he was encouraged to look for work, but he couldn't because of intense back pain. D., who is also a substance abuse counselor, helped him to cut down his drinking, although he still used marijuana. He started taking Arthrotec, which helped.

[32] In 2007, when he last qualified for disability benefits, he was unable to stand for more than five minutes, nor could he lift anything. Even now, the simple task takes him two days to recover. He has to lie down. He has never looked for job because he wouldn't be able to do it, and Dr. Belgasem agrees that he's not fit to work. Arthrotec is not as effective as it used to be, but without it, he wouldn't be able to do anything. If he increases his dose, he starts to hallucinate. He has tried Naproxen and Celebrex but found they didn't work. He did try physiotherapy but the exercises made his back pain worse.

[33] He has been diagnosed with hepatitis C. He has tattoos and did IV drugs more than 20 years ago. He has symptoms of the disease—he sleeps all the time and has no energy or ambition. The Appellant was asked about Dr. Ibrahim's April 30, 2014 report, in which he was described as "asymptomatic." The Appellant replied that he didn't know why Dr. Ibrahim would say that, because he tells him he's fatigued all the time. Likewise, he has never told him (or Dr. Griffiths) that he is pain-free at night. He does notice, however, that during his visits, Dr. Ibrahim rarely asks how he's doing. He usually sees Dr. Ibrahim every six months or so. He intends to undergo the "triple treatment," which supposedly has an 80 percent success rate, but is expensive. He's looking into funding options.

[34] His new family physician Dr. Ravindran, suggested that he see a psychiatrist, but he thinks it would be hard for him to talk about his personal problems.

[35] Even now, he can't walk more than four blocks. D. cooks all the food and does all the housework. He is able to shower by himself and get himself dressed. He would like to go back to school if he could, but he can't sit for more than half an hour. He can write a little bit but

has never used a computer. He didn't formally graduate from high school but did take some grade 12 equivalent English and math courses in order to going to college.

[36] He can't see himself doing any kind of work at this point.

[37] Ms. C. also spoke on the Appellant's behalf. She has been an addictions counselor for 16 years. She knew him when they were teenagers but didn't see him for 30 years. When they reconnected, she was shocked by his appearance. He was disheveled, his teeth were rotted out and he looked much older than his years. He smelled of liquor. He was living in a motorhome with no heat, and she feared he was going to die. After several attempts at detox and several relapses, he is finally stable.

[38] She was not surprised to hear that he never consulted a doctor about his back pain. In her experience, alcoholics just reach for a bottle. He was probably in an alcoholic fog for years. Although she didn't know him at the time, she suspects that alcohol abuse was a big factor in his getting laid off in 2007. She also believes he has cognitive issues, whether from a childhood head injury or years of alcohol abuse. Back pain is what stopped him from working, but she believes that his disability is bound up with his drinking.

[39] She was also not surprised to hear that he doesn't speak up when he sees his doctors. He likes to please people and often doesn't tell the whole story; his presentation at this hearing shows that he has trouble expressing himself. He won't volunteer information—he has to be asked first. In hindsight, she feels she should have accompanied him on his medical appointments.

SUBMISSIONS

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

- (a) He has been diagnosed with ankylosing spondylitis and hepatitis C, conditions that have left him with increasingly severe back pain and fatigue, rendering disabled him from all forms of work for which he is reasonably qualified;

- (b) He suffered from back pain for many years but was able to keep working because he medicated himself through alcohol and marijuana. For many years, he neglected himself through substance abuse and did not see doctors. As a result, his many significant medical problems predating the MQP went undocumented;
- (c) Since moving to Ontario, he has made a genuine attempt to regain his health, consulting medical specialists, taking pain medications as prescribed and reducing his alcohol consumption. Unfortunately, none of these strategies has provided any significant or long-term relief.

[41] The Respondent did not appear at the hearing, but in previous correspondence dated July 11, 2013 (p.GT6-1) and May 5, 2015 (p.GT6-6), it argued that the Appellant does not qualify for a disability pension because:

- (a) He has a minimum qualifying period ending December 31, 2007, but there is no information on file earlier than 2011;
- (b) The medical documentation that is on file is from 2011 to 2015 and contains no evidence that he was suffering from a severe and prolonged disability that precluded him from performing some form of suitable work;
- (c) From 2011 on, he was reportedly feeling well, an anti-inflammatory medication had improved his back symptoms and his recently diagnosed hepatitis C was asymptomatic.

ANALYSIS

[42] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before the end of the MQP.

MQP and Contributions

[43] In order to qualify for the CPP disability pension, the Appellant must have made sufficient valid contributions during his contributory period to establish an MQP. To establish an MQP after 1998, the CPP requires an applicant to show valid contributions in at least four of six calendar years. In written submissions, the Respondent proposed that the applicable MQP in this case ended on December 31, 2007, as the Appellant last had valid contributions over a six-year window in the four years of 2002, 2003, 2006 and 2007 (see Record of Earnings, p. GT1- 20). The Tribunal made the same analysis and the Appellant understood and agreed that, in order for him to qualify for the CPP disability pension, the evidence would have to show that he was disabled as of the end of 2007 and has remained so since.

Severe

[44] 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.

[45] 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).

[46] This appeal presented a particular challenge to the Tribunal because the Appellant last qualified for disability benefits more than seven years ago, and there was no documentary medical evidence dated earlier than January 2011. As a consequence, a large part of the Appellant's claim hinged on oral testimony. While he and his representative put forth their best possible case under the circumstances, in the end the Tribunal found that there simply was not enough evidence to show that the Appellant was disabled from all forms of substantially gainful work as of December 31, 2007.

[47] The Appellant claimed that back pain was the main reason he ceased working, but there were indications of larger factors behind his leaving the potash mines of Saskatchewan at the end of 2006. Foremost was the fact that he was laid off from his painting job for reasons

having less to do with performance than because outdoor painting does not occur during winter months. When asked at the hearing whether he would have returned to his job had he received a call-back in the spring of 2007, the Appellant replied with a firm “yes,” suggesting that, at some level, he was still physically able to do the type of manual work for which he was trained.

[48] The Appellant testified that he had symptoms of increasing back pain for at least ten years before it became so intense that he finally had to give up work. However this account was at odds with the history he gave Dr. Griffiths, his treating rheumatologist. On the initial consultation in May 2011, Dr. Griffiths relayed that the Appellant had experienced lower back “stiffness” since his twenties or thirties, but he was not functionally limited. On examination, the Appellant’s lumbar range of motion was only mildly restricted. By July 2011, having taken Arthrotec for a few months, he was “feeling fairly well,” with minimal stiffness though some mechanical back pain. In December 2013, the Appellant was reporting no nighttime pain or significant morning stiffness.

[49] An x-ray and CT scan, both taken in January 2011, showed evidence of ankylosing spondylitis, a condition characterized by spinal inflammation, although its progression varies depending on the individual. Dr. Griffiths declared as recently as June 2014 that the Appellant was largely asymptotic and the disease had not advanced. In his March 2015 letter, Dr. Griffiths said that the Appellant’s back pain was mechanical, limiting repetitive bending, lifting, twisting and extended positioning, but he was writing about the Appellant’s *current* condition and the Tribunal was unwilling to infer that he was subject to the same restrictions 7½ years ago. In any case, these restrictions would not have prevented the Appellant from performing relatively sedentary work in an environment that permitted varied movements and postures.

[50] The Appellant’s testimony suggested that alcohol abuse played a role in his not being called back to work. By his own account, he was drinking morning, day and night prior to his layoff, causing him to be at least occasionally late or absent. The Tribunal would not deny that alcoholism can lead to debilitation in some circumstances, but in this case no medical evidence was presented to indicate that it permanently impeded his physical or

mental functioning, notwithstanding Ms. C.'s speculation on the latter point. Moreover, subsequent events showed that the Appellant was, in fact, able to reduce his alcohol consumption and reverse, at least in part, the downward spiral into which his life had fallen.

[51] The Appellant also claimed that symptoms related to active hepatitis C contributed to his inability to work prior to December 31, 2007, but there was scant evidence of this. After 2010, the Appellant conveyed subjective complaints of fatigue and nausea to his treatment providers, but there is no objective evidence that they amounted to a severe disability several years earlier. The Appellant's claims were further undercut by many of Dr. Ibrahim's reports, which recorded no liver-related symptoms or nausea (November 2011) and relatively benign fibroscan results indicating low risk of progression (January 2013). Contrary to Dr. Ravindran's assertion in his December 2013 letter, there was little indication that the Appellant's hepatitis C had become active, and Dr. Ibrahim, in his April 2014 report, noted that he remained "asymptomatic."

[52] At the hearing, the Appellant's representative attempted to discount some of the unfavourable evidence in the medical reports by suggesting that they did not convey an accurate picture of the Appellant's symptoms at the time. Drawing on testimony of the Appellant and his witness, Ms. C., she argued that the Appellant's passivity and eagerness to please would have led his treatment providers to take a more benign view of his condition than was actually the case. The Tribunal found this unlikely, finding that the various reports of both Dr. Griffiths and Dr. Ibrahim to be detailed, frank and, to all appearances, built on a foundation of active inquiry. Over several years, both specialists used descriptive language to convey their respective impressions that the Appellant's back pain and hepatitis C were stable and under control.

[53] The Tribunal found the Appellant sympathetic and essentially credible, his testimony suggesting that he sincerely believes himself disabled. Ms. C. was a compelling witness on his behalf. Despite that, the Tribunal was reluctant to award a disability pension largely on the basis of subjective evidence with only weak independent medical corroboration, prepared several years after the fact. While he is probably no longer able to perform heavy labour, there

may be other, more sedentary, jobs available to him that are less likely to aggravate his lower back—the predominant source of his pain and discomfort.

[54] The CPP demands that an applicant’s disability preclude *any* kind of regular, gainful employment—commensurate with his background, education and training—a rather high standard to meet. The Appellant was 48 years old in 2007 and even given his condition at the time, it is possible to imagine that he could have found and maintained some form of suitable alternate employment—possibly in the retail sector. Looking at the “whole person,” the Tribunal was compelled to conclude that there simply wasn’t enough evidence to show that this individual’s disability crossed the threshold to “severe.”

Prolonged

[55] As discussed above, the Appellant’s back pain and symptoms related to hepatitis C fall short of the severity threshold, so there is no need to consider whether his disability can be termed “prolonged.”

CONCLUSION

[56] The appeal is therefore dismissed.



Member, General Division