

Citation: *S. C. v. Minister of Employment and Social Development*, 2015 SSTGDIS 80

Date: July 27, 2015

File number: GP-13-2198

GENERAL DIVISION - Income Security Section

Between:

S. C.

Appellant

and

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

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

Heard by Questions and answers on May 8, 2015 to June 15, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 11, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Tribunal on September 9, 2013.

[2] The hearing of this appeal was by Questions and answers for the following reasons:

- a) There are gaps in the information in the file and/or a need for clarification.
- b) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] 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).

[4] 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.

[5] 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

[6] The Tribunal finds that the MQP date is December 31, 2016.

[7] Since this date is in the future, 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 decision.

APPLICATION MATERIALS

[8] In his CPP disability questionnaire, date stamped by the Respondent on December 11, 2012, the Appellant indicated that he last worked as a construction estimator from May 10, 2000 until April 13, 2012; he indicated that he stopped working because of rectal cancer, radiation and chemotherapy treatment, surgery, heart attack, and fatigue. He claimed to be disabled as of May 24, 2012.

[9] A report dated October 16, 2012 from Dr. Dhillon, the Appellant's family doctor, accompanied the CPP application. The report diagnoses rectal carcinoma and coronary artery disease (CAD). The report indicates that the Appellant was diagnosed with rectal cancer in December 2012, and that he has been seeing an oncologist and Dr. Dhillon since then. The prognosis was unknown and depended on the outcome of recent chemotherapy. The report also indicates that the Appellant is unable to return to work at this time due to his ongoing medical condition and treatment.

MEDICAL EVIDENCE

[10] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[11] On January 21, 2012 Dr. Gold, cardiologist, reported that the Appellant sustained an anterior wall myocardial infarction in 2011 for which he underwent left descending artery (LAD) and diagonal angioplasty, and that in June 2011 he was admitted to William Osler Health Center with a non-segment elevation myocardial infarction and transferred to Toronto

General Hospital. The diagnostic angiography revealed in stent restenosis of the LAD coronary artery, and the Appellant had a drug-eluting stent placed to the LAD. The report indicates that the Appellant is stable and remains asymptomatic. Dr. Gold did not schedule the Appellant for specific follow-up.

[12] On June 26, 2013 Dr. Kim, oncologist, reported that he first saw the Appellant in January 2012, for newly diagnosed rectal cancer. The Appellant underwent neo-adjuvant chemotherapy for five weeks from February 8 to March 13, 2012; on April 23, 2012 he underwent surgical resection; there were some post-operative complications which resulted in prolonged hospitalization; and he subsequently underwent 8 cycles of further chemotherapy and completed his treatment in October 2012. Dr. Kim indicated that the Appellant was doing well and that his most recent endoscopic follow-up and scans show that he is free of recurrent cancer.

RECORD OF EARNINGS

[13] The Appellant's Record of Earnings (ROE) printed May 19, 2015 indicates sufficient earnings from 1999 through to 2014. The Appellant's employment earnings from 2011 to 2014 were as follows: 2011 - \$36,974; 2012- \$12,460; 2013 - \$51,100; 2014- \$52,190.

Appellant's Answers

[14] In a letter dated May 29, 2015 the Appellant, in response to initial questions from the Tribunal, advised that his total income for 2012 was \$19,360.50 consisting of \$6,900 Employment Insurance (T4E slip) and \$12, 460.50 part-time employment (T4 slip). In a letter dated June 15, 2015, in response to further questions from the Tribunal, the Appellant indicated that his employment income was \$51,000 in 2013 and \$ 52,190 in 2014. The Appellant stated that he was working as an estimator on his own time (without regular hours and time restrictions), and that he is not able to adhere to mental concentration and details as he was able to prior to his medical condition.

SUBMISSIONS

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

- a) His medical condition is severe at times, and there are phases when he experiences constipation, anal pain and burning, chest pain, and tiredness;
- b) His medical condition is prolonged and since being diagnosed with cancer he has developed frequent rectum evacuation, pain around the anal area, tiredness, chest pain, mental frustration with tendency to urination and bowel movement, loss of memory and concentration, and erectile dysfunction;
- c) These conditions limit his ability physically and mentally, and he cannot assure any commitment to an employer.

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

- a) The medical reports indicate that the Appellant's cardiac status is stable and that, following treatment, there has been no recurrence of his cancer;
- b) His earnings indicate that he has recovered sufficiently to return to gainful employment;
- c) The evidence does not support a severe and prolonged disability.

ANALYSIS

[17] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before the date of the decision.

Severe

[18] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job,

but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

Guiding Principles

[19] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[20] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of this decision he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[21] The measure of whether a disability is "severe" is not whether the Appellant suffers from severe impairments, but whether his disability "prevents him from earning a living": *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703. It is the Appellant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (MSD)*, [2008] FCA 33.

Application of Guiding Principles

[22] The Tribunal recognizes that the Appellant suffers from serious medical conditions that limit him both physically and mentally.

[23] However, the evidence establishes that the Appellant has recovered sufficiently to pursue substantially gainful employment. The Appellant has been working as an estimator and earned \$51,100 in 2013 and \$52,190 in 2014. Although the Appellant suffers from significant impairments, they do not prevent him from working [see *Granovsky*, supra].

[24] The Appellant has not established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[26] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security