

Citation: *R. A. v. Minister of Employment and Social Development*, 2015 SSTGDIS 82

Date: July 30, 2015

File number: GT-120579

GENERAL DIVISION - Income Security Section

Between:

R. A.

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

INTRODUCTION

[1] The Appellant was granted a disability pension by the Respondent at initial determination on January 14, 2008. The date of onset of his disability was deemed to be January 2007. On February 8, 2011, the Respondent wrote to the Appellant to inform him that a review of his file had been done and that his disability pension was ceased as of February 28, 2011, on the basis that the Appellant regained capacity. The Appellant requested a reconsideration of the Minister decision and it was denied on November 21, 2011. The Respondent 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 scheduled to be by Teleconference for the following reasons:

- The Appellant is the only party attending the hearing
- There are gaps in the information in the file and/or a need for clarification
- The form of hearing respects the requirement 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 teleconference hearing on March 17, 2015 at 2:00 p.m. The Tribunal Member waited 30 minutes on the line for the Appellant to show. On March 2, 2015, the Tribunal attempted to make a courtesy call to the Appellant to remind him of the hearing but was not able to speak to him or leave a voicemail. A Notice of Hearing was sent to the Appellant on November 12, 2014 by Express Post. The notice was delivered and received on November 20, 2014.

[4] 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. In this case, the Tribunal is satisfied and decided to proceed in the Appellant's absence to make a determination on the basis of the documentary evidence on file.

THE LAW

[5] 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.

[6] 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:

- be under 65 years of age;
- not be in receipt of the CPP retirement pension;
- be disabled; and
- have made valid contributions to the CPP for not less than the minimum qualifying period (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.

[8] Paragraph 70(1)(a) of the CPP states that a disability pension ceased to be paid for the month in which the beneficiary ceases to be disabled.

[9] Subsection 69(1) of the CPP Regulations states as follows:

"For the purpose of determining whether any amount shall be paid or shall continue to be paid as a benefit in respect of a person who has been determined to be disabled within the meaning of the Act, the Minister may require that person from time to time:

- a. to undergo such special examinations;
- b. to supply such reports; and
- c. to supply such statements of his occupation and earnings for any period, as the Minister may specify."

[10] Section 70(1) of the CPP Regulations states as follows:

"Where a person who has been determined to be disabled within the meaning of the Act fails without good cause to comply with any requirement of the Minister made under section 69, he may be determined to have ceased to be disabled at such a time as the Minister may specify except that such time shall not be earlier than the day of failure to comply."

[11] Section 70(1) of the CPP Regulations states as follows:

"If a person who has been determined to be disabled within the meaning of the Act returns to work, the person shall so inform the Minister without delay."

ISSUE

[12] In this case, the Tribunal must decide if it is more likely than not that the Appellant ceased to qualify for a disability pension, after the end of February 2011.

EVIDENCE

[13] The Tribunal has carefully reviewed and considered all of the medical and written evidence in the hearing file. Set out below is a summary of only the relevant documentation.

[14] The Appellant is a 58 years old man with post-secondary education who worked for 30 years as a power engineer. He stopped work on January 19, 2007. He sustained a spinal cord injury with partial paralysis of his right side following an assault on January 20, 2007, in which he was stabbed. At the time he was 50 years old.

[15] An operative report, dated January 20, 2007, stated that the Appellant had surgery following a penetrating spinal cord injury C3-4 with large posterior laceration cervical spine

and fracture at C3 and C4 laminae. The report concluded with a very guarded neurologic prognosis due to his severe cord injury. It also concluded that his spine was stable and that he should be able to mobilize without an orthosis.

[16] In the Service Canada Questionnaire for Disability Benefits, the Appellant stated that he could no longer work as of January 20, 2007 because of his spinal cord injury. He noted that the impairments that prevented him from being able to work were pain, poor balance and the disabled right side of his body. The Appellant indicated that he had functional limitations with standing, walking, lifting/carrying, reaching, bending, personal needs, household maintenance, using public transportation, driving a car, sleeping and remembering. His medications were noted to be Glyburide, metformin, gabapentin, ranitidine, fluvoxamine, hydromorphone, Tylenol #3 and simvastatin. He noted that he was awaiting a referral for psychiatry. The Appellant indicated that he required safety equipment in the shower, a lift in his right shoe and adaptive equipment for dressing.

[17] In the Service Canada Medical Report, dated August 14, 2007, Dr. Mugisha, family physician, diagnosed the Appellant with a spinal cord injury with partial paralysis of his right side of his body. It was noted that the Appellant had weakness of his right hand, poor balance and was in constant pain. Dr. Mugisha stated that the Appellant showed partial response to treatment and needed a long rehabilitation period. He gave a guarded prognosis for complete recovery.

[18] The Appellant attempted a return to his previous work from April 2008 to October 2008 but had to stop due to his medical condition.

[19] In a vocational assessment report from Work to Wellness, dated June 30, 2009, that was ordered by the Crime Victim Assistance Program (CVAP), it was noted that the Appellant looked forward to returning to work. It was reported that during the assessment meeting, the Appellant stated that he had been looking at job opportunities online and in the paper but had not applied for any positions. Having worked as a power engineer for more than 30 years, he stated that he was unsure of what type of employment he could do with his current physical limitations. The report stated that a power engineer's main job duties include operating and maintaining stationary engines such as boilers, generators and other equipment that provide

heat, ventilation, refrigeration and power for buildings industrial plants and other work sites. There is a manual dexterity requirement for duties such as cleaning and lubricating generators, turbines, pumps and compressors as well as to perform equipment maintenance using lubricants and hand tools. It was noted that the Appellant reported that during his work attempt of 2008, he needed assistance with the fine motor type work. He also reported that he could not handle the cold temperature of his workplace and that his return to work was premature, causing him more damage. The report's author stated that the Appellant's prognosis for successful competitive employment was fair. It was noted that he continued to have significant limitations and restrictions which would also make retraining difficult. His finger skills are very limited and he is only able to type for a minimal period of time. The consultant opined that the Appellant had some transferable skills that would allow him to undertake a supervisory type of work in his industry. He added however that the Appellant would have a hard time with any work that involved typing or writing but that he could use some assistive devices. The author stated that the Appellant had several barriers to his successful employment.

[20] In a Human Resources Development Canada Reassessment Medical Report, dated July 10, 2009, Dr. Mugisha diagnosed the Appellant with spinal cord injury with right side hemiparesis. He gave a poor prognosis and noted that the Appellant current treatment was exercise. Dr. Mugisha wrote that the Appellant lacks balance, is unable to use his right hand and lacks coordination.

[21] Dr. Mugisha, the Appellant's family physician, stated in a letter, dated September 9, 2009, that the Appellant "was able to perform a job suitable to his condition after he has had a thorough assessment of his condition and matched for that job". He recommended a functional assessment and opined that it would assist in his vocational rehabilitation. It was noted that the Appellant was able to drive.

[22] A home safety assessment report done for the CVAP, dated November 9, 2009, indicated that the Appellant had the following limitations: decreased walking tolerance, impaired balance, limitations with cooking, cleaning, shopping. It was noted that the Appellant's daughter supported him with household chores for 20h a week. The occupational

therapist stated that she agreed with the Appellant's family physician that the prognosis for gainful occupation was guarded, due to the safety issues present with the Appellant's poor balance and his decreased functional use of his right arm. She also recommended a physiotherapist to help the Appellant maintaining his physical abilities. She also noted that if a work position was obtained, a referral to an occupational therapist may be beneficial prior to workforce re-entry in order to determine safety of the work environment and appropriateness of the job tasks.

[23] A report from his family physician dated September 9, 2009 stated that the Appellant remained disabled and his ability to be gainfully employed at this time is guarded.

[24] In a letter, dated March 4, 2010, a CPP medical adjudicator stated that the Appellant's file was reviewed and that his disability pension would continue. He further stated that the CPP was aware of the Appellant being assisted with vocational rehabilitation through Victim Services and that the CPP would review his file again later.

[25] A progress report submitted by Work and Wellness to the CVAP, dated March 22, 2010, stated that the Appellant had completed the medical rehabilitation and was ready to begin the return to work process. The Appellant reported that he wanted to pursue employment as a power engineer and was hoping that an employer would accommodate him. He said that it would most likely have to be a position that supervises apprentices in the industry since he has limited ability to perform fine manual dexterity type tasks. It was noted in the report that the Appellant had very limited knowledge of the use of a computer. It was also noted that the Appellant needed to go through the interview process before it could be determine whether he could be successful in performing the job duties.

[26] A follow up progress report, dated June 30, 2010, from Work to Wellness and addressed to the CVAP indicated that the Appellant had applied for several positions as a power engineer without success. The consultant who did the assessment stated that after talking to a company that hires power engineers, it was indicated that they require the power engineers to be physically able to do the job, otherwise there is a potential for safety issues. The Appellant also indicated to the consultant that he now realized that there might have been

some safety concerns. The report stated that the Appellant had agreed to explore training options and has expressed some interest in a building inspector course. It was determined that the Appellant would not be able to return to work as a power engineer and it was recommended that the Appellant would likely benefit from assistance in determining his other options.

[27] Some internal notes from the CPP staff, dated November 21, 2011 describe the circumstances around the reassessment process of the Appellant's file. It was noted that the Appellant reported an attempt to return to work as a power engineer between April and October 2008 but he had to stop due to his medical condition. During a reassessment, the CPP became aware that the Appellant had completed a medical rehabilitation and that he was ready to begin the return to work process. In February 2011, his file was reassessed. The notes state that the Appellant reported that he was continuing to go to interviews and look for work but had not been able to find one. He also indicated that he still had weakness in his right hand and balance issues. The CPP notes stated that the most recent rehabilitation consultant report, from June 2010, indicated that at the time, the client was starting to consider looking at alternate types of work and-or retraining for alternate work within his limitations. It was further stated that no further information on the client's vocational rehabilitation was provided and that it was reasonable to conclude that the Appellant's vocational potential remains the same. The author of the notes opined that the Appellant was able to engage in some alternative type of work or retraining for other work on a regular basis. For that reason, they decided that the Appellant's medical condition no longer prevented him from performing suitable work and that he was no longer entitled to CPP disability benefits.

SUBMISSIONS

[28] The Appellant did not provide any submission.

[29] The Respondent submitted that the Appellant no longer qualified for a disability pension within the meaning of the CPP as of the end of February 2011 because:

- He demonstrated the capacity for substantially gainful work. It is appreciated that the Appellant's work trial in 2008 was not successful. However, the lack of its success

does not infer an inability to work. He had attempted to go back to his former heavy type of work in a cold environment, both of which had a negative impact on his ability to do that rehabilitation.

- By the end of June 2009, the Appellant had completed medical rehabilitation and was ready to return to work. While his employer was not able to accommodate him, he was

nonetheless looking for other work and his success in achieving competitive employment was considered fair.

- The Appellant's physical function and ability to perform various tasks supports his ability to do suitable work and this opinion is supported by his physician and the rehabilitation team.

ANALYSIS

[30] In the present case, the Appellant had already discharged the onus of proving he was disabled within the meaning of the CPP when his application was approved in January 2008. As indicated in *Doyle v MHRD* (July 26, 2001), CP 16627 (PAB) (*Doyle*), when the Minister decides to terminate a disability pension, the onus is on them to prove on a balance of probabilities that the Appellant was no longer disabled at the time his benefits were terminated. As such, the Respondent must prove that the Appellant's health or circumstances have improved to the extent that he was capable regularly of engaging in a substantially gainful occupation (*Lummiss v. MHRD* (September 22, 1999), CP 8229 (PAB)). In this case, the medical evidence before the Tribunal does not support the Respondent's assertion that the Appellant was capable of pursuing a substantially gainful occupation.

[31] The first issue to be considered is whether there were valid grounds upon which the Respondent could find that the Appellant was no longer "disabled" as defined in s.42(2)(a) at the time he terminated his pension.

[32] The Respondent's argument appears to rest on reports from a consultant company called Work and Wellness, dated June 30, 2009, March 22, 2010 and June 30, 2010. The reports indicated that the Appellant had completed medical rehabilitation and was ready to engage in some light duties employment. Such reports were ordered by a different entity, the Crime Victim Assistance Program of British Columbia under unknown circumstances. There is no indication as to the credentials of the consultant who perform the assessment and report. There is not detail on how the first vocational assessment was done or what medical assessments were relied on for the follow-up reports. The Tribunal is of the view that it is difficult to determine the credibility and the objectivity of the reports from the consultant Work to Wellness. Therefore, the Tribunal gives minimal weight to these reports. The Tribunal notes, nonetheless, that the said reports also stated that the Appellant was unable to return to his previous employment as a power engineer and that he faced significant barriers to retraining given his work history, education, age and functional limitations, which is not indicative, in a real world context, of some capacity to engage regularly in some gainful employment (*Villani v. Canada (A.G.)*, 2001 FCA 248).

[33] In July 2009, the same year as the reports from Work to Wellness, Dr. Mugisha, the Appellant's family physician, in a Human Resources Development Canada Reassessment Medical Report gave a poor prognosis. He noted that the Appellant lacked balance, was unable to use his dominant right hand and lacked coordination. In another letter, dated September 9, 2009, Dr. Mugisha stated that the Appellant may be able to perform a job suitable to his condition but he added that a thorough functional assessment of his condition was necessary. There is no evidence on file showing that such an assessment was done that would conclude to a realistic vocational option for the Appellant. The Tribunal gives significant weight to the medical evidence provided by the Appellant's family physician. It finds that he has been treating him for a few years and is in the best position to comment on his condition.

[34] The Tribunal finds that the evidence on file does not demonstrate, on the balance of probabilities that the Appellant's medical condition has changed, improved or that his disability is resolved. There is no need to review the Appellant's capacity to work and functional limitations since the Appellant's unchanged medical condition has already been adjudicated. Yet, the Tribunal notes that it would be difficult to imagine, in a real world context, what type of work the Appellant could do, considering his narrow expertise and work experience and his functional limitations.

[35] Unfortunately, the Tribunal did not benefit from the Appellant's testimony or written submission. But it remains that it was incumbent upon the Respondent to find some evidence of an increased physical or mental ability to perform substantially gainful work that would disqualify him from the requirements to obtain CPP benefits. The Tribunal finds that this onus has not been met.

CONCLUSION

[36] The appeal is allowed. The decision of the minister is set aside and the Appellant's benefits should be reinstated.

Lucie Leduc
Member, General Division - Income Security