

Citation: *F. W. v. Minister of Employment and Social Development*, 2015 SSTGDIS 105

Date: September 15, 2015

File number: GP-14-524

Between: GENERAL DIVISION - Income Security Section

F. W.

Appellant

and

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

Respondent

Decision by: Heather Trojek, Member, General Division - Income Security Section

Heard by Videoconference on September 10, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

F. W. Appellant

Ayesha Noorani: Barrister & Solicitor

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on February 14, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The hearing of this appeal was by Videoconference 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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2015.

[7] 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.

ORAL EVIDENCE

[8] At the hearing, the Appellant testified that he is currently fifty nine years old; he lives with his common-law partner and has two grown sons.

[9] He was educated in Germany and completed grade ten; then apprenticed as a bricklayer, carpenter and structural steel engineer. After coming to Canada, he attended George Brown College and became certified as a heavy equipment operator and as a driving instructor for large transportation vehicles.

[10] From 1973 to 2001, he operated his own transportation/trucking company. His company transported steel within the Hamilton area. In addition to driving, he maintained the equipment, recruited and trained new drivers and negotiated contracts with local companies. He normally employed five other drivers. He sold his last truck in 2001.

[11] He began driving for agencies in 2002. As an agency driver, he drove a variety of different trucks. In his last job he delivered steel.

[12] In June 2012, he injured his knee while securing a load of steel with a heavy metal chain that broke. His employer refused to file a report with the Workplace Safety and Insurance Board (WSIB). The Appellant continued to work because he was afraid of losing his job. He wore a knee brace and continued working despite the pain.

[13] In September 2012, he slipped in the mud while making a delivery and his body hit the steps of his truck. After this accident, he went to his doctor and she requested x-rays and MRIs of his back, right knee and right shoulder. She also filed a claim with the WSIB.

[14] He received WSIB benefits from September 2012 until April 2013. In March 2013, he attempted to return to work performing light/modified duties. His modified duties involved cleaning floors with a propane propelled sweeper. He was unable to perform this job and collapsed several times because of pain. His attempt to return to work lasted two and half weeks.

[15] The WSIB paid for him to attend physiotherapy from December until April 2013 and then cut it off. When he started physiotherapy his right shoulder was frozen; the physiotherapy was beginning to help but after he stopped going his shoulder froze up again. He did not have the funds to pay for physiotherapy on his own.

[16] After his attempt to return to modified duties, he never worked again. He ended up living on the street before he received Ontario Works. In 2014, he was approved for Ontario Disability Support (ODSP).

[17] He testified that he contacted Everest College and spoke to the WSIB about participating in a retraining program, but the WSIB did not agree it. He also inquired at Canadian Tire about obtaining a position managing the sports department, but was rejected because he told them that he would be unable to do any lifting.

[18] The Appellant testified that he is bored and desperately wants to believe that he will be able to return to work again. He hopes that he might be able to find some type of employment that will give him a chance to sit down and work at his own pace. He testified that he does not have a resume and that the only experience he has is working with heavy equipment.

[19] When asked what a typical day is like for him, he testified that he gets up in the morning and waits for his meds to kick in. He tries to wash some dishes. On good days he drives his girlfriend to work which is a mile away from their apartment. He does word puzzles for ten or fifteen minutes but cannot sit for any longer. He takes his medication again at 2 p.m. On good days he tries to walk for half an hour. He tries to sweep the floor, but he is unable to bend down. If he attempts to bend over, he experiences incredible pain. Although he is tired, he is unable to sleep or rest because he is in too much pain.

[20] He finds driving for any length of time extremely difficult to do. The movement of the car causes him excruciating back pain. On bad days, he could not drive at all. He drove to the hearing from X to St. Catherine's and had to stop seven times in order to get up and walk around.

[21] His medication includes painkillers, muscle and nerve relaxants, sleeping pills and aspirin. He used to take Percocet but now takes OxyContin because it provides him with longer lasting pain relief. Before his workplace accident, he never took any medication.

[22] After the accident, he was referred to Dr. Giammarco, a neurologist, because he suffers from constant headaches. He was also referred to Dr. Danker, an orthopedic surgeon who performed surgery on his right shoulder in September 2014. Prior to his shoulder surgery, he was treated by Dr. Upadhye, a pain specialist. Dr. Upadhye gave him cortisone injections. He had eight injections at the bottom of his brain stem; eight to ten injections in his right shoulder and twelve to fourteen injections in his lower back. After the injections he could function for about two or three days before the pain came back again. The last time he saw Dr. Upadhye was in the summer of 2014. Due to the stress of his injuries and his lack of income, he had two minor strokes and one minor heart attack. He is currently under the care of a cardiologist.

[23] After his shoulder surgery, the WSIB paid for him to attend physiotherapy for five months.

[24] He had an MRI of his right knee about a month ago. Dr. Denker's scheduled him for knee surgery. The surgery is scheduled for September 22, 2015. His family physician is trying to find funding for him to get a walker.

[25] The pain in his right shoulder, back and knee restrict all of his activities. His pain has taken everything away from him. He used to do volunteer work and loved to go camping, fishing and hiking, he can no longer do any of these things. He would give anything to have one or two days without pain. To get one good night's sleep is a miracle. He is unable to wash his feet or put on his socks because of the pain. He cannot bend over to tie his shoes. He usually wears moccasins that he can slip on; otherwise his girlfriend has to put his shoes on for him. His landlord installed a bar in the shower and beside the toilet because he cannot lift himself up on his own.

[26] The Appellant testified that he really hopes that he will be able to do some kind of work; but Dr. Denker and Dr. Chan told him that his condition will likely get worse.

DOCUMENTARY EVIDENCE

[27] The Appellant's statement of CPP contributions confirms that, with the exception of 1997, he worked continuously from 1974 to 2012 (GD4-5).

[28] X-rays dated January 16, 2012 revealed mild disc space loss at L4-L5 with moderate and plate osteophyte formation in the lumbar spine; a small effusion and moderate to severe chondrocalcinosis in the right knee; and tendinitis in the right shoulder with no tears (GD4-48).

[29] On October 2012 an x-ray of cervical spine revealed mild lumbar scoliosis and mild degenerative disc disease at C5-C6 and C6-C7. Mild degenerative changes were noted at all levels of the lumbar spine (GD4-50).

[30] In a letter dated November 22, 2012, Dr. Nathoo, family physician, and Sarah Tam, physiotherapist confirm that since attempting to return to work on modified duties the Appellant's condition has regressed significantly. He has decreased range of motion and functional ability in his right arm. He cannot return to modified work at this time and requires three to four weeks of intensive physiotherapy without work duties. His medications includes Tylenol #3 (two to three tablets); Codeine 30 mg, (three tablets daily); Percocet and one tablet of Naprosyn (GD4-52-59).

[31] In January 2013, Dr. Nam, orthopedic surgeon, and Bev Amy, physiotherapist conducted a comprehensive assessment at the request of the WSIB. According to their report, the Appellant fell onto his trailer injuring his low back, right shoulder and head in June 2012. On September 20, 2012, he fell directly onto the steel rail of his truck, injuring his right shoulder and left elbow. He also sustained a concussion to the head. Their clinical diagnosis is right shoulder rotator cuff tendonitis with a partial thickness tear and left elbow strain. In their opinion the Appellant has achieved partial recovery and further recovery of the shoulder is expected in twelve weeks. Full recovery of the left elbow was also expected in twelve weeks. They recommend an additional eight weeks of physiotherapy as well as temporary work restrictions for three months. These restrictions include no heavy lifting, carrying, pushing or pulling, as well as no above chest level work and repetitive use of the right arm away from the body. Left elbow restrictions included no repetitive or forceful gripping or twisting (GD4-61-66).

[32] Dr. R. Williams, physiatrist, and Mr. P. A. Jager, physiotherapist, state in a WSIB multidisciplinary health assessment summary report dated November 30, 2012, that because of a strain sustained in his lumbar spine the Appellant should avoid heavy, repetitive bending, lifting, twisting, prolonged sitting and standing for eight weeks and participate in an active physiotherapy program. In their opinion the Appellant is partially recovered; full recovery was expected in eight weeks after completion of treatment (GD4-54).

[33] In a CPP disability report dated February 4, 2013, Dr. Nathoo, family physician, confirms that he has known the Appellant since October 2010. He diagnoses the Appellant with right shoulder rotator cuff tendinopathy with a partial tear and degenerative disc disease. His right shoulder had decreased range of motion on all planes compared to the left. His spine is also tender and he has difficulty bending against resistance and standing for long periods of time. His medications include codeine, Percocet and Baclofen. His response to pain management medication has been fair. Physiotherapy has increased his function but not decreased his pain. His prognosis for recovery is unknown (GD4-44-47).

[34] MRI scan of right shoulder conducted on February 15, 2013 (GD4-69-70) revealed;

- a) marked supraspinatus tendinosis with a superimposed small low grade partial thickness tear;
- b) marked infraspinatus tendinosis and undersurface fraying of the tendon;
- c) Marked subscapularis tendinosis with probable superimposed interstitial tear;
- d) Moderate to marked AC joint osteoarthritis.

[35] An MRI scan of lumbar spine dated February 15, 2013 revealed relatively mild degenerative disc disease, mild facet osteoarthritis and mild to moderate foraminal stenosis at L4-5. No disc herniation, central canal stenosis or impingement was found.

[36] Dr. Matthew Robert Denkers in a letter dated August 13, 2014 confirms that an MRI and an ultrasound of the right shoulder conducted in June and August of 2013, revealed diffuse rotator cuff tendinosis with a partial thickness supraspinatus tear measuring 9 x7 mm. He confirms that the Appellant's treatment to date has consisted of four months of physiotherapy, NSAIDs and cortisone injections every three weeks without sufficient pain relief. His medications include ASA, Atorvastatin, Gabapentin, Coversyl, Trazodone, Rosuvastatin and Oxytocin. Surgery to the right shoulder was recommended (GD6-11).

[37] Dr. Rose Giammarco, neurologist, in a letter dated September 11, 2013 confirms that the Appellant was referred to her because of constant headaches that he has suffered since his workplace accident. Her diagnosis is post-traumatic bilateral occipital neuralgia. She started him on Gabapentin and referred him to Dr. Mathoo for occipital nerve injection (GD7-16).

[38] In a letter dated September 25, 2014, Dr. Denkers confirms that the Appellant had right shoulder arthroscopic surgery, LHB tenotomy, subacromial decompression, acromioplasty and distal clavicle co-planing on September 4, 2014 and should continue with physiotherapy (GD6-9).

[39] Dr. Ka Lam Chan, family physician, in a letter dated May 20, 2015 confirms that he has known the Appellant since November 2014. In his opinion the main conditions affecting the

Appellant's ability to return to work are his right shoulder and low back. In September 2014, he underwent extensive right shoulder surgery. Despite surgery, physiotherapy and shoulder injections, he still continues to complain of constant pain in his shoulder. His active range of motion in his shoulder is restricted by fifty percent. He is unable to lift anything over seven pounds, and unable to do any reaching/pushing/pulling. An MRI of his low back showed mild degenerative disc disease, facet joint OA and foraminal stenosis at L4/5. He was referred to Dr. Kachur, spinal surgeon, however the referral was declined because Dr. Kachur felt surgery was not indicated. The Appellant's back pain is constant; he has frequent muscle spasms. His range of motion in his back is also restricted by fifty percent. He can stand/sit for no longer than ten minutes. Due his medical conditions, the Appellant is unable to perform any manual labour job. With the restricted range of motion of his right shoulder and lower back, he is having difficulty even doing simple, light, sedentary work. His pain continues to be debilitating, even with medication. His prognosis for full recovery is very guarded (GD7-4).

SUBMISSIONS

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

- a) His has numerous medical conditions that prevent him from working;
- b) His age, limited education and lack of transferrable skills prevent him from obtaining in a "real" world context, suitable alternative employment;
- c) He has participated in recommended treatment but his condition has not improved.

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

- a) The medical evidence does not show any serious pathology that would prevent him from doing suitable work within his limitations.
- b) His work restrictions were temporary;
- c) He has not attempted any alternate lighter work.

ANALYSIS

[42] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2015.

Severe

[43] It is well established that an Appellant must provide some objective medical evidence to support his claim for a disability (*Villani v. Canada (A.G.)*, 2001 FCA 248; *Inclima v. Canada (Attorney General)*, 2003 FCA 117. In the Tribunal's opinion, the Appellant submitted an abundance of highly persuasive medical evidence. In the Tribunal's opinion, the x-ray's and MRI's contained or referred to in the file, reveal that the Appellant has significant pathology in his right shoulder and back. An MRI confirms that the nerves in his spine are compromised at L4/5 level. In spite of treatment, Dr. Chan reports that the Appellant continues to have a fifty percentage decrease in the range of motion in his back and right arm; as a result he has difficulty performing even simple, light, sedentary work. Although, Dr. Chan has not treated the Appellant for a significant period of time, the Tribunal found his report to be an accurate, detailed and convincing account of the Appellant claim. Based on the results of the objective testing contained in the file and the reports of Dr.'s Chan, Denkers and Nathoo, the Tribunal finds that the Appellant has established on a balance of probabilities, that the pain and limitations he experiences as a result of his back and shoulder injuries prevent him from regularly participating in substantially gainful employment.

[44] Although the Appellant testified that his right knee injury and heart condition contribute to his inability to work, there was, in the Tribunal's opinion, insufficient medical evidence contained in the file to support this finding. This is however, irrelevant since the Tribunal has already found that his back and right shoulder injury are severe enough that they disable him from working.

[45] The Tribunal found the Appellant to be a highly credible witness. His testimony was straightforward, honest and supported by the medical evidence on file. The Tribunal therefore accepts his testimony and believes that he experiences significant and debilitating pain.

[46] The Tribunal was also persuaded by the fact that the Appellant has worked continuously since he came to Canada. He established his own business, employed other workers and has almost forty years of work experience behind him. In the Tribunal opinion, this is not the portrait of a person who would stop working if he was physically capable of doing so. In the Tribunal's opinion, the fact that the Appellant continued working, after injuring his right knee in June of 2012, is evidence that he has strong work ethic and wants to continue working. At the hearing, it was evident that the Appellant, despite his pain, finds it difficult to accept, that it is highly unlikely that he will ever be able to return to the workforce and participate in any form of substantially gainful employment.

[47] The Respondent submits that the Appellant is not entitled to a disability pension because he has not attempted to return to lighter work.

[48] 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. At the time of the hearing the Appellant was fifty nine years old, which is not, in the Tribunal's opinion, a highly employable age for someone performing physically demanding work. Although the Appellant has a number of certificates, he would not be considered well educated, he has limited computer skills, has never been employed in a sedentary type job. The Tribunal therefore finds that the Appellant has few if any transferrable skills to rely on. In the Tribunal's opinion, the Appellant in a "real world" context is not capable of obtaining or maintaining substantially gainful employment which is sedentary in nature.

[49] The Tribunal is aware that where there is evidence of work capacity, a person must demonstrate that they have made reasonable efforts to obtain and maintain employment but has been unable to do so as a result of their health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant testified that he attempted to return in work performing lighter duties in March of 2012 but had to stop after two and a half weeks because he was in unbearable pain. Despite this, the Appellant did attempt to find alternative employment at Canadian Tire and was turned down because of his inability to lift. In the Tribunal's opinion, the Appellant has made

reasonable efforts to return to the workforce but his physical limitations prevented him from doing so. The Tribunal therefore finds that he meets the severity test established in *Inclima*.

[50] According to *Bulger v. MHRD* (May 18, 2000), CP 9164 (PAB), which the Tribunal is persuaded by, it is incumbent on Appellants who has applied for benefits, to show that they have participated in treatment and followed appropriate medical advice. In the Tribunal's opinion, the medical evidence confirms that the Appellant has consistently complied with recommended treatment. In addition to having surgery on his right shoulder, he has and continues to take a variety of medications, including OxyContin, to help control his pain. In addition to consulting with many specialists, he has participated in physiotherapy and has had cortisone injections in his neck, back and right shoulder. Based on an assessment of all of the evidence, the Tribunal is satisfied that the Appellant has actively participated in all forms of recommended treatment.

[51] Having regard to the totality of the medical and oral evidence, the Tribunal finds that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[52] In addition to finding that the Appellant's disability is severe, the Tribunal must also determine whether it is prolonged.

[53] The Appellant's disabling condition has persisted since September 2012. Despite the passage of time and his participation in treatment there has been no significant improvement in his condition. In the Tribunal's opinion, the Appellant's disability is therefore long continued and of indefinite duration.

CONCLUSION

[54] The Tribunal finds that the Appellant had a severe and prolonged disability in September 2012. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of January 2013.

[55] The appeal is allowed.

Heather Trojek
Member, General Division - Income Security