

**Citation: *S. B. v. Minister of Employment and Social Development*, 2015 SSTGDIS 109**

**Date: September 30, 2015**

**File number: GP-14-918**

**GENERAL DIVISION - Income Security Section**

**Between:**

**S. B.**

**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 Teleconference on September 22, 2015**

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

S. B.: Appellant

### **INTRODUCTION**

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 19, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on February 24, 2014.

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

- a) The Appellant will be the only party attending the hearing;
- b) Videoconferencing is not available within a reasonable distance of the area where the Appellant lives;
- c) There are gaps in the information in the file and/or a need for clarification; and
- d) 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, 2015.

[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 hearing.

## **PERSONAL BACKGROUND**

[8] The Appellant is 53 years old. He now lives X and moved there from X in June 2014. He is a joint Canadian and American citizen. He has a high-school education as well as one year of college in fine art. His employment history includes farm work, working in the produce department of a grocery store, working on a survey crew, a temporary job in the post-office while in college, driving a taxi, delivering draperies, working as a long distance truck driver, and lastly working as a cleaner for the Department of National Defence. He has not worked since February 2013.

## **APPLICATION MATERIALS**

[9] In his CPP disability questionnaire, signed on July 3, 2013, the Appellant indicated that he has a grade 12 education, one year of college, and a truck driver training certificate. He stated that he last worked as a cleaner from June 23, 2003 until February 15, 2013 and that he stopped working because of cramped muscles and insomnia. He did not indicate a date as of which he was claiming to be disabled; he noted that the illnesses or impairments that prevented him from working include tight and cramping muscles that do not allow him to be on his feet for very long and keep him from sleeping.

[10] He described how the illnesses or impairments prevent him from working as follows: “To do my work I have to be on my feet longer than my muscles allow. I have times of severe insomnia which makes everything difficult to do.” He described various physical limitations as well as insomnia and occasional breathing restrictions; he noted no difficulties with seeing, hearing, speaking, remembering, and concentrating. Although he noted that he could not stand for more than 10 minutes without great discomfort and pain, he did not indicate any sitting difficulties or limitations.

## **ORAL EVIDENCE**

[11] The Appellant testified that he left his cleaning job because he had to lie on rocks all day in order to keep his muscles loose and to stop them from cramping up. If his muscles cramped up, he wouldn't be able to sleep at night. He would lie on the rocks from “morning to night” and occasionally get up for ½ hour to do a few domestic chores. He would lie on two pointed rocks (one 4 inches and the other 5 inches) that he found in a gravel pit behind his house. He would put them on the floor and move them all over his body. His doctors thought this was odd, but none told him to stop doing this.

[12] He stated that he stopped working because he wasn't able to sleep and his muscles were cramping - he couldn't be on his feet. His employer was good to him and he missed a lot of days from work, but he couldn't continue working. He didn't look for work because he couldn't do any other job since he had to lie on the rocks all day. He didn't take any courses to upgrade his employment skills because he had to spend most of his day lying on rocks. He now might be able to work on a computer, but he has no office computer skills.

[13] When he was lying on the rocks, he would go for weeks at a time without going anywhere. He lived with his parents and his family would come to visit. If he visited anyone he would take his rocks and lie on the floor. He was able to spend ½ hour every once in a while off the rocks, and during that time he would do a little light housework or take care of his chickens. He married in June 2014. His wife lives in X and he met her when she came to visit with her parents. They bonded since they both have health problems and they exchanged telephone calls and emails. He is on Medicaid in X and his wife receives US Social Security Disability benefits and is on Medicare. They also receive extra food stamps.

[14] Approximately six weeks ago, he saw a “non-professional” podiatrist (who he learned about from his aunt) who in conjunction with a chiropractor has enabled him to get off the rocks. He was diagnosed with excessive pronation and flat feet. The “non-professional” podiatrist gave him tissue massage therapy and the chiropractor re-aligned his spine. He is to see another doctor who will prescribe orthotics and he may undergo an operation in which a bar will be placed in his foot. They gave him a stretching and massaging routine which involves rolling and pressing his muscles on baseballs or pop bottles. He does this three times a day; he is now happier and sleeping six hours a night. He stated, “I am not cured yet... I still can’t work because if I walk too far my muscles cramp up and I have difficulty breathing...I don’t think I can work yet... I may be able to in the future...my return to work is indefinite...I don’t know when or if I will be able to return to work.”

[15] He described his typical day as follows: he gets up between seven and eight and walks the dog; he then does the dishes and after this does his first exercise routine which takes 45 minutes to an hour; he might drive to the grocery store; he spends most of the day watching television or lying flat in bed; he and his wife occasionally go out in the evening for supper with his in-laws. They live in a trailer park and he does the dishes, vacuuming, and goes to the grocery store; she does the laundry and cooking. Other than recently going to the library a few times, they have no other social activities.

[16] His only treatment in X was from his family doctor and ten sessions of massage therapy which weren’t helpful. He did not see any specialists in X, and stated that the physical rehabilitation specialist that he was to see in X kept changing their meeting date. His doctor made an appointment for him to go for physiotherapy but he didn’t go because the physiotherapist called for an appointment on a day when he couldn’t go; he didn’t propose another day because he didn’t think he could stay off the rocks long enough to go.

[17] He recalls seeing an emergency hospital doctor in X who recommended that he go to mental health services. He refused to go because he doesn’t have a mental health issue. He stated, “I don’t believe that I am delusional about having tight muscles.” He initially stated that he doesn’t recall whether Dr. Rowe suggested he see a mental health specialist, and then stated that Dr. Rowe may have suggested this after the emergency doctor did. He recalls seeing a

psychologist at the Holland Community Clinic in X who recommended biofeedback; Dr. Kane-Smart also suggested this. He didn't want to do this because he didn't think it would work, and he had to be on the rocks all day. He stated, "I didn't want to take time off the rocks to interact with a machine in order to relax...I could only sleep by lying on the rocks."

[18] He has gone to a pain clinic on two occasions in X and they gave him injections (which didn't help) and prescribed Cymbalta and Gabapentin. Dr. Bosscher prescribes Serax. He isn't taking any other medications and he is scheduled to go back to the pain clinic on October 30<sup>th</sup>. He has never been referred to a sleep specialist; he stated that he couldn't recall if anyone suggested this but he would not want to go to one. Other than the one session with the psychologist at the Holland Community Health Centre, he has not seen any mental health specialists. He thinks the triggering event for his muscle cramping was his long distance truck driving, and that his condition gradually deteriorated after that. He stated that he hoped to be able to work things through while working as a cleaner but his muscles just kept getting tighter and tighter.

## **MEDICAL EVIDENCE**

[19] 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.

[20] A report dated July 7, 2013 from Dr. Rowe, the Appellant's family doctor, accompanied the CPP application. Dr. Rowe noted that the Appellant was scheduled to see Dr. Majaess, a physiatrist, and that the Appellant did not want standard physiotherapy because he didn't think it would help. The report diagnosis insomnia and muscle tightness/spasm. The prognosis was "very good"; and that although the condition will not affect the Appellant's life span it will limit him.

[21] A report dated October 27, 2014 from Dr. Bosscher, family practitioner at the Holland Community Health Centre, relates that lying on pointed rocks helps the Appellant to sleep at night. The report notes that the Appellant recently married and came to X to be with his wife and that the Appellant stated that he cannot sleep because "I need to lay [sic] on my rocks." The Appellant's prescribed medications were oxazepam (Serax), amitriptyline (Elavil), and

levothyroxine (Synthroid). The report also notes that the Appellant was oriented to person, place and time, and that he appears well-developed and well-nourished.

[22] When describing the assessment/plan Dr. Bosscher indicated that the Appellant was not taking his thyroxine for his hypothyroidism. Dr. Bosscher also noted:

Insomnia: Pt convinced that this is related to back discomfort that he treats with local pressure points and benzodiazepines. I told him that I was not comfortable Rxig that med long term and suggested alternatives to which he was quite closed. We discussed that he might be more comfortable at another practice if he was not open to other means of helping his problem.

Tobacco abuse: Pt continues to smoke, understands need to quit but unwilling to make commitment at this time. Encouraged to consider being smokefree.

[23] Dr. Bosscher recommended an alternative medicine to oxazepam to help with tight muscles, that they look for reasons why he has so much muscle spasm, arrangements to see Kr. Kane-Smart a rehabilitation specialist, an alternative muscle spasm medication once the Appellant is weaned off oxazepam, and quitting smoking.

[24] On January 13, 2015 Dr. Kane – Smart, rehabilitation specialist, diagnosed chronic musculoskeletal pain, insomnia, and deconditioning.

[25] On March 10, 2015 Dr. Kane-Smart reported that the Appellant still has ongoing pain despite therapy and medications.

[26] On May 12, 2015 Dr. Kane-Smart reviewed the MRI findings with the Appellant and discussed a potential pain clinic referral; the Appellant stated that he already had a consultation set up in June. She also discussed pursuing biofeedback but the Appellant became irritated and stated that this is not a mental problem it is in the muscles. She also tried discussing trying to increase activity, and noted that the Appellant was adamantly against this and stated that he can't do simple things in the house and has to lie on his rocks all day. She commented, "He really is not interested in anything I have to say..." She concluded that she would ask her staff to copy the note to the Pain Clinic because she thinks biofeedback would be appropriate. She did not plan to see Appellant again.

## **SUBMISSIONS**

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

- a) His muscle cramping and insomnia are severe conditions which preclude him from pursuing any form of gainful employment;
- b) Up until approximately six weeks ago, he could not go anywhere because of the need for him to lie on rocks for 10-12 hours a day;
- c) There has been some improvement due to his recent treatment from the “non-professional” podiatrist and chiropractor, but he is still unable to work and the prospect of his being able to return to work is indefinite.

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

- a) Although the Appellant is limited due to muscle tightness, the medical evidence does not show any serious pathology or impairment which would prevent the Appellant from doing suitable work within his limitations;
- b) The Appellant tried ten sessions of massage therapy, but his active treatment was himself pressing heated rocks into his muscles for 12 hours per day. He declined physiotherapy and seeing a mental health specialist;
- c) Although the Appellant has been prescribed sleep medications, there is no indication of referral to a sleep specialist. No severe underlying condition has been identified for the Appellant’s insomnia and he has not exhausted all forms of treatment;
- d) The totality of the evidence does not support a severe disabling physical or psychological impairment in accordance with the CPP disability requirements.

## **ANALYSIS**

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



## **Severe**

[30] 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***

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

[32] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of hearing 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.

[33] However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[34] The Appellant should demonstrate a good-faith preparedness to follow obviously appropriate medical advice and to take such retraining and educational programs as will enable him to find alternative employment when it is obvious that one's prior employment is no longer appropriate: *Lombardo v MHRD*, (July 23, 2001), CP 12731(PAB). The Tribunal must consider whether the Appellant's refusal to pursue a recommended treatment is unreasonable and what impact the refusal might have on the Appellant's disability status should the refusal be considered unreasonable: *Lalonde v Canada (MHRD)*, 2002 FCA 211.

### *Application of Guiding Principles*

[35] The Tribunal is satisfied that up until approximately six weeks ago (when the Appellant started to undergo new treatment) he believed that it was necessary for him to lie on rocks for 12 hours. The difficulty facing the Appellant, however, is that in order to comply with the CPP disability criteria he is obligated to follow obviously appropriate medical advice (see *Lombardo v MHRD*, supra) and to reasonably pursue recommended treatments (see *Lalonde*, supra).

[36] After a careful review of the totality of the evidence the Tribunal has determined that the Appellant has failed to comply with these requirements:

- The only medical treatment that he underwent in X was seeing his family doctor and ten sessions of massage therapy. There were no specialist consultations and he declined physiotherapy;
- He refused to follow the advice of the emergency room doctor and his own family doctor that he see a mental health specialist for his condition.
- Although he initially pursued treatment at the Holland Community Health Centre in X he did not seem to be open to suggested alternatives from Dr. Bosscher (see paragraph 22, supra) or the suggestion of biofeedback by Dr. Kane-Smart.
- He is now pursuing treatment from a “non-professional” podiatrist and a chiropractor which seems to have given some relief, but he is still refusing to follow the recommendations of the accredited physicians whose reports are in the hearing file. There are no reports from the “non-professional podiatrist” or chiropractor in the hearing file.

[37] The reports and oral evidence indicate that the Appellant has been adamant that he could not pursue various recommended treatment modalities because of his need to lie on rocks for 12 hours a day. Although lying on rocks may have given the Appellant some relief, it is not a reasonable replacement for pursuing recommended treatment modalities.

[38] The Tribunal finds that the Appellant has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

**Prolonged**

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

**CONCLUSION**

[40] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security