

Citation: *The Estate of D. E. v. Minister of Employment and Social Development, 2015*

SSTGDIS 119

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File number: GP-13-1236

GENERAL DIVISION - Income Security Section

Between:

The Estate of D. E.

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 October 8, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. M.: executor of the estate of the late D. E.

INTRODUCTION

[1] The late D. E. (the Appellant) sent his application for a *Canada Pension Plan* (CPP) disability pension to Service Canada by priority post on Wednesday, March 27, 2013. Friday March 29th was Good Friday and Monday April 1st was Easter Monday. The application was date stamped by the Respondent on Tuesday, April 2, 2013.

[2] The Appellant had started to receive retirement benefits in January 2012. The Respondent denied the disability application initially and upon reconsideration on the basis that the Appellant's application was received in April 2013 which was beyond the 15 month timeline for the Appellant to withdraw his retirement application. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on July 11, 2013.

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

- a) The executor will be the only party attending the hearing.
- b) There are gaps in the information in the file and/or a need for clarification.
- c) Credibility is not a prevailing issue.
- 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

Eligibility Requirements for CPP disability

[4] 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).

[5] 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.

[6] 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.

Appellant must not be in receipt of a retirement pension

[7] Pursuant to paragraph 44(1)(b) of the CPP, an applicant must not be in receipt of a CPP retirement pension in order to qualify for CPP disability.

[8] Pursuant to paragraph 42(2)(b) of the CPP, an applicant cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension.

[9] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in paragraph 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension. There is an exception to this provision and it is found in section 66.1 of the CPP.

[10] Paragraph 66.1 of the CPP and paragraph 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[11] Pursuant to paragraph 66.1(1.1) of the CPP, if a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be

cancelled in favour of a disability benefit is if the person is deemed to be disabled before the month the retirement pension first became payable.

[12] Paragraph 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

[13] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

ISSUES

Threshold Issue

[14] The threshold issue is to determine whether the application should be considered to have been received in March 2013, even though it was not date stamped by the Respondent until April 2, 2013.

[15] In accordance with the applicable CPP provisions, if the disability application is considered to have been received in March 2013 it would be within the 15 month timeline for the Appellant to withdraw his retirement application and the appeal should be considered on its merits.

[16] If the disability application is considered to have been received in April 2013, it would be outside the 15 month time line and the appeal should be dismissed.

Issue on the Merits

[17] Having regard to the Record of Earnings (ROE), the MQP extends to December 31, 2014. However, the Appellant started to receive retirement benefits in January 2012. Pursuant to paragraph 66.1(1.1) of the CPP (see paragraph 11, supra) he must be found disabled on or before December 31, 2011, the last day prior to the month in which he started to receive retirement benefits.

[18] In this case, if the Tribunal determines that the application should be considered to have been received in March 2013, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before December 31, 2011.

BACKGROUND

[19] The Appellant was born in September 1950 and passed away on January 18, 2015. The application is being continued by D. M. the executor of his estate. The Appellant's employment history included working for many years as an accounting executive until he was laid off due to his employer being sold in 2007, and then working as a sales representative for Lowes. The Appellant last worked in May 2011. He was diagnosed with multiple myeloma in September 2011 and passed away on January 18, 2015.

APPLICATION MATERIALS

[20] In his CPP disability questionnaire, signed on March 18, 2013, the Appellant indicated that he has a grade 13 education as well as a three year Bachelor of Education degree. He noted that he last worked as a sales specialist for Lowes from December 29, 2007 until May 6, 2011; he indicated that he stopped working because of health issues. He also noted that he had worked as an account executive from September 18, 1989 until September 22, 2007. The Appellant claimed to be disabled as of September 28, 2011 and stated that the illnesses or impairments that prevented him from working included multiple myeloma, renal failure (dialysis four times per week), and peripheral vascular disease. He also stated that these illnesses prevented him from working because of weakness, fatigue, dialysis scheduling, and leg and foot pain.

[21] When providing information about his treating physicians he listed: Dr. Rosenberg, family doctor who he was seeing for various medical issues; Dr. Trudel, oncologist, who he first saw in September 2011 and who he saw for multiple myeloma, a stem cell transplant, and follow up visits; and Dr. Chan who he was seeing for ongoing dialysis since September 2011. He also indicated that he had been admitted to X East General Hospital on September 30, 2011 for a stem cell transplant and discharged on October 21, 2011. He noted that his other hospitalizations included for tests by Dr. Shao from September 23rd to September 27th, 2011; for possible immune respiratory failure from June 3rd to June 7th, 2012; for c. difficile from

July 31st to August 8th , 2012; for pneumonia from June 26th to July 3rd, 2012; and for a broken left femur from December 19th to December 21st, 2012.

[22] A report dated March 18, 2013 from Dr. Rosenberg, the Appellant's family doctor, accompanied the CPP application. The report diagnosis multiple myeloma with renal failure diagnosed in 2011, type II diabetes with neuropathy, and peripheral vascular disease. The report notes that investigations revealed the diagnosis after a gradual onset of weakness. The report also notes that the Appellant was attending four times a week for renal dialysis. The prognosis indicates that the Appellant has multiple chronic diseases with possible vascular surgery to come; that he is restricted in activity and energy; and that he is highly unlikely to ever return to gainful employment.

ORAL EVIDENCE

[23] D. M. testified that he and the Appellant were partners for 39 years. The Appellant enjoyed working at Lowes but had to stop in May 2011 because his feet were getting worse due to his diabetes. The Appellant wasn't able to wear steel toe shoes (which were required) and couldn't stay on his feet.

[24] After the Appellant stopped working, things continued to go downhill. He came down with shingles and when he went for tests the doctors discovered that he was suffering from multiple myeloma. This was diagnosed in August/September 2011. The Appellant then saw Dr. Trudel at Princess Margaret Hospital and she sent the Appellant for chemotherapy at East General Hospital. The chemotherapy caused the Appellant to go into a coma, and he had a tube down his throat for at least a week. The doctors then discovered that he was suffering from kidney failure and the Appellant had to go on dialysis. The Appellant was admitted to hospitals for pneumonia, c. difficile, fractures, and amputation of four of his toes. He also underwent a stem cell transplant. Because of the complications, the Appellant couldn't undergo chemotherapy when he was on antibiotics.

[25] The Appellant went for dialysis three times a week. He was picked up by Wheel Trans at 3:30 and wouldn't get home until after 11. By that point, the Appellant was totally exhausted. He took care of the Appellant and learned to change the bandages from the amputations. The

Appellant had to be sponge bathed because he couldn't go into the shower since there was a permanent line in his artery for the dialysis. The Appellant couldn't do any housework; sometimes he would just walk in a circle around the floor of their condominium and occasionally go down to the tuck shop. Many times he had to use a wheel chair because the dialysis was so hard on him.

[26] The Appellant passed away on January 18, 2015 from internal bleeding caused by his multiple myeloma.

MEDICAL EVIDENCE

[27] 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.

[28] A discharge summary report prepared by Dr. Shao, X East General Hospital, on September 29, 2011 indicates that the Appellant had experienced poor appetite, watery diarrhea, as well as 12 lb. weight loss over the past two months. The final diagnosis was severe anemia related to underlying newly diagnosed multiple myeloma, and diabetes on diet control.

[29] A report dated November 22, 2011 from Dr. Chan, Princess Margaret Hospital, indicates that the Appellant has a new diagnosis of IgG Kappa light chain myeloma. The report notes that Dr. Chan originally saw the Appellant on September 29th and at that time he was extremely unwell with very severe anemia as well as progressive renal failure. The report notes that the Appellant had started on dialysis.

[30] A discharge summary from the University Health Network indicates that the Appellant was admitted for pneumonia on June 26, 2012 and discharged on July 3, 2012.

[31] Reports from Dr. Trudel, oncologist, dated May 2nd, May 29th and August 28th, 2012 diagnose stage III IgG kappa myeloma and indicate secondary diagnoses including renal failure, deep vein thrombosis, intermittent atrial fibrillation, and shingles.

[32] On October 2, 2012 Dr. Chan, nephrologist, reported that the Appellant was started acutely on dialysis treatment in September/October 2011 when he presented with significant anemia, hyponatremia, renal failure, and congestive heart failure. The report notes that the

Appellant also suffers from diet-controlled type 2 diabetes mellitus; that he underwent stem cell autologous transplant on May 3, 2012 but the treatment was only partially successful; that he was left with persistent paraproteinemia; and that in August the Appellant mentioned that he did not want any further treatment and was looking at comfort care/palliative care for his multiple myeloma. The report also notes that the Appellant suffers from recurrent c. difficile colitis and that he had fallen in August and fractured his left humerus bone.

[33] On January 28, 2013 the Appellant underwent open reduction and internal plate fixation surgery for a nonunion fractured left side shaft humerus.

[34] A leg arterial duplex examination on March 6, 2013 revealed bilateral tibial disease and that the tibial arteries are diffusely calcified and atherosclerotic.

SUBMISSIONS

[35] Mr. D. M. submitted that the Appellant qualifies for a disability pension because:

- a) The application should be considered to have been received in March 2013 (within the 15 month required time line) since it was sent to Service Canada by priority post on March 27, 2013;
- b) The oral and medical evidence confirms a severe and prolonged disability.

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

- a) He does not meet the eligibility requirements because he applied for CPP disability in April 2013 which was more than 15 months after he started receiving a retirement pension;
- b) The Respondent did not make any submissions on the merits.

ANALYSIS OF THRESHOLD ISSUE

[37] The Tribunal has determined that the application should be considered to have been received in March 2003 and that the appeal should proceed on the merits.

[38] On the balance of probabilities, the Application was received late Thursday, March 28th by the Respondent although it wasn't date stamped until April 2nd. The application materials were sent by priority post from X at 9:30 am on the Wednesday morning. The receipt (GD2-4) confirms that the application was mailed at 9:36:36 and in his oral evidence Mr. D. M. stated that the Appellant mailed the package in the morning because he had to go for dialysis in the afternoon.

[39] It is likely that materials sent by priority post in the morning from a major centre such as X will be delivered by the next afternoon in X. It is also understandable that if materials were delivered late in the afternoon on the day before a long weekend, that they may not have been date stamped until the next business day which was the following Tuesday. Unfortunately, due to the passage of time, although the Appellant has provided a copy of the receipt for the priority post he was unable to obtain the actual tracking sheet.

[40] If the Tribunal is wrong with respect to its finding that the application was received on the Thursday afternoon, then paragraph 26 of the *Interpretation Act*, RSC 1985, c1-21 is applicable. That paragraph provides:

Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

[41] In this case, the time for the Appellant to apply for disability expired on Sunday, March 31st which was a holiday; Monday April 1st was Easter Monday; and the application was received on the following Tuesday, which was the next day which is not a holiday.

[42] The Tribunal finds by reason of paragraph 26 of the *Interpretation Act* the application should be considered to have been received in time.

[43] The appeal should be considered on its merits.

ANALYSIS OF THE MERITS

[44] The Appellant must prove on a balance of probabilities that he had severe and prolonged disability on or before December 31, 2011.

[45] 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.

[46] The medical and oral evidence establish that the Appellant was suffering from a severe and prolonged disability as of December 31, 2011.

[47] His disabling conditions included multiple myeloma, renal failure (requiring dialysis at least three times a week), diabetic neuropathy, peripheral vascular disease, and congestive heart failure. After September 2011 he was hospitalized on numerous occasions for severe illnesses including pneumonia, c. difficile, fractures, and four amputations. He clearly did not have the capacity to pursue any form of gainful employment.

[48] In addition, his disability was likely to be long continued and tragically resulted in his death.

[49] The Tribunal finds that the Appellant suffered from a severe and prolonged disability on or before December 31, 2011.

CONCLUSION:

[50] The Tribunal finds that the Appellant had a severe and prolonged disability in May 2011, when he last worked. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The Tribunal has found that the application was received in March 2013; therefore, the Appellant is deemed disabled in December 2011. According to section 69

of the CPP, payments start four months after the deemed date of disability. Payments will start as of April 2012.

[51] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security