

Citation: *D. L. v. Minister of Employment and Social Development*, 2015 SSTGDIS 136

Date: December 10, 2015

File number: GP-14-1987

GENERAL DIVISION- Income Security Section

Between:

D. L.

Appellant

and

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

Respondent

Decision by: Shane Parker, Member, General Division - Income Security Section

Heard by Videoconference on December 1, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant

INTRODUCTION

[1] The Appellant's previous application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 8, 2010 (the 2010 application). The Respondent denied the 2010 application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT). The OCRT placed the appeal before a review tribunal, which heard the appeal on July 17, 2012, prior to the Appellant's Minimum Qualifying Period (MQP) of December 31, 2012. The review tribunal rendered a decision, denying the appeal based on the information before it.

[2] The Appellant submitted a new application for CPP disability benefits on December 27, 2012 (the 2012 application). The Respondent denied the 2012 application initially and upon reconsideration. In April 2014 the Appellant appealed the second reconsideration decision to the Social Security Tribunal of Canada (the Tribunal).

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

- Videoconferencing is available within a reasonable distance of the area where the Appellant lives; and
- There are gaps in the information in the file and/or a need for clarification.

THE LAW

[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.

ISSUE

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2012.

[8] Since another review tribunal adjudicated whether the Appellant was disabled on or before its hearing date of July 17, 2012, the present Tribunal must decide whether it is more likely than not that the Appellant had a severe and prolonged disability between July 18, 2012 and her MQP date (the “window period”).

EVIDENCE

[9] The Appellant’s personal, employment and educational background were as follows. She had a grade 9 education and was 56 years old at the time of her MQP. Her main health issues preventing her from working were said to be: chronic pain in her neck, back, hips, left shoulders and knees. She was employed as a security guard from January 20, 2010 to March 2010 (her last day was March 19). She stopped working and stated she was medically unable to work as of March 19, 2010 due to the aforementioned health issues, which were caused by a motor vehicle accident that occurred on March 5, 2010 (the MVA). The Appellant did some seasonal work as a cook for two summers, most recently from May 2010 to October 2010. (GD5-334 to 336)

[10] The most relevant medical evidence was that which arose during the window period, and thereafter. This evidence included:

- a) Emergency Room record dated October 9, 2012 due to ongoing back and left knee pain, (GD5-45);
- b) X-ray of left knee dated October 10, 2012 noting history of ongoing severe left knee pain (GD5-47);
- c) Report by Dr. M. Zaitlen (Neurologist) dated October 18, 2012 noting normal neurological assessment, mental status; very difficult gait and “a lot of pain”; satisfactory palpation in lower back without major findings; burning pain in buttocks and tenderness in hips; treatment recommendations including attendance at a pain clinic (surgery was not recommended) (GD5-48 to 51);
- d) Report by Dr. D. Ogilvie-Harris (Orthopaedic Surgeon) dated October 25, 2012 (GD5-99 to 110), who evaluated the Appellant on October 20, 2012 and opined as follows on page 9 of the report:

Given her current status state I do not think she has the physical capability or endurance of returning to work. She will have difficulty with the prolonged sitting that is required. She will have difficulty with the standing and walking which is required. In addition the ongoing chronic pain will make it difficult for her to interact with colleagues and clients and to be a reliable worker. For these reasons therefore I feel she is unable to return to any form of gainful employment at the current time [...] Her prognosis for return to work is guarded.
- e) MRI of left knee dated October 22, 2012 indicating medial meniscal tear and cystic degeneration of the ACL (GD5-54 to 55);
- f) MRIs of the lumbar spine dated October 22, 2012 (GD5-52 to 53) and December 30, 2013 (GD5-43);
- g) Physiotherapist reports (C. Ogden) dated November 5, 2012 (GD5-56 to 57) stating that chronic pain has “only been getting worse”;

- h) Massage therapist report (Mr. A. L.) dated November 15, 2012 indicating no significant improvement from massage, and ongoing pain in low back, hip and knee (high to moderate intensity) (GD5-60 to 61);
- i) CPP medical report by Dr. S. Chiang (family physician) dated March 11, 2013 (GD5-69 to 72) detailing the Appellant's ongoing struggle with chronic pain since the MVA;
- j) Operative report (left knee and meniscal tear) by Dr. M. Khodabandehloo (orthopedic surgeon) dated March 14, 2013 (GD5-62 to 63);
- k) X-ray of the lumbar spine and hips dated September 12, 2013 (GD8-14);
- l) Letter of Dr. Khodabandehloo dated December 3, 2013 stating the Appellant requires a left total knee replacement, but that due to her age, surgery should be delayed until she is aged 60 to 65 (GD2-2);
- m) Report of Dr. Khodabandehloo dated December 12, 2013 noting the Appellant's back pain worsening over the preceding 3-4 years, and recommending a MRI of the back to rule out disc protrusion (GD2-3);
- n) MRI of December 30, 2013 showing mild to moderate protrusions, most evident at L2-3 and L3-4; and moderate narrowing most prominent at L4-5 and on right side of L5-S1 (GD2-4 to 5);
- o) Physiotherapist report of B. Duclos February 26, 2014 (GD1-9);
- p) Social worker reports (A. Ferron) dated March 20, 2014 (GD1-7 to 8), May 29, 2014 (GD2-6 to 8) discussing the Appellant's attendance at counselling sessions and struggle with suicidal ideation between October 28, 2013 and May 16, 2014;
- q) An April 30, 2014 Workfit Centre rehabilitation note referring the Appellant back to Dr. Chiang, and indicating "no improvement with treatment/unable to progress/chronic condition"(GD8-45);
- r) Report of Dr. E. Schneider (Neurosurgeon) dated September 15, 2014, noting the Appellant's subjective complaints of back pain over the past several years; no significant

change from physiotherapy; she has not worked since the MVA; disk bulging and significant spinal stenosis indicated in a MRI of her back; and referral for back surgery (GD4-1 to 2);

- s) Doctors' chart notes referencing persistent chronic pain between December 2013 and October 31, 2014 (GD8-20 to 22);
- t) November 22, 2014 hospital admission note indicating past medical history of chronic back pain from the MVA (GD8-267);
- u) Timmins and District Hospital transfer form of December 12, 2014 noting chronic pain post-MVA (GD8-259).

[11] At the hearing, the Appellant said her condition has worsened since her last review tribunal hearing. She has had to lie down and sit frequently. She has had a difficult time with activities of daily living. She cannot walk for long distances, so she remains at home frequently. She has been less able to do housework. She has therefore doubted that any employer would hire her. She remains depressed.

[12] The Appellant was repeatedly questioned about any changes to her condition and functional abilities during the window period specifically; but her memory was unable to assist in giving the Tribunal any response.

[13] The Appellant informed the Tribunal at the hearing that she had a MRI on her back in November 2015; and her doctor advised that her back "is finished." The Appellant read from the MRI report, the findings section indicating the existence of protrusions and disc narrowing, amongst other things. The impressions section noted most prominent changes and severe narrowing at L4-5.

[14] The Appellant also revealed at the hearing that she had another drug overdose, this time in November 2015, and that she was suicidal.

SUBMISSIONS

[15] The Appellant submitted that she qualifies for a disability pension because she has been unable to work due to her health issues from July 18, 2012 onward. In particular:

[The Appellant] continues to suffer from chronic pain. Her main complaints include back, neck, right wrist and left knee pain. She has difficulties walking long distances and on uneven ground. She has attended chiropractic treatment, physiotherapy treatment and massage therapy with limited results . [The Appellant] continues to receive Cognitive Behavioral Therapy and attends a Functional Restoration Exercise group to help with her pain and activity tolerance and/or function.

The chronicity and severity of [the Appellant's] symptoms have left her with a permanent disability consisting of pain, weakness and lack of endurance . Her daily activities remain fairly sedentary due to her pain . She has difficulty with her household tasks as she is only able to do light tasks for short periods of time . [The Appellant] has permanent occupational, household and recreational limitations. She is unable to return to any job and continues to experience severe and constant pain. We believe [the Appellant] clearly meets the disability criteria in accordance with the Canada Pension Plan Act and it is our position that she is entitled to Canada Pension Plan Disability Benefits.

(Notice of Appeal, GD1-5)

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

- a) The evidence within the window period does not establish that the Appellant is disabled under the CPP. She retains the capacity to do work suitable to her limitations, although this may rule out her previous work as a security guard. (GD3-11; GD10-2)

ANALYSIS

[17] The Federal Court explains the concepts of issue estoppel and *res judicata* in *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100. These are important concepts to understand because they explain why the present Tribunal cannot overrule the previous review tribunal in its assessment of the evidence presented before it on July 17, 2012. Similar to the situation in *Belo- Alves*, issue estoppel and *res judicata* apply here because the Appellant's 2012 application for CPP benefits pertains to the same accident (the MVA) that was assessed in her 2010 application before the review tribunal. The MQP (December 2012) was also the same before the

review tribunal as it is before the present Tribunal. Given that the previous review tribunal rendered a decision regarding the December 2012 MQP and the evidence presented before it, including an assessment of the MVA, the decision is final and binding upon the present Tribunal. In short, the present Tribunal is “estopped” (prevented) from adjudicating the issue that was before the previous review tribunal (which found that the Appellant was not disabled under the CPP on or before the July 17, 2012 hearing date); and that matter is *res judicata*.

[18] In a window period situation, however, what must be decided is whether there is evidence that the applicant for benefits (in this case, the Appellant) became disabled under the CPP after the review tribunal hearing and before the MQP (*H.D. v. MHRSD* (December 7, 2011), CP 23992 (PAB)).

[19] The present appeal deals with such a window period situation. Here, the Appellant must prove on a balance of probabilities that she had a severe and prolonged disability between July 18, 2012 (the day after the review tribunal hearing) and December 31, 2012 (her MQP).

Severe

[20] 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.

[21] The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant’s ability to work (*Ferreira v. AGC*, 2013 FCA 81).

[22] Claimants have a personal responsibility to cooperate in their health care (*Kambo v. MHRD*, 2005 FCA 353).

[23] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person’s health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[24] In the present appeal, the Tribunal was persuaded on balance that the Appellant’s condition became severe under the CPP during the window period. In making this finding, the

Tribunal placed significant weight on Dr. Ogilvie-Harris' October 2012 report. Dr. Ogilvie-Harris is a well-known expert in his medical field, who provided a thorough assessment of the Appellant. Dr. Ogilvie-Harris commented on her work capacity which is a key consideration in assessing whether the Appellant is disabled under the CPP. The copious body of medical evidence on file was reviewed, and Dr. Ogilvie-Harris had not provided any pre-window evidence. His window period opinion bears repeating:

Given her current status state I do not think she has the physical capability or endurance of returning to work. She will have difficulty with the prolonged sitting that is required. She will have difficulty with the standing and walking which is required. In addition the ongoing chronic pain will make it difficult for her to interact with colleagues and clients and to be a reliable worker. For these reasons therefore I feel she is unable to return to any form of gainful employment at the current time.

[25] In further support of a severe condition during the window period was the physiotherapy report of November 2012 that noted the Appellant's chronic pain has "only been getting worse" (GD5-56 to 57).

[26] For the above reasons, the Tribunal finds that the Appellant lacked any work capacity and therefore the obligation to attempt work was not triggered. The effect of her medical condition was such that she was incapable regularly of pursuing any substantially gainful occupation in the real world. This, despite reasonably cooperating in various healthcare treatments.

Prolonged

[27] The Tribunal was also persuaded on balance that the Appellant's disability was prolonged during the window period. The following evidence enabled the Appellant to meet her onus in this regard:

- a) Dr. Ogilvie-Harris' October 2012 opinion that the Appellant's "*prognosis for return to work is guarded.*";
- b) Physiotherapist reports (C. Ogden) dated November 5, 2012 (GD5-56 to 57) stating that chronic pain has "only been getting worse";

- c) Massage therapist report (Mr. A. L.) dated November 15, 2012 indicating no significant improvement from massage, and ongoing pain in low back, hip and knee (high to moderate intensity) (GD5-60 to 61);
- d) CPP medical report by Dr. S. Chiang (family physician) dated March 11, 2013 (GD5-69 to 72) detailing the Appellant's ongoing struggle with chronic pain since the MVA;
- e) Report of Dr. Khodabandehloo dated December 12, 2013 noting the Appellant's back pain worsening over the preceding 3-4 years (GD2-3);
- f) An April 30, 2014 Workfit Centre rehabilitation note referring the Appellant back to Dr. Chiang, and indicating "no improvement with treatment/unable to progress/chronic condition"(GD8-45);
- g) Report of Dr. E. Schneider (Neurosurgeon) dated September 15, 2014, noting the Appellant's subjective complaints of back pain over the past several years; no significant change from physiotherapy; she has not worked since the MVA; disk bulging and significant spinal stenosis indicated in a MRI of her back; and referral for back surgery (GD4-1 to 2);
- h) Doctors' chart notes referencing persistent chronic pain between December 2013 and October 31, 2014 (GD8-20 to 22);
- i) November 22, 2014 hospital admission note indicating past medical history of chronic back pain from the MVA (GD8-267);
- j) Timmins and District Hospital transfer form of December 12, 2014 noting chronic pain post-MVA (GD8-259); and,
- k) Finally, the Appellant's testimony that her condition has worsened since the review tribunal's hearing, and that her back was "finished" according to her doctor's advice in November 2015.

CONCLUSION

[28] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2012, when Dr. Ogilvie-Harris saw the Appellant and provided a convincing opinion on the issue under appeal. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of February 2013.

[29] The appeal is allowed.

Shane Parker
Member, General Division - Income Security