



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. B. v Minister of Employment and Social Development*, 2016 SSTGDIS 111

Tribunal File Number: GP-14-419

BETWEEN:

B. B.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Ramon Andal

HEARD ON: April 4, 2016

DATE OF DECISION: May 31, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

B. B., the Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 13, 2012. 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 teleconference for the following reasons:

- a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives, however the Appellant requested a hearing by teleconference instead.
- b) There are gaps in the information in the file and/or a need for clarification.
- c) 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, 2009.

[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.

EVIDENCE

a. Oral Evidence of the Appellant

[8] The Appellant is 36 years old. He completed high school then worked at various temporary jobs such as general labour, warehousing, machine shops, order pick-up and receiving. He had no formal training except on the job. His last employment was with Canadian Tire beginning in 2004, where he operated a battery bull to remove the batteries from forklifts and charge them. In 2006, he felt stiffness in his back because of the demands of his job. He took a stress-related leave of absence for personal (not medical) reasons, and returned to work. During the Christmas holidays in 2006, his back pain returned. He tried to return to work in 2007, however his back pain was not getting better. In March 2007, he sustained a leg fracture after twisting his ankle. He was placed on a leg cast for six weeks, and was off work for a few more months. His doctor gave him three months off.

[9] Around September or October 2007, the Appellant applied for modified duties at Canadian Tire, and was told that there was nothing available. He could not return to his regular job because his back was getting worse. He wanted to return to lighter duties, which his chiropractor recommended. He did not look for other work because his health was deteriorating,

and he was becoming depressed. A rheumatologist told him that his pain was due to gradual wear and tear. Dr. Samuel Silverberg, internist, told him he should work in a sedentary position. He had physiotherapy treatments until his health benefits ran out. None of his physicians told him he could not work. He felt that he could not do even sedentary work because he could not sit, stand or walk for very long. His main complaint is his back problem which radiates to his legs. He also suffers from migraine headaches, depression, anxiety, deep vein thrombosis and irritable bowel syndrome (IBS). He has been diagnosed with fibromyalgia.

[10] The Appellant lives with his parents. He stated that he has difficulty doing house work. He would sometimes walk around the block using a walking stick and visit the mall. He believes he is capable of part-time work.

b. Medical Evidence

[11] The March 7, 2007 CAT scan of the lumbar spine revealed no evidence of lumbar disc degeneration or focal disc herniation. Dr. Lawrence Chizen, physiatrist, indicated in his April 11, 2007 report that the Appellant's chief complaints were low back pain and lower extremity pain of several months duration. The onset was gradual, with no related event or injury. He also fractured his ankle. He had been attending therapy with slow progress. Physical examination revealed no acute physical distress, no inflammatory arthritis, normal walking base and balance, normal vital signs, normal distal perfusion, and no vasomotor signs. Dr. Chizen stated in his October 24, 2007 report that the Appellant had not yet returned to work nor was he attending school because he felt he could not work. Examination did not reveal any musculoskeletal, head, neck, or cardiopulmonary conditions which were contributory, nor signs of generalized inflammatory arthritis. The neurological examination was unremarkable. A rheumatology assessment was recommended.

[12] Dr. Charles Lu, family physician, stated in his August 11, 2007 report that the Appellant's ankle fracture made his back illness worse, and because of his pain, he was in no condition to return to his duties as a battery attendant which required him to stand, lift, and walk, sit for long periods. He was taking pain killers. Dr. Lu opined that if he returned to work, he would need more time off to recover from his disability by continuing to see his chiropractor and physiotherapist for exercise to strengthen his back. In his CPP medical report dated October 17,

2008, Dr. Lu diagnosed the condition as chronic low back pain syndrome, and stated that he could not return to work. Prognosis was poor.

[13] The November 20, 2007 report of physiotherapist Shaileen Mohammed listed the Appellant's physical problems as reduced range of motion of the lumbar spine, lumbar distraction, decreased muscle mass lumbar paraspinals, weakness in abdominal muscles, right ankle effusion, weakness right ankle inversion and decreased proprioception of the right lower extremity. He received physiotherapy treatments twice a week and was instructed on daily exercise program. The recommended return to work restrictions consisted of frequent changes in position for sitting, standing and walking after 20 minutes, no lifting greater than 15 pounds from waist, no heavy lifting from floor or overhead, limited repetitive bending of the lumbar spine, limited stooping and squatting, and no twisting. On September 4, 2008, Shaileen Mohammed reported to Manulife that given his restrictions, he would not be able to return to his previous employment as a battery operator.

[14] Dr. Samuel Silverberg, internist, reported on January 4, 2008 that the Appellant's lower back pain started suddenly in the previous year without a definite precipitating cause, and he had been unable to perform his job for the last year because of pain with bending. He suffered ankle pain due to a fracture in April 2007. On examination, there was pain at the lumbosacral junction when he brought his fingers within 3 feet of the floor on lumbar flexion and on five degrees of lumbosacral extension, and normal range of movement in other joints. He was unable to sit, stand or walk for more than 10 minutes. Dr. Silverberg diagnosed the condition as mechanical lower back pain due to bending and lifting at work, and strongly suggested that he return to school for retraining for a sedentary job.

[15] Dr. Silverberg stated in his June 24, 2009 report that the Appellant developed lumbar spine pain radiating to his legs in December 2006. He stopped working on January 3, 2007 because of the pain which persisted and he had been unable to return to his "bending and lifting" job. He was unable to walk, sit or stand for more than one hour. A CAT scan of the lumbar spine in March 2007 was normal. There was no evidence of ankylosing spondylitis. Dr. Silverberg stated that he could not improve on his physiotherapy and analgesic treatment, and did not anticipate improvement in the future. He was considered not employable in any capacity.

[16] A knee ultrasound on May 19, 2010 revealed joint effusion, while the x-ray of the knee on the same day was normal.

[17] Dr. Silverberg indicated in his July 5, 2010 consultation report that the Appellant was unable to walk, stand or sit for more than 30 minutes. He could not bend over to shovel snow, carry garbage, put on his shoes, or carry heavy groceries without pain, and unable to concentrate. He had been attending physiotherapy for three years without improvement and obtained only temporary relief from analgesics. Dr. Silverberg did not anticipate complete improvement, and concluded that he was unable to return to any job which requires standing, sitting, walking or bending.

[18] The Appellant consulted Dr. T. Glazman on September 7, 2010 about a trial of nerve block therapy for his chronic low back pain. He decided not to proceed with the treatment after discussion of the potential risks and benefits.

[19] According to the September 21, 2010 letter of Shaileen Mohammed, physiotherapist, the Appellant had physiotherapy treatments for his lumbar strain starting October 23, 2007 once to four times every month, up to April 15, 2010. He reported pain on a daily basis which limited standing, sitting, walking for prolonged periods. Previous functional abilities testing indicated inability to do heavy lifting, carrying and repetitive bending that his previous employer required. Modified duties were not available. He was encouraged to stay active with household chores within tolerances.

[20] Dr. Lu's October 19, 2010 report to Manulife stated that the Appellant was not able to work due to the damage to his soft tissues in his lumbosacral spine. Dr. Lu opined that he was not fit for any gainful employment due to his severe chronic pain and declining health. In addition to the pain, he complained regularly of stiffness and cramping throughout the day and night. His overall flexibility and muscle tone had deteriorated, and he gained 60 pounds over the period of his disability. Dr. Lu felt that he met the definition of total disability since May 2009.

[21] According to the April 19, 2011 operative report of Dr. Rajiv Sethi, gastroenterologist, the Appellant underwent an endoscopy and colonoscopy. His complaints were diarrhea, nausea, vomiting intermittently and back pain. He seemed worse under stressful situations. Dr. Sethi

indicated that some of his complaints seemed somatic in nature, and suspected he had IBS. According to Dr. Sethi's June 16, 2011 report to Dr. Lu, the endoscopy was normal. Dr. Sethi felt that his symptoms were stress-related and due to IBS, and recommended that he watch his diet.

[22] Dr. Ian Smith saw the Appellant on September 13, 2011 to assess his varicose veins. His mobility was very limited. He complained of swelling in the left lower extremity. Dr. Smith saw no evidence of deep venous insufficiency. The non-invasive arterial assessment of the Appellant's lower extremities on October 25, 2011 was normal. His symptoms were not due to arterial disease. Dr. Smith's consultation report dated November 2, 2011 stated that there was no evidence of deep vein thrombosis in either leg. Dr. Smith did not think that surgery on the left leg was in his best interest.

[23] The Appellant was examined by a psychiatrist, Dr. Mohammed Hussain on December 14, 2011 because of depressed mood. He denied prior psychiatric hospitalizations or treatments. He was being supported by Ontario Works. Dr. Hussain found no evidence of psychomotor agitation, retardation, thought disorder or gross cognitive deficits. He appeared preoccupied with his disability. GAF score was 55 – 60. He was said to be suffering from mild depressive symptoms and was prescribed a low dose of Cymbalta for his depression, and counselling sessions which he was not interested in. Dr. Hussain did not see the benefit of ongoing psychiatric care.

[24] Dr. Sethi reported on February 13, 2012 that the Appellant complained of excess gas and bloating which was likely IBS, and multiple somatic complaints for which there was nothing that can be offered. The CT scan of his abdomen and pelvis was negative for Crohn's disease.

[25] In a subsequent CPP medical report dated March 2, 2012, Dr. Lu indicated that the diagnoses were severe chronic low back pain since 2007, depression and high cholesterol. Prognosis was poor. His letter dated September 10, 2012 added migraine, IBS, and severe varicose veins in both legs to these conditions, and reiterated the view that he was unable to go back to any work.

[26] Dr. Silverberg's consultation report dated April 18, 2012 stated that the Appellant suffered soft tissue injuries to the lumbosacral spine the result of bending to lift heavy objects at work from 2004 to 2006 and continued to experience pain from that injury. The CT scan in 2007 showed normal disc spaces in the lumbar spine. Dr. Silverberg did not anticipate improvement in the future, and felt that he was unable to return to any job. Because he was young, he was sent for an MRI scan of the sacroiliac joints to look for inflammatory disease. The X-ray of the cervical spine taken on May 18, 2012 and the CT scan of the brain on June 13, 2012 were normal.

SUBMISSIONS

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

- a) He is physically incapable of working in a competitive environment.
- b) He has tried physiotherapy, chiropractic treatments, massages and yoga but his condition is getting worse.
- c) He is sick and needs held from CPP.

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

- a) Numerous investigations showed no abnormal pathology or structural deterioration.
- b) Dr. Hussain concluded that he had "mild" depressive symptoms and offered a low dose antidepressant and individual counselling which the Appellant was not interested in. No further psychiatric care was felt necessary.
- c) Dr. Sethi confirmed completely normal findings in November 2011 regarding his gas and bloating symptoms.
- d) An arterial study of his varicose veins was completely normal while a venous study of the legs showed moderate insufficiency on the left leg in keeping with his varicose veins. Dr. Smith advised against any intervention.

- e) Dr. Silverberg strongly recommended in January 2008 that he return to school to retrain for a sedentary job.
- f) The physiotherapist indicated in September 2008 that that while he could not return to his previous work, it would be appropriate for him to retrain for more suitable employment.
- g) He did not follow the recommendations of Dr. Glazman in September 2010 to administer minimally invasive injections.

ANALYSIS

[29] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2009.

Severe

[30] The primary condition that is said to cause the Appellant's disability is his low back pain. This began around late 2006 and was attributed to the bending and lifting demands of his work at Canadian Tire where he worked as a battery bull operator. While he was off work, he suffered an ankle fracture. Around September 2007, he sought to return to modified duties at his previous job, but was told that this was not available. Various tests and examinations at the time by Dr. Chizen revealed no objective abnormality. Dr. Lu was of the initial view that he would need more time off to recover from his disability to strengthen his back with physiotherapy. The physiotherapist recommended return to work with a number of restrictions.

[31] The medical evidence as of the end of 2007 therefore supports the view that the Appellant was capable of returning to modified work within his physical restrictions, but no such work was available at Canadian Tire.

[32] In January 2008, Dr. Silverberg strongly suggested to the Appellant that he return to school for retraining for a sedentary job. The opinion of the physiotherapist Shaileen Mohammed in September 2008 was that he would not be able to return to his previous employment as a battery operator, however that opinion did not exclude the ability to be employed in sedentary work. The Appellant testified that he did not retrain or look for modified work because he felt that even sedentary work was beyond his ability.

[33] For more than two years, the Appellant had physiotherapy treatments, which did not result in significant improvement. In June 2009, Dr. Silverberg did not anticipate improvement in the future even after physiotherapy and medications, and expressed the view that the Appellant was not employable in any capacity. There were no medical reports around the critical MQP date of December 2009.

[34] A year later in July 2010, Dr. Silverberg stated that the Appellant was unable to return to any job which requires standing, sitting, walking or bending, but did not rule out sedentary work. The physiotherapist likewise did not rule out modified duties (which were said to be unavailable) and encouraged him in September 2010 to stay active and do his house chores.

[35] Dr. Lu supported the Appellant's disability claim with Manulife that he met the definition of "total" disability since May 2009. That definition however is not what the Tribunal has to consider in this appeal, as it may not be similar to the definition of "severe" disability in the CPP legislation.

[36] In 2011, the Appellant saw specialists regarding depression, varicose veins and IBS. The results of those investigations did not indicate any serious underlying illness which impaired his ability to work. In any event, those conditions were first reported in 2011, after the MQP had expired. Dr. Silverberg's opinion in April 2012 that he was not able to return to any job was more than two years after the MQP expired. Prior to the MQP date, Dr. Silverberg did not rule out sedentary work and even encouraged the Appellant to retrain for alternative employment.

[37] 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 36 years of age, the Appellant can retrain for alternative work within his physical restrictions, as indicated by Dr. Silverberg and his physiotherapist. He has many more years of working life ahead of him. His only work limitation before the MQP was his lower back pain which did not preclude modified work.

[38] The Appellant acknowledged in his testimony that he is capable of part-time work. As of December 2009, his health care professionals other than Dr. Lu believed that he could work in a

sedentary job if he retrained. Because there is evidence of work capacity, he was required to show that efforts to obtain and maintain alternative work were unsuccessful by reason of his medical condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). He has not done so.

[39] The Tribunal therefore finds on a balance of probabilities that the Appellant did not have a severe disability on or before the MQP date.

Prolonged

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

CONCLUSION

[41] The appeal is dismissed.

Ramon Andal
Member, General Division - Income Security