



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. C. v. Minister of Employment and Social Development*, 2016 SSTGDIS 57

Tribunal File Number: GP-15-361

BETWEEN:

C. C.

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: Virginia Saunders

HEARD ON: July 12, 2016

DATE OF DECISION: July 28, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

C. C. Appellant

D. C. Witness

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on February 25, 2104.

[2] In his application the Appellant stated that he last worked as a residential property manager, and that he stopped in January 2013 when the property was sold. He stated that he was unable to work as of November 6, 2013, because of degenerative disc disease in the cervical column; numbness, palsy and shaking in his right arm; chronic pain and cramping of muscles; and chronic and severe neck and back pain. He stated that he was unable to stand, walk or sit for any length of time; could not hold items securely; and that his writing and typing ability was impacted by the shaking of his hand. He stated that his pain also limited his mobility and his ability to do household activities; and affected his concentration and his sleep.

[3] The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[4] The appeal was heard by teleconference for the following reasons:

- a) the issues under appeal are not complex.
- 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

[5] 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).

[6] 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.

[7] 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

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[9] 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 December 31, 2009.

EVIDENCE

[10] The Appellant was 56 years old at the time of the hearing; he was 49 years old when his MQP ended. He was born and raised in X, British Columbia. He left school after Grade 10 to work as a carpet layer and after that was usually employed in construction. His wife, D. C., had

a job that was flexible and she was able to transfer to different locations, so they moved around the province depending on where there was work for him.

[11] In 2002 the Appellant began working as a crane lift operator and forklift operator in a lumber yard in X. He started to have pain in his back and neck, as well as pain, numbness and weakness in his right arm. He believed these were caused by years of physical labour. In early 2003 he saw a neurologist, Dr. Johnston, and was started on gabapentin. He then saw a neurosurgeon, Dr. Zwimpfer, who recommended surgery to treat right C7 radiculopathy.

[12] In May 2003 the Appellant had a C6-C7 anterior discectomy and fusion. A six week follow-up report by Dr. Zwimpfer indicated that the Appellant had complete resolution of his right arm pain and tingling, with improvement in the right arm weakness and only some residual numbness in the forearm. He was to wear a cervical collar for the next month, after which he could return to work. The Appellant testified that he was off work for two or three months in total. He returned to full-time work with modified duties, and after about a month he resumed his duties on the crane and forklift.

[13] The Appellant testified that the surgery was not entirely successful. In early 2007 he developed right arm pain with some numbness and weakness. He returned to see Dr. Johnston that September.

[14] An MRI of the Appellant's cervical spine dated September 17, 2007, revealed degenerative disc disease that was moderate at C4-5 and mild at C5-6, with central canal stenosis at three levels, and possible irritation on the exiting right C5 and C6 nerve roots.

[15] Dr. Johnston's report of September 19, 2007, indicated that in addition to his arm pain the Appellant had neck pain caused by looking up while driving the crane at work, and that he had also noticed a tremor in his right hand. He was taking gabapentin and this was improving the pain somewhat, but Dr. Johnston cut the dosage in half. He noted that the Appellant had significant median nerve compression at the right wrist, and suggested he use a wrist splint at night for the next several weeks.

[16] The Appellant underwent surgery for carpal tunnel syndrome in January 2008. He testified that while the surgery improved the pain and tingling in his right arm, the tremor in his

right hand got worse. His hand began shaking constantly, and since then he has been unable to grip anything without his hands cramping; he drops things easily; and has difficulty writing.

[17] The Appellant continued to have pain in his neck and back, and weakness and numbness in his right arm. On his doctor's advice he tapered off gabapentin over fears he was becoming addicted. He began using Tylenol 3 and Extra-Strength Tylenol. His reliance on strong pain medication meant that he could no longer operate heavy machinery.

[18] The Appellant testified that his boss was a friend who was very accommodating, and that together they tried to find different duties that the Appellant could manage. He stopped driving and doing heavy lifting, and tried working in sales and managerial positions inside the lumber store; however, he could not do these jobs because he could not write.

[19] The Appellant testified that by the spring of 2008 he had missed quite a bit of work because of his pain and to attend medical appointments. He had taken a month off to try to recover, and after two weeks back on the job he felt unable to continue. Dr. Waite, his family doctor, told him that he should stop working. The Appellant spoke with his boss, who agreed.

[20] The Appellant was covered by private disability insurance after he stopped working. He testified that he continued to try different medications to control his pain, with little effect. He could not recall their names as they were given to him by Dr. Waite as samples, and so were not listed on his medications. He experienced significant cognitive side effects with some of these and did not continue taking them.

[21] The Appellant's wife testified that he was in significant pain and made numerous visits to doctors but was told his symptoms were not bad enough to warrant surgery. She believed that her husband's doctors thought (and continue to think) it was better to try to control the Appellant's pain rather than risk surgery.

[22] The Appellant applied for a CPP disability pension in March 2009. In his application he stated that he had been unable to work since May 15, 2008, because of limited movement in his neck; numbness in his arm; cramping muscles and chronic pain. He stated that he was unable to do heavy or repetitive lifting, or anything that strained his neck. He listed functional limitations with standing, walking and lifting, as well as interrupted sleep that was improved by

medication. He was taking gabapentin as well as medications for high blood pressure and gastroesophageal reflux (GERD). He indicated that physiotherapy had been prescribed but he could not afford to attend, and that now it was no longer thought to be of any benefit. He stated that he was working with Triumph, an employment program for persons with disabilities, to try to be retrained.

[23] The Appellant testified that he has also had increasing difficulty sitting since his surgery in 2003. He did not think to include this in the 2009 application because it did not interfere with his ability to do his most recent job, in which he spent most of his time on his feet.

[24] Dr. Waite completed a medical report dated December 24, 2008, in support of the Appellant's disability application. He stated that the Appellant had cervical spine degenerative disc disease with right radiculopathy. He had recurrent pinching of nerves in his neck, and recurrent pain, weakness and numbness in his right arm which was persistent and aggravated by physical labour. No further consultations or investigations were planned. The Appellant was taking gabapentin which slightly reduced his pain; and was doing home physiotherapy which helped maintain his range of motion. Dr. Waite stated that the Appellant had a chronic degenerative condition that would worsen. He could not continue to do heavy labour, and needed to be retrained into more sedentary work.

[25] The Appellant's application was denied. He recalled that the decision letter indicated that he was capable of sedentary work. His wife testified that they decided not to appeal this denial because the Appellant was still in his forties and "did not want to give up." He thought that perhaps he could be retrained for sedentary work and he was willing to try. His wife testified that it took him about two years after stopping work to get his pain under control so that he could then consider sedentary work. She did not recall that he saw any specialists for the following three years or so, because there was nothing to be done for him.

[26] The Appellant testified that Triumph sent him to a physiotherapist to assess his abilities. It was decided that he would pursue work as a property manager in an apartment building as the work was not constant and his wife would be able to help him. He obtained Grade 11 through Adult Education, and this allowed him to register in a property management course.

[27] The Appellant testified that the course was appealing to him because it was on-line and could be done at home and at his own pace. He did not believe he was capable of sitting in a classroom. He testified that he spent about eight hours per day on the course. About 90% of it involved studying, which he mostly did while lying on his back on the floor. He would break up his studying time to change position or move around. He recalled that it took him about six weeks to complete the course; his wife believed that it took about three months. In any event, he completed the course in early 2011, in less time than was recommended. He received a grade of 100%.

[28] Soon after this the Appellant was then hired by Meicor Property Management to work as a property manager at the Cygnet and China Creek Apartments, a two-building apartment complex in X. The complex had 43 units but many of them were not rented because they were in poor condition. He and his wife lived on the premises.

[29] The Appellant's wife testified that she and the Appellant were both interviewed by Meicor and were hired as a couple. She went to X for training by the employer because she had not taken a property management course. They divided up the duties between them. She did almost all the physical work such as mopping and cleaning; and looked after all the paperwork. The Appellant answered the phone when prospective renters called; answered the door when tenants delivered rent cheques; showed apartments and inspected them after tenants moved out; and took deposits to the bank after his wife prepared the deposit slips. Because turnover and vacancies were limited, this work was minimal and did not require regular attention.

[30] The job paid \$25000.00 per year, out of which \$550.00 each month went towards rental of the apartment that the Appellant and his wife lived in. She testified that they were told that only the Appellant would be paid, because he had taken the property management course. It did not occur to them to have the Appellant pay her for the work she did, as the money was used jointly by them in any case.

[31] The Appellant testified that when he first started he tried a few different tasks to see what he was capable of. He tried to do light cleaning but could not work more than 30 minutes. He could not do any book-keeping or other paperwork because his hand was so shaky. His wife testified that she would fill in receipts and the Appellant would sign them, because he could not

do that amount of writing and it is almost illegible. His computer skills are limited, so she would generate any forms required from the Residential Tenancy Branch web-site, and tell the Appellant how to complete them. She stated that from her perspective her husband's difficulties in this area were a combination of lack of skill and experience, as well as physical pain.

[32] They did not track their weekly hours. The Appellant's wife stated that she did all the cleaning on the weekends, and if she was unable to get to it then the Appellant would hire someone as he was unable to look after it himself. There was quite a bit of paperwork at the beginning of the month, but not at other times. She testified that she was working for the provincial government at the time, on a four days on and five days off schedule with five weeks of holidays per year. This allowed her to perform almost all the work at the apartment. She estimated that she did 95% of what was required. The Appellant testified that he did some minor repairs if they could be done in a short period of time or at his own pace, but that he usually hired someone else to do such work and paid for it out of his income.

[33] An Employer's Questionnaire was completed for the Respondent on July 28, 2014, by L. S. of China Creek Apartments. She stated that the Appellant began working as a resident manager for the organization in October 2011 and stopped when the building was sold in January 2013, because the terms of sale required that all employees be terminated. His job was "renting suites, rent collection, building upkeep & cleaning" at an annual salary of \$25,000.00. She estimated that he worked 25 to 30 hours per week; that his attendance was good; that he had no absences for medical reasons; and that the quality of his work was satisfactory. He did not need help from co-workers; special equipment or special arrangements; and his medical condition did not affect his ability to handle the demands of the job.

[34] The Appellant testified that Ms. L. S. was his boss at Meicor and she was located in X. Other than interviewing him and seeing him once or twice at company functions, neither he nor his wife ever saw her. She was not involved in the day to day operation of the building and would not have known anything about how the Appellant and his wife divided the duties. He testified that the owner of Meicor visited every three weeks to a month, and that he would not have been aware generally of who was doing the work.

[35] The Appellant's wife testified that after the apartment building was sold in January 2013, she and the Appellant applied for hundreds of similar positions across the province, but received no interviews. They moved from X to the Lower Mainland, where they now live in a trailer which her parents helped them to purchase.

[36] The Appellant's wife testified that immediately upon moving to the Vancouver area she and the Appellant found a family doctor, Dr. B. Yong, who they continue to see. Dr. Yong told the Appellant that he had liver disease and told him to stop using Tylenol products. He also referred the Appellant to Dr. Johnston, the neurologist, but it took almost a year before he was able to see him.

[37] Dr. Yong completed a medical report that accompanied the Appellant's disability application in February 2014. He stated that he had known the Appellant for six months, when he began treating him for severe chronic low back pain and chronic neck pain. He noted the results of the 2007 MRI above, and that an x-ray of the lumbar spine in 2013 showed an anterior compression fracture at L1. He noted the Appellant's symptoms of chronic pain in the neck and lower back, right arm tremors and paresthesia, and right arm cramping, all of which continue despite manual therapy and analgesic medication.

[38] Dr. Yong noted that on physical examination the Appellant had tender cervical, thoracic and lumbar paraspinous muscles with stiffness and spasm, with markedly reduced range of motion and a positive Spurling's test on the right. He stated that the Appellant was "not fit for even sedentary duties as he is unable to sit, stand or walk in one position for an acceptable length of time. He lives in constant pain and is unable to participate in recreational activities." He was to see neurologist Dr. Johnston in September 2014.

[39] Dr. Yong stated that the Appellant's prognosis was poor, as he had been in chronic pain for more than 10 years that was resistant to medications, surgery and physical therapy. He stated "it is highly unlikely that he will make significant improvement in the future."

[40] In a report dated July 2, 2014, Dr. Waite stated that the Appellant was no longer his patient, having moved away the previous summer. He stated that most of the medical information he had for the Appellant from December 2009 on related to his chronic medical

conditions of non-insulin dependent diabetes, hypertension, metabolic syndrome with fatty liver, gastroesophageal reflux disease, morbid obesity, and psoriasis. He stated that the Appellant's disability

pertains more to his cervical spine degenerative disc disease for which he had a C6-C7 discectomy and fusion in May of 2003 and has had ongoing symptoms ever since with pain, weakness and numbness into the right arm. [The Appellant] had attempted to return to work in April of 2008 after trying to rehabilitate post surgery for his discectomy and fusion, but any heavy work including heavy equipment operating or heavy physical labour tended to cause escalation of his right arm pain, numbness and weakness.

[41] Dr. Waite stated that he had encouraged the Appellant to retrain into more sedentary work and he believed he had returned to work as an apartment manager which he also found to be too taxing for his neck and arm symptoms.

[42] The Appellant saw Dr. Johnston and had an MRI in September 2014. According to the Appellant's wife, Dr. Johnston told them that there was nothing that could be done about his condition and that he should consider using opiate-based medication for pain control.

[43] The Appellant testified that he continues to see Dr. Yong approximately once a month, for pain control or other issues that might arise. He has refused to use some pain medications because they produce too many cognitive side effects as well as nausea. He has been using tramadol for the last few months, and finds that it "takes the edge off" but that is all. He also has a certificate that allows him to use medical marijuana, and he has relied on this for several years. Together with the tramadol this makes his pain bearable but has not increased his mobility or his ability to sit, nor has it controlled his right arm and hand symptoms.

[44] The Appellant testified that he spends his day "wandering around" his home and taking his dog around the block. He is unable to settle anywhere for any length of time because of his pain. He may watch TV or nap, but he is in quite a bit of pain when he gets up. He used to have a hobby building models, but he gave this up around the time he stopped working in 2008 because of the shaking in his hand. He used to go fishing but stopped at about this time as well, because he cannot sit in a boat. He is able to drive in his truck for about an hour but he is constantly shifting his weight and he is very sore when he stops. He is unable to do any of the yard work for his mobile home. He does some indoor chores such as cooking and dishes, if he

sits down and spends only short amounts of time doing them. He is able to vacuum if he paces himself. He testified that he sleeps for about four hours each night before pain wakes him up. He then gets up and wanders around the house, after which he is usually able to go back to sleep for a few more hours.

SUBMISSIONS

[45] The Appellant submitted that he qualifies for a disability pension because he has had a severe and prolonged disability since before December 31, 2009.

[46] The Respondent submitted that the Appellant does not qualify for a disability pension because the medical evidence does not support a finding that his condition was so severe as to preclude all suitable work continuously since December 2009. In particular::

- a) Dr. Waite stated in December 2008 that the Appellant could be retrained for sedentary work suitable for his cervical spine condition;
- b) Medical evidence indicates that the Appellant's condition deteriorated after the end of the MQP, and that he was suited to less physical labour before that;
- c) The Appellant demonstrated a capacity for work after he last met the eligibility requirements for a disability pension

ANALYSIS

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

Severe

[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.

[49] 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).

[50] The Tribunal found the Appellant and his wife to be credible. They answered questions spontaneously and their narrative was generally consistent with the medical reports previously submitted. The Tribunal accepts their testimony as an accurate account of the Appellant's symptoms and limitations at all times.

[51] The Appellant has a history of pain and limitations as far as back as 2002. He had surgery and returned to work, in spite of the fact that some of his symptoms continued and he developed new ones. Medical imaging in 2007 revealed degeneration of the cervical spine, spondylosis and nerve compression. The Appellant had carpal tunnel surgery in 2008. He continued to have problems with pain, numbness and weakness in his neck and right arm and hand.

[52] Further surgery has not been recommended. The Appellant has complied with treatment recommendations. His reluctance to take certain types of pain medication is reasonable given their significant side effects. It is unlikely that taking these medications would permit the Appellant to work, given that they make him nauseous and affect his cognition.

[53] The Tribunal considered the absence of evidence regarding the Appellant's back pain on or before his MQP. While the Appellant recalled that he had back pain while he was still working, he does not appear to have reported it to his doctor and there does not appear to have been any investigation into its cause. In 2013 a compression fracture was discovered. There is no indication as to how long it had been there or if it was the cause of the Appellant's back pain.

[54] The Tribunal accepts that the Appellant had back pain as far back as 2003, as he recalled, but cannot find that it played a significant role in his inability to work on or before his MQP. There is simply no evidence to support that. However, the Tribunal also accepts the Appellant's recollection of his limitations, and his explanation for why he did not note in his 2009 application that he had difficulty sitting. The Tribunal accepts that the combination of the

Appellant's documented neck, right arm and right hand issues have caused him pain, limitations and extreme discomfort which caused him to stop working in May 2008.

[55] The medical evidence from 2008 indicated that at that time Dr. Waite did not believe the Appellant was capable of physical labour. He suggested the Appellant needed to retrain for sedentary work. He did not conduct a functional analysis and determine that the Appellant was capable of such work. In fact, the Appellant spent two years trying to recover, after which he took an on-line course in extremely accommodating conditions, and was then hired with his wife to perform a job in which she did most of the work. Very little was required of the Appellant. The comments of L. S. indicated that the Appellant's wife performed the job well. The Tribunal accepts the Appellant's evidence that Ms. L. S.' comments did not apply to him.

[56] The Appellant's ability to retrain and to find employment as a property manager in these circumstances does not indicate that he was regularly capable of gainful employment. The Appellant's experience since stopping work in May 2008 indicates that Dr. Waite's suggestion or opinion that he might retrain was wrong.

[57] The Tribunal considered whether the Appellant was capable of more sedentary work. He did not complete high school and spent his entire working life doing physical jobs. He has limited use of his dominant hand. He tried to work at managerial and sales jobs before stopping work in 2008. He was unable to perform these. He was unable to perform the paperwork requirements of the property management position from 2011 to 2013. These problems continue.

[58] In his disability application the Appellant stated that he could no longer work as of November 6, 2013. In explanatory notes attached to the application he indicated that this was when he and his doctor decided that his medical condition had increased to the point where he was no longer able to work at all. The Tribunal does not consider this to be an admission that the Appellant was able to work before that time. It is apparent from all of the evidence that the Appellant's health was compromised well before November 2013. The significance of that date is that it is when he gave up trying to find alternate work. The Tribunal notes that in November 2013 Dr. Yong had only known the Appellant for a few months. There is no evidence that he previously thought the Appellant was capable of work and then changed his opinion.

[59] The Tribunal is satisfied on a balance of probabilities that the Appellant was incapable regularly of pursuing any substantially gainful occupation as of May 2008, when he had to stop working at the lumber yard. He was unable to work at all for several years after that, and only managed to earn an income later in a flexible position in which most of the duties were performed by others.

Prolonged

[60] The Appellant's condition has continued to deteriorate since he stopped working. No surgery or treatment has been recommended other than pain control and physical therapy, which have been of limited benefit. As Dr. Yong stated, the Appellant has lived with his symptoms for many years, and he is not expected to improve. His condition is therefore likely to be long-continued and of indefinite duration.

CONCLUSION

[61] The Tribunal finds that the Appellant had a severe and prolonged disability in May 2008, as discussed above. 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 application was received in February 2014; therefore the Appellant is deemed disabled in November 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of March 2013.

[62] The CPP is clear that retroactivity is limited to 11 months from the date of an application. That is the case even where, as here, a person applied earlier based on the same condition and was denied. The Appellant had the opportunity to appeal the decision to deny his 2009 application. He did not do so. Unfortunately, the Tribunal does not have jurisdiction to back-date the Appellant's disability pension to the date of his first application.

[63] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security