Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *W. G. v. Minister of Employment and Social Development*, 2016 SSTGDIS 64

Tribunal File Number: GP-14-4943

BETWEEN:

W. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Pierre Vanderhout

HEARD ON: August 18, 2016

DATE OF DECISION: August 23, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

W. G. (Appellant)

Frank Van Dyke (Appellant's Representative)

C. G. (Witness)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* ("CPP") disability pension was date stamped by the Respondent on November 7, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[2] This appeal was heard in person for the following reasons:

a) The method of proceeding is most appropriate to allow for multiple participants; and

b) There are gaps in the information in the file and/or a need for clarification.

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, 2016. In this case, as the MQP 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.

EVIDENCE

[7] The Appellant is 48 years old and lives in X, Ontario with his wife and two sons (aged 5 and 15). He has a Grade 12 education and began working as industrial siding and roofing installer immediately after finishing high school. He continued this work for 25 years until he stopped working altogether on June 21, 2013. He has no post-secondary education and his only other work experience was working occasionally for his father as a teenager. That work also involved the installation of siding, albeit in a residential context. He has never done anything other than physical work.

[8] In his application materials for CPP disability benefits, the Appellant indicated that he was unable to work because of degenerative disc disease. He wrote that he had chronic severe back pain and was on high doses of hydromorphine and other medications. He indicated that he was unable to work as of October 14, 2013.

History

[9] The Appellant described a long history of back pain that deteriorated over many years. Dr. Ingo (Family Physician) provided disability certificates for three separate periods in 2005 and 2006. An MRI in 2008 revealed mild degenerative disc disease in the lumbar spine,

annulus tears involving the L4-L5 and L5-S1 discs, and a tiny disc bulge at L4-L5 without spinal stenosis. The Appellant had an initial consultation with Dr. David Smith (Kingston Orthopedic Pain Clinic) on June 5, 2010; the problem was described as low back pain that sometimes radiated down the right side to the knee.

[10] Dr. Smith recorded that the pain began in 2006 when the Appellant heard a "pop" as he was squatting with weight on his shoulders. He had taken a year off work and had conservative treatment in the form of medication. The pain had been increasing in intensity; the Appellant had previously seen a physiotherapist and a chiropractor but indicated that both of these treatments had made his symptoms worse. At the time he first saw Dr. Smith in 2010, the Appellant reported that he was currently unemployed, was getting only 3 hours of interrupted sleep per night, had occasional thoughts of self-harm to end the pain, and had fever, chills and night sweats. Constipation and urination problems were also reported. Previous findings of degenerative disc disease, annulus tears and a disc bulge were noted. Dr. Smith indicated that he would start a treatment of epidural steroid injections; Elavil and Arthrotec for inflammation were also prescribed.

[11] The Tribunal file reveals that the Appellant saw Dr. Smith regularly in 2012 and continuing well into 2014. The Appellant received regular Employment Insurance ("EI") benefits and then EI sickness benefits from January 8, 2012 until October 13, 2012. Dr. Smith noted on March 27, 2013 that the Appellant was still off work and in a lot of pain; a further course of epidural steroid injections was planned. The Appellant's last day of work at "Local 269 Kingston" was on June 21, 2013: the Appellant worked for a couple of companies through this union. He received regular EI again from June 23, 2013 until October 13, 2013; this appears to have been preceded by a period where he was on sick leave through the union.

[12] At the hearing, the Appellant said that he also received short-term disability benefits through the union for a couple of years, although the union did not have long-term disability benefit coverage. As noted above, the Appellant indicated that he was unable to work as of October 14, 2013: this was the day after his EI benefits expired. At the hearing, he said that this was when the pain was too much. However, his back was always sore even when he was working. His wife said that he worked in pain for many years but it kept getting worse and he

would go to bed immediately after getting home, in order to try to recover for the next day. She said that he only coped because of high medication doses. However, he eventually could not even get out of bed.

[13] Dr. Smith prepared a Medical Report in support of the Appellant's application for CPP disability benefits on October 11, 2013. He provided diagnoses of chronic low back pain, degenerative disc disease (August 2007), annular tears at L4-L5 (August 2007) and L5-S1, and chronic depression. Dr. Smith provided a prognosis of "poor", noted limitations of less than 20 minutes for walking, standing and sitting, and said that the Appellant was unable to lift from the floor to the waist.

[14] The Appellant completed his Questionnaire for CPP disability benefits on November 6, 2013. In addition to the impairments listed earlier, he included limitations such as sitting (20 minutes), standing (less than 20 minutes), walking (15 minutes), lifting/carrying (20 pounds from car to house), concentrating, remembering, bending, breathing and reaching, Despite taking sleeping pills, he had a hard time getting any sleep. He also had bowel and bladder problems, including bleeding, due to all of his medications. He could drive for a maximum of 30 minutes and got pain sweats when he tried to cook a meal. He could not shop.

[15] On October 19, 2013, Dr. Smith wrote that the Appellant was unable to perform his current job, as he was suffering from severe and ongoing chronic low back pain. Dr. Smith indicated that this would be for an indefinite period of time.

[16] On January 12, 2014, Dr. Smith reported continuous chronic low back pain, ranging from "moderately severe" to "severe" in intensity, with pain radiating down both legs and numbness in the legs. He described serious limitations with most activities and provided a "poor" prognosis, expecting the disability to be severe, permanent, and likely to deteriorate further. The Appellant's history of pulmonary embolus required Coumadin but this prevented interventional pain procedures (despite a history of responding to lumbar medial branch neurotonics). He wrote that the Appellant could only tolerate 30 minutes of work, provided that there was no lifting and no bending.

[17] The Appellant provided a letter on March 17, 2014 that outlined profound limitations on his daily life. He said that he kept working as long as possible by fortifying himself with pain killers such as Oxycontin, but noted that it was dangerous to his health and his weight ballooned from 190 to 300 pounds. He still had sleep difficulties, anxiety, excessive sweating, upset stomach, vomiting, extreme headaches, depression, problems with urinating and bowel movements, sexual side effects, ongoing lung clot problems (requiring blood thinners), and constant pain. He was limited to 20 minutes of any activity and had to lie down most of the time.

[18] Dr. Smith provided another Medical Report on May 3, 2014, with diagnoses of chronic degenerative disc disease, annular tears at L4-L5 and L5-S1, lumbar facet arthropathy, somatic referred pain down both legs, and chronic severe low back pain. Significant restrictions were noted; he described treatments of lumbar epidural steroid injections (equivocal), pulsed radiofrequency (equivocal), and continuous radiofrequency ablation (successful but inadequate duration). He opined that the disability would be of indefinite duration, adding that the Appellant was incapable of pursuing any gainful employment or any other occupation (including sedentary work). By July 10, 2014, Dr. Smith had started the Appellant on Cymbalta due to depression; he was also providing testosterone injections.

[19] On September 2, 2014, Dr. Smith provided a lengthy letter outlining the Appellant's condition. He described severe chronic low back pain that was present every day, as well as severe daily pain radiating into the legs and moderately severe daily numbness in his legs. He said that a variety of interventional pain procedures had not reliably resulted in any long-term relief. The Appellant was currently being weaned from a very high dosage of narcotics and being treated for opioid-induced testosterone suppression. Dr. Smith was not considering any further investigations, diagnostic tests, specialist consultations, surgery, physiotherapy or chiropractic care. He said that there were no social, personal or occupational factors contributing to the Appellant's conditions or constituting a barrier to recovery. The main barrier to recovery was the fact that the Appellant suffered from a severe chronic disease.

[20] At the hearing, the Appellant stated that he was no longer seeing Dr. Smith; the pain specialist had referred the Appellant back to Dr. Ingo earlier in 2016 as the only ongoing treatment was medication. The Appellant expected that Dr. Smith's 2016 prognosis would have

been the same as in 2014. The Appellant confirmed that his medications were lower than in 2014 due to the adverse side effects he suffered, such as a reduction in his testosterone levels to zero. He also stated that his lung clot had recently resulted in an emergency room attendance. The Appellant currently sees Dr. Ingo for his hydromorphine (pain medication) and Elavil (sleep medication). He said that the medication does not relieve his pain but just numbs him a little. The hydromorphine also causes hemorrhoids and bleeding. He no longer takes Dilaudid because of the issues with his testosterone levels. Other than Dr. Smith, the Appellant has not seen any other specialists recently.

[21] The Appellant gets perhaps 4 hours of sleep per night because of his constant pain. He usually cannot sleep until 1:00 or 2:00 a.m. He finds that doing anything at all makes his pain worse. His legs ache as well, at least a few times per week. His aches and pains lead to headaches, for which he takes a number of over-the-counter medications. He can only walk a little bit but sitting also creates a burning pain in his back and this causes him to sweat (he noted that this was happening at the hearing). This makes him stand up but he is limited to 10-15 minutes of standing before he gets pain from that. If he persists in standing, he will end up in bed for a week. He described the pain as being like a knife stuck in his spine; if he does anything, it feels like the knife is twisted in the spine. His wife said that, if he tries to do anything, he ends up in bed in the fetal position.

[22] The Appellant and his wife now sleep in separate rooms because she is the sole income earner/caregiver and needs to have undisturbed sleep. This is a frustrating change for him, as he was formerly the main provider for his family and his wife only used to work part-time. He used to earn in the range of $50,000 to $60,000 per year; she now earns just under $40,000 per year working full-time as a bookkeeper for the Salvation Army. He describes himself now as a hermit who rarely leaves the house: some weeks, he does not leave the house at all.

[23] On a typical day, the Appellant might be up as early as 5:00 a.m. due to his sleep issues. Otherwise, his wife wakes him up when she leaves for work. She brings him breakfast and he then lies in bed most of the day. His wife estimated that 90% of his day was spent in bed because of his chronic pain. His bedroom is now the living room; there are two televisions in there so that he can spend some time with his children. Both he and his wife testified that he

does not really do anything around the house because of the pain it creates. He does not want to talk to people and indicated that he does not "feel like a man".

[24] The Appellant said that his family life has been significantly affected. He did not attend a recent weekend family camping trip. His wife handles all of the school-related activities. Both he and his wife described their family as being like a single-parent household with three children: the Appellant is essentially one of the children, because of his dependence on her. She said that he cannot even do one lap of the local mall before he has to go home to bed. He also worried about the durability of his 16-year marriage, wondering how long his wife would put up with it. They both indicated that they basically do not have any intimate relations. His wife stated that they still loved each other but it is no longer a normal marriage.

[25] Prior to being disabled by his back pain, the Appellant played hockey and was also a coach. He enjoyed dirt biking, snowmobiling, Nascar racing and driving a four-wheeler. At present, his only activity is watching television.

[26] The Appellant said that he had tried all recommended treatments. His union paid for physiotherapy when he was still working but he found that it just irritated things more. Similarly, he found that chiropractic treatment (also paid for by the union) only made things worse. He attended KOPI for many years but steroid injections in the lower back did not help while the pulsed radiofrequency ablation (in which a needle was used to "burn" nerves around his spine) did not help either and was also very painful. He saw Dr. Yach (Orthopaedic Surgery) two years ago but Dr. Yach said that there was no surgical option available: it would cause even more pain. He also bought a "stretching/traction" board for $2500 but found that it did not help at all.

[27] The Appellant was never referred to a mental health specialist; he was recently put on a waiting list for a support group but has not yet been called to attend. While he received some Cymbalta trials, this medication gave him other side effects (including stomach distress and flu-like symptoms) on top of the pain. Even now, he needs to take additional medication in order to relieve himself because of the pain medication's side effects. The Appellant still gets very down and says that, if it were not for his sons, he would have taken his own life. However, he says

that he would not do this because he saw what happened to his children after the death of his first wife in 1999.

[28] He has not done any paid or volunteer work since 2013, nor has he applied for any jobs. Although it frustrates him greatly, he does not see how he could do any other job: he feels he is essentially an invalid and his pain is unpredictable and dominating. His elder son and his wife do the outdoor chores and the grocery shopping. He can only drive for very short periods of time, as just being in the car causes pain. He does watch over his younger son at home but this son will be returning to school in September.

SUBMISSIONS

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

a) He has objectively verifiable conditions resulting in chronic and constant severe pain as well as major limitations on basic activities such as walking, sitting and standing;

b) His situation is complicated by other conditions such as depression, poor sleep, and a lung embolus that affects the type of medication he can take; and

c) He has made extensive efforts to get better (and also continued working for many years despite his increasing pain) but is not competitively employable, cannot even look after himself at home, and is essentially an invalid.

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

a) He had no objective deterioration in his functional interference scores after his narcotic dosage was decreased;

b) While he may have limitations, the evidence does not show any serious pathology or impairment which would prevent him from performing suitable work; and

c) Given his age, education and transferable skills, the pursuit of suitable employment and retraining remains a reasonable option.

ANALYSIS

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

Severe

[32] As noted above, a person is considered to have a severe disability if he is incapable regularly of pursuing any substantially gainful occupation. 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.

[33] The Tribunal found the documentary evidence and the oral evidence adduced at the hearing by both the Appellant and his wife to be consistent and believable. The Tribunal accepts that the Appellant was a hard-working physical labourer who identified strongly with his role as "breadwinner" and also continued to do physical labour for a considerable period of time after it began to have a significant effect on his health. The Tribunal accepts that he was only able to work as long as he did because of his heavy use of painkilling medication. Unfortunately, this likely exacerbated his condition to the point where his activities are now severely limited.

[34] The Tribunal accepts that the Appellant's current complaints accurately reflect his current condition. The Tribunal also finds that the Appellant's other health conditions, including a lung embolus, have created a situation where very little can be done for the Appellant other than attempt to limit the extremes of his pain. He does appear to have explored all treatment possibilities and it is difficult to see what kind of activity the Appellant could do on a regular basis. The Appellant's background, in accordance with *Villani*, essentially restricts him to largely unskilled occupations or his previous occupation that involved a substantial element of physical labour. However, even if he had other work experience or aptitudes, it is still extremely unlikely that he would be capable regularly of pursuing any substantially gainful occupation. Even sedentary work was ruled out by Dr. Smith in 2014. The Tribunal accordingly finds that the Appellant is currently severely disabled, in accordance with the CPP legislation.

[35] Given that finding, the Tribunal must also determine whether a severe disability has existed continuously from an earlier date. Although the Appellant has had severe pain for many years, the Tribunal notes that he received regular EI benefits until October 13, 2013. Such benefits generally require a claimant to declare that they are ready, willing and able to work. In addition, the Appellant himself indicated that he was unable to work due to his medical condition as of October 14, 2013. Accordingly, the Tribunal finds that the Appellant did not have a severe disability before October 14, 2013.

[36] Dr. Smith's letter of October 19, 2013 stated that the Appellant was unable to perform his current job for an indefinite period of time, as he was suffering from severe and ongoing chronic low back pain. While this may speak to the prolonged nature of the disability, it also prevents a finding of severity at that time because it does not establish on a balance of probabilities that the Appellant was incapable regularly of pursuing any substantially gainful occupation (rather than just his own job). It instead suggests that another occupation would have been manageable for the Appellant at that time.

[37] Nonetheless, Dr. Smith's statement of January 12, 2014 signals a deteriorating prognosis that would preclude not just the Appellant's regular job but also any substantially gainful occupation. Dr. Smith's prognosis was poor, with the disability expected to be severe and permanent. The commentary was also not limited to the Appellant's regular job. Particularly when considered in the context of the Appellant's work history and education, the Tribunal finds that the limitations identified in this statement likely prevented, on a permanent basis, the pursuit of any substantially gainful occupation. Accordingly, the Tribunal finds that a severe disability existed as of January 12, 2014.

[38] The Tribunal further finds that the Appellant has remained severely disabled from January 12, 2014 to the present. The subsequent medical reports are all consistent with an ongoing severe disability. While the various clinical notes made by Dr. Smith in 2014 have not been specifically described above, they do reveal a trend of increasing pain scores despite injection treatments. Dr. Smith also specifically addresses the Appellant's inability to pursue any gainful employment, including sedentary work, in his May 3, 2014 report. Finally, Dr.

Smith's letter of September 2, 2014 confirms the ongoing nature of the Appellant's disability and affirms that there are no external factors contributing to the Appellant's condition.

[39] Given the trends documented through 2014, as well as the oral testimony at the hearing, the Tribunal finds that the lack of specific and objective medical documentation after September 2, 2014 is not fatal to the Appellant's case. The Appellant described ongoing attendance with Dr. Smith until 2016, a consultation with an orthopedic surgeon in 2014, and ongoing treatment (primarily in the form of medication) through Dr. Ingo. The Tribunal accepts the accounts provided at the hearing of these treatments and finds that they are consistent with both the Appellant's history and with an ongoing severe disability. Similarly, the Tribunal finds that the cessation of treatment by Dr. Smith in 2016 reflects a realistic reaction to the lack of progress over 6 years of specialist intervention.

[40] As a result of the above analysis, the Tribunal finds that the Appellant has established a severe disability commencing on January 12, 2014 and continuing through the date of the hearing.

Prolonged

[41] As noted above, a disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[42] The Appellant described conditions that have been deteriorating over a substantial period of time. He required time off work as long ago as 2005 due to his back problems and he stopped working altogether in 2013 despite a strong desire to continue. The ongoing deterioration, as well as a prognosis of "poor", was recorded in Dr. Smith's report of January 12, 2014. On that date, Dr. Smith also expected that the Appellant's condition would be permanent and severe.

[43] On May 3, 2014, Dr. Smith wrote that the Appellant's chronic pain would be severe and prolonged for an indefinite period of time. The existence of a chronic severe disease was affirmed again by Dr. Smith on September 2, 2014. The evidence at the hearing also suggested that there was little hope of any improvement in the future; in fact, the Appellant's condition may be getting worse. Considering the evidence before it, in particular the 2014 reports of Dr. Smith described above, the Tribunal finds that the Appellant's severe disability is also likely to

be long continued and of indefinite duration. Accordingly, the Tribunal finds that the Appellant's disability is prolonged.

CONCLUSION

[44] The Tribunal finds that the Appellant had a severe and prolonged disability in January of 2014, when Dr. Smith submitted an Attending Physician's Statement that substantiated a severe and prolonged disability on a balance of probabilities. According to section 69 of the CPP, payments start four months after the date of disability. Payments therefore start as of May, 2014.

[45] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security