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

Citation: *J. B. v. Minister of Employment and Social Development*, 2016 SSTGDIS 80

Tribunal File Number: GP-13-1478

BETWEEN:

J. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Pierre Vanderhout

HEARD ON: September 28, 2016

DATE OF DECISION: October 6, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. B. (Appellant)

PRELIMINARY ISSUES

[1] An evidentiary matter arose on the day before the hearing. The Appellant faxed a cover letter dated September 27, 2016 and an imaging report dated May 25, 2016 to the Social Security Tribunal ("Tribunal"). These were indexed by the Tribunal as pages GD66-1 and GD66-2 respectively. The Tribunal reviewed the documents and determined that, despite their lateness, they would both be admitted into evidence on the basis of relevance. The parties were advised of this in a Tribunal letter dated September 28, 2016. However, the parties were also advised that, given the very late filing, the Respondent would be given until October 19, 2016 to make submissions on those two documents. On October 5, 2016, the Tribunal received submissions from the Respondent on the documents indexed as GD66-1 and GD66-2.

INTRODUCTION

[2] The Appellant's application for a *Canada Pension Plan* ("CPP") disability pension was date stamped by the Respondent on May 18, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Tribunal. The Appellant also filed a previous application in September of 2006 that eventually proceeded to the Pension Appeals Board. However, *res judicata* is not a complete bar to the current application as the MQP date in his previous application was March 31, 2007.

[3] This appeal was heard by Videoconference for the following reasons:

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

b) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.

c) The issues under appeal are complex.

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

e) 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

[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 October 31, 2009. However, section 19 of the *Canada Pension Plan* provides that when an appellant's earnings and contributions are below the year's basic exemption for a year, their earnings and contributions can be prorated if they became disabled during the prorated period. In this case, the prorated period is from January 1, 2015 to July 31, 2015. The parties agree and the Tribunal finds that this prorated period may apply to this

appeal. There have been other MQP dates during the life of this application, as the Appellant has had intermittent earnings over the years. However, as of the date of the hearing and based on the earnings information filed, the October 31, 2009 MQP date (with possible prorating applying from January 1, 2015 to July 31, 2015) applies to this decision.

[8] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability commencing after March 31, 2007 and on or before October 31, 2009. If the Appellant does not meet that test, the Tribunal must make the same determination for a severe and prolonged disability commencing between January 1, 2015 and July 31, 2015. The March 31, 2007 limitation applies because of the principle of *res judicata*.

EVIDENCE

[9] The evidence in this matter is exceptionally wide-ranging and voluminous. The Appellant has had a very large number of employers as well as a complicated medical history and some family-related issues. While all evidence has been reviewed, only the evidence specifically relevant to the Tribunal's decision will be summarized here.

[10] The Appellant is 46 years old and lives by himself in an apartment in X, Ontario. He has a Grade 12 education and some carpentry training; most of his employment has been quite physical in nature. He had qualifying earnings for CPP purposes from 1989 to 1991 and from 1993 to 2004. Since then, he also had qualifying earnings for CPP purposes in 2010 ($5,112), 2011 ($20,334) and 2013 ($6,354). He did not quite achieve qualifying earnings in 2014 or 2015 although he appears to be on track to have qualifying earnings in 2016; his 2016 employment will be discussed in more detail below. He is no longer with his wife but was responsible for the care of their children at certain times: the "child-rearing dropout" provisions were therefore used when calculating his MQP.

[11] In his application for CPP disability benefits, the Appellant indicated that his illness was anxiety and depression. He said that these prevented him from working because his medication had been increased subsequent to negative past work experiences. He was depressed because he was not working and earning a livelihood. He found it difficult to get hired because employers often requested references and he had many harassment-related experiences in the workplace.

History

[12] The Appellant started working at K.A.S. Personnel Service on September 14, 2010 but quit on June 16, 2011 due to harassment. It was during this employment that he developed an umbilical hernia. Shortly afterwards, he applied for Employment Insurance ("EI") benefits and indicated that he was ready, willing and able to work. He was then self-employed from July of 2011 to October 12, 2011 in the recycling of e-waste, but stopped due to depression. However, on January 2, 2012, the Appellant sent an e-mail to a potential employer, indicating his available for work on the afternoon shift. He also documented his work search efforts in an e-mail dated February 6, 2012, noting that he was receiving EI benefits and therefore had to look for work.

[13] The Appellant obtained medical reports in 2012 that were essentially supportive of his claim for CPP disability benefits. He then made qualifying CPP contributions in 2013 through employment but Dr. Mistry provided a further medical report on October 25, 2013 that diagnosed chronic depression, personality disorder, alcohol addiction and post-traumatic disorder. Dr. Mistry also noted permanent numbness in both legs (attributable to a neurological problem in the lower spine), unemployment, marital separation, and urinary bladder retention, as well as a September 8, 2012 hospital admission due to a nervous breakdown and alcohol addiction. Dr. Mistry also reported anxiety, work place trauma and discrimination, suspiciousness at work, loss of confidence, low self-image, and frequent urination. The prognosis was guarded, noting that the Appellant was unable to work due to unresolved symptoms of major depression and the associated problem of urinary retention and frequency. The various issues reported by Dr. Mistry are mentioned in multiple places in the Tribunal file and were also described by the Appellant at the oral hearing. The discrimination and harassment encountered by the Appellant has been primarily based on sexual orientation although he also reported discrimination and harassment as a result of his urinary retention issues.

[14] The Appellant continued to try to work through employment agencies. He eventually found more stable employment on October 7, 2014 when he started working at Dinkel's Restaurant in X. He described it as a relatively light job: it primarily involved dishwashing but also included cleaning the kitchen, preparing ingredients for the cooks, unloading groceries, and taking out the garbage.

[15] Dr. Fung prepared a Medical Report on December 28, 2014 that provided diagnoses of left meralgia, degenerative disc disease of the lumbar spine with right leg radiculopathy, GERD, and alcohol and drug addiction. Dr. Fung noted a left thigh laceration from a chain saw and said that the major finding was pain and numbness in the Appellant's left thigh, with recent right leg pain secondary to radiculopathy. Dr. Fung thought the prognosis was good; he had not seen the Appellant since March 14, 2014.

[16] The Appellant's job at Dinkel's was not quite full-time and it continued until May 8, 2015. He earned a total of $6,545.00. On May 10, 2015, Dr. Dolan (Family Physician) produced a note stating that the Appellant was unable to work indefinitely due to "illness". At the hearing, the Appellant clarified that this was based on his mental condition. He felt that he was being harassed at work and that continuing to work there would further complicate his mental health. He subsequently applied for sickness EI (as opposed to regular EI) benefits. Dr. Fung prescribed physiotherapy for low back pain on May 19, 2015 and x-rays were taken of the pelvis, hips and right ankle on May 20, 2015.

[17] The Appellant received physiotherapy treatment from June 3, 2015 to July 14, 2015 for low back pain. However, the discharge summary indicated that there was no improvement and the Appellant was being referred back for medical assessment. When asked about this at the hearing, he said that he was referred to physiotherapy because both Dr. Fung and Dr. Mistry say that he has to go to work and move around. This was the last time that he attended physiotherapy.

[18] The next objective medical documentation is a December 16, 2015 request for surgery to repair an umbilical hernia. This surgery ultimately took place on February 5, 2016. He said that he did not work between his employment at Dinkel's and early 2016, as he was suffering from depression and anxiety. He does not recall if he received any medical treatment between July and December of 2015.

[19] The Appellant started working for Phoenix Quality Inspections in March of 2016 but quit after only one-and-a-half weeks because of workplace incidents and his resulting lack of trust in his co-workers. He then started working with Labour Ready (another employment agency) on March 28, 2016 and continued until he quit on April 29, 2016. His record of

employment reveals earnings of $2,023.28 as a casual labourer for Labour Ready. While he initially hoped that this would lead to a steady full-time job at Grace Canada in the near future, he reported that there were once again a number of workplace incidents. He reported incidents of sexual harassment, allegations of drug use, unfair assignments of work, comments about disability, being degraded in front of others, discriminatory incidents, and his own unauthorized absence from work, as well as various rumours and non-verbal forms of harassment.

[20] At the hearing, the Appellant said that his experience at Labour Ready generally mirrored his experiences in other workplaces. He says that he has been harassed at every job he has had in the last 5-6 years; he even took one company to the Human Rights Tribunal of Ontario in connection with harassment he received over his bladder condition. This affects his outlook on work and on being employed, as he feels he is constantly degraded, humiliated and harassed.

[21] The Appellant also tried working for a landscaping company on May 2, 2016 but did not return because he was not physically fit for the job. Dr. Mistry signed an EI sickness benefits form on May 13, 2016, indicating that the Appellant had mental health problems but would hopefully recover by August 31, 2016 if he responded to treatment. Dr. Mistry indicated that he was incapable of working until August 31, 2016. At the hearing, the Appellant said that he saw Dr. Mistry again in July or August of this year. They talked about various matters such as work, family, sexual orientation and harassment. He said that Dr. Mistry always tells him "you've got to keep working". The next appointment with Dr. Mistry is on October 31, 2016.

[22] The Appellant wrote on May 16, 2016 that he saw Dr. Bril (Neurology) and was told that nothing had improved in his lower back. At the hearing, the Appellant confirmed that his back had neither improved nor deteriorated and Dr. Bril thought it would stay that way forever. Dr. Bril said that, from a neurological perspective, he was not prevented from working.

[23] On May 30, 2016, the Appellant reported that he had two more hernias: he was going to see a hernia specialist on August 10 for an assessment of whether they were big enough to remove. However, he said that he would continue to look for work in the meantime. At the hearing, he confirmed that he worked through the Adecco employment agency for 3.5 months, amassing 541 hours of work at a manufacturer of aluminum structures. He described this as intense manual labour but he ultimately quit because he was sexually harassed. The August 10,

2016 appointment with the hernia specialist was postponed until late October. He expressed concern that the hernias would get bigger if he continued to work.

[24] On September 27, 2016, the Appellant confirmed that he was working again. He has been employed by the Randstad employment agency since approximately August 25, 2016: his only assignment thus far has been a full-time position in packing, sorting and quality control at Mother Parkers Tea & Coffee. The job requires hand-eye co-ordination, good balance, and a combination of sitting and standing. He works about 52 hours per week, consisting of five 8-hour shifts during the week and a 12-hour shift on Sundays. These are all at night. This work flows from a new Mother Parkers business line in Canada; he indicated that this business line will likely require staffing for an extended period of time. Mother Parkers has permanently hired some new employees already and will likely be hiring more in the next few months, although it will likely also continue to use Randstad to fill at least some of its staffing needs.

[25] The Appellant believes that he has made a good impression at Mother Parkers with his work performance thus far. He has been careful to comply with the strict rules regarding hygiene and vulgarity: some other temporary employees have been weeded out already. He can see himself doing this job for a while and thinks he will know by January of 2017 if Mother Parkers wants to keep him on a more permanent basis. He likes it there and thinks it has a better work atmosphere than his other jobs. While he thinks he has a good chance of becoming a Mother Parkers employee, he said that there would be other opportunities with Randstad if the Mother Parkers position does not work out. However, his contract with Randstad says that he must accept whatever assignment they give him. He says that he was given the Mother Parkers assignment because it was relatively light but he could just as easily be assigned to a heavy labour position through Randstad. He cannot be registered with more than one employment agency at a time.

[26] Dr. Fung is still the Appellant's family doctor. He sees Dr. Fung roughly once every 3-4 months; his last appointment was on May 30, 2016 and mostly dealt with his hernia condition. He thinks that Dr. Fung's prognosis for him has changed over time, noting (among other things) that the left thigh meralgia is also now present in the right leg. He also mentioned that Dr. Fung diagnosed him as being in the early stages of osteoarthritis. Other than the visits described

above with Dr. Bril and Dr. Mistry, he has not seen any other specialists since May 13, 2016. He said that he has complied with treatment recommendations, with the exception of Dr. Fung's prescription of Flomax: while it helped with his bladder, it also interfered with his existing prescription of Amitriptyline.

[27] At the hearing, the Appellant said that everything going wrong physically at present is from his lower back down to his feet. He does not actually feel any issues in his back: it is his legs that are getting weaker. He said that the irritation in his right thigh is a result of a slipped disc in his back that is pinching on a nerve. He feels that his physical conditions are not going to get any better. He reported feeling burning, spurring, burning and tingling in his legs, as well as a form of paralysis in the sides of his legs. He also said that he was discouraged and quite depressed, from both his physical and mental issues. His legs were sore when he went to the washroom near the end of the hearing.

[28] The Appellant believes that his condition has deteriorated since July of 2015, explaining that he worked hard before and is now dealing with a lot of consequential medical complications. He said that he does not have any administrative skills and he only knows how to stand on his feet and work hard.

SUBMISSIONS

[29] Both parties have made extensive submissions and responses to submissions over the years. While all such submissions and responses have been considered, the Tribunal is listing only the most current and relevant ones in this section. The Appellant submitted that he qualifies for a disability pension because:

a) Work aggravates his existing conditions and he is being bullied by the Respondent into returning to work: this may improve the situation for others but it does not help him;

b) Despite his physical and mental limitations, he has to keep working because both of his doctors say that he must do so;

c) In addition to his health concerns, his employment prospects are also limited by his skills, narrow experience, a lack of references, and his criminal record;

d) His recent employment history has been plagued by incidents of discrimination and harassment, which has led to multiple cases of constructive dismissal and in turn has affected his outlook on employment and his mental health;

e) Employers harass him about his disabilities and personal characteristics, blame him for the poor conduct of others, and seek reprisals against him when he questions their unfair practices against him; and

f) He cannot work part-time because there is no such work available for his age group.

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

a) The medical information on file does not suggest that his physical or mental health findings were of a severity to preclude him from working on or before October 2009 (or by a possible prorated date) and continuously thereafter;

b) There are several instances in the documentation suggests that he has been able to work after his MQP date of October 2009 (or after a possible prorated date) and he was working in September of 2016;

c) He reports various work issues but the capacity to perform part-time, modified or sedentary work may preclude a finding of disability as it is indicative of a capacity for work;

d) It is the capacity to work and not the diagnosis or the disease description that determines the severity of the disability under the CPP; and

e) The purpose of the CPP is to provide a pension where a disability forces a claimant to leave the workforce on a long-term basis and not to tide a claimant over a temporary period where a medical condition prevents him or her from working.

ANALYSIS

[31] As the Appellant had already appealed to the old Pension Appeals Board with respect to a prior MQP date of March 31, 2007, the Tribunal cannot find that a disability began on or before that date. The Appellant must therefore prove on a balance of probabilities that he has a severe and prolonged disability which commenced after March 31, 2007 but on or before October 31, 2009 and continued through the date of the hearing. Alternatively, pursuant to section 19 of the *Canada Pension Plan*, the Appellant must prove on a balance or probabilities that he has a severe and prolonged disability which commenced during the prorated period from January 1, 2015 to July 31, 2015 and continued through 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 disability onset period ending on October 31, 2009 can be dealt with rather quickly, as there is considerable evidence attesting to prolonged work capacity between 2010 and 2012. The Appellant worked at K.A.S. Personnel Service from September 4, 2010 until June 16, 2011 and quit due to harassment. His earnings during that time were significant. He then started receiving regular EI benefits on July 10, 2011 and continued receiving them until March 8, 2012. He was also self-employed from July of 2011 until October 12, 2011. Regular EI benefits generally required that a claimant be ready, willing and able to work. When combined with the other evidence, including his concurrent self-employment and his previous employment, the Tribunal has no difficulty finding that the Appellant was not severely disabled from at least September 4, 2010 until March 8, 2012. The Tribunal accordingly finds that a severe disability did not exist continuously from on or before October 31, 2009 through to the date of the hearing.

[34] However, this finding is not the end of the matter. The Appellant can also succeed in this appeal if he establishes that a severe disability commenced between January 1, 2015 and

July 30, 2015 and subsequently continued through to the date of the hearing. There is some medical evidence supportive of such an onset date, as Dr. Dolan indicated that the Appellant was unable to work indefinitely from May 8, 2015 onward. Although Dr. Dolan did not specify the illness, the Appellant said it was a mental health matter and there is no reason to doubt that based on the other evidence in the file. In addition, the Appellant had unsuccessful lower back physiotherapy in June and July of 2015 and did not work again until after his hernia operation in February of 2016. Particularly given the Appellant's history of mental health concerns, the Appellant could certainly argue that a severe disability began on May 8, 2015.

[35] The lack of subsequent mental health follow-up is of concern. There is no objective mental health documentation until more than a year later when Dr. Mistry prepared an EI form on May 13, 2016. However, the Appellant's subsequent employment activities are sufficient in and of themselves to prevent a finding of severity.

[36] The Appellant started working for Phoenix Quality Inspections in March of 2016 but quit after only one-and-a-half weeks for non-medical reasons. He then worked with Labour Ready from March 28, 2016 until quitting on April 29, 2016, again for reasons that were essentially non-medical. He had previously hoped that this would lead to a steady full-time job at Grace Canada. Dr. Mistry indicated on May 13, 2016 that the Appellant was incapable of working until August 31, 2016. However, the Appellant seems to have started working again almost immediately after May 13, 2016, as he worked for 541 hours over 3.5 months through Adecco prior to commencing employment through Randstad at the end of August. He quit the Adecco job because of harassment. The Appellant has been employed full-time at Mother Parkers through Randstad ever since. The Appellant has therefore been employed almost continuously since March of 2016, notwithstanding that Dr. Mistry found him incapable from May 13, 2016 to August 31, 2016. It is noted that he was unable to continue with a more physical job that he attempted on May 2, 2016.

[37] Dr. Mistry's May 13, 2016 opinion is given relatively little ongoing weight: it can only be interpreted as a short-term finding, as he also told the Appellant in the summer of 2016 that "you've got to keep working". The Appellant said that Dr. Mistry "always" tells him that. The Appellant also said that he was referred to physiotherapy in 2015 because both Dr. Fung and

Dr. Mistry say that he has to go to work and move around. Thus, it appears that the Appellant's two main treating physicians support the Appellant being at work. There was also no neurological impediment to working on May 16, 2016, based on the comments of Dr. Bril.

[38] The Appellant has given extensive evidence over the years about the reasons that prevent him from working. It does appear that the Appellant has had the misfortune to endure upsetting incidents of discrimination and harassment in multiple workplaces. However, it also appears that he is fully capable of working in a supportive work environment such as Mother Parkers. This is a full-time position involving a very heavy workload of 52 hours per week on the nightshift. Despite this heavy workload, the Appellant has done well so far and has been careful to comply with the strict workplace rules: in fact, these rules appear to be welcomed by him. Although at one point he expressed some concern that the hernias will get bigger if he continued to work, this job appears to be relatively light and he can see himself doing this job for a while. He thinks it has a better work atmosphere than his other jobs. He also said that there would be other opportunities with Randstad if the Mother Parkers position does not work out. His main concern is that the Mother Parkers assignment is relatively light but his next Randstad assignment could be a heavy labour position.

[39] Given that the Appellant is currently working 52 hours per week, appears to be succeeding, and wishes to continue his current job indefinitely, the Tribunal finds that the Appellant has not established a severe disability that continued through the date of the hearing. This finding is also supported by the opinions of his caregivers, who currently affirm that he should be working although they have supported his claim medically from time to time in the past. He may no longer be suited for very heavy physical work but the evidence discloses that he is capable of lighter work such as the Mother Parkers position, particularly when the work environment is a supportive one.

[40] The Appellant has recounted numerous incidents of discrimination and harassment in the workplace. However, the Tribunal's jurisdiction does not extend to making findings on these issues. The Tribunal also notes that the Pension Appeals Board's 1998 decision (*Stubb* v. *Minister of Human Resources Development*, CP 4734) concerned a worker who had epilepsy and who implied that he would have been working if employers did not discriminate against

epileptics. The Board stated that such discrimination may well exist but it was not covered by the *Canada Pension Plan*: the Board could only consider whether the claimant had the capacity to regularly perform any substantially gainful employment. While Pension Appeals Board decisions are only of persuasive value for Tribunal matters, the *Stubb* decision does emphasize that the focus in CPP matters must be on the claimant's work capacity and not external factors such as discriminatory attitudes in the workplace. Similarly, socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD)* v. *Rice*, 2002 FCA 47).

[41] The *Rice* decision also addresses the Appellant's submission concerning the apparent lack of part-time work. While the Tribunal has carefully considered the Appellant's other submissions, it finds that they are all addressed by the above analysis and the Appellant's desire to continue working indefinitely at his current job. The Tribunal therefore affirms that the Appellant has not established a severe disability in accordance with the *Canada Pension Plan*.

Prolonged

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

CONCLUSION

[43] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security