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

Citation: *G. E. v. Minister of Employment and Social Development*, 2016 SSTGDIS 96

Tribunal File Number: GP-15-2356

BETWEEN:

G. E.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Virginia Saunders

HEARD ON: October 27, 2016

DATE OF DECISION: November 24, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

G. E.	Appellant
Ilena Candiani	Appellant's Representative
S. S.	Witness

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on June 24, 2014. 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 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.

[3] At the beginning of the hearing, the Tribunal briefly reviewed the contents of the appeal file with the Appellant's representative, who confirmed that she had the complete file.

THE LAW

[4] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[5] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[6] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2013. 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

[8] The Appellant's Record of Earnings revealed that he made valid contributions to the CPP in every year since he turned 18 except 1994, 2009, 2010 and after 2013 (GD2-34).

[9] In his application for disability benefits the Appellant stated that he stopped working as a labourer on November 4, 2013, because of back pain. He stated that he was no longer able to work as of that date because he cannot bend; nor can he sit or stand for more than a few minutes. He listed other functional limitations with lifting, carrying, reaching, walking, driving, and sleeping; as well as difficulty with personal needs and household maintenance. He indicated that he was not taking any medication (GD2-76-82).

Appellant's Testimony

[10] The Appellant was born in 1976 in Alberta. He moved to B.C. as a child, and he currently lives in X with his wife and children.

[11] The Appellant left school during Grade 10, after being expelled for skipping. He began working in jobs that involved intensive physical labour including bending and heavy lifting. He worked fairly consistently after leaving school. From approximately 1998 to 2007 he worked at a manufacturing plant in X, B.C. About ten years ago he tried to get his GED so that he could train to be an electrician, but he decided that working was easier so he did not complete his courses.

[12] The Appellant had developed a drinking problem which caused issues in his marriage. Because of these he moved to Alberta in 2008 and lived with his mother for about three years to get his drinking under control. He did not work while he recovered. He returned to B.C. and to the workforce in 2011, and once again began doing a variety of physical jobs.

[13] As the years passed the Appellant began to have back pain and stiffness while performing his job duties. These increased as the day went on, but usually subsided by the next day. If necessary he would take a week off, or find a different job. He did not seek medical help for this, except to occasionally go to a walk-in clinic for analgesics or muscle-relaxants.

[14] On November 4, 2013, the Appellant was working as a pipe layer's helper, a job he had started the previous July. On that day, he felt pain and stiffness in his back much earlier in the day than usual. The pain increased quickly, and he called his wife at lunchtime to ask if she thought he should go home. He decided to complete the day but by 3 p.m. he could hardly stand. At 5:30 when his shift ended he had to be helped to his car to go home. When he got home he was in so much pain that he was crying, and had difficulty getting into the house.

[15] November 4, 2013, was the Appellant's last day of work at any job. He has been in pain ever since.

[16] The Appellant went to a walk-in clinic, and he was told that he should find a regular family doctor. He began to see Dr. J. Tolmie, who told him that he thought he had degenerative disc disease, and that he would not be able to continue working as a labourer. He asked if the Appellant could do lighter duties such as computer work, but the Appellant told him that he is not computer-literate and is unable to sit for more than a few minutes.

[17] Dr. Tolmie referred the Appellant to a neurosurgeon, Dr. Gul. Dr. Gul ordered an MRI after which he told the Appellant that he did not have a pinched nerve, that his pain was muscular, and that there was nothing he could do for that. He suggested physiotherapy. The Appellant does not feel that his pain is muscular, as he feels a burning pain in one spot like a knuckle is being pressed there. He has not been to see any other specialists.

[18] At first the Appellant saw Dr. Tolmie about once every three weeks to a month. If he had to sit and wait for the appointment for even ten minutes, he found his pain excruciating. Dr. Tolmie prescribed Gabapentin and then amitriptyline.

[19] The Appellant gave uncertain testimony as to when he stopped and started taking these medications. He eventually recalled that Dr. Tolmie gave him a three month prescription of Gabapentin, which he took four times a day for a few months. He found this made him anxious and unable to sleep, and dulled his pain but did not increase his mobility.

[20] The Appellant returned to Dr. Tolmie and was given a prescription for amitriptyline. This helped him sleep but made him feel sick and unmotivated the next day and did not improve his pain during the day.

[21] Sometime in 2015 the Appellant stopped the amitriptyline and began taking Gabapentin again because he had some left over from when it was first prescribed. He then developed chest pains, rapid heartbeat and shortness of breath which caused him to go to the hospital on two different occasions, about six months apart. He was told that he was not having a heart attack, but when he returned home he looked up his symptoms on the internet and learned that they may have been caused by Gabapentin, so he stopped taking it and all other pills.

[22] The Appellant initially thought that he told Dr. Tolmie that he had stopped taking amitriptyline. Later in the hearing he clarified that he probably told Dr. Tolmie that he had stopped Gabapentin the first time. He did not think Dr. Tolmie knew that he was no longer taking amitriptyline, although the Appellant has stopped asking to have the prescription refilled. He recalled that Dr. Tolmie told him it was not wise to take Tylenol every day, so he does not take it at all, nor does he take Advil or any other type of painkiller. He has not talked to Dr. Tolmie about medication since he stopped taking amitriptyline. When he sees him now

he discusses what is new with his pain. In the past year he has developed a sharp pain upon sitting and standing.

[23] The Appellant has not thought about going back to work, because he is unable to do anything at home such as sit still through a family dinner, sweep the floor or do the dishes. He needs a cane to get up out of a chair. He manages throughout the day by moving slowly and taking hot baths. He bought a mini-van which is easier than a car to get in and out of. Because he has such difficulty dressing, he sleeps in his clothes and changes them only two or three times a week. He showers only twice a week because he is afraid of falling in the shower.

[24] The Appellant tries to walk, as Dr. Tolmie has recommended, but he can only manage three blocks before he is in too much pain and his legs begin to shake. The only relief he gets from his pain is if he lies down on the couch. As soon as he sits or stands up the pain comes back, and it increases with each activity. Twenty minutes of being upright causes such pain that he has to lie down for an hour or two in order for the pain to subside.

Witness Testimony

[25] S. S. is the Appellant's wife. She recalled the Appellant's last day of work, when he called home and then decided to push through to the end of the day. When he came home after work he could not move, and he barely left the couch for a couple of days. After three or four days they went to the walk-in-clinic and then found Dr. Tolmie.

[26] From Ms. S. S.'s perspective, the Appellant cannot do anything since he stopped working. He cannot lift a jug of milk or help with housework except to do dishes for a few minutes. He cannot tie his shoes. When grocery shopping he uses the cart for support and walks around with her while she loads the cart. He cannot stand in line. His legs shake when he is on the stairs. He spends the day lying on the couch, getting up to use the bathroom or to have a cigarette. If he pushes himself at all, he is in a lot of pain. He sleeps on the couch because he cannot get in and out of his bed.

[27] Ms. S. S. recalled that the Appellant's medications caused anxiety, mood changes and insomnia; and then heart flutters which led to two trips to the hospital. The only other thing that

has been suggested to him is physiotherapy, but they cannot afford it. The Appellant would be willing to try anything if he could afford it.

Evidence in the Hearing File

[28] In a medical report dated June 25, 2014, Dr. J. Tolmie stated that he had known the Appellant since November 7, 2013. The Appellant was diagnosed with severe degenerative disc disease of the lumbar spine, with retrolisthesis and very limited range of motion. He had seen a neurosurgeon and was not a surgical candidate. Treatment included medication (Zytrim [*sic*; possibly Zytram or tramadol], Flexeril, and Toradol) and physiotherapy. Dr. Tolmie stated that the Appellant's prognosis was poor, as he would have chronic pain and was not able to work "at this stage" (GD2-70-73).

[29] Dr. Tolmie's clinic notes from November 2013 to November 2014 indicated that he first saw the Appellant for back pain on November 7, 2013. He was prescribed Zytrim [see above], Flexeril and Toradol. The Appellant testified that he does not remember taking any of these, and he doubted that his wife would have agreed to opioid use because of his previous difficulties with alcohol. Dr. Tolmie's notes indicated that he sent the Appellant for x-rays which revealed degenerative disc disease. A CT scan showed nerve root compression of L5 caused by a disc bulge, and posterior listhesis of L5-S1. The Appellant was referred to the Rapid Access Spinal Clinic at Lions Gate Hospital

[30] The clinic notes indicated that the Appellant saw Dr. Tolmie frequently; complaining of pain and tenderness and exhibiting reduced range of motion. He was told to continue on medication. In May 2014 Dr. Tolmie advised him to talk to his union to talk about possibly retraining for sedentary work. He noted in June that "this guy really has a stiff back" and he thought he would qualify for disability "in the meantime". He agreed with the Appellant's hope that he might in future be able to do more sedentary work

[31] Reports from Dr. S. Gul, neurosurgeon, indicated that he saw the Appellant in April and June 2014. Dr. Gul noted the Appellant's five year history of lower back pain, worse when getting up after prolonged sitting and with increasing physical demands. Pain had been particularly bad since November 2013. The Appellant was not on any regular prescription

medications. An MRI study of the lumbar spine in May 2014 demonstrated disk desiccation with small posterior annular tears, but no suggestion of nerve root impingement. Dr. Gul concluded that the Appellant's back pain was mechanical and muscular, and so there was no cause for surgical intervention. He suggested conservative therapy such as physiotherapy (GD2-61-65).

[32] Dr. Tolmie noted on September 24, 2014, that the neurosurgeon did not feel there was anything he could do for the Appellant because he did not have any nerve root impingement. He stated that the Appellant "does have spondylosis in a severe degree in his lumbar spine. Even while he is sitting here in the office he has severe pain." He started the Appellant on 300 mg of Neurontin (Gabapentin) once a day, to be increased to twice a day after four days.

[33] On October 9, 2014, the Appellant reported some improvement on Neurontin, from 6/10 down to 3/10. The Neurontin was increased to 300 mg three times day, and after a week the Appellant was to take 600 mg at bedtime. The Appellant was given a refill of Neurontin on November 3, 2014; and Dr. Tolmie noted that he was seen on the weekend with chest pain (GD2-49-54).

[34] On October 30, 2014, the Appellant told the Respondent's medical adjudicator that he had been told that surgery was not an option for him, and that medication and physiotherapy were recommended. He had started taking Gabapentin about a month earlier, and found only a short-term benefit. His doctor was going to increase the dose. He felt that because his pain was unpredictable he would not be able to commit to training. His pain affected his sitting, standing, bending and driving, and he only felt fine if he was lying down. He was concerned about his future (GD2-39).

[35] In a letter dated September 10, 2015, Dr. Tolmie stated that the Appellant had severe mechanical back pain. As surgery would not help him, he was being treated with analgesics. Dr. Tolmie stated that in spite of ongoing use of medication the Appellant had chronic pain preventing him from sitting, standing, or lying down for more than five minutes; or from working for more than 15 minutes. The Appellant had reduced range of motion of his back; limited ability to flex or bend forward; bend backwards; or rotate from side to side. He felt it

would be impossible for the Appellant to do any kind of work, and that he became disabled in November 2013.

SUBMISSIONS

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

a) he has severe back pain that limits his abilities and requires him to spend most of the day in a reclined position;

b) objective findings support his claims of pain;

c) he has been diligent in seeking medical treatment, with no resolution of his pain; and

d) there is no work available in the real world for a person in this situation.

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

a) while he may have been unable to perform physical work due to his condition, he was capable of performing or retraining for work suited to his limitations;

b) there is no indication that he attempted alternate work suited to his limitations; and

c) his Appellant's treatment does not support a finding that he was disabled at his MQP.

ANALYSIS

[38] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013.

Severe

[39] 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.

[40] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[41] Applicants for a disability pension must show that they have made efforts to improve their situation. They must submit to reasonable treatment recommendations and follow appropriate medical advice (*Lombardo v. MHRD*, 2001 CP 12731 (PAB). 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).

[42] The Tribunal accepts the testimony of the Appellant and his wife as to the extent of his pain and his limitations. Objective findings indicate that he has degenerative disc disease. While another person might be more functional with similar findings, it is the Appellant's personal experience that must be considered by the Tribunal in determining whether or not he is disabled.

[43] The Tribunal is not persuaded that Dr. Tolmie ever stated definitively that the Appellant was capable of sedentary work. When read in context these statements indicate that Dr. Tolmie felt the Appellant might be capable if he found some resolution to his back pain, and suggested that he ought to consider that possibility because he was certainly not going to be able to return to his previous line of work.

[44] At the same time, the Tribunal is not persuaded by Dr. Tolmie's statement in September 2015 that the Appellant was incapable of any type of work. That opinion was based in part on the fact that ongoing use of medication was not controlling the Appellant's pain. The difficulty here is that the Appellant was not taking medication as prescribed. According to his clinic notes and the June 2014 medical report, Dr. Tolmie believed that the Appellant had been taking analgesics and muscle-relaxants from November 2013 until he was prescribed Neurontin in late September of the following year. The Appellant did not remember taking these medications and in fact stated in his disability application in June 2014 that he was not taking anything. He

testified at the hearing that while he tried amitriptyline and Gabapentin after that date, he stopped taking all medication sometime in 2015 after reading something on the internet and without advising Dr. Tolmie. According to the Appellant's evidence this would have been before Dr. Tolmie wrote his report in September 2015.

[45] The Tribunal accepts that the Appellant experienced unpleasant side-effects from Gabapentin and amitriptyline. However, there is no evidence that he reported these to Dr. Tolmie. There is no evidence that he told Dr. Tolmie that he was not taking the suggested medications before Gabapentin was prescribed; nor is there any evidence as to why he did not take them. Had Dr. Tolmie been aware of the true situation, he might have prescribed something different or given advice as to how to minimize side effects.

[46] It is possible that such adjustments would not have made any difference; however, it is equally possible that they would have at least to the extent that the Appellant could have attempted lighter work. The onus is on the Appellant to prove his case on a balance of probabilities, not leave it to the Tribunal to speculate in his favour.

[47] The Tribunal cannot conclude that the Appellant was disabled on or before December 31, 2013. While he may have been incapable of working at that particular time, his failure to follow appropriate medical advice in an effort to control his pain means that he has not proven that he was incapable regularly, or that his condition was likely to be long-continued and of indefinite duration or was likely to result in death. His condition was therefore neither severe nor prolonged as those terms are defined in the CPP.

CONCLUSION

[48] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security