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

Citation: *T. P. v Minister of Employment and Social Development*, 2016 SSTGDIS 110

Tribunal File Number: GP-15-987

BETWEEN:

T. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Connie Dyck

HEARD ON: November 23, 2016

DATE OF DECISION: December 22, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, T. P.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 30, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Appellant was 39 years old at the time of his MQP and in the Questionnaire included with his CPP disability application dated April 30, 2014, he indicated that he had completed grade 9. He noted that he last worked as a cleaner/supervisor in 2008 for X and that he had stopped working because of a work related injury. He listed the illnesses or impairments preventing him from working to include a spinal fusion on the left side of his neck. As a result of his condition, he was prevented from working because he could do no heavy lifting, reaching over his head and no circular movements. Medications included Ventolin and Flovent. (GD 2-305 – GD 2-311)

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

a) The Appellant will be the only party attending the hearing.

b) Videoconferencing is not available within a reasonable distance of the area where the Appellant lives

c) The issues under appeal are not complex.

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

e) Credibility is not a prevailing issue.

f) 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 December 31, 2005. Section 19 of the CPP provides that when an appellant's earnings and contributions are below the year's basic exemption for that 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, 2006 to October 31, 2006.

[8] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

EVIDENCE

[9] In a Work Conditioning Report dated July 14, 2004, Sandra Messenger, physiotherapist, noted that the Appellant had completed two weeks of work conditioning and had progressed very well with very little pain and was ready to return to full-time work at X the following week. The Report also stated that the Appellant did not have any pain in the left wrist at the start or when the lifting portion of his evaluation was completed. The Appellant noted some pain during the high lift but this quickly subsided. All values were now ranked above the 50th percentile except the overhead lift which remained at the 25th. It was noted that the Appellant also demonstrated good body mechanics. (GD 2-85 – GD 2-86)

[10] In an initial assessment for physiotherapy dated August 11, 2004, it was noted that the Appellant re-injured his left wrist and felt immediate pain shooting up to his left shoulder. It was noted that the pain from his previous injury had gone away until this re-injury. (GD 2-88) In a report dated September 13, 2004, it was noted that the Appellant had decided to stop physiotherapy treatment on his own, although this was not recommended by his doctor or a physiotherapist. (GD 2-90)

[11] In a Rehabilitation Assessment dated September 14, 2004, Dr. Seetharamdoo provided a brief history of the Appellant's condition noting that the Appellant reported that he initially injured his left hand and wrist in April 2004 while working as a labourer at a recycling/bottle depot. Apparently while pulling cardboard from a machine he experienced immediate pain along the top of his left wrist. He received physiotherapy treatment until he attempted a return to work in July when during the first week at work he re-aggravated with injury while opening a tractor-trailer door. The Appellant's chief complaint was of left wrist pain which is worse when he has to use his left hand for lifting even a small object. The assessment revealed that the Appellant demonstrated weighted abilities within the medium range as described by the Dictionary of Occupational Titles. (GD 2-91 – GD 2-95)

[12] A Work Conditioning Program progress report dated November 24, 2004 noted that the Appellant's functional abilities improved in all areas tested and he continued to report no significant difficulty with his sitting, standing or walking abilities. (GD 2-101) In an Occupational Psychologist report dated January 18, 2005, it was noted that with treatment, the

Appellant's pain level had decreased and there was considerable improved noted on the Pain Disability Index. The Appellant's depressive symptoms decreased to a 50th percentile score in the final assessment. It was noted that the Appellant continued to have difficulty with fear of pain, rather than the pain itself. However, when the time came for the Appellant to begin a job search, he was very enthusiastic and found employment working night shift in the cleaning industry. (GD 2-105 – GD 2-106)

[13] In a report dated January 20, 2005, Dr. David Johnston, orthopedic surgeon, stated that he could find no obvious musculoskeletal problem with the Appellant and he reassured him that he could find no surgical problem with his wrist or arm. Dr. Johnston recommended that the Appellant refrain from using the splint and attempt to return to his full activities. He reassured the Appellant that this problem should resolve over the near future. (GD 2-108 – GD 2-109)

[14] In a report dated May 31, 2005, Dr. Robert Mahar, physical medicine and rehabilitation, stated that the MRI of the Appellant's wrist was normal and he could identify no particular structure which he would inject with corticosteroid. Dr. Mahar hoped that the Appellant could be given the opportunity to gradually increase his hours in the workplace. He could not identify any treatment for the Appellant's condition as in most cases, it resolves spontaneously without any intervention. (GD 2-116)

[15] In a Functional Assessment report dated November 16, 2005, it was concluded that the Appellant's workday tolerance was 8 hours, based upon his demonstrated tolerance for sitting, standing and walking. This was contingent upon the job requirements not exceeding the functional limitations of the Appellant. His material handling abilities fell within the medium to heavy range as described by the National Occupational Classification system. The Appellant demonstrated and reported no difficulty with sitting, standing or walking. He did demonstrate upper extremity tolerance which was extrapolated to a 6 hour total workday tolerance for the left upper extremity in 45 minute durations. (GD 2-118 – GD 2-120)

[16] In a Discharge Summary Report from Capital Health dated February 5, 2010, it was reported that the Appellant was admitted to Halifax Infirmary on February 4, 2010 for a left cervical radiculopathy. On February 4, 2010 an operation involving C5-C6 anterior cervical discectomy and fusion was performed. Dr. Sean Christie, neurosurgeon, further noted that on the

day following the surgery, the Appellant was reporting improvement in his left arm pain, although he had some neck pain that resolved with narcotics. The Appellant was independent in his mobilization and was using the bathroom freely prior to his discharge. An x-ray was performed and revealed good alignment of the hardware. (GD 2-38 – GD 2-39)

[17] In a clinic note dated August 6, 2010, Dr. Sean Christie stated that the Appellant was doing quite well and had no pain in his arm and only minimal pain in his neck. The Appellant's range of motion of his neck was good considering his surgery and the Appellant was happy with the outcome. It was noted that the Appellant still had some residual numbness in his hands, but it was Dr. Christie's opinion that all in all, there had been some positive improvement. (GD 2-142)

[18] In a subsequent examination of the Appellant on March 4, 2011, Dr. Christie reported that the Appellant did have some intermittent neck pain and particularly noticed changes in the weather. Dr. Christie noted that this was a pretty standard complaint. It was reported that the Appellant's arm pain was better and his function was improving well. The Appellant did increase his activity, which set him back a little bit but Dr. Christie was of the opinion that the Appellant was rebounding from that. The x-rays were satisfactory and there was good healing across the surgical site. Dr. Christie did not see any need for the Appellant to come back to clinic again unless there was a problem in the future. (GD 2-145)

[19] In a Physiotherapy Progress Report dated June 14, 2013, Heather Richard, registered physiotherapist stated subsequent to 17 treatments, that the Appellant had work capabilities for medium to heavy work. (GD 2-43). In a subsequent report dated June 28, 2013, Ms. Richard stated that the Appellant had work capabilities for heavy to very heavy work. (GD 2-45)

[20] A Functional Capacity Evaluation dated July 3, 2013 revealed that based on the Appellant's demonstrated abilities he was capable of 8 hours of Medium to Heavy level work. Any work pursued should have minor above shoulder level reaching with the left arm and a maximum of occasional level requirements for left fine and simple handling. (GD 2-147 – GD 2-165)

[21] A Functional Capacity Evaluation dated January 27, 2014 provided a brief work history of the Appellant which noted that the Appellant attempted a return to work in July 2004

following his injury, but stated that he reinjured himself. He did not return to Fader's after that time. In 2008, the Appellant worked as a cleaning supervisor for about two years in Bedford before he was forced to discontinue due to escalating neck and arm pain. He did a short-term training in cleaning in 2012, but found that he was operating equipment using mainly his right arm. He found mopping exacerbated his neck and arm pain. The evaluation concluded that the Appellant demonstrated physical abilities consistent with medium level weighted activities. (GD 2-166 – GD 2-187)

[22] The Appellant stated that he had a carpal tunnel injury in 2004. His wrist was still painful, but he attempted to return to work. He stated that his wrist continued to be hurt until he had a specialist appointment. He explained that he continued to have pain even after seeing the specialist. He advised the Tribunal that he found a new family physician in X in Halifax, Dr. Robin in approximately 2005.

[23] The Appellant stated that he had surgery in 2010. He explained that when he had the first injury he was told he was okay and was sent back to the workplace. He stated that after the surgery the bad pain is gone, but the pain he has now is that his arm hurts whenever he uses it. He stated that it feels like his has a knot on the back of his neck.

[24] The Appellant stated that he was forced to go to work by Social Services and went to work full-time from 2006 to 2008 at X. He stated that he was the supervisor/cleaner at X and his duties included such things as cleaning out garbage cans, sweeping, mopping, etc. He stated that he was working full-time, but he told his employers that he had an injury and had left arm pain. He stated that he had to quit in 2008 because his pain was too much.

[25] The Appellant stated that he had to deal with Social Services and was forced to go to upgrading training. He stated that he completed a computer course in 2011. He stated that this was right after he had surgery, so it was difficult. The Appellant stated that he cannot type with his left hand. He stated that he needs to alternate between sitting and standing.

[26] The Appellant explained that after his surgery, the pain in his arm and the numbness was gone, but he had no strength in his left arm and it was in pain when he used it. He advised

the Tribunal that he could no longer do any work because he could only use one arm, could not sit or stand for long.

SUBMISSIONS

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

a) He cannot stand or sit for a long period of time and his arm has limited usage;

b) Any activity gives him pain; and

c) WCB has given him long-term disability which proves that there is no work due to the limitation and severity of pain that he goes through.

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

a) The medical evidence strongly supports that the Appellant had capacity to work at his MQP and the possible prorated MQP and for several years after; and

b) The CPP's legislative requirements for "severe and prolonged" have not been satisfied.

ANALYSIS

[29] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2005. Section 19 of the CPP provides that when an appellant's earnings and contributions are below the year's basic exemption for that 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, 2006 to October 31, 2006.

Severe

[30] 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. The evidence shows that the Appellant was 39 years old at the time of his MQP, is proficient in English and has past work and life experience. The Tribunal considered that the Appellant's level of education was a grade 9, however the Appellant had some upgrading and had successfully completed a computer course in 2011.

[31] Not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[32] The evidence shows that the Appellant had a workplace injury in April 2004 and that he injured his left wrist and hand. In August 2004, he re-injured his left wrist and felt pain up his arm to his shoulder. While there is no doubt that the Appellant sustained an injury, it is not sufficient for chronic pain to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation.

[33] It is the Appellant's capacity to work and not the diagnosis of his condition that determines the severity of the disability under the CPP. An Applicant must adduce before the Tribunal not only the medical evidence in support of the claim that their disability is "severe" and "prolonged", but also evidence of efforts to obtain work and to manage their medical condition. *Klabouch v. Canada (MSD),* [2008] FCA 33

[34] The Tribunal considered the medical evidence and numerous evaluations and assessments which were conducted. In September 2004, a Rehabilitation Assessment determined that despite the Appellant complaint of pain in his non-dominant wrist, he demonstrated weighted abilities within the medium range. In November 2004, a Work Condition report noted that the Appellant's functional abilities had improved in all areas tested and the Appellant reported no significant difficulty with sitting, standing or walking. In January 2005, an orthopedic surgeon found no obvious musculoskeletal problem and recommended that the Appellant return to his full activities. In November 2005, a Functional Assessment found the Appellant material handling abilities fell within the medium to heavy range. The medical evidence does not support

that the Appellant had a severe disability as defined in the legislation. The Tribunal finds that the medical evidence supports that the Appellant has limitations, particularly with overhead reaching, but that he retained the capacity to work and in fact was encouraged to return to work and resume activities.

[35] This is further corroborated by the report of Dr. Mahar in May 2005 which noted the Appellant should be given the opportunity gradually increase his hours in the workplace and by a Functional Assessment in November 2005 which concluded the Appellant's workday tolerance was 8 hours and 6 for the left upper extremity. The Tribunal finds that the evidence does not support that the Appellant's disability was severe as defined in the legislation and would render him incapable regularly of pursuing any substantially gainful occupation.

[36] 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). In this case, the Appellant was able to work full-time from 2006 to 2008, well past his MQP as a cleaner/supervisor. While the Appellant submitted that he was no longer able to work as of 2008 due to the pain in his wrist and arm, this was well past his MQP. Further, in February 2010, the Appellant had a left cervical radiculopathy which improved the pain in his arm and neck as well as the range of motion in his neck and his function ability. A FCE in July 2013 again showed the Appellant was capable of 8 hours of medium to heavy level work.

[37] The Appellant has submitted that the acceptance of the WCB of his disability is evidence that he is disabled. While the Appellant may meet the criteria of the WCB, the Tribunal is bound by the CPP legislation, and its definition of disability.

[38] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal is not satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria at the time of his MQP or his prorated MQP date.

Prolonged

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

CONCLUSION

[40] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security