



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. A. v. Minister of Employment and Social Development*, 2017 SSTGDIS 100

Tribunal File Number: GP-16-2066

BETWEEN:

J. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Anne S. Clark

DATE OF DECISION: July 25, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on September 21, 2015. The Appellant claimed that he was disabled because he had surgery for bladder cancer and ongoing symptoms make him unable to work. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Appellant's contributions to the CPP. Based on his contributions to the CPP the end of the Appellant's MQP would be December 31, 2018. However, in October 2014 the Appellant began receiving CPP retirement benefits. Therefore, the Appellant must be found to be disabled before his retirement pension became payable, specifically on or before September 30, 2014.

[3] In his letter of appeal the Appellant requested that he be contacted by telephone before the Tribunal made a decision on his appeal (GD1). In his Notice of Readiness he confirmed that he had no further documents to file (GD3). A hearing was not required and the appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The issues under appeal are not complex.
- b) There are no gaps in the information in the file or need for clarification.
- c) Credibility is not a prevailing issue.
- d) 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.

[4] The Appellant is not eligible for a CPP disability pension for the reasons set out below.

EVIDENCE

[5] The Appellant's CPP retirement pension became payable in October 2014. The employer's report (GD2-101) confirmed that he worked as a truck driver from June 7, 2010 until July 5, 2015. His attendance at work was satisfactory and he required no special equipment or help from others to meet his job expectations. His medical condition did not affect his ability to do his job in the opinion of his employer. He missed time from work for medical appointments and was laid off in July 2015 due to illness.

[6] In his letter (GD1A) the Appellant explained that he started having some health issues in the winter of 2015. Medical testing showed that he had bladder cancer and he had surgery on July 31, 2015 to remove his bladder. He will have chemotherapy for two years following his surgery which affects his energy levels. He applied for CPP disability benefits in September 2015 and believed he would be eligible for benefits because he became disabled within 15 months after his retirement pension began.

[7] In the questionnaire he filed with his application for benefits ((GD2-48) the Appellant confirmed that he could no longer work as of July 31, 2015. The Appellant's Statement of Earnings and Contributions (GD2-31) confirm that he had earnings in 2015 of approximately \$29,000.00.

[8] Medical evidence on file confirms that the Appellant has a history of lymphoma which was in remission (GD2-68). In 2014 follow up testing identified a spot on his appendix. He reported slightly decreased energy and urinary urgency. He elected to have surgery to remove the appendix (GD2-80). Testing confirmed cancer in his appendix that was totally asymptomatic and with a low risk of recurrence (GD2-77). There was no need for further treatment.

[9] Follow up testing in March 2015 (GD2-73) showed no evidence of lymphoma or metastatic disease. In May 2015 testing identified a tumor in the Appellant's bladder and he required surgery in July 2015 to remove his bladder and create an ileal conduit (GD2-65).

[10] The Appellant's Family Physician Dr. Elizabeth Phillips reported in September 2015 (GD2-55). She confirmed that the Appellant had bladder cancer since 2015; cancer of the appendix in 2014; and a history of Non-Hodgkin's lymphoma. Dr. Phillips reported the

prognosis for recovery as good but also noted the Appellant was left with an ileal conduit. Her opinion was that managing the conduit and his other conditions made him unable to work.

SUBMISSIONS

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

- a) he became unable to work after having surgery for bladder cancer in July 2015; and
- b) his disability began within 15 months of the month when his retirement benefits began.

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

- a) the evidence does not show that he was disabled before he began receiving retirement benefits; and
- b) he continued to work after his retirement pension began.

ANALYSIS

Test for a Disability Pension

[13] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that he was disabled as defined in the CPP before October 2014 when his retirement pension became payable.

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

- a) be under 65 years of age;
- b) not be in receipt of a CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the MQP.

[15] 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.

Minimum Qualifying Period

[16] The Appellant's contributions would have established his MQP as ending on December 31, 2018. However, he would only be eligible for disability benefits if he became disabled before his retirement pension became payable.

[17] Section 66.1 of the CPP sets out the rules for when a retirement pension can be cancelled in favour of a disability pension. Specifically, a person can cancel a retirement pension in favour of a disability pension only if the person is deemed to be disabled before the month the retirement pension became payable.

[18] The Appellant began receiving a retirement pension in October 2014. In order to cancel his retirement pension, the Appellant would have to be deemed disabled in September 2014 or earlier.

[19] The Appellant misunderstood the rules related to retroactivity of disability benefits. Under paragraph 42(2)(b) of the CPP, the earliest a person can be deemed to be disabled is 15 months before the date of the disability benefit application. This does not mean that a person can be eligible if found disabled at any time during the 15 month period. This section establishes a limit on the amount of retroactive benefits a person may receive if the person is found to have a disability under the CPP. It does not alter the requirement that the Appellant must be found disabled before his retirement pension became payable.

[20] Section 66.1 of the CPP requires the Appellant's deemed date of disability to be before his retirement pension became payable. Paragraph 42(2)(b) does not alter the requirements under section 66.1 which clearly establishes that a person may not cancel a retirement pension in favour of a disability benefit if the person is deemed to have become disabled in or after the month for which the retirement pension first became payable.

[21] In summary, in order to find that the Appellant is eligible to cancel his retirement pension in favour of a disability pension I must find it is more likely than not that he was disabled as defined by the CPP before October 2014 when his retirement pension first became payable.

Severe

[22] The Appellant has a history of Non-Hodgkin's lymphoma that is in remission. He had surgery for cancer of the appendix that was totally asymptomatic and, in July 2015 had surgery for bladder cancer. He worked until June 2015 with no special assistance or accommodation for his health condition. He receives a retirement pension under the CPP that became payable in October 2014.

[23] 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. (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). Being diagnosed with serious conditions does not necessarily also mean that the Appellant was disabled under the CPP. The evidence must show, on a balance of probabilities that his conditions made him incapable regularly of pursuing any substantially gainful occupation. The information on file including the Appellant's submissions do not support a finding that he was disabled as defined by the CPP before June 2015 when he stopped working.

[24] 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). The evidence shows that the Appellant had several conditions that required treatment and are likely described as serious. Taking them all into consideration I am still not reasonably satisfied that the combination of his conditions made him disabled before October 2014. His Non-Hodgkin's lymphoma was in remission and he had no symptoms from the cancer in his appendix. The evidence is that the Appellant continued to be able to work until June 2015.

[25] Section 68.1 of the CPP *Regulations* states that "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The Appellant's earnings in 2015 were approximately \$29,000 and were substantially gainful. The fact that the

Appellant was able to earn substantially gainful earnings after his retirement pension became payable is only one factor I considered. I also considered all of the medical and employment evidence and submissions including the fact that the Appellant reported that he became unable to work in July 2015 after developing symptoms in the winter of 2015; his employer reported him to be able to do his job without special assistance until July 2015; and, the medical evidence identifies conditions that were in remission or asymptomatic in and before March 2015.

[26] The Tribunal is created by legislation and, as such, it only has the powers granted to it by its governing statute. Therefore, I am required to interpret and apply the provisions as they are set out in the CPP. I cannot consider extenuating circumstances to disregard the mandatory requirements under the CPP.

[27] The evidence on file shows that the Appellant managed different health conditions and was able to work until June 2015. His last diagnosis led to surgery resulting in what is reported to be ongoing symptoms that affect his ability to work. Although the Appellant submits that he has serious conditions the evidence does not satisfy the requirement that he must be found to have been disabled before his retirement pension became payable. As noted above, disability is determined by the impact a condition has on a person's ability to work and not on the diagnosis. Given the evidence on file I cannot rely on symptoms and surgery that occurred after October 2014 to conclude that the Appellant had a severe disability under the CPP before October 2014.

[28] I also note the Appellant misunderstood the rules under paragraph 42(2)(b) of the CPP and believes he should be able to receive disability benefits because he became disabled within 15 months of first receiving his retirement pension. The Appellant was clearly wrong in his interpretation of paragraph 42(2)(b) and even with his unfortunate misunderstanding I cannot dispense with the mandatory requirements under the CPP.

[29] I find the Appellant did not prove, on a balance of probabilities that, before October 2014 his health conditions made him incapable regularly of pursuing any substantially gainful occupation.

Prolonged

[30] Paragraph 42(2)(a) of the CPP requires a disability to be both severe and prolonged. As I found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[31] The appeal is dismissed.

Anne S. Clark
Member, General Division - Income Security