



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. V. v. Minister of Employment and Social Development*, 2017 SSTGDIS 101

Tribunal File Number: GP-15-2039

BETWEEN:

S. V.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Anne S. Clark

HEARD ON: July 20, 2017

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 October 22, 2014. The Appellant claimed that he was disabled because symptoms of depression and side effects from cancer treatment 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. I find the end of the Appellant's MQP is December 31, 2014.

[3] The appeal was previously adjourned to allow the Appellant an opportunity to obtain results of medical testing scheduled for March 2017. In April 2017 the Appellant requested further delay of his appeal to allow him the opportunity to request additional referrals for more medical testing. He hoped that he would have appointments and test results within one year. The file contained medical evidence about the Appellant's health conditions around and before the end of his MQP. There was no evidence that the Appellant had scheduled appointments or that future possible appointments would likely result in evidence relevant to his medical condition on or before the end of the MQP.

[4] Since the Appellant's request was speculative and did not identify actual medical appointments that would likely be relevant to the question on appeal I refused his request for an open-ended adjournment and scheduled the hearing for July 20, 2017.

[5] This appeal was heard by teleconference for the following reasons:

- a) There are gaps in the information in the file and a need for clarification.

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.

[6] The Appellant was the only person to attend the hearing.

[7] The Appellant is eligible for a CPP disability pension for the reasons set out below.

EVIDENCE

Overview

[8] The Appellant was 37 years old when he last worked and 39 at the end of his MQP. He has a diploma in computer programming and worked as an advisor in compensation and benefits. In May 2012 he stopped work due to symptoms of anxiety and depression that were aggravated by work-related incidents. In July 2013 he was diagnosed with cancer and required surgery, radiation and chemotherapy. He attempted to return to work in 2016. His duties, location and work hours were modified in an effort to accommodate his limitations. His return to work was not successful and he remains off work due to symptoms of depression, anxiety and radiation neuropathy.

Appellant's Oral Testimony

[9] The Appellant became very emotional and found it difficult to talk about his work and the events that caused him to stop work in 2012. While he struggled with his testimony regarding work he was able to discuss his illnesses, treatment and ongoing limitations in a clear and credible way. He explained his physical and mental limitations openly and addressed difficult questions in a consistent and credible manner. He responded directly to my questions and the issues the Respondent raised and was a compelling witness. I am satisfied the Appellant's oral testimony is an accurate description of his health conditions and limitations.

[10] The Appellant testified that he was a healthy person who enjoyed his work and family. He liked caring for his house and property and entertaining his daughter. His mental and physical health make him feel and function like an old person. He is afraid to see people; he rarely leaves the house and then only for medical appointments; he needs his wife's help for all of his personal care including dressing and bathing; he relies on his wife for all household care

and maintenance and for cleaning and cooking. He cannot play with or take care of his daughter.

[11] The Appellant explained that he experienced harassment in the workplace leading to serious symptoms of Post-Traumatic Stress Disorder (PTSD) and depression. He described himself as having a “nervous breakdown” in 2012. Under doctors’ care he tried different medication to address the symptoms with little or no effect. In 2013 he had to deal with an additional health problem. He was diagnosed with tonsillar cancer and required surgery followed by radiation and chemotherapy. Dealing with his mental health and the cancer diagnosis and treatment was very difficult. The Appellant described frequent episodes where he can do nothing but cry “out of control”. He has flashbacks to his workplace traumas and to his cancer diagnosis and treatment. His sleep is very poor and he fears being with people.

[12] Following his treatment for cancer the Appellant developed extreme pain particularly in his arms and hands. He understands this is neuropathy caused by the radiation. It is slowly getting worse and his pain is constant. He has numbness and limited function in his hands and fingers.

[13] In 2016 the Appellant’s employer requested that the Appellant attempt to return to work in a different location. His Family Physician Dr. Lora Cruise agreed that he should attempt the return to work with specific modifications. His employer placed him in a job with reduced hours; reduced performance targets; and in a different location. The Appellant had a very hard time working although he tried for almost one year because he felt he had no choice. He believed he would lose his health insurance if he did not agree to return to work. At the beginning he worked two days per week and was not always able to work his assigned hours or meet his reduced targets. He learned that he had to work more hours per week to have access to sick leave. Therefore, even though he was not able to successfully work two days per week he asked to increase his hours to three days per week. His physical and mental conditions worsened.

[14] The Appellant’s mental health symptoms remain poorly controlled. Working, even part time, increased his physical symptoms and he became extremely anxious and depressed about his health and his inability to work. His neuropathic pain continued to increase and he saw a neurologist who explained that there is no treatment for neuropathy caused by radiation. The

Appellant describes his pain as being constant. He is very limited in what he can do with his hands. He cannot dress himself and requires help from his wife to bathe, shave and button or fasten his clothing. He is unable to prepare food and relies on his wife for all household needs. He can no longer use a keyboard and feels off balance much of the time.

[15] The Appellant feels worthless and helpless. His attempt to return to work made his psychological symptoms much worse. He cannot imagine being able to attempt another return to work. He sees his Family Physician every five or six weeks. Since he moved to another location for his attempted return to work he had to go on a wait list resume psychiatric counselling with another psychiatrist. He was assessed by a neurologist who will see him every six or eight months. He has checkups with his oncologist every six months. The Appellant also has Hepatitis B which requires monitoring in case of reactivation. He explained that he has not followed up on his Hepatitis B in the past few years because he has had more serious conditions to manage. He is worried that he has not been able to seek appointments to properly monitor for that virus.

[16] The Appellant tried all medical assistance that was available to him. The pain and worry about his cancer and neuropathy increase his depression and anxiety which, in turn increase symptoms of pain and fatigue. He wants to improve his symptoms and hopes that he will improve in the future but has little faith that he will be able to recover sufficiently to return to work.

Evidence on File

[17] I am reasonably satisfied that the evidence on file supports the Appellant's description of the conditions and symptoms that make him unable to work. There is very little evidence on file about his attempted return to work however Dr. Pierre Bourque, Neurologist confirmed that the Appellant made the attempt with modification and was unsuccessful because of his symptoms (GD10-9). Dr. Bourque found there were legitimate issues limiting the Appellant's ability to work.

[18] Dr. Lora Cruise has been the Appellant's Family Physician since 2009 (GD2-43). She confirmed the Appellant had Major Depressive disorder (MDD) with features of PTSD and anxiety. In 2014 he was in recovery from treatment for squamous cell cancer. He has a history

of Hepatitis B and persistent depressive disorder with chronic headaches. Dr. Cruise felt the prognosis for recovery was guarded.

[19] The Appellant had continuing care for his mental health conditions. In 2013 (GD2-67) his Psychologists felt return to work was not an appropriate treatment plan and they should focus on stabilizing his symptoms. Dr. Shree Bhalerao reported that he was unable to return to work and continued to have symptoms consistent with MDD (GD2-75). In August 2014 Dr. Bhalerao hoped the Appellant would be able to return to work after he recovered from his cancer treatment (GD2-100). Dr. Poon, Radiation Oncologist reported in September 2014 that the Appellant's symptoms made him unwilling and unable to return to work. Dr. Poon confirmed that it would be worthwhile for the Appellant to return to work at some point.

[20] In 2015 the Appellant's neurological symptoms were assessed. Dr. Christian Fortin confirmed that he had significant shoulder girdle wasting and radiation induced "cervical and brachial plexitis" (GD10-13). Dr. Fortin also confirmed the Appellant's desire to return to work.

[21] In 2016 Dr. Davidson reported that the Appellant had significant neurological problems (GD10-3) but was slowly progressing. As noted previously Dr. Bourque confirmed the Appellant's neurological symptoms legitimately limited his ability to work. In November 2016 a Neurology Consult report confirmed there is no known treatment for radiation neuropathy (GD10-10).

[22] In 2016 Magnetic Resonance Imaging (MRI) showed findings likely related to radiation therapy (GD10-16) and abnormal signals in the bilateral brachial plexus (GD10-17). While the report in November notes the findings are not typical of post radiation change it is not necessary for me to confirm that the Appellant's symptoms were caused by radiation. These reports are relevant because they confirm findings in the area where the Appellant describes some of his pain and functional limitations.

SUBMISSIONS

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

- a) he is unable to work because of his health conditions; and
- b) the combination of his health condition make his disability severe and prolonged.

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

- c) the evidence does not support a determination that Mr. S. V. was disabled within the meaning of the Canada Pension Plan (Plan or CPP) on or prior to his Minimum Qualifying Period (MQP) of December 31, 2014 and continuously thereafter; and
- a) the Appellant was reportedly working in 2016 which may preclude a finding of disability.

ANALYSIS

Test for a Disability Pension

[25] 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 on or before the end of the MQP.

[26] 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.

[27] 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.

[28] The parties agree and I find that the end of the MQP is December 31, 2014.

Severe

[29] The Appellant was 39 years old when he last worked. He has post-secondary education and has over 15 years of work experience most, if not all, of which was in an office environment. His medical history includes ongoing symptoms of depression and Hepatitis B. In 2012 he experienced increased symptoms of depression and anxiety from incidents at work. He stopped work in May 2012.

[30] While he was off work the Appellant was diagnosed with cancer in his tonsil and required surgery, radiation and chemotherapy. He experienced post radiation symptoms of pain and limited mobility of his upper extremities. His pain, depression and limited mobility make him unable to work. With the exception of an unsuccessful attempt to return to modified duties and hours the Appellant has not been able to work since May 2012.

[31] 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 the Appellant has a severe disability, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. I find there are no factors such as those considered in *Villani* that would impact the Appellant's efforts to seek employment in a real world context.

[32] 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). The Respondent submitted that the Appellant demonstrated the capacity for work when he returned to modified duties in 2016. I do not agree. I find the Appellant's efforts showed his sincere attempt to comply with employment and insurance requirements but do not demonstrate a capacity for work.

[33] The Appellant's credible testimony was that he felt pressured to return to some form of work to satisfy the employer's requirements and to regain some insurance coverage. To support

his return to work the employer made extreme accommodations. His work location was changed to another province; his job hours were reduced by more than half and his job duties were decreased from direct client service to data entry with reduced performance expectations.

[34] I recognise that there is no evidence from the employer that documents the return to work however, based on the Appellant's evidence which is confirmed in part by Dr. Bourque's report I am reasonably satisfied the Appellant's work in 2016 was an unsuccessful attempt to return to work. It was not evidence of retained capacity to work that would preclude a finding of disability under the CPP.

[35] 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 Appellant experienced a significant increase in his symptoms of anxiety and depression in 2012. These were in addition to his history of depressive disorder and Hepatitis B. Within approximately one year he was diagnosed with cancer requiring surgery, radiation and chemotherapy. This condition and the side-effects of his treatment further complicated his significant psychological symptoms. The side effects (radiation neuropathy) continue and further increase his symptoms of anxiety and depression and result in pain and physical limitations.

[36] The Appellant's conditions cause him to have serious symptoms that also aggravate or increase symptoms from other conditions. It is the combination of the Appellant's conditions and, in particular, his depression and anxiety combined with pain and functional limitations from radiation neuropathy that make him incapable regularly of pursuing any substantially gainful occupation.

Prolonged

[37] Paragraph 42(2)(a) of the CPP requires a disability to be both severe and prolonged. Having found that the Appellant has a severe disability I must now consider whether it is also prolonged. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[38] The Appellant has a history of depression and Hepatitis B that he managed before 2012. In 2012 he developed more extreme symptoms of MDD and PTSD from incidents at work. Those are ongoing and medication has not been effective. In 2013 he had surgery and treatment for cancer. There is no treatment for the radiation neuropathy and those symptoms are not improving with time. Throughout the medical evidence there is discussion of the Appellant's eventual return to work including his own desire to work again. Unfortunately he was not able to successfully return to work in a reduced capacity. The evidence does not support a conclusion that his conditions will improve or resolve with time or treatment.

[39] I find the Appellant's disabling conditions are likely to be long continued and of indefinite duration making them prolonged as defined by the CPP.

CONCLUSION

[40] I find that the Appellant had a severe and prolonged disability in May 2012, when symptoms of depression, anxiety and PTSD made him unable to work. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) of the CPP). The application was received in October 2014; therefore the Appellant is deemed disabled in July 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of November 2013.

[41] The appeal is allowed.

Anne S. Clark
Member, General Division - Income Security