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

Citation: *A. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 98

Tribunal File Number: GP-17-884

BETWEEN:

A. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Valerie Hazlett Parker

HEARD ON: June 30, 2017

DATE OF DECISION: July 26, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on May 25, 2012. The Appellant claimed that he was disabled because he suffered injuries in a motor vehicle accident resulting in chronic pain and physical limitations. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal). The General Division of the Tribunal held a videoconference hearing, and on November 18, 2015 allowed the Appellant's appeal. The Respondent appealed this decision to the Appeal Division of the Tribunal. On March 21, 2017 the Appeal Division allowed this appeal, and returned the matter to the General Division for redetermination.

[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. The Tribunal finds the Appellant's MQP to be December 31, 2012.

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

a) More than one party would attend the hearing;

b) Videoconferencing was available within a reasonable distance of the area where the Appellant lives;

c) This method of proceeding respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit; and

d) The parties agreed to proceed in this way at the pre-hearing conference.

[4] The following people attended the hearing:

A. M., the Appellant

Judith Bayliss, the Appellant's Representative

Chris White, counsel assisting Ms. Bayliss

Heather Carr, Respondent's Representative

[5] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

PRELIMINARY ISSUES

Adjournment Request

[6] On May 18, 2017 a pre-hearing teleconference was held to discuss procedural issues with respect to this appeal. At the teleconference the Tribunal decided that the hearing of this matter would be expedited. The Appellant applied for the disability pension some time ago, continued to suffer from his medical conditions and was in financial distress. The parties agreed to a hearing date at the end of June 2017.

[7] During this teleconference counsel for the Respondent also indicated that he would be requesting further information from the Appellant, including information regarding his success at university. The Appellant assured all attending the teleconference that these documents were available and would be produced prior to the hearing. Notwithstanding this the Respondent later sent a written request to adjourn the hearing as it had not received the documents requested. The documents were then provided by the Appellant. The adjournment request was therefore denied.

Recording of the Prior General Division Hearing

[8] After the initial General Division hearing in this appeal the Respondent requested and was provided with a copy of the hearing recording. The Appellant was provided with this recording just prior to the hearing in June 2017. At this hearing the Respondent's Representative advised that she had only received the copy of the recording the day prior to the hearing as it was sent to Legal Services at the Respondent. On consent, both parties were given additional time after the oral hearing to provide written submissions based on the recording of the hearing, and time to respond to any submissions from the other party.

Form of Redetermination Hearing

[9] Section 59 of the *Department of Employment and Social Development Act* provides that the Appeal Division of the Tribunal may refer the matter back to the General Division for redetermination with directions. In this case, the Appeal Division did not provide any directions regarding the redetermination.

[10] The Act does not define what a redetermination is, and whether it requires the General Division to rehear all of the evidence from the parties afresh, or whether the appeal can be decided based on the evidence already adduced at the first hearing. The Tribunal requested that both parties file submissions on this issue prior to the hearing in June 2017. The Respondent did not file any submissions. The Appellant requested that the Tribunal listen to the recording of the prior General Division hearing, read the prior General Division decision and hold a further hearing only to clarify or add to the evidence that had already been presented.

[11] The Tribunal finds that a redetermination of an appeal, unless there are issues of natural justice, bias, or procedural fairness, can proceed on this basis.

[12] In *Re X*, 2005 CarswellNat 6321 the Immigration and Refugee Board of Canada decided that the sworn testimony which the claimant gave at the first hearing was an integral part of the record. I am satisfied that the recording of the prior General Division hearing forms part of the record in this appeal. The parties knew that the hearing was being recorded at that time, the recording was made available to the Appeal Division, and neither party objected to this. In addition, the Appeal Division could have directed that the recording be removed from the record and did not. Finally, in this case, the Appeal Division allowed the appeal in this matter on the basis of an error in law, not a breach of natural justice or procedural fairness.

[13] The *Social Security Tribunal Regulations* state, in section 3, that the Tribunal is to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. Certainly, it is quicker to decide a matter based on a thorough review of the evidence previously adduced than to have all parties attend and repeat their evidence. The parties also received a copy of the hearing recording prior to this hearing and had the opportunity to address it prior to this decision being made. There was no breach of natural

justice or procedural fairness, or any prejudice to any party as the parties were given the opportunity to present further evidence to add to and clarify the evidence previously adduced.

[14] In addition, the Appellant should not be required to testify again to the same facts when that evidence is available and has not been challenged by the Respondent (the Respondent only challenged the decision made based on this evidence). Doing so would unnecessarily lengthen the redetermination hearing.

[15] Proceeding in this fashion is also in keeping with the directive in section 2 of the Regulations which states that the Tribunal must interpret the Regulations so as to secure the just, most expeditious and least expensive determination of appeals. A complete rehearing of an appeal would not be expeditious or the least expensive alternative. The most expeditious and least expensive alternative was to proceed on the basis of a review of the recording of the prior hearing with an oral hearing to add/clarify the evidence.

[16] Further, the Regulations do not specify how a redetermination hearing is to proceed. Subsection 3(2) of the Regulations provides that if a question of procedure that is not dealt with by the Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations. Guidance on this issue is given by the decisions of the Federal Court in immigration and refugee appeals. The Regulations governing those proceedings have a provision, similar to section 2 of the *Social Security Tribunal Regulations*, which requires it to complete matters as informally and expeditiously as the circumstances and consideration of fairness permit. In *Sitsabeshan v. Canada (Secretary of State)*, 1994 CarswellNat 241 the Federal Court stated that while an order requiring the adjudicating panel to take into account the record before a prior panel is not necessary, that option was always open to the second panel. The court went on to state:

> …counsel advised me that some panels of the CRDD have been reluctant in a hearing de novo to do anything else that to in fact start "de novo" ignoring all of the evidence previously before the earlier panel. That strikes me as a significant waste of resources. While, as in this case, the evidence before the earlier panel may not be fully satisfactory, it should be possible to overcome the weaknesses in the earlier evidence by supplementing that evidence. It should not be necessary to revert to the beginning.

[17] Further, in the *Diamanama v. Canada (Minister of Citizenship and Immigration)*, 1996 CarswellNat 57 the Federal Court stated,

> The second panel must be free to conduct the hearing as it sees fit and to make its decision by reference to the evidence adduced before it. The second panel can, of course, use the transcript of the first hearing for whatever purposes it wishes.

[18] I am satisfied that the reference to transcript in this decision would include the recording of the first hearing in the context of the Social Security Tribunal.

[19] The Federal Court and Federal Court of Appeal have also decided that use of a recording from a prior hearing may not be appropriate in cases where there has been a breach of natural justice, but I need not comment on that in this case.

EVIDENCE

[20] The Appellant affirmed to tell the truth at both General Division hearings. He testified at the original General Division hearing, and at this hearing answered questions posed by his Representative and the Tribunal to add to/clarify the evidence on record.

[21] The Appellant was born in X. He completed high school and obtained a license as an automotive mechanic. He worked as a mechanic until he was injured in a motor vehicle accident in May 2010. As a result of the accident the Appellant suffered an injury to his left shoulder which was later repaired with surgery. He confirmed that this injury was not disabling at the MQP. The Appellant also suffered a compression fracture in his lumbar spine and soft tissue damage. This has resulted in physical limitations and chronic pain. As a result he can sit or stand for 30 minutes, walk for 15 to 20 minutes on a better day and must plan all of his activities and know his limitations when he is to perform certain activities. Lifting and carrying is not recommended. The Appellant further stated in the questionnaire he completed for the disability pension application that reaching bothers his left shoulder (he is left handed) so he tries to use his right arm. Sweeping and cleaning the bathroom causes his back to “tighten” which bothers him for the remainder of the day he does this activity. He cannot do outdoor lawn or snow care. Any activity that requires him to have his arms in front of him is difficult.

[22] The Appellant further testified that he has also suffered non-physical consequences of the accident. His social relationships have changed because he can no longer participate in recreational sports and the associated social activities. He was very active in this prior to the accident. The Appellant participated in a fixed number of sessions with a psychologist in 2012 to help deal with these and other emotional issues, including learning to live with pain. The Appellant testified at the second hearing that he would have continued to see Dr. Hartley, the psychologist, after these sessions ended but could not pay for further sessions. There are no community mental health resources available to him. The Appellant continues to meet regularly with Dr. Peacock, his family physician with whom he discusses his conditions. He also talks to his wife about emotional issues.

[23] Mr. Hartley, Registered Psychologist, penned a report to the Appellant's insurer on February 13, 2012 (GD3-48). The report states that the Appellant's overall pain levels had decreased, and this had had some positive impact on the Appellant's ability to remain active over the course of the day and on his sleep. However, the Appellant continued to feel significantly disabled. He continued to avoid activity that he believed would lead to increased pain and limited his activity in response to pain as a primary pain control technique. Mr. Hartley also noted that the Appellant had sleep problems. He concluded that the Appellant did not appear to have made major changes during treatment.

[24] The Appellant also has difficulty sleeping, and suffers from restless leg syndrome. He wakes after one or two hours of sleep. He is hesitant to take medication for this as he does not want to use this "as a crutch". The Appellant attributes his sleep issues to his inability to be physically active during the day.

[25] The Appellant testified that he was essentially bedridden for six months immediately after the accident. He then participated in physiotherapy for approximately two years to improve his function and pain. This treatment also included acupuncture. Once this was completed he was directed to continue with a home exercise program, which he still does when he can. Some days he cannot due to pain. He clarified at the second hearing that the physiotherapy home program included light ball exercises, walking and swimming once or twice each week for approximately 15 minutes. Again the Appellant testified that he did this only on days that he was able to.

[26] The Appellant testified that although his condition improved immediately after the accident, he has not continued to see improvement. He suffers from a constant dull pain, which becomes worse and feels like a burning pain with any activity.

[27] The Appellant testified that he has tried a number of medications including analgesics and anti-inflammatories for pain. As he had no money to pay for medication for some time and he did not have an extended health care plan, his doctor gave him medication samples. They did not take the pain away. There is no pain clinic in Prince Edward Island where he lives. He has not continued with physiotherapy, chiropractic care or massage therapy since his insurance company stopped paying for this as he cannot afford it.

[28] Dr. Peacock, the Appellant's family physician, reported on September 11, 2013 (GD2-3) that the Appellant suffered a shoulder tear and lumbar spine compression fracture in a motor vehicle accident. The spinal fracture made it difficult for the Appellant to continue to work as he could not walk, stand, sit or bend without pain. His disability affected all aspects of his daily living, as these activities took an extraordinary amount of time and were not done on a set schedule, but when the Appellant felt able to do so. She reiterated that the Appellant participated in a physiotherapy program for 2.5 years and that he continued to do exercises at home.

[29] Dr. Peacock completed a consultation request to Dr. Wotherspoon, orthopaedic surgeon, on September 11, 2012. In that note she wrote that the Appellant suffered stiffness and chronic pain, and that there was no indication for spinal surgery.

[30] Dr. Wotherspoon's reports were filed with the Tribunal and indicated that the Appellant suffered from shoulder pain as a result of the car accident, and that this improved after surgery on the left shoulder. He also noted that the Appellant had back pain.

[31] The Appellant testified about his regular activities. He stated that his activity level is about the same as it was in 2012. He stated that he has to plan what he does. If he has "big plans" he does his best to get through it. At the time of the first hearing the Appellant spent his time attending school, and reading. He drives short distances and takes Aleve if he must travel off the Island.

[32] The Appellant has not had to make any modifications to his home as it is a bungalow. He completes his self-care taking his time, although his wife cuts his toenails. He doesn't shower every day and has difficulties with tasks that require him to lean over the sink (e.g. trim his beard). He completes what housework he can, and helps others in the home cook meals. In the second hearing the Appellant clarified that it would take him one to two hours to prepare food that would take someone else fifteen minutes to prepare. It is a "chore" to cook a boxed macaroni and cheese meal.

[33] The Appellant testified that in 2012 he contacted the local council for people with disabilities for help finding work he could do with his limitations. He discovered, with its help, that there were no jobs he could do. He certainly could not return to work as a mechanic as he could not bend, reach, etc. He has difficulty sitting. He would not be able to work four to five hours at a time. He did not know of any job where he could rest/lie down after an hour or so of work. The Appellant hopes that by furthering his education he may be able to find some work to do in the distant future.

[34] The Appellant also testified that he has gained a lot of weight since the accident. He has tried to lose weight and consulted a nutritionist for assistance. Despite this he has not succeeded. He believes that due to his physical limitations he is not able to be active enough to burn more calories than he ingests each day. He has also developed a thyroid imbalance which contributes to difficulty losing weight.

[35] The Appellant also had knee surgery a number of years ago, and in 2013 required a brace for this knee. He did not rely on this as a disabling condition in this proceeding.

[36] The Appellant began to attend university in 2012. At that time he drove approximately 15 minutes to the school. The Appellant enrolled in a full course load (five courses) in his first year of university. He struggled with constant pain, and tried medication to alleviate it without success. Between classes he sat and stretched, and when he returned home he was bedridden for five to six hours. The Appellant testified that he had difficulty studying outside of class, and did not study as much. His pain also interfered with his physical ability to sit in a chair. His mind wandered in class and he was "fidgety". After this academic year, he took two courses during the summer term.

[37] In his second year of university the Appellant received accommodations from the school including a special parking permit, special chair, dictation software which also read documents to him, money for tutoring, and extra time to complete exams. In the second semester of this year the Appellant reduced his course load to four courses. He also "dropped" a chemistry lab as it was too much for him physically to complete lab work.

[38] In his third year of university the Appellant further reduced his course load to three courses each semester. He arranged his classes so that he attended school on Tuesday and Thursday each week, for a total of four six hours per week. At the second hearing the Appellant stated that he spent four to six hours each week in class, and two to four hours each week studying outside of class, in bed and at his own pace.

[39] The Appellant testified that he had difficulty reading and studying outside of class. He regularly read in bed where he could lie down, and used the computer sitting on a couch where it was less uncomfortable. He found it difficult to type and was given dictation software as a result.

[40] In his testimony, the Appellant confirmed that he made no effort to return to work as an automobile mechanic.

[41] The Appellant completed a Functional Abilities Assessment in 2012. He testified that he did complete the tasks as set out in the report of January 2012. He also noted that the report did not refer to the pain he suffered as a result of completing this assessment. He "pushed himself" during the assessment and was very sore the next day. He also noted that if he was to continue to do the tested activities every day it would further strain him, causing a cumulative increase in his pain.

[42] The report states that the Appellant undertook all that was requested of him, however, was pain focussed. The Appellant demonstrated good range of motion in his shoulder and his back, accompanied by discomfort. The report recommended an ease back to work program with modifications as the Appellant did not have heavy lifting capabilities. The report stated that the Appellant said he was looking at other employment options.

SUBMISSIONS

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

a) He was disabled as a result of the motor vehicle accident, based on the cumulative impact of all of his medical conditions;

b) More weight should be placed on the reports by Dr. Peacock as she treated him consistently after the accident and had regular contact with him;

c) His ability to attend university does not demonstrate that he has any capacity regularly to pursue any substantially gainful occupation;

d) Full time university demands are not the same as demands placed on a person in a competitive work environment.

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

a) The Appellant's shoulder condition is not severe;

b) Less weight should be placed on Dr. Peacock's evidence as she may be advocating for the Appellant;

c) The Appellant is coping with his pain, his depression did not require treatment and he did not have any other significant disabling condition at the MQP;

d) The Appellant's attendance at university demonstrated that he had capacity to work;

e) The Appellant has not attempted any alternate work after the accident;

f) The Appellant's personal circumstances should weigh against a finding of disability in this case;

ANALYSIS

Test for a Disability Pension

[45] 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, which is December 31, 2012 in this case.

[46] 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 MQP.

[47] 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

Severe

[48] The Appellant must satisfy the Tribunal the he suffered a disability that was both severe and prolonged on or before the MQP. The severe criterion must be assessed in a real world context (*Villani v. Canada (Attorney General),* 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. In this case, the Appellant was 33years old at the MQP. He obtained a mechanic's license and there was no evidence of any language or learning impediments. These factors, alone, would not restrict the Appellant's ability to find work in the competitive workforce. However, the *Villani* decision also states that a claimant is not required to satisfy the Tribunal that he is unable to do any conceivable job, but any realistic job in the competitive workforce given his limitations.

Physical Limitations

[49] There was no dispute that the Appellant was injured in the accident in 2010. His shoulder was injured. He suffered a fracture in his spine, with soft tissue injury that led to chronic pain. Dr. Wotherspoon, who treated the Appellant's shoulder, noted that this pain improved. The Appellant agreed. I am not satisfied that improvement in shoulder pain must mean that the Appellant's chronic pain condition was therefore also resolved or minimized. The evidence was clear that the Appellant's pain from his spinal injury continued.

[50] The Appellant also suffered some mental illness as a result of the accident and the changes this imposed on his daily living, including having to live with pain, and changes in his relationships. I accept the Appellant's testimony that he benefitted from treatment with Mr. Hartley and that this stopped for funding reasons. I am also satisfied that this condition, alone, is not disabling.

[51] After the accident the Appellant gained weight, developed thyroid issues and later also required a knee brace. The Appellant testified that these conditions, alone were also not disabling. The medical evidence on these conditions is consistent with this.

[52] The Appellant's main disabling condition is his ongoing pain and associated limitations. The evidence was clear from the Appellant's testimony and Dr. Peacock's reports that the Appellant has significant restrictions for sitting, standing, bending, walking and completing routine daily tasks. These restrictions have continued despite a thorough and lengthy program of physiotherapy, acupuncture, medication trials and home exercise as directed by the physiotherapist.

[53] The Appellant's testimony was credible. It was delivered in a forthright manner. It was consistent at both hearings. It was also consistent with the facts reported by Dr. Peacock. The Appellant did not exaggerate his limitations although it would have been in his legal interest to do so. The Tribunal placed significant weight on his testimony at both hearings.

[54] The Tribunal also placed significant weight on the reports penned by Dr. Peacock. She treated the Appellant over a long period of time, and was familiar with all of his conditions. Her written reports refer to all of the Appellant's conditions. The reports are objective and consistent with the Appellant's testimony. She did not advocate for the Appellant. She consistently stated that the Appellant could not work.

[55] In contrast, I did not place much weight on Dr. Wotherspoon's reports. He treated the Appellant for a relatively short period of time, and his treatment focused only on the shoulder injury. Although he mentions the Appellant's back pain, he did not treat this condition.

[56] Similarly, I did not place much weight on the functional abilities assessment report. The testing for this was completed over one day, with no consideration of the Appellant's condition (increased pain) after the testing day. It also did not consider any mental health components of the Appellant's condition.

[57] The Respondent argued that the Appellant's pain condition should not be considered severe because he was not taking medication to treat it, and had not been referred to a pain clinic. However, the Appellant testified that he tried numerous pain medications. He could often not afford to purchase them so used samples provided by his doctor. Despite this, he got no relief from his pain. It is understandable that a claimant would not continue to take medication that was of no benefit. The Appellant also clarified at the second hearing that there are no pain clinics in the province where he lives, so attendance there would be impossible for him.

University Attendance

[58] The challenge in this appeal is whether the Appellant's successful attendance at university at the time of the MQP and after demonstrated that his disability was not severe. 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).

[59] While the ability to attend school is strong evidence of capacity to work in some situations, I am not satisfied that it is so in this case. The Appellant received significant accommodations at school in order to be able to continue to attend. While it is not uncommon for students to be accommodated, it is not realistic to expect that someone in the commercial marketplace would receive the accommodations given to the Appellant – including special parking, special furniture, software that allows him to dictate instead of type and have documents read to him, additional time to complete tasks, and the ability to read lying down as he did to study at home. In addition, the Appellant attended one hour lectures, with breaks between. He studied at home at his own pace and did not spend much time studying. When he returned home from class he rested for five to six hours. He was in significant pain. He succeeded at school only with significant accommodations and a reduced course load. This is not indicative of an ability to attend work consistently and predictably as would be required in a workplace.

[60] In addition, the Appellant testified that his mental condition contributed to his disability. I am satisfied that the Appellant also suffered from mental illness at the MQP. He was treated by a psychologist and received benefit from this. This treatment stopped because of funding, not because it was no longer necessary. The Appellant testified that he continued to discuss his issues with his family doctor and his wife. I find that this was informal treatment for the condition and that this condition continues despite treatment.

[61] The Respondent also contended that the Appellant should have made efforts to find work apart from what he did prior to the accident. The Federal Court of Appeal has decided that 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 (Attorney General),* 2003 FCA 117). In this case I am not satisfied that the Appellant had capacity to work when all of his conditions are considered cumulatively. He was significantly restricted physically by back pain. He had limitations with his shoulder. He suffered mental illness regarding coping with the changes in his lifestyle and relationships as a result of the accident. Absent work capacity, the Appellant was therefore not obliged to try to demonstrate that he could not obtain or maintain work because of his disability. If, however, I am wrong on this, I am satisfied that the Appellant's ability to continue with his university studies on a

reduced course load basis after his first year demonstrated that he could not maintain this because of his disability. He therefore satisfied the requirements of the *Inclima* decision.

Prolonged

[62] I am also satisfied that the Appellant's disability is prolonged. He was injured in 2010. He underwent extensive treatment without significant improvement. There is no indication that the Appellant's condition will improve in the future.

CONCLUSION

[63] The Tribunal finds that the Appellant had a severe and prolonged disability in May 2010, when he was injured in the car accident. 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 May 2012; therefore the Appellant is deemed disabled in February 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of June 2011.

[64] The appeal is allowed.

Valerie Hazlett Parker
Member, General Division - Income Security