



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. C. v. Minister of Employment and Social Development*, 2017 SSTGDIS 123

Tribunal File Number: GP-16-1432

BETWEEN:

M. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Jane Galbraith

DATE OF DECISION: August 28, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's request for his *Canada Pension Plan* (CPP) disability pension to continue after it was suspended in August 2014 retroactively to when he was found to be able to work in August 2011. The Appellant claimed that he continued to be disabled because of his back condition. The Respondent denied the request initially and upon reconsideration maintained their decision to end his benefits. 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. In this case the Appellant had been found disabled and received a CPP disability pension from January 1993 to October 2006 and it was then reinstated as per the Respondent's process from July 2008 to July 2011.

[3] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The member has decided that a further hearing is not required.
- b) The method of proceeding provides for the accommodations required by the parties or participants.
- c) The issues under appeal are not complex.
- d) There are no gaps in the information in the file or 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.

[4] The Tribunal has decided that the Appellant was no longer eligible for a CPP disability pension as of the end of July 2011 for the reasons set out below.

PRELIMINARY ISSUES

[5] The Tribunal wrote to the Respondent on August 1, 2016 requesting an updated record of contributions for the Appellant. The Tribunal received this document on August 10, 2017. (GD6-1)

EVIDENCE

[6] The Appellant was 53 years old when his disability benefit ceased. He has a Grade 12 education and worked in the carpentry trade before he first became disabled. He had back surgery in February 1993 but his doctor at that time reported he had a poor response to the treatment.

[7] The Appellant was granted disability in 1993 due to his low back pain and stiffness in both legs. He was working as a carpenter at that time. In 2002 it was discovered that he had attempted to return to work by starting his own body piercing business but was not successful and his benefits continued. He had stated that he didn't not think that self-employed work was considered a return to work.

[8] He was referred for vocational rehabilitation in 2003 and retraining for a computer technician was discussed. The Appellant had an interest in truck driving but this choice was not supported medically.

[9] In March 2005 he returned to vocational rehabilitation and he was supported for retraining in computer repair, which he attended for a period of time and then dropped out. The Respondent discovered that the Appellant attended a truck-driving course in January 2006 and started working in February 2006 and his vocational rehabilitation file was closed. His benefits were ceased at the end of October 2006 based on his successful return to work.

[10] The Appellant requested his benefits be reinstated in August 2008 after he stopped working in June 2007 due to a recurrence of his back pain. This was granted effective July 1, 2008. The letter of reinstatement on September 30, 2008 stated that the Appellant should inform

the Respondent is he returned to work in a full time, part-time or on a trial basis. He was also to inform them if his condition changed. (GD2-168) In another interact with the Respondent he indicated that he had not recalled being told that he could only earn a maximum of \$5,200.

[11] A Record of Earnings report received by the Respondent in August 2013 showed earnings of \$15,666 in 2011 and \$7,854 in 2013 from several different employers. The reassessment investigation reported the Appellant had returned to working as a truck driver and had regained the capacity to work in an area suitable to his limitations. His benefits were ceased as unreported work in December 2014 with an effective cease date of August 1, 2011. The record of contributions received by the Tribunal in August 2017 was essentially the same as the other record of contributions on file with the exception of \$24,205 earnings in 2016. (GD6-1)

[12] The Respondent sent a reassessment kit by letter to the Appellant in May, July, August and September 2014. He replied by letter dated September 15, 2014 that he had not responded or completed the forms as he had not returned to full time work and had only taken part-time jobs due to his back condition. He requested and would not give permission for the Respondent to contact his employers as they were not aware of his medical condition and he was afraid he would not be given further work. It advised that it was his understanding that if he returned to work he would have a year's grace period for receiving benefits. (GD2-139)

[13] The Appellant had moved to New Brunswick in 2008 to be close to his family. When speaking with Respondent's staff in August 2008 they reminded the Appellant that he should inform them if he returned to work. (GD2-562)

[14] The Respondent wrote to the Appellant in September 2015 asking for a list of all medical professionals seen from 2011 to 2014 with their addresses. They also wanted him to confirm that he would not give them consent to contact his employers. (GD2-135)

[15] The Respondent wrote to the Appellant's physician in September and December 2015 requesting information about his condition. A response was received from Dr. Griffin in December 2015 indicating the Appellant had been a patient since 2008. She stated he had chronic low back pain, which was easily exacerbated. He had been feeling stronger in 2013 and

had started working as a truck driver for short distance trips for limited hours. She also commented that he was not fit for a regular work schedule. (GD2-125)

[16] Dr. Griffin provided some of her clinical notes from the Appellant's visits. The Appellant had advised her in December 2011 that he had been out of work for 6 months and did not expect to get any work over the winter months. Dr. Griffin wrote in January 2016 that he had been able to work in 2013 as a truck driver with limitations on hours of work as he could exacerbate his back pain. She had recorded the Appellant was doing daily pushups and walking 2.5 miles a day in January 2013. She also noted he had been diagnosed with colitis in 2015 which interrupted his work but that he planned to return to work in 2015.

[17] A clinical notation in October 2013 stated the Appellant was back driving a new truck and will be driving in the Atlantic Provinces and down the Eastern seaboard. He was using ibuprofen for pain relief as needed at that notation.

[18] The Appellant did not work during 2012. In 2013 he worked in January on a snowplow and from September to November for a trucking company. In 2014 he was working on an on-call basis for a trucking company from May to September when he stopped due to appendix surgery.

SUBMISSIONS

[19] The Appellant submitted on his Notice of Appeal that he continued to be eligible for a CPP disability pension as of the end of July 2011 because:

- a) He was still disabled and struggled to stay working.
- b) He is seeing his doctor in May 2016 for tests and believes his condition is getting worse.
- c) He is so far in debt repaying what he owes is unrealistic
- d) He misinterpreted the rules and it took the Respondent 4 years to tell him he was in the wrong even though he had filed income tax on time each year.

[20] The Respondent submitted in writing that the Appellant was no longer eligible for a CPP disability pension as of the end of July 2011 because:

- a) The Appellant demonstrated the capacity for substantially gainful work as of the end of July 2011. The Respondent notes the onus is on the Respondent to show, on a balance of probabilities, that the Appellant is no longer disabled at the time the benefits were ceased.
- b) The Appellant had been made aware of his reporting responsibilities on many occasions throughout the years he was receiving disability benefits by letter, yearly newsletters and talking to the Respondent's staff.
- c) The Respondent was not given consent by the Appellant to obtain information from his employers about his performance or productivity at work. As the Appellant continued to be called by employers to work, it is reasonable to assume his employers were satisfied with his work.

ANALYSIS

Test for a Disability Pension

[21] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that he continued to meet the definition of a severe and prolonged disability as defined in the CPP after July 2011.

[22] 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.

[23] 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.

[24] Subsection 70(1)(a) of the CPP Regulations indicates a disability pension ceases to be payable for the month in which a beneficiary ceases to be disabled. Pursuant to subsection 42(2)(b), “a person shall be deemed to have become or to have ceased to be disabled a such time as is determined in prescribed manner..”

[25] Subsection 69(1) of the CPP Regulations states:

“For the purpose of determining whether any amount shall be paid or shall continue to be paid as a benefit in respect of a person who has been determined to be disabled within the meaning of the Act, the Minister may require that person from time to time:

- a. to undergo such special examinations,
- b. to supply such reports, and
- c. to supply such statements of his occupation and earnings for any period, as the Minister may specify.”

[26] Subsection 70(1) of the CPP Regulations states as follows:

“Where a person who has been determined to be disabled within the meaning of the Act fails without good cause to comply with any requirement of the Minister made under section 69, he may be determined to have ceased to be disabled at such a time as the Minister may specify except that such time shall not be earlier than the day of failure to comply.”

Severe

[27] 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.

[28] The Appellant was 53 years old when his disability benefit ceased. He speaks and writes English. He had been trained in carpentry and took a truck-driving course. He also had attended a computer repair and maintenance program, which he quit. He had the experience and obtained skills when he started his own business, albeit not successful.

[29] The Tribunal finds the Appellant has shown to have transferrable skills and the ability to retrain in many different fields. It was his choice and not inability that prevented him from completing his retraining in computer repair. In applying the Villani personal characteristics they do not preclude him from work and as such did not meet the definition of severe.

[30] In *Villani v Canada* [2002] 1 F.C. 130 at paragraph 50, the Federal Court of Appeal The Court gives context to the “real world test” where it explains:

(50) This restatement of the approach to the definition of disability does not mean that 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.

[31] *Warren vs. (A.G.) Canada*, 2008, FCA 377 confirms for the Tribunal the need for objective medical evidence when it states:

In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant’s disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Minister of Social Development*, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL))

[32] The Appellant's physician's notes and letter indicate the Appellant had capacity for truck driving when he did this work within his limitations. She did not indicate that the Appellant could not work at all. She did not mention his ability to perform other types of work. Several years after the Appellant's benefits were ceased he was taking an over the counter pain medication when needed and not on a regular basis.

[33] 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).

[34] The Appellant has worked for several different trucking companies and also a snowploughing company. He has worked on an on-call basis. He did not allow the Respondent to obtain any information about his performance, which would give some indication about how his condition was affecting his ability to perform his duties. The Tribunal finds it is reasonable of the Respondent to assume that since he was being repeatedly requested to work that there was no issue or difficulty performing his work functions.

[35] There is no evidence that his health condition has prevented him from obtaining or maintaining employment. In fact the recent record of contributions shows the Appellant earning \$24,205 for working part of 2016. The Tribunal finds these are substantial earnings.

[36] The Appellant has not complied with his obligation of reporting any change in his condition or part-time, full time or a trial of work. The Tribunal is not persuaded by his explanations and accepts that the Respondent has notified him of this expectation in many different ways.

[37] The Tribunal notes that the Respondent submits the onus is on the Respondent to show, on a balance of probabilities, that the Appellant is no longer disabled at the time the benefits were ceased. The Tribunal finds it agrees with the Respondent's submission.

[38] The Tribunal has carefully reviewed the medical reports and documents, which includes correspondence from the Appellant. The Tribunal finds that, on a balance of probabilities, it has not been persuaded that the Appellant had a severe disability within the meaning of the Act. The

Respondent has shown, on a balance of probabilities, that the Appellant was no longer disabled at the time the benefits were ceased.

Prolonged

[39] As the Tribunal found that the disability was not severe at the time his benefits were ceased, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[40] The appeal is dismissed.

Jane Galbraith
Member, General Division - Income Security