



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. W. v. Minister of Employment and Social Development*, 2017 SSTGDIS 155

Tribunal File Number: GP-17-861

BETWEEN:

E. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Adam Picotte

HEARD ON: October 6, 2017

DATE OF DECISION: October 13, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on July 12, 2016. The Appellant claimed that he was disabled because of chest pain, and generally poor functional capacity. 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. The Tribunal finds the Appellant's MQP to be December 31, 2001

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

- a) There are gaps in the information in the file and/or 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.
- c) The Appellant has requested a teleconference

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

EVIDENCE

Questionnaire for CPP disability benefits

[5] On July 12, 2016 the Appellant submitted responses to a questionnaire for CPP disability benefits.

[6] He indicated that he had a grade 8 education and no post-secondary education or technical training.

[7] He had most recently been employed as a truck driver from 1981 to 1999. He stopped working in November 1999 as a result of a heart attack.

[8] The Appellant indicated that he is in receipt of insurance benefits through Sunlife.

[9] The Appellant detailed that generally he had very poor functional capacity including both physical and psychological aspects. He noted that he had a loss of strength, was always gasping for air and he could not lift.

Medical evidence

[10] In a June 5, 2001 consultation report Dr. Kincade detailed that the Appellant had the following issues:

- Sleep apnea;
- Dizzy spells;
- Heart disease; and
- High cholesterol.

[11] In an August 23, 2001 consultation report Dr. Kincade detailed that the Appellant continued to have ongoing symptoms. He detailed the following aspects:

- Sharp chest pain occurring five or six times per week managed with nitroglycerin;
- Profound fatigue, including loss of energy through the day; and
- Problems with sleep apnea managed somewhat with a CPAP machine.

[12] In a February 5, 2002 consultation report Dr. Kincade detailed that the Appellant due to the constellation of illnesses he was experiencing was likely precluding him from any kind of

gainful employment currently. Dr. Kincade further detailed that once the Appellant's sleep apnea was settled down it may be possible for him to engage in sedentary employment.

[13] In a January 21, 2003 consultation report Dr. Kincade detailed that the Appellant was experiencing atypical chest pain up to four times per day. It was focused on his left side and radiated into his right arm causing numbness and nausea. The Appellant was using nitroglycerin and this helped. He had never been taken to the emergency room for this.

[14] In a March 20, 2003 consultation report Dr. Kincade detailed that the Appellant had no ongoing angina symptoms and his tests showed only what had been seen previous, from old events.

[15] In a June 27, 2003 consultation report Dr. Kincade detailed that the Appellant's blood pressure was under control, his cholesterol was being treated with medication, his chest pain was akin to angina but there had been improvement and he was no longer suffering from headaches. Dr. Kincade detailed that overall the Appellant was looking quite well.

[16] In a March 12, 2004 consultation report Dr. Stabler, gastroenterologist, detailed that the Appellant had a heart attack in 1999 that resulted in stenting of his heart valves. Dr. Stabler detailed that initially the Appellant had a fair bit of pain and he used a lot of nitroglycerine to manage his symptoms. However this had since settled. Dr. Stabler further detailed that the Appellant continued to smoke heavily despite his heart attack. He was noted to have a three month history of diarrhea with a possible diagnosis of Crohn's Disease. Follow up consultations from Dr. Stabler indicated that the Appellant did not have Crohn's Disease and that his diarrhea had stopped.

[17] A December 12, 2004 consultation report from Dr. Karpiak indicated that the Appellant had lost 80 pounds over a 7 month period and that he complained of episodes of nausea and a watery bowel movement at least once daily. Dr. Karpiak indicated that the Appellant appeared perfectly well except that he was a very poor historian and sometimes talked about symptoms bordering on the bizarre. Dr. Karpiak recommended that the Appellant have a psychiatric assessment.

[18] On December 14, 2004 Dr. Mohamed conducted a psychiatric assessment of the Appellant. Dr. Mohamed opined that the Appellant showed features of an acute stress reaction with explosive tendencies, agitation, and anxiety. These symptoms increased the Appellant's chest pain.

[19] On September 6, 2005 the Appellant's treating physician, Dr. Farrell provided a medical report for an earlier application for CPP disability benefits. Dr. Farrell detailed that he had known the Appellant for five years. He indicated diagnoses of, angina, myocardial infarction, diabetes, and a chronic condition. He noted that the Appellant required daily nitroglycerine for his heart condition. Findings included daily chest pain that was increased with activities. The Appellant was also noted to be treated with a number of medications.

[20] An October 3, 2016 consultation report indicated that the Appellant had underlying asthma or COPD with significant obstruction.

CPP Disability Medical Reports

[21] There are several medical reports on file.

[22] On April 18, 2002 Dr. Farrell submitted a medical report for CPP disability benefits for the Appellant.

[23] Dr. Farrell detailed that he had known the Appellant for one year. He provided the following diagnoses:

- Sleep apnea;
- Diabetes;
- Myocardial infarction;
- Atypical chest pain;
- Polycythemia; and
- Hypercholesteral.

[24] As a result of these medical conditions the Appellant was known to have ongoing chest pain,

[25] He indicated that the Appellant required ongoing management of his condition and was due for a neurologist consultation for presenting head pressure.

[26] Dr. Farrell detailed that the Appellant had a fair prognosis as he was a young man with multiple risk factors for myocardial ischemia.

[27] On September 16, 2003 Dr. Farrell submitted a medical report for CPP disability benefits for the Appellant.

[28] Dr. Farrell detailed that he had treated the Appellant since April 2001 for the following medical conditions:

- Diabetes;
- Coronary artery disease;
- Heart attack;
- Headaches; and
- Polycythemia.

[29] He indicated that the Appellant had ongoing chest pain. The Appellant was unable to perform significant physical exertion and he continued to have unbearable chest pain.

[30] Dr. Farrell opined that the Appellant's prognosis was such that improvement was very unlikely.

[31] On December 28, 2016 Dr. Farrell submitted a medical report in support of the Appellant's present application for a CPP disability benefit.

[32] Dr. Farrell indicated that the Appellant had the following diagnoses:

- COPD;

- Heart disease;
- Diabetes; and
- Hyponatremia.

[33] As a result of these conditions the Appellant had persistent chest pain and shortness of breath with exertion.

[34] Dr. Farrell opined that the Appellant prognosis was such that improvement was unlikely and his conditions were likely to deteriorate with time.

Testimony of the Appellant

Medical information

[35] The Appellant stated that he cannot do much. He stated that his chest is painful, he has a difficult time breathing, bad knees, has a difficult time walking. He stated that he has a difficult time walking to put trash out.

[36] The Appellant stated that he had a heart attack in 1999. Since that time he has been unable to lift over 7kg.

[37] The Appellant stated that his knees started to bother him 30 years ago. He stated that he does not have a diagnosed condition for his knees and that he received a prescription of Tylenol 3 from his family physician.

[38] The Appellant stated that his trouble breathing started in 2016.

[39] The Appellant was asked about his sleep apnea. The Appellant stated that he continues to use his CPAP machine. He stated that he only uses the machine 3 times a week. He stated that he has a hard time sleeping with a mask.

[40] The Appellant stated that his doctor has advised him to use the machine every day but he will not do so because it is uncomfortable.

Condition post heart attack

[41] The Appellant stated that he had a heart attack while driving a truck. The Appellant stated that as a result of his heart attack he lost strength and the ability to do a lot of activities. He stated that he now gets tired and loses his breath.

[42] The Appellant stated that his LTD provider stopped paying him last year. He stated that he took a buyout in exchange for stopping his benefit payments.

[43] The Appellant stated that he is in receipt of welfare benefits from his province.

Return to work and education

[44] The Appellant was asked whether he tried to go back to work. He stated he never tried to return to work because he was getting too tired and he could not stand up to it.

[45] The Appellant stated that he never looked for other work because he did not have any education and could not get hired anywhere.

[46] The Appellant stated that after his heart attack he tried to go back to school. He stated that he had difficulty with reading and writing but that he never enrolled in any courses or education to assist with his improvement.

SUBMISSIONS

[47] The Appellant submitted that he qualifies for a disability pension because he has a severe and prolonged disability.

[48] The Respondent submitted that the Appellant does not qualify for a disability pension because he does not have a severe and prolonged disability.

ANALYSIS

Test for a Disability Pension

[49] 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.

[50] 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.

[51] 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

[52] As indicated above the MQP is December 31, 2001. Given the dated MQP it becomes challenging for the Tribunal to assess whether the Appellant has continuously had a severe and prolonged disability throughout.

[53] The Tribunal notes there are significant gaps in the medical information. For instance from 2007 to 2015 there is almost no medical evidence on file. It is challenging in this context to assess whether there is a severe disability. Keeping in mind that the Appellant bears the onus of proving on a balance of probabilities that he does have a severe disability, this lack of medical evidence weighs against a finding of severe within the meaning of the CPP.

[54] It is evident that the Appellant had both sleep apnea and chest pain since at least 2001. However, there is a lack of evidence to support other medical conditions being present since that time and continuing to functionally impact the Appellant.

[55] The Tribunal notes that Dr. Kincade's opinion indicated that the Appellant may be able to return to employment should his sleep apnea settle down. The problem for the Appellant is

that he has failed to use his CPAP machine in the recommended fashion such that symptom relief has not been provided.

[56] The Appellant acknowledged that he has been advised to use his CPAP machine daily. However he will only use it 3/7 days a week.

[57] This failure to follow medical recommendations, particularly those that are fundamentally tied to his functional ability to return to employment, weighs against a finding of disability within the meaning of the CPP.

[58] The Tribunal is not satisfied that the Appellant has attempted to return to work although he was relatively young at the time of his disability and as early as 2002 had a fair prognosis for recovery.

[59] 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).

[60] The Appellant detailed in his testimony that he never attempted a return to work and did not seriously attempt any further education to enhance his skills and capacity for work.

[61] There is no indication on file that the Appellant would be unable to engage in educational pursuits to enhance his occupational prospects. He did not seriously dispute that he never enrolled in further education. Nor was he able to offer a cogent answer why he did not enroll in further education.

[62] This fact supports a finding that the Appellant is not disabled within the meaning of the CPP.

[63] While it is acknowledged that the Appellant has current significant impairments. These are not the same extent and severity of impairments that the Appellant suffered at the time of his MQP. Given the late application provisions, this adjudication can only consider entitlement effective the end of the Appellant's MQP.

[64] The Tribunal has considered the test set out in Villani. While the Appellant had minimal education at the time of his disability his other personal attributes such as his age do not support a finding of severe under the real world test.

[65] For the reasons set out above the Tribunal has determined that the Appellant did not have a severe disability at the time of his MQP.

Prolonged

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

CONCLUSION

[67] The appeal is dismissed.

Adam Picotte
Member, General Division - Income Security