



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L.W. v. Minister of Employment and Social Development*, 2017 SSTGDIS 200

Tribunal File Number: GP-15-3485

BETWEEN:

L. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Susan Smith

HEARD ON: August 3, 2017

DATE OF DECISION: December 17, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a Canada Pension Plan (CPP) disability pension on August 24, 2014. The Appellant claimed that he was disabled because of broken shoulder, seven broken ribs, two displaced ribs, vertigo, and PTSD with depression, anxiety, and sleep deprivation. 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, 2017.

[3] This appeal was heard in person for the following reasons:

- a) More than one party will be attending the hearing.
- b) The issues under appeal are complex.
- c) There are gaps in the information in the file and/or a need for clarification.
- d) Credibility is not a prevailing issue.
- e) 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 following people attended the hearing:

The Appellant: L. W.

The Appellant's legal counsel: Terry McCaffrey

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

PRELIMINARY ISSUES

[6] During the hearing the Tribunal member requested that counsel for the Appellant prepare written submissions on the issue of eligibility for a closed period of disability to submit to the Tribunal within 30 days following the conclusion of the hearing. The finalization of the decision was adjourned pending receipt of the written submissions from the Appellant's legal counsel and following receipt of the Respondent's reply to those submissions. Both parties have now made written submissions.

EVIDENCE

[7] The Appellant testified during the hearing regarding the nature and the extent of his injuries and the traumatic shock that resulted from the bizarre and shocking accident in which he was involved while riding a ski lift. The accident was horrific and caused enormous trauma both physically and mentally.

[8] The Appellant indicated that on the day of his accident he had taken his eleven-year-old daughter for a fun day with Dad. They had each taken a ski lesson in the morning and were planning to ski together for the afternoon. At the time of the accident his daughter was on the ski hill and was witness to the ordeal. The cable of the chair lift derailed and sent three chairs abruptly to the ground and then the cable rebounded sending the three chairs abruptly upward again before catapulting the chairs through the air and to the ground again. The Appellant was on the lift with his instructor. The occupants of the other two chairs involved in the accident were also ski resort staff members. The Appellant is the only paying customer involved in the accident. The Appellant is significantly older than the other victims and he is now the only victim who was not injured while working. He is isolated in every aspect of the trauma he suffered and that isolation has contributed to his emotional trauma.

[9] The Appellant stated that although he worked very hard at rehabilitation throughout the period from when he was first injured onward, his recovery from post-traumatic shock was never a given. He struggled with many aspects of mental health issues including: depression; anxiety;

anger control; and extreme emotional lability. He indicated that he was never told he would recover and that at all times up until he did successfully return to work his prognosis was based on hope but not expectation for recovery.

[10] The Appellant indicated that the cognitive issue with which he has struggled since the accident has not resolved and he is still unable to read a book. He was previously an avid reader but is now unable to follow a story due to short-term memory and concentration issues. He indicated that he continues to suffer from residual pain resulting from his multiple bone fractures.

[11] The Appellant stated that his occupation in aircraft repair is highly demanding, both physically and mentally, and it took 27 months recovery time before he was able to begin a gradual return to work. He stated that he did not successfully return to full-time occupation in his previous job until April 2017, 37 months after his injury occurred.

Medical

[12] March 7, 2014, Dr. Loken, completed the discharge report from X General Hospital. He indicated that the Appellant's prognosis for a complete recovery was good (GD2-65-66).

[13] June 1, 2014, Mike Pennington, physical therapist, prepared a report on the Appellant's progress at the Appellant's request for his insurance requirements. He indicated he had been treating the Appellant over the course of 8 sessions and that he believed the Appellant's recovery would be a protracted one. His therapy had been beneficial thus far and continued treatment was recommended (GD2-104-105).

[14] July 2014, Dr. Covaser, family physician, clinical notes, indicated the Appellant's prognosis was relatively good in the long term but because of some psychological issues it would take longer to resolve. He had a Global Assessment of Functioning (GAF) of 60-70 at the time.

[15] October 4, 2014, Dr. Kuelker, clinical psychologist treating the Appellant, reported to Dr. Covaser. He indicated the Appellant demonstrated improvement on the Outcome Rating Scale and it is considered a reliable measure of psychological distress. His prognosis was for continued

slow progress. It was suggested his progress could be accelerated by weekly sessions as opposed to twice monthly (GD2-148).

[16] December 29, 2014, Dr. Covaser, reported to the Appellant legal counsel. She indicated the Appellant continued to experience symptoms, both physical and mental health-related. He was reassured by her that his recovery from his physical symptoms should be full, including full recovery of the right side of his upper limb and side of the body including the functions necessary at his regular job. Recovery from PTSD was continuing and although he had a bad reaction to anti-depressant medication, he was responding to psychotherapy and improvement was expected to continue. His overall prognosis for returning to work remained good. The Appellant was eager to return to work and they agreed on a target of approximately 2-3 months to consider returning to work even if his recovery from his PTSD symptoms took longer (GD2-190-92).

[17] March 2015, Dr. Covaser, family physician, clinical notes, indicated the Appellant was not ready to return to work but the aim was to return to work in a couple of months. The Appellant had a GAF of 70-80 at the time.

[18] November 13, 2015, Dr. Kuelker, clinical psychologist treating the Appellant, completed a report at the request of the Appellant's legal counsel. He indicated that the Appellant had declined to take antidepressants. He may need to consider retraining. He had achieved clinically significant improvement with therapy; however, he was still experiencing significant psychological distress. Dr. Kuelker expected the Appellant's symptoms would continue to improve to mild symptoms but he did not expect a full remission (GD3-2-10).

[19] February 24, 2016, Dr. Covaser, reported the Appellant continued to have the occasional intrusive thought from the accident and he had memory concerns that had yet to be explored. The Appellant had benefitted from all the treatment modalities. He was assessed as very deconditioned and had started a daily walking program and it was noted that he would benefit from a more structured exercise program to facilitate a resumption of all physical activities. Prognosis indicated the Appellant was anticipated to remain completely disabled for the next few months and may have a partial disability in the context of not being able to resume full duties of his regular job for up to 1-2 years. A targeted date to attempt a return to a non-physical job was

suggested as April or May 2016. The doctor stated that the Appellant had a good chance of overcoming his symptoms and problems from a functional standpoint, as far as work and daily life is concerned, and therefore he did not believe the Appellant to be permanently disabled. He went on to say that since the accident, the Appellant has been disabled 100%, and this was likely to continue for another few months, at least. He expected that if the Appellant's return to work went well, he would estimate his disability for the following 1-2 years to about 50% on average. The doctor did expect the disability to start at more than 50 % and gradually decrease to eventually no disability at all. (GD4-2-9).

SUBMISSIONS

[20] The Appellant's counsel submitted that he qualifies for a disability pension because:

- a) Despite the Appellant having recovered sufficiently from his injuries to return to work, he ought to be granted disability benefits for a closed period because during the period between his accident and his return to work he met the definition of a severe disability within the meaning of the CPP;
- b) The facts of the Appellant's case support that he met the definition of a prolonged disability because he remained disabled by his injuries for an extended period of time and it was unclear, due to his lengthy recovery period, when he would be able to return to work;
- c) He should be determined to have been disabled from March 1, 2014, when he was injured, until July 4, 2016, when he returned to work;
- d) During the period claimed the Appellant met the definition of both a severe and a prolonged disability.

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

- a) The Appellant does not meet the definition of a severe disability because the medical evidence shows he could have returned to alternate work, suitable to his limitations, long before he returned to his previous occupation;

- b) The Appellant did not make any effort to obtain and maintain gainful occupation in any alternate occupation suitable to his limitations. He was obligated to have made those efforts in order to succeed in demonstrating he met the definition of a severe disability;
- c) There is no accommodation for temporary benefits under the CPP legislation and the definition of a prolonged disability clearly states that CPP disability benefits are for long continued and indefinite duration;
- d) An indefinite timeframe would be when there is no indication of improvement over several months to years when someone was fully engaged in all reasonable treatments, yet the Appellant's condition continuously improved with treatment until, after a relatively short duration of 27 months, he was able to return to his pre-injury demanding occupation;
- e) The Appellant has failed to meet the burden of proof in demonstrating he met the definition of a severe and prolonged disability within the CPP.

ANALYSIS

Test for a Disability Pension

[22] 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 hearing date.

[23] 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.

[24] 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 and Prolonged

[25] The Appellant's counsel has submitted that the Appellant should be granted a CPP disability pension for the period that extended from the date of his injury in March 2014 until 27 months later in July 2016, when he returned to his previous occupation.

[26] The Respondent has submitted that it is not appropriate and not available for an applicant in such circumstances to receive a disability pension as the legislation clearly states that the disability must be long continued and of indefinite duration.

[27] The issue of whether the legislation allows for the granting of benefits on the basis of a closed period has generated much case law including decisions from the SST General Division (SSTGD), the SST Appeal Division (SSTAD), the Pension Appeals Board (PAB), and the Federal Court of Appeal (FCA).

[28] The case law has focused on the discussion of whether the prolonged criteria can be met in a case where the Appellant in fact recovers and successfully returns work.

[29] The Tribunal considers that the case law, which it is bound to follow, clearly precludes an applicant, in circumstances such as the Appellant's, from qualifying for a disability pension for a closed period.

[30] A disability is considered to be prolonged if it is long continued and of indefinite duration, or likely to result in death. The objective medical reports reiterate collectively that there was an expectation that the Appellant would regain capacity regularly to pursue substantially gainful occupation. That expectation was present continuously from the date of his horrific accident in March 2014 until the date he did return to work in June 2016. Although recovery from his multiple injuries was expected to be a slow and gradual progression, that expectation was continuously present.

[31] The Federal Court of Appeal has addressed the question of closed period benefits. In *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309, the Court considered the previous decisions issued by the PAB in which a closed period of disability was found to satisfy the test for a severe and prolonged disability in the circumstances presented, and reached the following conclusion:

[10] However, in our view, these "closed period" decisions would appear to be distinguishable from the present case. The medical opinion prior to the prescribed treatment about the likelihood of the claimants' recovery and of their subsequent ability to work was much less clear in those cases than that accepted in Mr. Henderson's case. This point has been made by the Board in other cases, including Kinney v. Minister of Social Development (CP 21314, February 24, 2005) and Tibbo v. Minister of Social Development (CP 21704, August 23, 2004).

[11] The restrictive language of section 42 indicates that the purpose of the Plan is to provide a pension to those who are disabled from working on a long-term basis, not to tide claimants over a temporary period where a medical condition prevents them from working.

[32] In the case of *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366, the Federal Court of Appeal considered its earlier ruling in *Henderson*. The Court stated:

[9] There are no circumstances here that would justify this court reversing its own precedent. The use of the word "indefinite" in subparagraph 42(2)(a)(ii) of the Plan makes clear that Parliament did not intend that disability pensions would be available in cases of temporary disability.

[33] In *Minister of Human Resources Development v. D.Z.*, 2015 SSTAD 1194, (Zagordo) the Appeal Division issued a decision related to this issue. In that case, Counsel for the Appellant contended that the purpose of the CPP disability pension is not to provide a temporary benefit to a claimant and cited the Federal Court of Appeal decisions, namely *Henderson* in support of her argument.

[34] In Zagordo the SST Appeals Division determined that it is clear that the purpose of the CPP disability pension is not to provide a benefit to a claimant who is unable to work for a defined period of time due to a temporary disability. *“In some exceptional cases, a disability pension has been awarded for a closed period of time. In those cases, however, at the time that the pension was awarded, the evidence indicated that the claimant was not expected to recover to the extent that she or he would have capacity to pursue a substantially gainful occupation. The decision went on to say that in this case, the treating practitioners stated that the Respondent was expected to recover, but did not know when. I agree with counsel for the Appellant that having a disability for an undefined period is different than having a disability that is of indefinite duration”*.

[35] In the current appeal before the General Division, counsel for the Appellant has argued that the SST has taken contrary positions to the conclusions reached in Henderson. He has included two cases where the General Division of the SST granted CPP disability for a closed period. Counsel for the Appellant relies on *J.J. v. Minister of Employment and Social Development* and *J.M. v. Minister of Employment and Social Development*, as examples where facts can be distinguished from those found in the *Henderson* decision. He argues that the Appellant’s case more closely resembles these two decisions than the *Henderson* decision. With respect, the Tribunal is not persuaded by this argument. The Appellant’s recovery, though it may have felt like an eternity to him, was relatively short in duration when considered in comparison to permanent disability. He was at all times improving with treatment and he was at all times expected to continue to improve with treatment. I am not persuaded that the Appellant’s circumstances differ materially from those in Henderson.

[36] In both of the General Division decisions leave to appeal was granted to the Minister of Employment and Social Development and in both cases the appeal was successful based on the grounds that there may have been an error of law and the decisions were referred back to the General Division for redetermination. Moreover, in *Minister of Employment and Social Development v. J.M.* it was considered a possible error of law for the General Division not to have considered the *Zagordo* case above.

[37] The Tribunal has carefully considered the medical evidence submitted and finds that the facts of the Appellant's injury assessment, treatment, and recovery followed a trajectory that, while slower than anticipated, was expected from the outset to result in a full recovery. During the 27 months it took the Appellant to recover from his accident and be able to return to his previous occupation, at no time did any treating practitioner express doubt that the Appellant would make a satisfactory recovery from the injuries he suffered both physically and mentally. The Appellant's physical recovery was at all times expected to be a full recovery. His mental health recovery was expected to be less than a full recovery but at all times it was expected that his symptoms of PTSD would reduce to the mild range such that they would not prevent a full return to work.

[38] The medical opinions, evident in the reports set out in the evidence section above, demonstrate that from the outset, the Appellant's full recovery was expected and it was anticipated that a lengthy period of rehabilitation would be required due to the nature and extent of the injuries sustained. These facts are inconsistent with the definition of long continued and of indefinite duration. The anticipation of recovery was at all times considered infinite, because he was at all times expected to recover. The Tribunal finds that the facts of the Appellant's case demonstrate the Appellant's period of disability was not long continued and of indefinite duration.

[39] Counsel for the Appellant has also argued that to disallow benefits to persons that meet the definition of disability under the CPP and who later regain their health permits systemic delay by the Minister to exclude disability claims. The Tribunal finds that this argument is not persuasive. If the Appellant's case had come before the Tribunal in December 2014, or in March 2015, or in March 2016, the Appellant would not have succeeded in his appeal because: he was under treatment; his condition was continuing to improve; and his treating physician's expected him to reach a full recovery. All of the same reasoning that precludes granting of a closed period would apply to preclude granting this appeal even if it had been heard before the Appellant returned to work. The reason is that he could not, in the circumstances, have satisfied the definition of a prolonged disability. The fact situations presented to the PAB did satisfy the definition of a prolonged disability and that distinction from the present case is what resulted in the PAB decisions that allow for a closed period of disability.

[40] The Tribunal finds that the expectation that recovery would occur is a barrier to determining that a disability satisfies the prolonged criteria under the CPP. The SST Appeal Division has determined that having a disability for an undefined period is different than having a disability that is of indefinite duration. A disability that carries with it the expectation of recovery, and, as in the Appellant's case, documentation of a clear and slow progression to recovery from his medical conditions, cannot satisfy the requirement of a disability that is long continued and of indefinite duration. The duration of disability, though undefined, was at all times expected to be finite in that it was expected to end.

[41] The Tribunal finds that the Federal Court of Appeal, in the decisions reached in *Henderson* and *Litke*, has placed a limitation on the circumstances under which a closed period might potentially be considered and that limitation creates an insurmountable barrier to the Appellant. The decision of the SST Appeal Division in *Zagordo* also confirms that barrier to the success of the Appellant's appeal. Having regard to all of the circumstances of this case, and having carefully considered the case law and the arguments advanced, I find the Appellant cannot succeed in his appeal.

[42] The Tribunal finds that the Appellant has failed to meet the burden of proof in demonstrating he met the criteria of both a severe and prolonged disability, as those terms are defined by the CPP, either as of the time of the hearing of this appeal, or at any point prior to the hearing of this appeal.

CONCLUSION

[43] The appeal is dismissed.

Susan Smith
Member, General Division - Income Security