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

Citation: *J. M. v. Minister of Employment and Social Development*, 2018 SST 466

Tribunal File Number: GP-17-2842

BETWEEN:

J. M.

Claimant (Appellant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Kelley Sherwood

Teleconference hearing on: May 9, 2018

Date of decision: June 6, 2018

Canada

DECISION

[1] The Minister has failed to establish that the Claimant ceased to be disabled by the end of February 2017. Therefore, the Claimant's Canada Pension Plan (CPP) disability pension is to be reinstated as of March 2017.

OVERVIEW

[2] The Claimant was granted a CPP disability pension effective January 2006. He was found to have a severe and prolonged disability because of symptoms arising from a heart condition. After a review of updated medical information, the Minister ceased payments as of the end of February 2017 arguing that the Claimant was no longer disabled within the meaning of the CPP. The Claimant appealed the decision to the Minister, but was denied initially and on reconsideration. The Claimant then appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

ISSUE

[3] Does the Minister's evidence support that the Claimant's disability was no longer severe and prolonged within the meaning of the CPP by the end of February 2017?

ANALYSIS

[4] Disability is defined as a physical or mental disability that is severe and prolonged[1]. A person is considered to have a severe disability if 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.

[5] A disability pension ceases to be payable the month in which a Claimant ceases to be disabled[2]. The Minister has the onus to prove on a balance of probabilities that the Claimant ceased to be disabled at the time his benefits were terminated[3].

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[1] Paragraph 42(2)(a) Canada Pension Plan
[2] Subsection 70(1)(a) of the CPP Regulations
[3] *Atkinson v. Canada (A.G.)* 2014 FCA 187

The evidence does not support that the Claimant's gross income represented work activity

[6] A person who has been determined to be disabled within the meaning of the CPP must inform that Minister without delay if he or she returns to work[4].

[7] The Claimant had a heart attack in 2000. He returned to his usual job as an optician, but could no longer work as of November 2004 following triple bypass surgery. He claimed symptoms of extreme fatigue with exertion rendered him disabled. The Minister received his application for a disability pension in April 2007. He was deemed to have a severe and prolonged disability within the meaning of the CPP upon reconsideration.

[8] In July 2016, the Minister launched an investigation of the Claimant's eligibility for a disability pension following information received from the Canada Revenue Agency that showed the Claimant had significant gross earnings between 2006 and 2014. The Claimant explained in correspondence with the Minister[5] and at the hearing that the income was from rental units and a convenience store managed by his wife. Besides filing the taxes, he had no duties or responsibilities in the businesses since he stopped work. He said that the store was always his wife's business. Before he stopped work, he owned seven or eight rental units. He used to collect rent and do maintenance work on the properties. However, after he stopped working, his wife took over the management of the properties. They had to sell three units because his wife was unable to care for all of the properties on her own. They also had to hire someone to do the maintenance work. He stated that he had always reported his taxes this way and continued to do so after he was in receipt of a disability pension.

[9] While the Minister began its investigation on the basis of his gross earnings reported to the Canada Revenue Agency, it did not make a clear finding on his gross income in its submissions. Given that the investigation stemmed from his gross earnings, I find it is necessary to make a clear finding on his gross income.

[10] I accept the Claimant's evidence. I concluded that that his income between 2006 and 2014 does not represent work activity.

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[4] Subsection 70(1) of the CPP Regulations
[5] GD2 – 9 to 11, GD2 – 43

The evidence does not support a meaningful improvement in his medical condition

[11] The Minister's decision in awarding a disability pension and paying benefits until February 2017 must be dealt with as having been correct. In order to cease disability benefits, the Minister must show that the conditions upon which disability payments were made had improved such that the Claimant no longer qualified[6].

[12] I considered the evidence before the Minister when the decision was made to grant a disability pension to the Claimant. In April 2007, Dr. Whitten, his family doctor, completed his CPP Medical Report[7]. He noted the Claimant had severe left ventricular dysfunction. He had had some improvement, but he continued to have fatigue with mild exertion. His condition was manageable if he did not exert himself. His prognosis was poor. He was unable to do any work.

[13] Also before the Minister were reports from the Claimant's cardiologists. The Claimant had a defibrillator implanted in 2005, at which time he was documented to have New York Heart Association (NYHA) function class I-II heart failure and an ejection fraction (EF) level of 20-21%[8]. In January 2006, Dr. Graham reported that the Claimant had no chest pain since the bypass surgery. He had not had further episodes of ventricular tachycardia. He had fatigue and shortness of breath with any prolonged activity. He could not do full-time work[9]. In April 2006, Dr. Connors reported that the Claimant was doing well. There was no evidence of heart failure. In October 2006, Dr. Connors reported that the Claimant had shortness of breath with marked physical exertion, but his symptoms were stable. An echocardiogram from February 2007 measured an EF level of 38-39%[10]. Dr. Graham attributed the Claimant's complaints of increased shortness of breath at the time to weight gain as his EF levels had improved since the defibrillation device was implanted[11].

[14] In the reconsideration decision from October 2007, the medical adjudicator wrote:

> When considering the client's medical condition with resultant symptomatology of shortness of breath with minimal activity, and severe fatigue, combined with the client's

[6] *Boudreau v. MHRD* (2000) CP 11626 (PAB)
[7] GD2 – 427 to 430
[8] GD2 – 410
[9] GD2 – 483 to 439
[10] GD2 – 296
[11] GD2 – 298 to 299

> ongoing medical treatments, family physician supporting his disability, and the client's excellent work history, it is reasonable to render the client is not capable of maintaining any gainful employment. As such, [the Claimant] meets severe and prolonged criteria as defined by CPP legislation[12].

[15] As part of its review of the Claimant's disability status, the Minister obtained his updated cardiac records. The Minister argued in its submissions[13] in the current appeal that the medical information on file reveals his symptoms to be consistent with the NYHA Class I. Further, the EF level has improved over the years. It concluded that a longitudinal review of his cardiac assessments shows a consistent stable cardiac status.

[16] While the reports show a consistent stable cardiac status, I disagree that the reports denote an improvement in the Claimant's condition since the time of the reconsideration decision in October 2007. The annual/biannual cardiology reports consistently report that the Claimant's condition is stable with no evidence of heart failure[14]; however, these findings are unchanged since the reports that were before the medical adjudicator at the time of the reconsideration decision. The Claimant's condition was described as stable by Dr. Connors in October 2006. That he continues to have a consistent stable cardiac status is not evidence of an improved condition.

[17] I considered his NYHA functional classification. While not before the medical adjudicator, Dr. Connors reported in the same month the reconsideration decision was made that the Claimant's condition was NYHA function class I[15]. I acknowledge that Dr. Paulin also indicates that the Claimant had a NYHA function class I level in his reports from 2014, 2015 and 2016; however, the cardiologist reports are not consistent. Dr. Sheridan, who saw the Claimant on a rotational basis with Drs. Connors and Paulin, noted Class I-II functioning in April 2008[16] and Class II in April 2012[17]. As such, I could not conclude that the NYHA functional classification was sufficient to show evidence of improvement in his health condition in the absence of other supporting medical findings.

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[12] GD2 – 420
[13] GD4 – 10
[14] Multiple reports from Drs. Connors and Paulin dated April 2007 until August 2016.
[15] GD2 – 302 to 303
[16] GD2 – 304 to 305
[17] GD2 – 318 to 319

[18] Finally, I looked at the Claimant's EF function. The Minister has stated that the Claimant's EF function has improved over the years; however, this statement is misleading. While it is accurate to say that his EF function has improved since he had the defibrillator installed in 2005, objective evidence shows that his EF function has declined somewhat since the reconsideration decision. In 2007, an echocardiogram (ECG) showed his EF function at 38-39%. His most recent ECG test results, however, show some evidence of decline with testing from June 2015 showing an EF of 34%[18]. Moreover, the Minister was aware of the improvement in the Claimant's EF testing following the installation of his defibrillator when it made the decision to grant a disability pension in 2007.

[19] Accordingly, I am not satisfied that the medical evidence supports a meaningful improvement in the Claimant's health condition by the end of February 2017.

The Minister did not demonstrate that the Claimant regained capacity for work as of March 2017

[20] In its submissions, the Minister argued that the Claimant no longer met the severe and prolonged criteria as of the end of February 2017 when he regained the capacity for regular substantially gainful work. It cited a letter from Dr. Connors dated February 2017 as evidence to cease benefits as of that date.

[21] Dr. Connors reported that the Claimant was most recently seen at the defibrillator clinic in August 2016[19]. He was felt to be in NYHA functional class I. The Claimant denied any palpitations or chest discomfort. Dr. Connors reported that there had been "some improvement" on ECG testing, but he acknowledged that he did not have the actual test results as they were not sent to the clinic. He stated that the Claimant's condition was stable. Given his NYHA functional class, he wrote that "it may be reasonable for him to do a moderate amount of physical activity and to work in some capacity". What is not clear from Dr. Connors' report is that he had not treated the Claimant since 2010, yet almost seven years later he was offering his opinion on the Claimant's capacity to work based in part on an improvement from test results that he had not received or reviewed. As such, I did not accord much weight to Dr. Connors' report.

[18] GD2 – 332 to 333
[19] GD2 – 405 to 406

[22] While Dr. Connors' theoretical opinion is acknowledged, I elected to place greater weight on the report dated October 2017 from Dr. Whitten[20], who has treated the Claimant since the onset of his heart condition and continues to see him four times a year. I considered how Dr. Whitten's findings from October 2017 are strikingly similar to those he reported when he completed the Claimant's CPP Medical Report in April 2007. Dr. Whitten reported his severe left ventricular dysfunction has had a significant negative impact on his quality of life and functional ability. The Claimant becomes short of breath with any exertion, such as a slow walk on surface level. If he does overexert himself, he takes days to recover. Dr. Whitten reviewed the CPP Medical Report and concluded that his symptoms continue to be very similar since that time. While his EF improved from 21% to 34% after surgery, he remains symptomatic. His heart function will not improve. As a result of his condition, he has not been able to do any type of work and this is not anticipated to change. Dr. Whitten concluded that the Claimant was permanently disabled.

[23] In conjunction with Dr. Whitten's report, I also considered the Claimant's evidence. When he completed his CPP Application February 2007[21], he was 47 years old. He reported that he was very easily fatigued. He could not sustain activity. He had stopped all of his sporting activities. After 20 to 30 minutes of walking, he needed to rest for a few hours. He could only perform household maintenance activities a little bit at a time. He became very short of breath with any exertion. His symptoms worsened as the day progressed. In his request for reconsideration dated September 2007[22], he wrote that normal activities left him very weak. He took several naps during the day. It took great effort to keep his condition stabilized. He took his medications, ate properly, exercised and tried to reduce his stress level. At the hearing, the Claimant confirmed that his symptoms have not improved since he applied for a disability pension. He is now 58 years old. He can only walk 10 to 15 minutes before he becomes exhausted. He can only do light activities around the house at a slow pace. He does not do any heavy chores, such as shovel snow or mow the lawn. He finds his breathing is worse as he gets older. It takes less activity to make him short of breath and his recovery time is longer. He

[20] GD1 – 9 to 11
[21] GD2 – 452 to 458
[22] GD2 – 18

continues to require naps during the day. Accordingly, after a thorough review of the evidence, I did not conclude that the Claimant's functional capacity had improved.

[24] As such, I determined that the evidence did not support the Minister's contention that the Claimant had regained capacity to work as of the end of February 2017.

CONCLUSION

[25] Accordingly, I concluded that the Minister did not prove that the Claimant ceased to be disabled within the meaning of the CPP as of the end of February 2017. His disability pension is to be reinstated as of March 2017.

[26] The appeal is allowed.

Kelley Sherwood
Member, General Division - Income Security