



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. H. v Minister of Employment and Social Development*, 2018 SST 1047

Tribunal File Number: GP-17-1158

BETWEEN:

E. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Susan Smith

Claimant represented by: Yolanda Beaudry

In person hearing on: September 5, 2018

Date of decision: September 12, 2018

DECISION

[1] The Claimant continued to be disabled in October 2014, and onward.

OVERVIEW

[2] The Claimant applied for a Canada Pension Plan (CPP) disability pension. He claimed he was disabled because of the symptoms associated with a left leg below knee amputation resulting from a boating accident in 1992, as well as numerous complications arising from the amputation, stump healing, multiple infections, and alignment issues caused by his unusual gait caused by compensating for his prosthesis.

[3] The Claimant has had a lengthy and complicated history with his disability benefits. I will only briefly summarize the details below as both parties have full knowledge of the history.

[4] The Minister first granted the Claimant's application for the disability pension with a start date of May 1992. Since that time the Claimant has been reassessed, ceased benefits, reinstated by the Pension Appeals Board, ceased and re-started again, and ultimately in January 2016 the Minister initiated a reassessment and the Claimant was found no longer disabled, his benefits were ceased effective September 30, 2014, and he was assessed an overpayment of \$22,093.29. Initially his appeal of the Minister's assessment was denied. He was successful in an appeal before the Appeal Division from the SST General Division dismissing his appeal. On July 13, 2017, the Appeal Division determined the General Division had made an error of law and referred the case back to the General Division for redetermination on the merits.

ISSUES

[5] Did the Claimant's medical condition for which he was first granted a disability pension with the date of onset in May 1992, undergo such improvement that the Appellant was no longer incapable regularly of pursuing substantially gainful occupation by September 30, 2014?

[6] Do the Claimant's earnings during the fiscal year of 2014, earned between June and November 2014, present an insurmountable barrier to a determination that he continued to be disabled?

ANALYSIS

[7] 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. A person must prove on a balance of probabilities their disability meets both parts of the test.

[8] Once a person has been granted a disability pension, in order to cease benefits and assess an overpayment, the Minister must show on the balance of probability that the Claimant no longer meets the criteria of a severe and prolonged disability.²

[9] To meet the burden of proof the Minister must show that the Claimant's condition has undergone such improvement, or the Claimant has adapted sufficiently to his limitations, that he is no longer incapable regularly of pursuing any substantially gainful occupation.

The Claimant's condition has not improved and he has not adapted to his limitations such that he is no longer disabled

[10] I find the Claimant continued to have a severe disability that rendered him incapable regularly of substantially gainful occupation from October 2014 onward.

[11] The Claimant testified during the hearing in a forthright and compelling manner. His testimony was both internally consistent and consistent with the objective evidence. He described in detail the impact his injury of 1992 has had on his ability to function and to earn a living. He was young when he lost his leg and he has repeatedly attempted to find a way to earn a living and provide for himself and his family ever since. He has had periods of being capable of earning a living in the past 26 years, but he has never been able to sustain employment for an extended period. He has mainly only succeeded in physically demanding seasonal work with earnings below the year's basic disability amount for CPP contributions. As he ages it has

¹ Paragraph 42(2)(a) *Canada Pension Plan*

² *Atkinson v. Canada (A.G.)*, 2014 FCA 187

become more difficult to find and to sustain employment of any kind due to his disability. His injury was significant enough to require four years of recovery and rehabilitation. There is ample medical evidence of the complications he has experienced with repeated infections of his stump. The scar tissue build-up has resulted in his tendons and his skin becoming fused so that they moved together and create continuous friction between his stump and his prosthesis. The problem cannot be resolved. His gait has been awkward since his accident affecting his balance and creating a safety issue in many work environments.

[12] The Claimant testified that he has been dismissed by employers because he has caused accidents as a result of his limitations. He said he has done everything he can to gain employment where he is able. He does not have any computer skills, he has never had any type of job that was not physically demanding and it has become increasingly difficult as he ages to succeed in any occupation for which he is reasonable qualified even on a part time or seasonal basis.

[13] The medical evidence and the Claimant's testimony do not support a conclusion he ceased to be disabled within the meaning of the CPP by October 2014. The conclusion that he ceased to be disabled is based solely on the assumption that his earnings generated during the 2014 fiscal year prove he was not disabled.

[14] I not am satisfied by the evidence that the Claimant's symptoms and limitations arising from his 1992 injury have improved, or that he has adapted to such an extent that he is no longer disabled by his symptoms and limitations.

[15] I find the condition for which he was granted a disability pension did not undergo such improvement that he became capable regularly of substantially gainful occupation.

The Claimant's work efforts do not demonstrate his limitations improved or that he adapted to them

[16] The evidence shows the Appellant's effort at obtaining and maintaining employment has been unsuccessful by reason of his health condition. He has not been successful at maintaining employment for any appreciable period since he was first injured in 1992. He attempted to return to work in a variety of occupations over the years. In each case he was unable to sustain gainful

occupation. He worked in a seasonal position during the 2013 fiscal year but the job was too physically demanding to sustain and the employer let him go. He worked at X from June 12 to December 5, 2014.

[17] On August 24, 2016, the Claimant's employer at X submitted an employer questionnaire completed by the general manager. He indicated the Claimant was paid \$17.00 an hour, worked 30 to 40 hours per week, had fair attendance, worked independently and work was satisfactory, and he quit without notice.³ On November 29, 2016, the Plant Manager for X wrote on behalf of the Claimant and described modifications made to accommodate the Claimant's limitations. He indicated the Claimant was not required to climb ladders, he was assigned lighter duty tasks to avoid heavy lifting, and he was assisted by other employers for some tasks due to his disability. His attendance was not affected by his disability.⁴

[18] The Claimant testified that his hours of work at X varied from week to week; that he never had certainty regarding the amount of work available; and he was constantly worried that he would not be able to sustain the effort because he had mobility difficulties and safety concerns while on the job. He said that his doubts regarding sustainability are what lead to him omitting to report his return to work.

[19] The Claimant testified that he struggled while working at X because the demands of job, though modified, were still beyond his capability. He said he was at risk of injury many times as direct result of his disability. He described becoming caught in the back of a truck one day when foot got stuck in a pallet used to transport glass and his leg fell off. On September 29, 2014 he sustained a workplace injury to his arm when he stumbled into a plate of glass because of his unstable gait while walking and he cut his arm on the glass. He also stated that while he was working he was not able to manage anything else. Even his diet suffered because he was too exhausted from a day of work to adequately shop for groceries and prepare proper meals.

[20] The Claimant stated that he did not return to X in January 2015 following the Christmas shut down because he was concerned for his safety in the workplace. He said that cold weather with the possibility of ice forming in the workplace made it too unsafe for him to continue

³ GD2-418-419

⁴ GD2-18

despite his motivation to earn a living. He said he has not been able to work since December 2014.

[21] The Claimant testified that his earnings since 2014 have consisted of employment insurance; social benefits he receives from the Provincial disability program; and less than the year's disability amount for some part time carpentry work he does for a friend intermittently as he is able. He stated that the symptoms and limitations resulting from his injury in 1992 have increased over time and that his extensive treatment with antibiotics for repeated infections has resulted in additional medical issues.

The Appellant's earnings after October 2014 are not an absolute barrier to finding he remained disabled by his medical condition

[22] The Claimant had earnings in 2014 of \$18,315.31 which is above the amount that is considered to be substantially gainful.⁵

[23] In the past the Pension Appeals Board (PAB) determined that significant remuneration should never be an absolute bar to the receipt of disability benefits.⁶ Earnings are just one factor of many that must be considered in reaching a conclusion. Although I am not bound by the decisions of the PAB, I find the overriding principles are the same, and the rationale applied is compelling.

[24] The CPP regulation setting out the substantially gainful amount came into effect May 29, 2014 and applies only to applications for benefits received after that date. However, the established amount provides a reasonable benchmark for all claims.

[25] The Claimant did succeed in generating substantially gainful earnings during 2014. However, I am not convinced that his success was the result of any improvement in his condition or any significant ability to adapt to his limitations as much as his determination to try his best. The Claimant could not sustain the effort. He paid a price for his attempt and he has never been capable of gainful occupation since.

⁵ Section 68.1 Canada Pension Plan Regulations

⁶ *Porter 1998 CP 5616*

[26] I find the Claimant's work efforts during 2014 demonstrate a failed attempt to return to work and the earnings he generated cannot reasonable be found to demonstrate he adapted to or recovered from his medical condition such that he ceased to be disabled within the meaning of the CPP. His work effort lasted only six months and he has never been able to return to work since 2014.

[27] I find the Minister has failed to meet the burden of proof to demonstrate the condition for which the Claimant was first granted a disability pension has undergone such improvement or that the Claimant has sufficiently adapted to his limitations such that he is no longer disabled within the meaning of the CPP.

CONCLUSION

[28] The Claimant continued to be disabled within the meaning of the CPP in October 2014 by the same disabling condition for which he was first granted a disability pension in May 1992. His disability pension should be restored and the assessed overpayment withdrawn.

[29] The appeal is allowed.

Susan Smith
Member, General Division - Income Security