



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. C. v Minister of Employment and Social Development*, 2019 SST 115

Tribunal File Number: GP-17-2635

BETWEEN:

A C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Claimant represented by: K. C.

Videoconference hearing on: December 12, 2018

Date of decision: January 9, 2019

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of December 2015.

OVERVIEW

Background

[2] The Claimant was born in India in August 1951. He immigrated to Canada when he was 15 years old. He completed high school and for many years was a X in British Columbia. He stopped in July 2002, after he injured his non-dominant left hand in a workplace accident. He had multiple surgeries to repair the damage, but still had pain, tingling, and reduced grip and range of motion that made the hand virtually unusable¹. He applied for a CPP disability pension in August 2005, but was unsuccessful².

[3] The Claimant retrained to be an X, and worked as one from 2006 to 2008. His hand pain increased so he stopped working and had more surgery, which did not improve his condition. He also developed elbow and shoulder pain³. He applied for a CPP disability pension again in June 2011. This time the application was approved, with payment retroactive to July 2010, which is the maximum allowed under the CPP⁴.

Cancellation of disability benefits and reconsideration decision of June 28, 2016

[4] In March 2016, the Minister determined the Claimant ceased to be disabled as of July 2010, because he was able to work on his family farm beginning in April of that year. He was assessed an overpayment of \$63,554.42 for disability payments received from August 2010 to February 2016⁵. The Minister maintained this decision upon reconsideration in June 2016⁶. The reconsideration decision advised the Claimant that he had a right to appeal to the Social Security

¹ GD2-545-548, 557-560, 568-569

² GD2-307, 297

³ GD2-524

⁴ GD2-514-516

⁵ GD2-64-66, 72

⁶ GD2-39

Tribunal (Tribunal), but he did not do this. Instead, he submitted a new disability application in November 2016⁷.

Disability application of November 2016 and reconsideration decision of July 10, 2017

[5] After receiving the November 2016 disability application, a medical adjudicator for the Minister called the Claimant in February 2017 to clarify if he intended to appeal the June 2016 reconsideration decision to the Tribunal, or make a new application. The record of that call suggests the difference between the two approaches may not have been clearly explained to the Claimant⁸. It appears he was not told that even if his new application was approved he could not be deemed disabled earlier than 15 months before the application was made, which would affect how much retroactive payment he would receive⁹. By contrast, a successful appeal of the June 2016 reconsideration decision might restore his entitlement to a disability pension back to July 2010, and cancel the overpayment he had been charged. Nor does it appear the Claimant was told of the different burden of proof that applied depending on which method he chose. On a new application, the Claimant had to prove on a balance of probabilities that he was disabled; on a cancellation of benefits, the onus was on the Minister¹⁰.

[6] The Claimant decided to pursue the new application rather than appeal the cancellation of his disability pension. The Minister denied the new application initially, and on reconsideration in a decision dated July 10, 2017¹¹. The Claimant appealed the reconsideration decision of July 2017 to the Tribunal. That appeal is before me.

The Test for a CPP Disability Pension

[7] On this appeal, the Claimant must prove on a balance of probabilities that he became disabled on or before the end of his Minimum Qualifying Period (MQP), which is calculated based on his contributions to the CPP¹². The Claimant's MQP ended on December 31, 2011¹³.

⁷ GD2-19

⁸ GD2-17-18

⁹ Paragraph 42(2)(a), section 69 *Canada Pension Plan*

¹⁰ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

¹¹ GD2-7

¹² Paragraph 44(1)(b), subsections 44(2), 52(3) *Canada Pension Plan*

¹³ GD2-313

[8] A person is disabled under the CPP if he has a physical or mental disability that is severe and prolonged. A disability is severe if the person 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 death¹⁴.

ISSUES

[9] Does the Claimant have a severe disability, meaning he was incapable regularly of pursuing any substantially gainful occupation by December 31, 2011?

[10] Was the disability likely to be long continued and of indefinite duration by December 31, 2011?

ANALYSIS

The Claimant has a severe disability

[11] Although the Claimant now has problems including depression and alcoholism, there is no evidence these contributed to his inability to work by December 31, 2011. However, I find he has been incapable regularly of pursuing any substantially gainful occupation since 2008 because of pain, his limited use of his left hand, his age, and his narrow work experience.

[12] The measure of whether a disability is “severe” is not whether the person suffers from severe impairments, but whether the disability prevents him from earning a living. He must be incapable regularly of pursuing any substantially gainful occupation, not just incapable of performing his usual job¹⁵. In deciding if the Claimant has any work capacity, I must keep in mind factors such as his age, level of education, language proficiency, and past work and life experience¹⁶.

[13] I am satisfied the Claimant has not had any work capacity since 2008, when he stopped working as a X. He has difficulty using his left hand because of significant pain and restricted

¹⁴ Paragraph 42(2)(a) *Canada Pension Plan*

¹⁵ *Klabouch v Canada (A.G.)*, 2008 FCA 33

¹⁶ *Villani v. Canada (A.G.)*, 2001 FCA 248

movement. Over-use of his right hand to make up for this led to right shoulder and elbow pain¹⁷. Although his main limitation is with his non-dominant hand, his only work experience is as a labourer. These jobs typically require two hands. The Claimant was unable to perform light work as a X. He testified he applied for several jobs at gas stations and as a security guard, but was not hired when he told employers about his hand. His family doctor, Dr. Forrester, doubted the Claimant would last twenty minutes even as a gas station attendant¹⁸.

[14] It is not realistic to expect the Claimant would be employable in any other capacity. Although Dr. Forrester suggested the Claimant might be able to sit at a desk and use one hand¹⁹, he did not consider the Claimant's personal characteristics that made that scenario doubtful. By 2008, the Claimant was in his late 50s and therefore an unlikely candidate to train for an administrative or other "desk job" that could conceivably be performed without relying on both hands.

Farm activity is not evidence of work capacity

[15] Along with other family members, the Claimant is a part owner of two farms in BC's X. One of the farms produces berries and poultry and has been in the Claimant's family since 1991. The Claimant's wife purchased the second farm later with funds obtained from an insurance settlement. Its income is from poultry and a rental house. The Claimant, his wife, and daughter testified that before 2002 the Claimant's father-in-law did much of the farming, and the Claimant helped after work and on weekends. After the Claimant was injured and could no longer do farm work, the berry farm was leased until 2007 or 2008 when the tenant gave it up because he was losing money. No one else was interested in renting the property, and the Claimant's family – including his adult children – struggled to keep the farm operating. In 2011 the Claimant's son won a poultry quota, and this increased the farm's profitably considerably. Since February 2017, the farm has been leased to a third party.

[16] The Claimant and the witnesses testified the Claimant did very little work on the berry farm and has nothing at all to do with poultry operations on either farm. They testified that

¹⁷ GD2-524-531; Claimant's testimony

¹⁸ GD2-339-340

¹⁹ GD2-339-340

references in doctor's reports that suggest otherwise do not accurately depict what the Claimant was capable of doing. He sometimes tried to drive the tractor or do other physical work, but had to stop after about 30 minutes because of his pain and limitations. He could only do things such as hire berry pickers and occasionally direct them, and sign cheques if necessary. He estimated he worked between four and eight hours a week, at most. The bulk of the work is performed by the Claimant's children, who are not paid because the Claimant and his wife provide them with a home. The farm is a family operation to which all contribute as they are able.

[17] The Claimant and his family members testified candidly and spontaneously. They gave a plausible description of the farming operation and the Claimant's participation in it, and I believed them. I accept their evidence as an accurate account of the Claimant's involvement in the farm. I do not think the Claimant's ability to work for a few hours a week in the operation of a small family farm is evidence of a regular capacity for substantially gainful work in farming or any other area. His contribution is marginal, and if he cannot do something then another family member will do it instead. His limited abilities would not make him employable in the real world.

The Claimant has a prolonged disability

[18] The Claimant's condition was long continued and of indefinite duration by his MQP of December 31, 2011. He had a significant hand injury that did not get better despite surgery and physiotherapy. Other treatment such as medication did not reduce his pain levels or increase his function. Since then, his pain has spread. There is no suggestion by his doctors that his condition will improve.

CONCLUSION

[19] The Claimant had a severe and prolonged disability in 2008, when he stopped working as a X. However, when calculating the date payment of the pension is to begin, he cannot be deemed disabled more than 15 months before the Minister received his application²⁰. The

²⁰ Paragraph 42(2)(a) *Canada Pension Plan*

application was received in November 2016; so the Claimant is deemed disabled in August 2015. Payments start four months after the deemed date of disability, as of December 2015²¹.

[20] As noted above, this is a significantly different result than what would have occurred if the appeal concerned the cancellation of the Claimant's previous CPP disability pension. The Claimant and his representative told me at the hearing that they understood that the present appeal concerned his new application, not the June 2016 decision to cancel his benefit. However, it was obvious to me that they did not realize this made any difference. Unfortunately for the Claimant, I cannot do anything to remedy the situation. The Tribunal derives its authority to decide appeals entirely from legislation²². I cannot somehow consider this to be an appeal of the June 2016 reconsideration decision. First, it is clear the Claimant intended to make a new application and to appeal the denial of that application; and second, he filed his appeal to the Tribunal in October 2017, more than one year after the June 2016 reconsideration decision²³.

[21] Under the legislation, I only have jurisdiction to decide if the July 2017 reconsideration decision should be confirmed, varied, or rescinded. That reconsideration decision concerned the Claimant's November 2016 disability application, and although I have found in the Claimant's favour, the law limits the retroactivity of his payment to 15 months.

[22] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security

²¹ Section 69 *Canada Pension Plan*

²² Section 82 *Canada Pension Plan*; section 52-54 *Department of Employment and Social Development Act*

²³ Subsection 52(2) *Department of Employment and Social Development Act* states "in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant". The Claimant must have received the reconsideration decision by August 2016, when he submitted a new medical report to the Minister (GD2-361).