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

Citation: *A. D. v Minister of Employment and Social Development*, 2019 SST 1499

Tribunal File Number: GP-19-320

BETWEEN:

A. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Russell Bailey

Teleconference hearing on: December 16, 2019

Date of decision: December 20, 2019

DECISION

[1] The Minister was not entitled to terminate the Claimant's *Canada Pension Plan* (CPP) disability pension.

OVERVIEW

[2] In April 1991, the Claimant suffered a spinal cord injury in a motor cross accident. As a result, he was partially paraplegic.[1] In September 2002, he was granted a CPP disability pension with payment effective July 1991.

[3] In 2004, the Minister reassessed his eligibility because of unreported work activities and earnings in 2000 and 2003. In April 2005, the Minister completed its review and notified the Claimant that his disability payments would continue.[2] This was based on information that the Claimant's earnings were from failed return to work attempts.

[4] In 2009, the Minister again reassessed the Claimant's eligibility, and the Minister decided to cease his disability pension retroactively to July 1, 2008. Upon reconsideration of that decision, the Minister decided to retroactively cease the Claimant's benefits starting in February 1995.

[5] The Claimant appealed. In 2013, the appeal was transferred to this Tribunal. In August 2016, the General Division dismissed the appeal, the Claimant had ceased to be disabled within the meaning of the CPP on January 31, 1995. In September 2017, the Appeal Division dismissed the Claimant's application for leave to appeal.

[6] The Claimant applied to the Federal Court for judicial review. The Federal Court allowed the Claimant's application for judicial review, finding (on consent) that the Appeal Division's decision was unreasonable. The Appeal Division failed to determine that the General Division had erred in law by not applying the principles established by the Federal Court of Appeal in a case

---

[1] GT1-394
[2] GDT1-205

called *Kinney*.[3] The Federal Court returned the Claimant's case to the Appeal Division for redetermination.

[7] In February 2019, the Appeal Division allowed the appeal and returned this matter to the General Division for a new hearing.

[8] In order to avoid unnecessary duplication, I treated the recording of the evidence at the initial General Division hearing as part of the evidence at this hearing.

ISSUE

[9] Has the Minister established that it is more likely than not the Claimant ceased to be disabled after April 2005?

[10] If so, as of what date did he cease to be disabled?

ANALYSIS

[11] A qualifying disability must be severe and prolonged. A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.[4]

[12] In order to terminate a disability pension the Minister must establish that it is more likely than not that the Claimant has ceased to be disabled. A disability pension ceases to be payable for the month in which a Claimant ceases to be disabled.[5]

[13] According to the *Kinney* decision, the Minister can only terminate the pension as far back as the last standing decision confirming eligibility.

[14] The Minister acknowledges that it cannot terminate the Claimant's pension prior to April 2005, the date of the last standing decision. Its position is that the Claimant was no longer eligible for CPP disability effective May 1, 2005, the earliest date it can terminate the benefit in accordance with the principles in the *Kinney* decision. Despite the *Kinney* decision, the Minister

[3] Kinney v. Canada (Attorney General), 2009 FCA 158
[4] Subsection 42(2) of the CPP
[5] Subsection 70(1) (a) of the CPP

argues that the Claimant was regularly capable of pursuing substantially gainful employment before April 2005. From January 1995 to April 2005, the Claimant had completed an associate degree at college, competed in numerous high-level wheelchair events including some at the international level which required extensive travel, and worked for several different employers.

[15] With respect, I disagree with the Minister's application of *Kinney*.

[16] I am guided by the General Division decision in *D.H. v Minister of Employment and Social Development.*[6] That decision states that the last standing decision must be considered to have been correct. This means that I must proceed on the basis that the Claimant continued to be disabled up until April 2005. The Minister has the burden of proof and it must establish that it is more likely than not the Claimant's regular capacity to work had improved after April 2005. The Minister can do this by showing a medical improvement, an improvement in symptoms, or an improvement in work capacity.[7]

The Minister has failed to establish that the Claimant's work capacity improved after April 2005

[17] The Minister did not provide any medical evidence to establish that the Claimant's medical condition had improved after April 2005. The only medical evidence after April 2005 is the March 2010 report from Dr. Norton, the Claimant's family doctor. Dr. Norton stated the Claimant was seriously disabled because of paraplegia from the 1991 accident, a bulging intervertebral L4/L5 disc from a second serious accident in 2002, and bone spurs at C3 and C5. The Claimant could not stay seated for long periods of time, had to frequently change his body position, needed frequent breaks in order to stretch, and required rest throughout the day. Dr. Norton's opinion was that the Claimant was unable to do any substantially gainful regular work because of his extensive chronic neck and back pain.[8]

[18] The Claimant's only return to work after April 2005 was his part-time work for X for eight months starting in March 2008. Mr. Bailey, the Claimant's representative, argues that this was a failed attempt to return to work. X created a temporary position for the Claimant, to

---

[6] 2015 SSTBDIS 65. Although this decision is not binding, I find it persuasive.
[7] *D.H*, paras 48 to 51
[8] IS3-15

facilitate his ambition to move into a training teaching role that never materialized.[9] The Claimant stated that he was laid off in October 2008 because he wasn't physically able to handle the job. He was exhausted and in increased pain.[10] In his March 2010 report, Dr. Norton confirmed that when the Claimant attempted part-time employment in 2008, he experienced significant increased neck and back pain, as well as swollen and painful legs and feet.[11]

[19] The Minister acknowledged that if the Claimant's work activity for X is considered in isolation, and without taking into account his wheelchair athletics, it should be considered a failed work trial.[12] The Minister's position, however, is that the Claimant's capacity to train for and compete in high-level wheelchair activities demonstrated that he had the regular capacity to perform some type of work suitable to his limitation.

[20] Mr. Bailey argues that exercise is an integral way for the Claimant to alleviate his relentless pain. People with disabilities like the Claimant should be encouraged to pursue training and competitive sports within their capacities, rather than being punished for trying to better themselves physically and psychologically through exercise.

[21] The Claimant was seriously injured in a wheelchair racing accident in March 2002. As a result, he was not involved in any wheelchair racing between 2002 and 2010. He did not race again until May 2010, when he suffered serious injuries in another accident. In his oral evidence at the initial August 2016 hearing, the Claimant stated that he had not raced since May 2010. He had resumed training and hoped to be able to return to racing. There is no evidence that he was able to do so. Further, there is no evidence of any significant wheelchair athletics by the Claimant between April 2005 and July 1, 2008, the date as of which the Minister terminated his disability payments.

---

[9] GT1-317.
[10] IS3-12, Dutson affidavit, paras 4 to 8; July 4, 2016 email, IS3-16
[11] IS3-15
[12] Minister's submissions, IS5-2, paras 7 and 8

[22] Persons suffering from a disability do not remain static. They must occupy themselves, try to improve their lot, and be active. Such activity does not necessarily indicate capacity for regular employment.[13]

[23] I find that the Claimant's work with X from March to October 2008 was a failed return to work attempt. It was an commendable effort by the Claimant to return to the work force, despite his severe disability. I also find that his wheelchair athletics after April 2005 do not establish a regular capacity to pursue substantial gainful employment. Rather, they represent an admirable way of coping with his chronic pain. I agree with Mr. Bailey that such activities are to be encouraged, not punished.

[24] The Minister has failed to establish that it is more likely than not that the Claimant ceased to be disabled as of May 2005, or as of any other date thereafter.

CONCLUSION

[25] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

[13] *Elwood v. MEI* (June 23, 1994) CP 2781 CEB & PG 8541). This decision is not binding but I find it persuasive.