



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *The Estate of J. R. v Minister of Employment and Social Development*, 2020 SST 536

Tribunal File Number: GP-19-425

BETWEEN:

**The Estate of J. R.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Suzanne Kennedy

Claimant represented by: D. R. (Estate Representative)

Teleconference hearing on: April 15, 2020

Date of decision: May 12, 2020

## **DECISION**

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension because he does not suffer from a severe and prolonged disability. The Claimant did meet the criteria for the Post-Retirement Disability Benefit (PRDB) but the benefit is not payable as the Claimant passed away prior to the end of the waiting period for payment.

## **OVERVIEW**

[2] At the date of his CPP Disability Pension Application, the Claimant was a 61-year old man who had worked most of his life in parts and sales for heavy trucks. In January 2017, he started receiving an early retirement pension (CPP). On July 15, 2017, the Claimant applied for the CPP disability pension on the basis of health problems that included: kidney failure, multiple skin cancers, left hip problems and left eye issues. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] On January 10, 2019, the Claimant applied for the Post-Retirement Disability Benefit (PRDB). In a letter dated January 28, 2019, the Minister acknowledged receipt of the application and indicated that the Claimant would be notified of a decision. There is no record of a decision except in the Minister's submissions.

[4] The Claimant passed away on March 24, 2019. His wife, D. R., continued the appeal as the Estate Representative.

[5] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). In this case, the Claimant commenced receipt of a retirement benefit in January 2017. A person cannot receive both a retirement and disability benefit at the same time.<sup>1</sup> That means in order for him to receive a disability benefit he must have had a severe and prolonged disability in the month prior to receiving the retirement pension. In this case, the Claimant's MQP is December 31, 2016.

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<sup>1</sup> Section 70(3) CPP

[6] The Minister submitted that the Claimant was eligible for the PRDB, but as the Claimant died in the four-month waiting period, the benefit was not payable.

## **PRELIMINARY MATTERS**

### **Jurisdiction to Consider the Post-Retirement Disability Benefit**

[7] At the beginning of the hearing, I explained to the Claimant's wife that the Minister had not rendered a formal decision about the Claimant's entitlement to the PRDB. I then advised that I needed her consent to add the issue of entitlement the PRDB to the existing appeal to be able to decide the issue. The Claimant's wife agreed to add the issue of the PRDB to the existing appeal.

[8] As the Minister was not in attendance, I sent a request to the Minister after the hearing with two questions:

- a) In light of a recent decision<sup>2</sup> rendered by the Tribunal's Appeal Division, I am asking if the Minister deems their submissions to be the initial and reconsideration decisions with respect to the PRDB.
- b) If so, does the Minister consent to the PRDB being included for consideration by the Tribunal in this matter?

[9] On May 5, 2020<sup>3</sup>, the Minister responded in writing as follows:

- a) Yes, the submissions are the initial and reconsideration decisions with respect to the PRDB.
- b) Yes, the Minister consents to the PRDB being included for consideration by the Tribunal in this matter.

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<sup>2</sup> *M.L. v Minister of Employment and Social Development*, 2020 SST AD-20-35

<sup>3</sup> The Minister's May 5, 2020 addendum to their submissions can be found at GD7-1 in the appeal record

[10] Considering that the Claimant has agreed to add the issue of entitlement for the PRDB to the existing appeal and that the Minister has indicated that it deems its submissions to be the initial and reconsideration decisions with respect to the Claimant's entitlement for the PRDB, I have the jurisdiction to decide the Claimant's entitlement for the PRDB in this appeal<sup>4</sup>.

## **ISSUES**

[11] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2016?

[12] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2016?

[13] If not, is the Claimant eligible for payment of the PRDB?

## **ANALYSIS**

[14] Disability is defined as a physical or mental disability that is severe and prolonged<sup>5</sup>. 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, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **Did the Claimant have a severe disability on or before December 31, 2016?**

[15] No. While the Claimant's medical conditions restricted his ability to do heavy physical labour by December 2016, he did have residual capacity to do light or sedentary work. In fact, the Claimant did work at a sedentary job until June 25, 2017 - almost 6 months after the MQP.

### ***Medical Conditions***

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<sup>4</sup>A party can only appeal before the Tribunal a decision made by the Minister on reconsideration. Since the Minister confirmed it rendered a reconsideration on the issue of the Claimant's entitlement for the PRDB, I have the jurisdiction to decide the issue on appeal according to sections 81 and 82 of the CPP

<sup>5</sup> Paragraph 42(2)(a) *Canada Pension Plan*

[16] I must assess the Claimant's total condition, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment.<sup>6</sup> The Claimant's medical conditions were kidney failure, bilateral hip avascular necrosis, skin cancers and eye issues.

[17] According to a number of medical reports, the Claimant had a kidney transplant in 1990. In 2015, he started having symptoms of a failing kidney transplant and was referred to Dr. Pouloupoulos (Nephrology-Hypertension specialist). In his report dated December 17, 2015, Dr. Pouloupoulos wrote that the Claimant had ESRD (end stage renal disease) and a failing transplant after 25 years. He wrote that the Claimant was very close to requiring dialysis and that they had discussed options. Dr. Pouloupoulos also indicated that the Claimant had bilateral hip avascular / necrosis (death of bone tissue due to lack of blood supply – also called osteonecrosis) but he did not require a cane. He also noted that the Claimant had some skin cancers removed.

[18] On February 10, 2016, the Claimant attended the kidney care clinic. In his report of that date, Dr. Pouloupoulos wrote that the Claimant had reached stage 5 CKD (Chronic Kidney Disease) but he did not have significant symptoms except for some loss of energy and appetite. Preparations were being made for PD (peritoneal dialysis). In a letter to Dr. Smith (family doctor) dated March 10, 2016 he wrote that the Claimant continued to work but did complain of being tired.

[19] In a May 10, 2016 report to Dr. Smith, Dr. Pouloupoulos wrote that he referred the Claimant to Dr. Tushinski (orthopedic surgeon) regarding right hip pain which occurred especially on exertion.

[20] On August 17, 2016, the Claimant saw Dr. Tushinski who diagnosed him with bilateral hip osteoarthritis and avascular necrosis of both hips – worse on the right. Dr. Tushinski wrote that the pain involved the trochanter (outside of the hip), low back and thigh and radiated to the ankle. He also wrote that it was intermittent with activity, walking and stair climbing but that the Claimant did not use ambulatory aids. Dr. Tushinski recommended was a total hip replacement.

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<sup>6</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

[21] The Claimant saw Dr. Tushinski again on December 20, 2016. According to his report, the Claimant continued to have ongoing pain on his right hip. At that time, Dr. Tushinski was considering a total hip arthroplasty depending on the Claimant's relief from a steroid injection.

[22] According to the Claimant's wife's testimony, the Claimant started peritoneal dialysis (dialysis using a tube into the abdomen) in September 2016. At first, the Claimant did the dialysis 4 times a day: before work, lunchtime, supertime and bedtime. It would take about 20 - 30 minutes and he would come home from work on his lunch break to do one session. The Claimant's wife stated that the dialysis did not interrupt his work.

[23] The Claimant's wife testified that, after a while, this dialysis did not work properly and at about February 2017, he had to change to an overnight cycler dialysis. A progress note written by Dr. Tascona at the Peritoneal Dialysis clinic dated March 8, 2017 also states that he made the switch the month before.

[24] On July 25, 2017, Dr. Pouloupoulos submitted a CPP disability medical report. His diagnosis was "end stage renal disease requires dialysis". He also indicated that the Claimant had a failed kidney transplant and bilateral hip osteonecrosis. Dr. Pouloupoulos did not provide any detail about the Claimant's functional limitations.

[25] In the Claimant's disability application dated July 25, 2017, he wrote that the illnesses that prevented him from working were: "dialysis every day, multiple skin cancers, needs hip replacement, and left eye failing".

[26] There are no medical reports after July 25, 2017. During the hearing, the Claimant's wife provided some additional information. With respect to the Claimant's eye issues, his wife said that the Claimant needed a cornea transplant. He could not see very well. However, he could use the computer because he wore strong glasses.

[27] The Claimant's wife also stated that he kept getting cancer lesions. At first, he had small spots to deal with. He had a spot on his face that the doctor thought he had gotten it all but it spread to his throat and then to his lungs. In 2018, he had chemo and radiation treatments which were really hard for the Claimant. The Claimant also got pneumonia a few times between 2016 and 2018. The Claimant passed away on March 25, 2019.

***Limitations***

[28] In the Claimant's CPP disability application, he described the following limitations:

- a) Physical: could only walk for about 4 minutes; could only stand for about 10 minutes and the dialysis shunt in his abdomen affected his ability to lift, carry, bend and reach. He could not lift heavy parts.
- b) Vision: left eyesight was very limited and computer screen was blurred.
- c) Difficulty concentrating and focusing; memory problems; and had to concentrate to speak properly.
- d) Fatigue and difficulty breathing because of dialysis.

[29] The above limitations were present at the time of the Claimant's application - dated June 23, 2017. At the hearing, the Claimant's wife provided the following information about his limitations at the time of his MQP – December 31, 2016:

- a) The Claimant had difficulty standing and walking because of his hip problems / pain. He could not do much in the way of household chores but could mow the lawn as he had a ride on lawn mower. Sometimes he needed to sit on his side, other times he had to stand. He could not go for walks.
- b) He was not able to see well and wore strong glasses, but he was able to use the computer.
- c) At that time, his concentration was good and he had a good memory.
- d) The Claimant was tired all the time and often fell asleep in the chair when he came home from work for supper.

***Did the Claimant engage in substantially gainful work?***

[30] In the Claimant's application for CPP disability, he indicates that he worked from May 26, 2012 to June 25, 2017 in "Parts Sales Heavy Truck". He wrote that he worked 55 hours week for 5 days a week. He also indicated that the date he could no longer work because of his medical condition was June 26, 2017.

[31] However, there is little information in the documents about the Claimant's job duties or his relationship with his employer in 2017 (after his MQP) so I must rely on the testimony of his wife.

[32] The Claimant's wife testified that that his work involved ordering parts and getting the best prices for truckers. She said that he sat at a desk and worked on the phone and computer. He worked 8:00 – 5:00 every day except for appointments and sick time. The Claimant's wife said, although the job was stressful, work was his life and it helped him keep his mind off his health issues. She confirmed that he continued to work until June 25, 2017.

[33] The CPP identifies an amount of money for what is considered to be a substantially gainful occupation<sup>7</sup>. The benchmark is whether the salary or wages are equal to or greater than the maximum amount of the disability pension for that year. For the year 2017, the amount is \$15,763.92.

[34] The Claimant worked for almost 6 months after his MQP date of December 31, 2016. His record of earnings show his income to be \$45,656.00 for 2017 – much more than the benchmark amount.

[35] However, despite the Claimant working and making more than the benchmark amount, I must also consider whether his work was the result of a 'benevolent employer'. A benevolent employer may: (i) vary the job conditions or modify their expectations of the employee, (ii) expect considerable less in the way of performance, output or product compared to other employees, or (iii) offer accommodations beyond what is required of an employer in a competitive marketplace<sup>8</sup>.

[36] The Claimant's wife indicated that the Claimant's employer was very generous. She said that his employer told the Claimant to take whatever time off he needed and paid the Claimant whenever he took time off for medical tests, procedures or was on sick leave.

[37] However, the Claimant's wife was unable to speak to any change in employer's expectations. The only knowledge she had of job modification was that years ago he used to go out to accident scenes but later did not. She did not have any information to suggest that the Claimant performed considerably less in the way of output.

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<sup>7</sup> Section 68.1 *CPP Regulations*

<sup>8</sup> *Atkinson v. Canada (A.G.)* 2014 FCA 187



[38] The Claimant's wife also testified that he was not off work on sick leave between December 31, 2016 and June 25, 2017. She said she checked her calendar and there was no indication of extended absences from work – the only absences were for appointments.

[39] The information provided does not indicate that the Claimant's employer varied his job conditions, modified their expectations of the Claimant's performance or offered accommodations. Therefore, I am unable to find that the Claimant's work in 2017 was the result of a benevolent employer.

[40] Based on the fact that the Claimant:

- a) indicated that the date he could no longer work due to medical conditions was June 16, 2017;
- b) worked for almost 6 months after his MQP;
- c) received much more income than the benchmark amount and
- d) did not work for a benevolent employer,

I find that he did engage in substantially gainful employment after his MQP date of December 31, 2016. As a result, he does not meet the test for 'severe' disability.

### **Prolonged disability**

[41] As I have found that the disability is not severe, there is no need to consider the prolonged aspect.

### **Is the Claimant eligible for payment of the CPP Post-Retirement Disability Benefit (PRDB)?**

[42] No, while the Claimant may have met the eligibility requirement for the PRDB, he passed away before the benefit was payable.

[43] In the Minister's submissions, he states that the Claimant satisfied the legislative criteria for a PRDB and was eligible with a date of onset of January 2019. The Minister also finds that the Claimant was disabled within the relevant timeframe for the PRDB. However, the Minister submits that there is no PRDB payable because the Claimant passed away before the end of the

four-month wait period for payment. The earliest date of payment for the PRDB would have been May 2019.

[44] I agree with the Minister's conclusion but also add that the CPP states that the PRDB stops the month that the beneficiary dies<sup>9</sup>. The Claimant died in March 2019. Therefore, the PRBD was never payable to the Claimant because the Claimant unfortunately passed away prior to the earliest date of payment of the PRDB which was May 2019.

## **CONCLUSION**

[45] The appeal is dismissed.

Suzanne Kennedy  
Member, General Division - Income Security

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<sup>9</sup> Paragraph 70.02 *Canada Pension Plan*