



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *TM v Minister of Employment and Social Development*, 2020 SST 1138

Tribunal File Number: GP-20-31

BETWEEN:

T. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Date of decision: October 9, 2020

DECISION

[1] The Claimant, T. M., is not entitled to a *Canada Pension Plan* (CPP) disability pension. This decision explains why I am dismissing the appeal.

OVERVIEW

[2] The Claimant is now 64 years old. He has an eye condition called retinitis pigmentosa. It is progressive and there is no cure. He is legally blind. He has not worked for many years. This is the second time the Claimant has applied for a CPP disability pension. The history of his applications matters to the result of this appeal.

[3] The Claimant first applied for a CPP disability pension in August 2009. The Minister denied the application, so the Claimant appealed to a Review Tribunal.¹ The Review Tribunal dismissed the appeal in May 2011.² The Claimant applied for permission to appeal to the Pension Appeals Board, but the Board refused.³

[4] In November 2017, the Claimant applied for a disability pension a second time.⁴ The Minister denied the application, so the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed the Claimant's appeal in June 2019.⁵ The Claimant appealed to the Tribunal's Appeal Division. The Appeal Division said the General Division made some legal errors, so it sent the appeal back for reconsideration.⁶ This decision is about that appeal.

WHAT THE CLAIMANT MUST PROVE IN THIS APPEAL

[5] A person who applies for a CPP disability pension has to prove that he has a severe and prolonged disability. A disability is severe if it makes a person incapable regularly of pursuing

¹ Review Tribunals used to decide CPP appeals. Since 2013, the General Division of the Social Security Tribunal has decided them.

² GD2-40-46

³ The Pension Appeals Board used to decide appeals of Review Tribunal decisions. Since 2013, the Appeal Division of the Social Security Tribunal has decided them. The refusal is at GD2-37.

⁴ The Claimant's 2017 CPP application and disability questionnaire are at pages GD2-29-33 and GD2-219-226.

⁵ GP-18-2578 General Division Income Security Section Decision, June 9, 2019

⁶ AD-19-421 Appeal Division Decision, December 30, 2019

any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁷

[6] The person also has to prove he became disabled by the end of his minimum qualifying period, which is based on his contributions to the CPP.⁸ The Claimant's minimum qualifying period ended on October 31, 1985.⁹

[7] However, the Claimant's situation is complicated, because the May 2011 Review Tribunal already decided that he was not disabled on or before July 31, 1985.¹⁰ I cannot change that decision.¹¹ That means that to succeed on this appeal, the Claimant has to prove that his medical condition changed after that. He has to prove that he became disabled between August 1, 1985, and October 31, 1985, when his minimum qualifying period ended.¹²

WHY I MADE THIS DECISION WITHOUT HAVING A HEARING

[8] I scheduled a hearing of this appeal for July 30, 2020. A few days before the hearing, the Claimant called the Tribunal and said he wanted to withdraw the appeal because he was not feeling well. After speaking to Tribunal staff, he decided that he actually wanted an adjournment. I adjourned the hearing.

⁷ The definition is found in paragraph 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove he is disabled on a balance of probabilities. In other words, he must show it is more likely than not that he is disabled.

⁸ Paragraph 44(1)(b) and subsection 44(2) of the *Canada Pension Plan*.

⁹ The Claimant's contributions are at IS7-10-11. The Minister explained how the date of October 31, 1985 was determined (IS7-21-25). There are other possibilities. It could be argued that the Claimant's minimum qualifying period ended July 31, 1985, as the Minister and the 2011 Review Tribunal originally calculated. It could also be argued that the Claimant did not have enough contributions to meet any minimum qualifying period, which is what the 2011 Review Tribunal said in its Addendum (GD2-45-46). However, I have to follow the Appeal Division, which said the minimum qualifying period ended October 31, 1985.

¹⁰ GD2-45

¹¹ This is because of a legal rule called *res judicata*. It says I cannot decide a case that has already been decided. The rule applies when the parties to the appeal are the same, the issues are the same, and the earlier decision was final. There is an exception to the rule, where following it could cause an injustice. However, I did not consider the *res judicata* issue here. The Appeal Division appears to have accepted that *res judicata* applied, and that there should not be an exception. Although the Appeal Division did not explain why, I have to follow its decision.

¹² The Pension Appeals Board said this in *Minister of Human Resources Development v Boudreau* (February 28, 2003), CP 14752.

[9] Two days later, the Claimant called the Tribunal again. He said he was certain that he wanted to withdraw his appeal. A withdrawal has to be in writing, and filed at the Tribunal.¹³ Over the next two months, Tribunal staff sent the Claimant a blank withdrawal form and instructions by regular mail, courier and email. They tried to contact him by telephone to help him. The Claimant did not respond. I then set a deadline: if by October 5, 2020, he had not returned a signed withdrawal or asked the Tribunal to schedule a hearing, I would decide the appeal based on the documents and submissions already in the file.¹⁴

[10] As of today, the Tribunal has not received a written request to withdraw the appeal, nor has the Claimant contacted the Tribunal to ask for a hearing. I decided a hearing was not required, because there was no indication the Claimant would attend. As a result, I based my decision on the documents and submissions already filed.¹⁵

THE REASONS FOR MY DECISION

[11] The Claimant did not prove that he has a severe and prolonged disability that started between August 1, 1985, and October 31, 1985.

There is not enough evidence that the Claimant could not work in 1985

[12] Retinitis pigmentosa is a congenital condition, meaning the Claimant has had it since birth.¹⁶ The Claimant said he was diagnosed when he was about 10 years old.¹⁷ His doctor said he was diagnosed in 1997.¹⁸ The doctor did not know the Claimant in 1997, and did not refer to any medical records from that time. I do not know where he got that information.

[13] In any case, the date of the diagnosis is not that important, because my decision about when the Claimant's disability became severe is not based on his diagnosis.¹⁹ It is based on whether the Claimant had functional limitations that prevented him from earning a living.²⁰

¹³ Subsection 14(1) *Social Security Tribunal Regulations*

¹⁴ IS14

¹⁵ Section 28 of the *Social Security Tribunal Regulations* allows this.

¹⁶ GD2-235

¹⁷ 2019 hearing recording at 9:00 minutes

¹⁸ GD2-242

¹⁹ The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

²⁰ The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

[14] The Claimant said his poor vision has always affected his ability to work. He did not have night vision, and he had trouble seeing because of floaters in his eyes.²¹ He said that in 1985 he was living on a reserve, collecting disability.²² In 1997 he had surgery by a Dr. Underhill. His eyesight improved for a time, and he was able to work a bit after that.²³

[15] The Claimant's Record of Earnings shows he only worked enough to make valid CPP contributions in a few years since he turned 18.²⁴ Unfortunately, I know nothing else about his work history up to 1985, such as what jobs he held and when and why he stopped working. He earned very little in 1985, but I don't know why. The Claimant's low earnings do not prove that he became disabled between August and October of that year.

There is no medical evidence of the Claimant's condition in 1985

[16] Furthermore, there is no medical evidence of the Claimant's condition in 1985. More recent medical reports explain that the Claimant has a severe visual impairment.²⁵ But there is nothing that shows his vision worsened significantly between August and October 1985.

[17] The Claimant has to provide objective medical evidence of his disability for the period from August 1, 1985, and October 31, 1985. If he does not prove that he had a severe disability that started in that period, medical evidence dated after is irrelevant.²⁶

[18] I recognize that the lack of medical evidence is not the Claimant's fault. He lived on a reserve from 1976 to 1989, and it was hard to see doctors.²⁷ The doctor who treated him in 1997, Dr. Underhill, is deceased and his records were destroyed.²⁸ The Minister's medical adjudicator tried to get records from 1985, but could not.²⁹ However, I have to follow what the Federal Court of Canada said in a decision called *Dean*.³⁰ The claimant in that case was in the same position as

²¹ IS1-2; 2019 hearing recording at 19:00 minutes

²² 2019 hearing recording at 19:00 minutes

²³ IS1-2; 2019 hearing recording at 9:00 and 19:00 minutes

²⁴ IS7-10-11

²⁵ For example, Dr. Lawrence GD2-235, Dr. McKinney GD5-1; Dr. Helliard GD2-70

²⁶ The Federal Court said this in *Canada (Attorney General) v. Dean*, 2020 FC 206, citing the Federal Court of Appeal in *Warren v. Canada (Attorney General)*, 2008 FCA 377; and the *Canada Pension Plan Regulations*.

²⁷ IS2

²⁸ IS8-2

²⁹ IS1; IS7-30-35

³⁰ *Canada (Attorney General) v. Dean*, 2020 FC 206

the Claimant here: through no fault of their own, they do not have medical records for the period during which they have to prove they became disabled.

[19] I do not think the Claimant has to produce a medical document that was actually written in 1985. But there has to be documentation related to that date, such as a later report from a doctor or other health care professional based on clinical observations or assessments made between August and October 1985. There is no evidence in the file that meets that requirement.

The Claimant's personal characteristics are not a consideration

[20] Sometimes, an assessment of whether a person's disability is severe has to include consideration of things like age, level of education, language proficiency, and past work and life experience. That is so there can be a realistic assessment of their work capacity.³¹ I did not do that assessment here, because medical evidence is still needed to support a finding of disability, and in this case there is none for the period in question.³²

The Claimant did not prove he became disabled in 1985

[21] The evidence does not show that the Claimant had functional limitations that affected his ability to work, that arose between August 1, 1985, and October 31, 1985. As a result, he did not prove that he had a severe disability at that time. This means I did not have to consider whether his work activity after 1985 was of any significance, or whether his disability was prolonged.

CONCLUSION

[22] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security

³¹ *Villani v. Canada (A.G.)*, 2001 FCA 248

³² *Villani*, paragraph 50; *Giannaros v. Minister of Social Development*, 2005 FCA 187