



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PC v Minister of Employment and Social Development*, 2021 SST 52

Tribunal File Number: GP-19-1676

BETWEEN:

P. C.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Patrick O'Neil

Videoconference hearing on: January 5, 2021

Date of decision: January 13, 2021

DECISION

[1] The Claimant did not cease to be disabled within the meaning of the Canada Pension Plan (CPP) as of December 31, 2010.

OVERVIEW

[2] The Minister received the Claimant's application for the disability pension on May 27, 1988¹. The Minister approved his application effective June 1987. Following the Minister's 2005 review of his eligibility to continue to receive the CPP disability pension, the Minister determined August 24, 2005, he continued to be entitled to the CPP disability pension².

[3] Following the Minister's 2019 review of the Claimant's eligibility to continue to receive the CPP disability pension, the Minister determined initially³, and upon reconsideration⁴, he ceased to be disabled as of December 31, 2010. The Minister determined he received CPP pension payments to which he was not entitled totalling \$104,320.56 during the period January 2011-February 2019. The Claimant appealed the reconsideration decision to the Tribunal.

[4] The CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must be disabled⁵. A disability pension ceases to be payable with the payment for the month in which the beneficiary ceases to be disabled⁶.

[5] If a person who has been determined to be disabled within the meaning of the Act returns to work, the person shall so inform the Minister without delay⁷.

ISSUE(S)

[6] Did the Claimant cease to be disabled within the meaning of the CPP as of December 31, 2010?

¹ GD2 pages 37-38

² G2 pages 29-30

³ GD2 pages 17-20

⁴ GD2 pages 7-9

⁵ Paragraph 44(1)(b) CPP

⁶ Paragraph 70(1)(a) CPP

⁷ Paragraph 70.1 CPP Regulations

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged⁸. The Claimant 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.

[8] The onus is on the Minister to prove on a balance of probabilities the Claimant ceased to be disabled because he no longer met the CPP eligibility requirements for a disability pension when his CPP disability benefits were terminated⁹.

[9] The Minister determined May 27, 1988 the Claimant's disability was severe and prolonged as of June 1987. The Minister determined August 24, 2005 the Claimant's disability was still severe and prolonged. Those decisions are final. The Minister is unable to vary those decisions which determined and reaffirmed, respectively, his eligibility as for the CPP pension as of the dates of those decisions¹⁰.

[10] The Minister must prove on a balance of probabilities the Claimant ceased to be disabled as of December 31, 2010. In order to do so, the Minister must show that the conditions upon which disability payments were granted to the Claimant in May 1988, and reaffirmed in August 2005, had improved such that he no longer qualified¹¹. The Minister must prove his condition was not severe and prolonged as of December 31, 2010.

⁸ Paragraph 42(2)(a) *Canada Pension Plan*

⁹ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

¹⁰ *Kinney v. Canada (A.G.)*, 2009 FCA 158

¹¹ *Boudreau v. MHRD* 2000 CP 11626

Severe disability

The Claimant's disability was severe as of December 31, 2010.

[11] The Minister approved the Claimant's May 27, 1988 application for disability benefits based upon his physical conditions¹². He had sustained injuries to his back and right knee in January 1986, which conditions the Minister determined were severe and prolonged, and entitled him to a CPP disability pension effective February 1987. The Claimant testified his condition has not improved since the Minister determined in 1988 his condition was severe and prolonged, and entitled him to the CPP disability pension.

[12] Despite four right knee operations prior to the Minister's 1988 decision, and a fifth operation in May 1989¹³, the Claimant's condition did not improve. The Minister decided on August 24, 2005 his condition remained severe and prolonged, and he continued to be entitled to the CPP disability pension. His back and right knee condition has not improved since August 24, 2005. His condition has progressively worsened since August 2005. He required back surgery in June 2020. A sixth right knee surgery is pending.

[13] The Claimant has operated a sole proprietorship business since September 2010. He buys and sells merchandise at online auctions, and makes and sells log furniture. He has employed a few people from time to time to make the furniture, and pick up and deliver the furniture and the items purchased/sold on auction. He has worked at most 1-2 hours a day, despite severe, constant, debilitating back and knee pain. Thirty minutes after joining an auction online, he must either stop participating, due to debilitating back and knee pain, or lie down and continue online in bed. He does no physical work. He rarely leaves his house. He provides instructions to employees by telephone or email¹⁴.

¹² GD2 pages 558-566

¹³ GD2 pages 390-391

¹⁴ GD5 pages 2-3

[14] The Claimant sustained a net business loss in 2010¹⁵, and most years since¹⁶. The Claimant did not advise the Minister that he began operating a business in 2010. His accountant, in his presence, called Service Canada in 2010 and asked if the Claimant remained entitled to a CPP disability pension if he started a business. The accountant was told he if the business was not profitable. Due to receiving that information, the Claimant did not report starting a business in 2010, as the business operated at a loss in 2010, and most years since.

[15] Lack of profit does not necessarily mean the Claimant lacked capacity to pursue substantially gainful employment. However, losses that result from his disability are evidence that he was incapable regularly of pursuing any substantially gainful employment in that business, or other occupation. The Claimant's lack of business profitability was mostly due to wages paid to employees, as he was unable to do physical work, and very little sedentary work.

[16] The Claimant was a credible witness. I accept his evidence describing the debilitating symptoms he has suffered from and his difficulty functioning on a daily basis since he sustained injuries to his back and right knee in January 1986. There was no indication of exaggeration in his presentation, and no mention of it in medical reports, which support his evidence. No treatment provider suggested his symptoms did not exist, or are exaggerated, and none suggested he is malingering or has been able to work regularly at any occupation since January 1986.

[17] The Minister determined in 1988, and again in August 2005, the Claimant's disability was severe. There is no evidence the conditions upon which the Minister granted the Claimant's disability pension in 1988, and reaffirmed his entitlement in August 2005, improved since. The Minister did not prove on a balance of probabilities the Claimant's disability improved as at December 31, 2010, when the Minister terminated his CPP disability benefits. As the Minister has not proven the conditions upon which the Claimant was granted a disability pension improved subsequent to August 2005, I find the Minister has not proven on a balance of probabilities his disability ceased to be severe as of December 31, 2010.

Prolonged disability

¹⁵ GD2 page 44

¹⁶ GD6 pages 33 and 50

The Claimant's disability was prolonged as of December 31, 2010.

[18] The Minister determined in 1988 and again in August 2005 the Claimant's disability was prolonged. The evidence substantiates the Claimant continued to suffer from severe chronic back and right leg pain since August 2005, without improvement or expectation of improvement. I find his disability is likely to be long continued and of indefinite duration, and accordingly prolonged as of December 31, 2010.

CONCLUSION

[19] The Minister determined the Claimant had a severe and prolonged disability in May 1988, and in August 2005. The Minister did not prove on a balance of probabilities his condition improved as at December 31, 2010, when the Minister terminated his CPP disability benefits. I find the Claimant did not cease to be disabled within the meaning of the CPP as of December 31, 2010.

[20] The appeal is allowed.

Patrick O'Neil
Member, General Division - Income Security