



Citation: *Minister of Employment and Social Development v CW*, 2021 SST 547

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Minister of Employment and Social Development
Representative: Sandra Doucette

Respondent: C. W.
Representative: Jonathan Burton

Decision under appeal: General Division decision dated April 22, 2021
(GP-18-2885)

Tribunal member: Janet Lew

Decision date: September 9, 2021

File number: AD-21-247

Decision

[1] The application for leave (permission) is granted. The appeal is also allowed. The Respondent, C. W. (Claimant), has a severe and prolonged disability. He is entitled to a Canada Pension Plan disability pension commencing July 2016.

Background

[2] The Claimant applied for a Canada Pension Plan disability pension in June 2017. He had been involved in a motor vehicle accident in September 2014, following which he experienced post-concussion symptoms. This included cognitive problems with concentration and memory, dizziness, altered vision and light and noise sensitivity. He also had headaches and neck, back, hips, shoulders, and left leg pain. He faced several limitations, including with his mobility, sitting, standing, and lifting or bending.

[3] The Claimant underwent various investigations and numerous treatment modalities. But, he did not see any significant improvement. His healthcare practitioners were largely of the view that the Claimant could not work because of his injuries.

[4] The Claimant was involved in a second motor vehicle accident in July 2017. The second accident aggravated his symptoms. By fall 2017, the Claimant began relying on help from personal support workers to assist with dressing, hygiene and fall prevention. The Claimant's symptoms persisted. He continued to experience dizziness, fatigue and pain, and to have balance issues and vision difficulties.

[5] During this time, the Claimant appears to have tried to return to work, from 2015 to 2017. However, there was little evidence before the General Division regarding the Claimant's work history after 2015. The General Division concluded that these were failed efforts to return to work.

[6] In early 2018, the family physician was of the opinion that the Claimant was still not ready for a return to work. By summer 2018, the family physician was of the opinion that the Claimant was doing better overall since surgical repair of his left retina. The

plan was for a graduated return to work as a computer technician and then, ultimately, a return to full-time work.

[7] The Claimant began a graduated return to work in early 2019. However, he was involved in a third motor vehicle accident in November 2019. He has not worked since then.

[8] The Appellant, the Minister of Employment and Social Development, denied the Claimant's application for a disability pension, initially and on reconsideration. It determined that the Claimant did not have a severe and prolonged disability by the end of his minimum qualifying period of December 31, 2017.

- The Claimant's appeal to the General Division

[9] The Claimant appealed the Minister's reconsideration decision to the General Division. The General Division allowed the Claimant's appeal in part. The General Division determined that the Claimant had a severe and prolonged disability from June 2015 to and including May 2019. The General Division also found that the Claimant's disability stopped being severe in 2019. This was because the Claimant had earnings for that year. The General Division found that the level of earnings suggested the Claimant was capable regularly of pursuing a substantially gainful occupation.

[10] A record of earnings shows the Claimant had earnings of \$14,714 for 2019, and earnings of \$19,053 in 2020. However, as the Claimant did not work again after his accident in November 2019, the General Division attributed the earnings for 2020 to 2019. The General Division wrote, "If [the Claimant's] earnings of almost \$20,000 are added to his earnings of \$14,714 then he would clearly be well above the substantially gainful threshold for 2019."¹

¹ See General Division decision, at para. 74.

[11] As well, the General Division found that the Claimant was able “to sustain his work activity [in 2019] over several months, and [appeared] to have been able to work regularly.”²

[12] The Claimant disputed that he was able to work regularly. At the General Division, he testified that he tried working full-time hours, but his managers and colleagues told him to work only one to two days a week. The Claimant arranged to work from home three days a week. The General Division dismissed this evidence, noting that it did not have any evidence showing that the Claimant was unable to meet his work commitments, that he was frequently absent from work, or that he had an accommodating or benevolent employer.

[13] The General Division found that the Claimant was disabled for a closed period. The General Division found that the earliest the Claimant could be deemed disabled was in March 2016. This is because the *Canada Pension Plan* says that the earliest a person can be deemed to be disabled is 15 months before the date of application. Here, the Claimant had applied for benefits in June 2017, so the earliest he could be deemed disabled was March 2016.

[14] Payment of the disability pension could not start until after a four-month waiting period. So payments in this case would start in July 2016.

- The Minister’s appeal to the Appeal Division

[15] The Minister appealed the General Division decision. The Appeal Division has to be satisfied that the appeal has a reasonable chance of success before it gives an appellant leave (permission) to go ahead with their appeal. A reasonable chance of success exists if there is a certain type of error. These errors are about whether the General Division:

- (a) Failed to make sure that the process was fair;

² See General Division decision, at para. 77.

- (b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- (c) Made an error of law; or
- (d) Based its decision on an important factual error. (The error has to be perverse, capricious, or without regard for the evidence before it.)

[16] Once an appellant gets permission from the Appeal Division, they move to the actual appeal. Usually the Appeal Division gives the parties time to file additional submissions. Often, the Appeal Division schedules a hearing. But, giving the parties time to file additional submissions or holding a hearing is unnecessary in this case because the parties agree on the outcome of the appeal.

The parties agree on the outcome of the appeal

[17] The Minister argues that the General Division made an error of law when it found that the Claimant was disabled for only a closed period from June 2015 through May 2019, rather than indefinitely. The Minister argues that the General Division also made an error of fact when it found that the Claimant's earnings were above the substantially gainful threshold and indicative of work capacity. The Minister accepts that the Claimant has a severe and prolonged disability of indefinite duration.

[18] The parties have asked for a decision based on a written agreement signed by the Claimant on August 30, 2021, and on behalf of the Minister on September 2, 2021. That agreement says (in part):

THE PARTIES AGREE that the General Division erred in law and in fact in making its decision within the meaning of the CPP and paragraphs 58(1)(b) and (c) of the *Department of Employment and Social Development Act* (DESDA).³ The [Claimant] has a severe and prolonged disability as a result of motor vehicle accident sequelae. Therefore, the General Division made an error of law by finding the [Claimant] disabled under the CPP for only a closed period of time - from June 2015 through May 2019 – versus indefinitely. The General Division made an error of fact when it found the [Claimant]'s earnings were above the substantially

³ *Department of Employment and Social Development Act*, SC 2005, c 34.

gainful threshold and indicative of work capacity. The [Claimant]'s earnings were the result of the correction of prior inaccuracies made under the Phoenix pay system and not indicative of work capacity.

THEREFORE under section 18 of the *Social Security Tribunal Regulations* (SST Regs)⁴ and sections 59 and 64 of the DESDA, the parties ask the Appeal Division to grant leave and allow the appeal and give the following order that the General Division should have given:

- a) The [Claimant]'s contributions create a MQP of December 31, 2017, and the [Claimant] satisfied the criteria of severe and prolonged prior to this MQP, by June 2015, within the definitions of paragraph 42(2)(a) of the CPP;
- b) Under paragraph 42(2)(b) of the CPP, the [Claimant]'s earliest possible deemed date of disability is March 2016, fifteen months before his June 2017 Application for Disability Benefits;
- c) Under paragraph 44(1)(b)(ii) and section 69 of the CPP, the [Claimant] is entitled to a disability pension commencing July 2016, which is four months after the deemed month of the [Claimant]'s disability onset in March 2016; and
- d) Proceeding in this manner is both cost-effective and efficient for both parties and consistent with section 2 and paragraph 3(1)(a) of the *SST Regs*.

[19] There is no breakdown of the earnings for 2019 or 2020, as to which years those earnings can be attributed. But, I agree with the parties that proceeding in the manner they propose is the most cost-effective and efficient disposal of this appeal. I accept the parties' agreement that the Claimant's earnings reflected in the record of earnings were from "the correction of prior inaccuracies made under the Phoenix pay system and were not indicative of work capacity."

[20] The Claimant's disability became severe and prolonged in June 2015. As set out above, the earliest that the Claimant can be deemed disabled is March 2016. He is entitled to a disability pension commencing July 2016, four months after the deemed date of onset of disability.

⁴ *Social Security Tribunal Regulations*, SOR/2013-60.

Conclusion

[21] The application to the Appeal Division for leave to appeal is granted.

[22] The appeal is also allowed.

[23] The Claimant's disability became severe and prolonged in June 2015. The Claimant is entitled to a Canada Pension Plan disability pension commencing July 2016.

Janet Lew
Member, Appeal Division