



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SB v Minister of Employment and Social Development*, 2017 SST 674
Tribunal File Number: GP-15-3711

BETWEEN:

S. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Antoinette Cardillo

HEARD ON: May 5, 2017

DATE OF DECISION: June 7, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

S. B. Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on January 31, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] This appeal was heard by teleconference for the following reasons:

- a) there were gaps in the information in the file and/or a need for clarification; and
- b) this method of proceeding respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) be under 65 years of age;
- b) not be in receipt of the CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[4] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[5] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is 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.

ISSUE

[6] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 1997.

[7] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

EVIDENCE

Documentary evidence

[8] The Appellant is 58 years of age with a college education.

[9] In the Questionnaire for disability benefits date stamped on January 31, 2014, the Appellant indicated that he was self-employed in a foreign country as a driver from May 1st 2002 to October 10, 2009, date at which he stopped working due to bankruptcy. He indicated a disability claim date of February 5, 2009 due to headaches and back pain, he also reported difficulty with standing/walking, lifting/carrying, and reaching/bending as well as difficulty with memory, concentration, and sleep.

[10] An x-ray report of the cervical spine dated February 10, 2015 showed that there was no significant degenerative disc disease.

[11] A medical report dated February 23, 2015 from Dr. Otto Veidlinger, Neurologist, provided that the Appellant did very heavy work up until 2009 as a truck driver for a period of four (4) to

five (5) years, working very long hours, driving extreme distances and doing heavy lifting. In 2009, he developed back pain and could not sleep and he then developed daily headaches which would come and go for two (2) hours at a time. These were diagnosed as possible migraine. He also had back pain and was told he had lumbago. The headaches were associated with pain around the left and to a lesser extent right shoulder. He was on medication but the pain was still steadily there. He had pain in his arms but more on the left side with headache and fatigue and he often felt depressed, waking up every two (2) hours during the night. He was also dizzy at times but there was no nausea. He did have light and noise intolerance and had to lie down when he had headaches. Neck movements give him slight pain and there was always a pressure sensation in the neck going into the left arm and chest.

[12] A report dated March 6, 2015 from Dr. Efala, Orthopedic and Spine Surgeon, provided that the Appellant's neck and lower back pain started in 2009 as a result of heavy lifting and driving while performing transportation work. He described his pain as being dull and intermittent in nature with radiation pain in his right leg. He rated his pain as seven (7) out of 10 in severity on the VAS scale. He took Advil for pain. He did not receive any form of physical therapy. His symptoms were consistent with myofascial pain in the cervical and lumbar spine. The x-rays of the cervical spine showed some degenerative changes in the mid cervical section. Dr. Efala recommended conventional passive and active physical modalities of treatment for his condition to improve symptoms but also to prevent the development of further disabilities.

[13] A medical report from Dr. Veidlinger date stamped on April 8, 2015 indicated that the Appellant suffered from depression, chronic back pain, migraines and cervical disc disease. The Appellant's prognosis according to Dr. Veidlinger was that he had not been able to work for many years and he would not be able to return to any employment.

[14] A medical report from Dr. Obaji dated June 23, 2016 indicated that the Appellant's back pain began in 2009, dizziness in 2009, neck pain in 2010, generalized fatigue in 2010 and left arm weakness in 2012.

Testimony

[15] The Appellant testified that he worked until 2009. He started having migraines in 2008 and at the same time severe back pain. He has been taking medication and has had injections for his back pain but with no relief. He cannot walk more than 20 to 30 minutes or stand for more than 30 to 40 minutes. He also has memory issues.

SUBMISSIONS

[16] The Appellant submitted that he is a person with a disability that is both severe and prolonged.

[17] The Respondent submitted that the Appellant does not qualify for a disability pension because the Appellant was 38 years old with a college education at his MQP of December 31, 1997. In 2002, he started self-employment and was capable of managing his business and working at a physically demanding occupation until 2009 when he stopped for non- medical reasons. The medical evidence supports that the onset of his medical conditions dates back to 2009; twelve years after he last qualified for disability benefits. The evidence clearly supports capacity for work after his MOP of December 1997 and that prior to 2009, there was no medical condition rendering the Appellant incapable of suitable employment. In fact, the Appellant claimed he could work until February 2009. The main question is whether a claimant has proven that he suffered from a severe and prolonged disability by the expiry of his MQP, and continuously thereafter. If he has not done so, it is irrelevant that his condition deteriorated after his MQP.

ANALYSIS

[18] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 1997.

Severe

[19] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the

Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[20] In this case, the balance of the evidence did not persuade the Tribunal that the Appellant had a severe disability on or before his MQP of December 31, 1997. The medical reports of Dr. Veidlinger, Neurologist, dated February 23, 2015, Dr. Efala, Orthopedic and Spine Surgeon, dated March 6, 2015 and of Dr. Obaji dated June 23, 2016 indicate that the Appellant's impairments began in 2009. More precisely, the evidence shows that his back pain began in 2009, dizziness in 2009, neck pain in 2010, generalized fatigue in 2010 and left arm weakness in 2012. Further, the Appellant also testified and confirmed that he started having migraines in 2008 and at the same time severe back pain, which is 11 years after his MQP.

[21] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The evidence shows that the Appellant was able to work until October 2009. In the Questionnaire for disability benefits date stamped on January 31, 2014, the Appellant indicated that he was self-employed in a foreign country as a driver from May 1st 2002 to October 10, 2009, date at which he stopped working due to bankruptcy and also indicated a disability claim date of February 5, 2009 due to headaches and back pain. As already stated, the Appellant worked for many years after his MQP, more precisely, he was able to work for a 12 year period, until 2009, after his MQP of December 31, 1997.

Prolonged

[22] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[23] The appeal is dismissed.

Antoinette Cardillo
mnnMember, General Division - Income Security