



Professional Development

ADDRESSING CANADA PENSION PLAN ISSUES IN PERSONAL INJURY CASES

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INTRODUCTION

When representing an injured person in litigation who was formerly working and now faces limited prospects for a return to the workforce, the question '*when and how to apply for CPP disability benefits?*' will invariably arise.

Applying for Canada Pension Plan Disability Benefits ("CPP Disability Benefits"), though seemingly straightforward, can present numerous administrative and legal challenges. To initiate the process, various forms are required for submission including, but not limited to, the Application for Disability Benefits, the Questionnaire for Disability Benefits, and the Medical Report. Some applications are not accepted on their face and, often, cases involving disability arising from chronic pain present additional complexities.

In personal injury cases, the outcome of a CPP disability application can bear tremendous influence on the tort, accident benefits and/or LTD proceedings. Namely, approval by Service Canada of a disability benefit that is premised on the notion that an individual has sustained a "severe" and "prolonged" impairment, strongly attests to the nature and extent of an injured person's state of disability. Though not synonymous with the terms "serious" and "permanent", as is applicable in tort cases, the tests are somewhat analogous and involve a similar analysis.

As a practical consideration, if you have advised your client to apply for CPP Disability Benefits, it is prudent to review the self-reported portions of their Application and Questionnaire, so as to ensure that the submissions reflect information consistent with evidence given under oath in a related proceeding. Ultimately, the CPP application and its outcome will likely be produced. For one reason, in an LTD proceeding, the contract for benefits may provide the insurer with

an offset for CPP Disability Benefits, and in a tort proceeding, CPP Disability Benefits are deductible from income loss claims.

This paper will examine some of the procedural considerations when addressing Canada Pension Plan Disability Benefits. It will also offer some practical strategies and “case law 101” for applying the procedural rules in order to obtain a successful result for your client.

THE APPLICATION PROCESS

Once it has been established through medical evidence that your client is unlikely to return to work as a result of an entrenched physical and/or mental disability, it is appropriate to consider an application. In some cases, disability may arise immediately following a traumatic injury, such as paraplegia or quadriplegia. Or, as in a chronic pain case, consider evaluating the merits of a CPP Disability Benefits application shortly after the 2-year mark.

To apply for CPP Disability Benefits, the Application Kit, which can be accessed electronically, must be completed and submitted to Service Canada. Upon receipt of the application, Service Canada will generally require approximately 4 months to process and review the application, except in circumstances where individuals are terminally ill. Thereafter, a decision letter is issued to the applicant, citing the reasons for approval or denial of the benefit.

If denied, the applicant’s first right to dispute is in the form of a Reconsideration. A Reconsideration must be filed within 90 days from the date of the decision letter. The Reconsideration involves a review of the application by other members of the department, and will consider additional materials and information submitted by the applicant or on behalf of the applicant. The Reconsideration can take several

months to complete, the results of which are again communicated by decision letter.

To qualify for CPP Disability Benefits, it is necessary for an applicant to have made sufficient annual contributions to the Canada Pension Plan. Some applications may be denied on the basis that an individual has failed to make sufficient contributions to qualify for the benefit. This involves a technical and quantitative analysis.

This paper, however, will only address denials based on medical evidence.

APPEAL PROCESS

In circumstances where a claim for CPP Disability Benefits is denied following a Reconsideration, the next step is the filing of a Notice of Appeal with the Social Security Tribunal. You must ensure that the Social Security Tribunal receives the appeal within 90 calendar days of receipt of the Reconsideration decision from Human Resources and Skills Development Canada.

Newly introduced is the Social Security Tribunal, which is an administrative tribunal that inherited all appeals not heard by the Office of the Commissioner of Review Tribunals and Pension Appeals Board before April 1, 2013. The Social Security Tribunal is an administrative tribunal that was implemented as an impartial quasi-judicial appeals unit under the *Employment Insurance Act*, the *Canada Pension Plan* and the *Old Age Security Act*. As of April 1, 2013, the creation of the Social Security Tribunal replaces the Office of the Commissioner of Review Tribunals.

STATUTORY TEST

To better understand the framework in which CPP Disability Benefits are approved or denied, it is necessary to acquaint the reader with the applicable legislation.

Under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, disability is defined as follows:

42(2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

CASE LAW

In addition to the legislative parameters, in preparing for and evaluating the merits of an appeal, it is prudent to review the case law that serves to govern and influence the Tribunal's decision.

Consider citing the following cases in opening or closing submissions:

Case	Reference	Summary
<i>Villani v. The Attorney General of Canada</i>	2001 FCA 248	<u>Statutory Interpretation:</u> Every enactment is deemed remedial and shall be given such fair, large

		<p>and liberal construction and interpretation as best assures the attainment of its objectives. The legislation has a benevolent purpose and ought to be interpreted in a broad and generous manner with any doubt arising from the language in the legislation being resolved in favour of the claimant.</p> <p><u>Defining Severe:</u> An analysis of the severe criterion must take into account the particular circumstances of an appellant including age, education level, language proficiency, and past work and life experience. There is a legislative intention to apply the test in the “real world” context.</p>
<i>Moore (Betty) v. MHRD</i>	CP15717	<u>Standard:</u> The claimant must establish the claim on a balance of probabilities. That is, it must be more likely than not that the claimant meets the requirements. Proof beyond a reasonable doubt is not required.
<i>MNHW v. McDonald</i>	CP1527	<u>Disability:</u> The definition includes a disability resulting from a cumulative combination of both mental and physical aspects.
<i>Carvery v. MHRD</i>	CP18772	<u>Gainful Employment:</u> The average work week in Canada is 37 and 40 hours a week. Having capacity to work 14-16 hours per week at \$8.40 per hour was not found to be gainful employment.
<i>Inclima v. The Attorney General of Canada</i>	2003 FCA 117	<u>Mitigation:</u> to establish a severe disability, the Appellant must not only

		show a serious health problem, but where there is evidence of work capacity, must also show efforts that obtaining and maintaining employment has been unsuccessful.
<i>MHRD v. Mulek</i>	CP4719	"It has been consistently held by this board that an applicant for a disability person is obligation to make all reasonable efforts to undertake and submit to programs and treatments recommended by the treating and consulting physicians. Only when those measures fail after reasonable attempts and efforts, can it be determined that the disability is severe as that term is defined."
<i>Leduc v. MNHW</i>	CP1376	"The board is advised by medical authority that despite handicaps under which the appellant is suffering, there must exist the possibility that he might be able to pursue some unspecified form of gainful employment. In the abstract and theoretical sense, this might well be true. However, the appellant does not live in an abstract and theoretical world. He lives in a real world, peopled by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all the Appellant's well-documented difficulties, any employer would even remotely consider engaging the appellant."
<i>MNHW v. Bilinski</i>	CP1437	"Even allowing the possibility of light work...the limitations of the movements should render his employment, though possible by a

		philanthropic employer, not probable in the current modern world.”
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THE HEART OF THE ISSUE: WHY CAN'T YOU WORK?

To prepare for an appeal hearing, a careful review of the medical reports is essential. This involves highlighting any and all key medical reports that touch on the issues of employability and earning capacity. However, as outlined in the case of *Duncan v. MHRD*, CP 9220 (PAB), presenting a compelling appeal will require focus on whether the whole of the evidence, including the oral evidence, indicates that the person suffers from a “severe and prolonged” disability.

As such, one of the primary elements for preparation is a proper and thorough briefing of the applicant. Whereas in some appeal hearings, counsel for the applicant is permitted to present evidence to the Tribunal in the form of a quasi Direct Examination, other appeal hearings will be conducted in the form of a question-answer led by the Tribunal panel members. Either way, the most critical question, in one form or another, will be “why can’t you work?” Ensure that your client is prepared to answer this question in a direct, concise and detailed manner that is consistent with the medical evidence. Credibility is essential.

THINK OUTSIDE THE BOX

Case law in the area of Canada Pension Plan Appeals emanates the theme *real world context*. Give life to your client’s appeal by filing documents such as pre-disability photographs, videos, and letters from colleagues, friends and family. Provide appropriate notice to the Tribunal, and present a character witness such as a spouse or former colleague.

Developing the character of your client, and reinforcing documentary and oral evidence with “real world” elements, can offer great depth to the appeal. Indeed, a

successful appeal can provide an injured person with a degree of financial security, sometimes well before the conclusion of a related lawsuit. Each case turns on its facts, but practical and procedural preparation will allow both you and your client to deliver a compelling appeal. Good luck!