

Office of the Commissioner
of Review Tribunals
Canada Pension Plan/
Old Age Security



Bureau du Commissaire
des Tribunaux de révision
Régime de pensions du Canada/
Sécurité de la vieillesse

Appeal #: 113611

BETWEEN:

Stewart McLean

FEB 07 2013

Appellant

and

Minister of Human Resources and Skills Development

Respondent

REVIEW TRIBUNAL DECISION

REVIEW TRIBUNAL MEMBERS:

Will Geselbracht
Shelby Entner
Eric Sykes

HEARING DATE:

December 4, 2012

HEARING LOCATION:

Vancouver, British Columbia

DECISION:

Appeal Allowed

PERSONS IN ATTENDANCE

| | |
|-----------------------------------|----------------|
| Appellant | Stewart McLean |
| Counsel for the Appellant | Ashley Ayliffe |
| Representative for the Respondent | Jan James |

DECISION

[1] The Review Tribunal finds the Respondent has not discharged its onus, upon the balance of probabilities, that the Appellant was no longer disabled after 2003 and prior to December 31, 2008.

INTRODUCTION

[2] The Appellant was initially granted disability benefits under the *Canada Pension Plan* (CPP) in July 2003 with benefits to commence from May 2003. In December 2008 the Appellant contacted the Respondent to advise that the Appellant had been elected to the Chilliwack city council, owned a funeral home and wanted to know how this would affect his entitlement to continuing disability benefits. By letter dated July 7, 2010 the Respondent informed the Appellant that he was no longer eligible to receive disability benefits commencing October 2003, and, that he was responsible to repay to the Respondent for the period November 2003 to April 2009, inclusive, the sum of \$57,790.48 (p. 22).

[3] The decision by the Appellant to appeal this decision was received by the Office of the Commissioner of the Review Tribunals on January 7, 2011.

ISSUE(S)

[4] Section 70 of the CPP provides that a disability pension ceases to be payable with the payment "(a) for the month in which the beneficiary ceases to be disabled." Section 66 of the CPP provides that a person who has received a benefit payment to which the person is not entitled is required to repay the amount of the overpayment. The

Respondent seeks repayment of all disability payments received by the Appellant since November 2003.

[5] A person ceases to be eligible to receive disability benefits once he no longer is determined to be disabled as defined pursuant to section 42(2) of the CPP. A disability is severe if a person 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.

[6] In this appeal the Respondent must demonstrate to this Review Tribunal that, on a balance of probabilities, the Appellant ceased to be disabled commencing November 1, 2003, and therefore is no longer eligible to receive disability benefits.

EVIDENCE

[7] During a telephone conversation between a representative of the Respondent and the Appellant on July 29, 2009, the Appellant reportedly advised of the following (pp. 215-217):

- He was one of the owners of a funeral home
- He did not work while in receipt of disability benefits
- He farmed out the work to other funeral directors since that was the only way to operate the business and not be working
- His brother Anthony McLean is a shareholder as well, and his niece also works in the business
- He has Crohn's disease, epilepsy and other ailments, and he is feeling better since having his hip replacement

- He had called the Respondent to have his disability benefits stopped since he had been elected to office as a city councillor in Chilliwack with a stipend of approximately \$26,000
- He was a licensed funeral home director which requires him to attend courses for about 6 hours a year

[8] The Appellant's Record of Earnings indicates that he made no contributions to CPP during the taxation years 2003 to 2008, inclusive. He did have earnings in 2009 (\$18,199) and in 2010 (\$18,633) (p. 59).

[9] The Appellant testified that he first commenced his funeral business on February 1, 2000 under the name of McLean's Funeral and Cremation Services and then was changed to McLean's Funeral Services Ltd.

[10] The Appellant testified that he had acted as a Burnaby school trustee from 1983 until 1990, served on the Chilliwack Hospice Board until 2004/2005, and has been a member of the Chilliwack Rotary Club. He also had received the occasional request from a Catholic priest, who is a friend of the family, to give grief counseling after October 2003.

[11] During the period 2003-2008, the Appellant testified his brother Anthony McLean began to take care of the business of the funeral home in 2007, although he is not licensed as a funeral director. However, another licensed funeral director by the name of Allen Harder helped to run the business, although he has not been with the business for one and one half years.

[12] The Appellant testified that no financial statements were filed for the company prior to 2006 since the Appellant was sick and unable to get the information to an accountant. In or about 2007, Anthony McLean took over the running of the business completely and financial statements were prepared for the years 2006 to 2008. The Appellant testified that he did not engage in marketing the funeral business except by means of the Yellow Pages and an occasional ad in the local paper.

[13] The Appellant testified that he had started his funeral director apprenticeship in the 1990s. As a funeral director he needs 12 hours of continuing education every 3-year period, which he is able to do online.

[14] During the period 2003 to 2006, the Appellant testified that he was experiencing full body arthritis, Crohn's disease, dermatomyositis (inflammation of the skin tissues) and epilepsy having had many grand mal seizures. He was being treated by his family doctor as well as 7 different specialists. It was during this period that his brother Anthony McLean was becoming more active in the funeral business. However, the day-to-day running of the business was given to Personal Alternative Funeral Services.

[15] In June 2003 the Appellant underwent his first total un-cemented hip replacement (right) which required one full year to recover. In addition, his other medical conditions flared up. In 2007 he underwent his second un-cemented hip replacement (left).

[16] A medical report of Dr. Page, family doctor, dated May 1, 2012, sets out a detailed summary of the various medical conditions the Appellant was suffering from during the period October 2003 to December 2008, including treatments for Crohn's disease, prostatitis, abdominal pain, vertigo, cortisone injections for osteoarthritis of the hips, temporal mandibular pain, hip replacements, headaches, cataract surgery and ankylosing spondylitis and partial complex seizures. The Appellant testified that this summary was accurate. Dr. Page provides his opinion that the Appellant's disability was severe and prevented him from regularly engaging in a consistent job during the period October 31, 2003 to December 31, 2008.

[17] He also testified that during this same time period, he spent a lot of time sleeping or in the bathroom due to his Crohn's disease. Also during this time period, the Appellant wore molded leather wrist splints which he wore on a regular basis from 2004 until 2 years ago. He testified that these splints prevented him from driving and caused him to use his computer with difficulty.

[18] He testified that he has never received any income from the funeral business. He initially invested \$30,000 of his own money in 2000-2001, which was from his savings

over the years. His brother Anthony was able to become involved in running the funeral business over the years since he worked for a major company as a manager and was able to take time off to run the funeral business. Anthony continues his involvement in the funeral business, has taken over all advertising and is a director, officer and shareholder in the company. The Appellant's sister and niece had also assisted in the running of the business during the period 2003 to 2008.

[19] The Appellant testified that he felt his health had begun to improve in the summer of 2008. He had been asked by a friend, the current mayor of Chilliwack, to run for a council seat. His friends and family contributed the monies for his campaign.

[20] The Respondent referred to the following medical evidence to support its submission that the Appellant had regained his capacity to be able to work:

- May 23, 2004, Clinical note of Dr. Enns (gastroenterologist): "...will be looking after physically able mental handicapped people (?) ..."
- July 5, 2004, report of Dr. Enns: "His pain has decreased...The pain has resolved...his quality of life is greatly improved...He has also noticed significant improvement in his joints and his back symptomatology."
- August 11, 2004, Dr. Page (family doctor): "In my opinion...[the Appellant] is free of infectious/communicable/contagious diseases and is physically and mentally able to perform the job duties described above."
- October 9, 2004, Dr. Page: "Generally manages very well with his own chronic medical disorders."
- February 16, 2005, Dr. Enns: "On this regimen (Imuran 125 mg daily and Infliximab 400 mg IV) his bowels as well as his joints...have been the best they have been in a number of years."

- December 18, 2006, Dr. Breden: “He currently has no symptoms of angina or congestive failure. He is a local funeral home director and quite physically active at his job.”

- February 17, 2008, Dr. How (rheumatologist):

“He was treated with Remicade for his Crohn’s which resulted in remission. The Remicade also significantly improved his symptoms of ankylosing spondylitis. However, he developed a reaction to the Remicade two years later which seemed to me to be somewhat mild. The Remicade was stopped and his Crohn’s flared up. He was then started on abatacept. The abatacept has resulted in remission in the Crohn’s again.”

- July, 2008, Dr. Enns: “This gentleman has done remarkably well in fact he is going to run for city council in Chilliwack. He is functioning at a very high level and it appears that the Abatacept is giving him at least some sense of control.”

- August 4, 2010, unknown author: “2003-2008 was unable to work so had other people doing the work. Crohns and two hip replacements, head pain.”

The Respondent’s representative did not question the Appellant specifically with respect to the above medical evidence.

[21] The Appellant submits that he continued being disabled until the end of December 2008, as a result of being elected as a city councillor in Chilliwack, B.C. and being entitled to receive a stipend in the amount of approximately \$26,000 annually.

[22] The Respondent submitted that the Appellant has been capable of performing some type of gainful employment since October 2003, and in particular, did in fact actively run a funeral business during the period October 2003 until December 2008. The Respondent’s representative submitted that the various medical evidence contained in the hearing file demonstrates the Appellant’s improved medical condition and ability to work.

ANALYSIS

[23] The Respondent in this appeal must demonstrate, on a balance of probabilities, that the Appellant regained the capacity to pursue regularly substantially gainful employment at any time subsequent to October 2003.

[24] The Appellant testified that during the period 2003 to 2008, he never received any income from the funeral business he incorporated in 2001. He testified that due to the combination of his various medical conditions, he was unable to carry out the duties as funeral director of his funeral business. Rather, his brother, as well as Personal Alternative Funeral Services, ran the day-to-day funeral business. Both the Appellant's sister and niece also assisted in the running of the business.

[25] The report of Dr. Page, the Appellant's family doctor, dated May 1, 2012 sets out the Appellant's various medical conditions and provides an opinion that these conditions/disabilities prevented the Appellant from engaging in regular consistent work during the period October 31, 2003 through to December 31, 2008.

[26] This Tribunal was unable to find any financial information located in the hearing file which otherwise showed that the Appellant received any remuneration from his position as a funeral director for his company's funeral business. Rather, the testimony of the Appellant demonstrated that his brother Anthony McLean, as well as other third parties, ran the funeral business.

[27] The Respondent, during its submissions, pointed to a number of entries in the medical records forming part of the hearing file, set out in paragraph 20 above, that tend to indicate that the Appellant had otherwise regained his capacity to work. The Tribunal does not agree with the Respondent's submissions. We find that the above passages from various medical records represent "snapshots" of the Appellant's condition at a particular point in time rather than a comprehensive overview of the Appellant's health and ability to return to substantially gainful employment. Rather, we accept the opinion of the Appellant's family physician, Dr. Page, that the Appellant's multiple disabilities

prevented him from regaining his capacity to pursue regularly substantially gainful employment until after December 31, 2008.

[28] We accept the Appellant's own testimony that he was unable during the relevant time period to work due to his multiple disabilities.

CONCLUSION

[29] Accordingly, we find that the Respondent has not discharged its onus to demonstrate that it was more likely than not that the Appellant was no longer disabled prior to December 31, 2008.

[30] The appeal is allowed.