PROFOUND PROCEDURAL CHANGES IN CPP LEGISLATION

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As of April 13, 2013, sweeping changes have been made to the administration of the Canada Pension Plan. This paper deals specifically with the new procedures that apply to the process of appealing a denial of benefits under Section 42 of the *Canada Pension Act*, R.S.C., 1985, c.C-8, s.42(2) which reads as follows:

> *(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*
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> *(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*
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> *(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.*

The statutory language governing the assessment of disability remains the same from the old regime to the new. A person is considered disabled for the purposes of CCP if the applicant has made the minimum financial contribution for four of the six years prior to application and where the disabling condition is found to meet the criteria of Section 42(2).

Because the new changes are procedural and there has been no change to the substantive criteria of disability, the applicability of the case law interpreting the language of Section 42 also remains the same. The leading case is still the decision of *Villani v. Canada (Attorney General)*, 2001 FCA 248 which requires the CPP adjudicator to employ in his or her analysis what is called in *Vallani* a "real world" approach or context:

> *[38] This analysis of subpara. 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and, when read in that way, the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.*

CPP decisions, therefore, continue to follow a fairly formulaic pattern. The adjudicator must first determine whether or not the required contributions have been made. If this precursor is met, the adjudicator then analyzes clinical records, medical reports and the applicant's own summary of symptoms and restrictions in a test. First, the adjudicator determines if the condition is "prolonged". A review of the decisions of CPP Review Tribunals, Pension Appeal Boards and Federal judges do not permit an easy characterization of what constitutes "prolonged", but generally, if the claimant's disabling condition has persisted for a number of years and is either degenerative or resistant to treatment, or acute with a poor prognosis, it is arguably "prolonged" for the purposes of Section 42. The adjudicator next considers whether the applicant's condition is "severe". It is at this stage of the analysis that the claimant's functionality or work capacity comes into play. Again, there is no "one size fits all" paradigm about the degree of restriction which meets the definition of "severe" but, if the claimant's symptoms prevent him or her from regularly completing a 7.5 hour work day at minimum wage, then an arguable case has been made. The medical file, clinical notes, consult reports, x-rays, MRIs, etc. play an important role in the adjudicator's decision as do the opinions of treating doctors and specialists. If you are advising a client at the initial adjudication stage, it is important that the client understand exactly what his or her family doctor or specialist is prepared to state on his or her behalf. A casual comment or equivocal statement about function or prognosis can become a significant hurdle to acceptance of a claim.

While the statutory threshold and substantive law interpreting it has remained the same, the procedural changes have been dramatic. Under the old regime, every rejected claimant had an automatic right to appeal to the OCRT (Office of Commissioner of the Review Tribunal). A Review Tribunal consisted of a three person panel comprised of a lawyer, a doctor and a layperson – all federal appointees. The tribunal would hear evidence viva voce from the claimant and any witnesses he or she might choose to call. Counsel could make submissions and provide written argument. The Minister of Human Resources and Skills Development would also have an advocate present, though not necessarily a lawyer. After hearing evidence and submissions, the tribunal would render a written decision. If the tribunal's judgment upheld rejection of the claim, the claimant had to seek leave for the next level of appeal, known as PAB or Pension Appeals Board. If leave was granted, the Pension Appeals Board would convene at a set date, generally reserving a half-day hearing. The Pension Appeals board was a three member tribunal consisting of three superior or appellate court judges from all Canadian jurisdictions. The matter would be heard de novo and involved evidence viva voce, live attendance and cross-examination of witnesses, argument and oral and written submissions of counsel. The tribunal would generally reserve and provide a written opinion. If this decision went against the claimant, he or she could seek leave to appeal to Federal Court. If leave were granted, the successful claimant would further seek an order that the matter be referred back to the Review Tribunal for a new hearing.

Under the new legislation the first two stages of application remain the same. First is the initial application which continues to be an essentially bureaucratic process. A single adjudicator reviews the application form, submitted medical documents and the physician's statement, usually from the claimant's family doctor. The claimant, by telephone, may or may not be interviewed. The adjudicator, by telephone, may or may not be interviewed. The adjudicator then applies the criteria of section 42(2) and renders a decision. If the application is rejected, the applicant has an automatic right of appeal provided CPP within 90 days of the denial receives a written request for reconsideration.

The second level of adjudication, called the Reconsideration, proceeds in a fashion similar to the initial adjudication. Generally, new medical or supportive information is submitted and the claimant may or may not be interviewed. A single adjudicator without further input, renders a decision.

It is at this stage that the new procedural changes become effective. There is no longer an automatic right to a three member tribunal hearing. If the claim has been rejected at the Reconsideration stage, the claimant has ninety days from receipt of the decision to notify the SST (Social Security Tribunal – General Division) that an appeal is requested.

The appeal is put before a single Tribunal member who can dismiss the appeal if he or she finds the appeal has no chance of success. If the Tribunal member decides that the appeal has merit, he or she will then determine how the appeal with proceed.

Attached to this paper as Appendix "A" is a step by step timeline summarizing the procedural timeline of the new appeal process.

Attached as Appendices "B" and "C" are two examples of recent cases taken through the SST appeal process – General Division.

In summary, the new CPP changes have removed the automatic right of an applicant to traditional "trial" process. The decision making apparatus has been streamlined and severely truncated. Appeal hearings are now far briefer, involve only a single Tribunal member, and are generally conducted by conference call over the telephone.