Citation: *R. G. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 9

Appeal No: CP28699

BETWEEN:

R. G.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Shu-Tai Cheng
HEARING DATE:	January 14, 2014
TYPE OF HEARING:	In person
DATE OF DECISION:	February 26, 2014

PERSONS IN ATTENDANCE

Appellant	R. G.
Representative for the Appellant	Ray Guilbeault
Representative for the Respondent	Daniel Willis
Witness for the Respondent	Dr. Jean-Guy Baribeau

DECISION

[1] The Tribunal dismisses the Appeal.

INTRODUCTION

[2] The Appellant filed two applications for *Canada Pension Plan* ("CPP") disability pension, as follows:

a) In August 2005, based on injuries resulting from a MVA and bypass surgery and last day of work in August 2000; the application was denied, the decision to deny was confirmed on reconsideration, the Appellant appealed and then withdrew his appeal.

b) In July 23, 2010, based on "strokes" and last day of work in September 3, 2009; this application is the subject of this appeal.

[3] On April 13, 2012, a Review Tribunal (RT) determined that a CPP disability pension was not payable. The RT found that the Appellant could not be considered disabled by the end of December 2003.

[4] The Appellant filed an Application for Leave to Appeal that RT decision (the "Leave Application") with the Pension Appeal Board (PAB) on May 8, 2012.

[5] The PAB granted leave to appeal on August 3, 2012. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Social Security Tribunal ("this Tribunal") is deemed to have granted leave to appeal on April 1, 2013.

[6] The hearing was held in person for the reasons given in the Notice of Hearing dated November 15, 2013.

THE LAW

[7] To ensure fairness, the Appeal will be examined based on the Appellant's legitimate expectations at the time of the original filing of the Leave Application with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the CPP as it read immediately before April 1, 2013.

[8] 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).

[9] 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.

[10] 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

[11] There was no issue regarding the MQP because the parties agree and the

Tribunal finds that the MQP is December 31, 2003.

[12] 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

[13] The Appellant gave evidence by answer to his Representative's questions. The Respondent also had one witness, Dr. Jean-Guy Baribeau, who gave evidence by answer to Counsel's questions. The parties agreed and the Tribunal is satisfied that Dr. Baribeau is an expert in family medicine. Each party was given the opportunity to ask questions of the other, and the Tribunal asked questions on occasion.

[14] Where there was conflicting evidence on a specific fact, it is stated below.

[15] Documentary evidence was submitted prior to and during the hearing, as follows:

Ex. 1 Appeal Record, prepared by the Tribunal

Ex. 2 Letter from the Respondent, dated December 16, 2013, attaching the resume of its medical witness

Ex. 3 Fax from the Appellant, dated January 13, 2014, attaching 37 pages of various medical notes in respect of the Appellant

Ex. 4 Fax from the Appellant, dated January 13, 2014, attaching 5 pages of medical notes from Sudbury Regional Hospital in respect of the Appellant

[16] The Appellant was 44 years old at the MQP. He graduated from grade 12 and, in his twenties, completed a post-secondary diploma in welding technology. The Appellant worked mainly in garages and eventually owned a welding business. He was the owner and operator of a tire business at the time he stopped work in September 2009, due to strokes, as stated on his CPP application.

[17] The Appellant testified that he was in a motorcycle accident that changed his life completely. This accident, according to medical documentation, occurred in

August 2000. The Appellant stated that before this accident, he had a business with quite a few employees, a good income and a good life. After the accident, he was in a coma with multiple broken bones, spent months in the hospital and could not return to his previous work. He stated that has been on pain medications since the accident, on increasing doses and stronger kinds.

[18] The Appellant applied for CPP disability benefits in August 2005 based on being unable to work since the accident in 2000. Benefits were denied by Human Resources Development Canada (HRDC) with this explanation: "We understand that you have limitations. However we concluded that the information does not show that your limitations prevent you from doing some type of work, since December 2003." On reconsideration, this decision was maintained, and HRDC stated: "We understand that you have limitations resulting from various conditions and that you cannot return to your previous occupation as a welder. However, we concluded that the information does not show that your limitations would prevent you from doing some type of work, since December 2003."

[19] The Appellant withdrew his appeal with the Office of the Commissioner of Review Tribunals on the first application by letter of August 6, 2008. He testified that he was starting to feel "not bad" and his application had been denied, so he "invested money in a business to try to make a decent living."

[20] The Appellant started a tire business with two partners; his partners were investors and did not work at the business. The tire business was an independent tire shop, not a franchise. The tire shop offered sales, installation, repair, replacement, rotation and balancing of tires. The Appellant testified that he did not do any of the physical work; there were two employees who did the lifting and other physical things. The Appellant worked about four hours a day, would open the shop, serve customers and make the sales, and his employees would do the hands-on work. He looked after ordering and inventory, paperwork, forms, the employees and taxes. These were all things he had done when he had run his welding business.

[21] At first the Appellant testified that he worked in 2008 only and did not work in 2009. When questioned by Respondent's Counsel, the Appellant agreed that he might have worked in 2008 and 2009, but only for a total of 12 months. He added that in 2009 his son was on strike from his job and worked at the shop in the Appellant's place along with one of the partners. Respondent's Counsel suggested that the period the Appellant really worked was 19 months, from April 2008 to September 2009, according to the documents on file. The Appellant replied that he worked for 12 months and may have owned the business for 19 months; he could not remember the exact months. His income in 2008 was $24,700 and in 2009 $31,990.

[22] The Appellant sold his share of the business to his son and one of the partners. He explained that he could not continue working at the tire shop because he was making too many mistakes, it was too stressful and he could not manage even paperwork. He said his memory loss and difficulties with concentration, in addition to being in constant pain, affected his ability to conduct a business. His last date of work, according to his application, was September 3, 2009, because of "strokes".

[23] Since September 2009, the Appellant has not looked for work and has not considered retraining, and stated "I wish I could, but I cannot". His pastime is making model race cars, and he can do this for 10 to 20 minutes at a time, after which he needs to lie down because of the pain.

[24] At the present time, he uses a cane once in a while, has hearing aids, and uses a heating pad on his chair. He uses no other assistive devices.

[25] The medical documentation shows that the Appellant:

a) Had a work related injury in 1980 and retrained through Workers' Compensation;
b) From 1990 to 1995, had low back pain and a drinking problem;
c) Between 1995 and 1999, he overcame the drinking problem and the back pain continued but was stable enough so that he was able to work full hours and run a viable business;

d) Had chest pains starting in 1997 and was diagnosed with angina; he underwent cardiac bypass surgery in 1999 and the angina was resolved by October 1999;

e) Was involved in an MVA in October 1999 and did not fracture any bones or have major lacerations;

f) Was in a second motorcycle accident in August 2000 and sustained a head injury and multiple fractures requiring surgery;

g) Had a stroke in 2006;

h) Underwent angioplasty in June 2009 because he was having cardiac symptoms.

Pre-MQP Medical Evidence

[26] A number of medical reports relate to the August 2000 accident: a Radiology Report and an Operative Report of August 13, 2000, a Consultation Note of October 4, 2000, and a Radiology Report of November 1, 2000. These reports state that:

a) The Appellant sustained a pelvic fracture and fractures to both wrists;

b) He underwent surgery for these fractures and there were no complications;

c) He had a significant cardiac history and had bypass surgery in January 1999 and at present did not have chest pain;

d) By early October, there was some range of motion in his left wrist, the right wrist was out of plaster, and physiotherapy had not been started; the external fixator for his hip was removed, he will need a scooter for about six months and "I don't think we need to worry too much" is noted;

e) The x-ray in November notes that the fracture site is no longer evident.

[27] On January 9, 2001, Dr. Tubin, orthopaedic surgeon, wrote a report to Sibley & Associates, answering questions asked. This report states that the Appellant is

ambulating independently with an assistive device and no further surgery is anticipated for his pelvis. As to his wrists, they were both very stiff and he may need further surgery. Physiotherapy would be helpful for the pelvis, back, wrists and any other area that is required, and the Appellant could increase his level of activity in accordance with his symptoms of pain and fatigue.

[28] In 2001, the Appellant's follow up appointments and tests show that:

a) By the end of January, the fractures in the wrists "are completely healed", he complains of pain and discomfort in the lower back, and he is to undergo CT and bone scan;

b) X-rays of the right knee and 2 wrists showed no bone or joint abnormality in the knee and some irregularity in the distal radius (the fractured part) of both wrists;

c) The CT scan of the lumbar spine was normal and the scan of the pelvis showed the pelvic fracture was healing and was otherwise unremarkable;

d) Dr. Tubin's report after testing stated that the Appellant was "doing well" and ambulating with a cane, and he stated his pain is diminishing though present in his right lower back, the pubic area and the wrists, especially the left one. The report concludes "I would manage him with continued conservative treatment of modification of activities and intermittent anti inflammatory. There is nothing we can offer him surgically at the present time", that his wrists may need to be addressed later with operative procedures, and that his pelvis is "quite stable" and ongoing symptoms in his right SI (sacroiliac) joint should be treated conservatively;

e) The Appellant was seen by Dr. Wallace, an orthopaedist, in September 2001, and a report was produced for private insurance purposes. The report states that the Appellant attended physiotherapy for about 2 months in late 2000, had no specific treatment since December 2000 and takes pain medication on a prn (as

needed) basis. The Appellant reported ongoing neck discomfort which the medical report states was pre-existing and related to the 1999 accident; the Appellant also reported that he still had aches, his right wrist had pretty good function and his left wrist was not limiting him with regards to activities either of daily living or preventing him from working. His major complaint was of low back discomfort, which pre-dated the 2000 accident. Dr. Wallace described his examination of the Appellant and concluded that no further investigations are needed for the cervical spine, wrists, lumbar spine or pelvis. As to treatment, there was no indication for surgery for the neck, the wrists or the back, no need for physical modalities (physiotherapist, massage therapy or a chiropractor) for the neck or the wrists, and 6 weeks of physiotherapy trial was recommended for the low back/SI pain. In respect of work, the report states "should he return to the workforce and develop a problem, then his wrists may have to be reassessed" and "I do feel that he is unable to return to his previous occupation at the present time".

f) In November 2001, Dr. Tubin wrote a report summarizing examinations and testing of the Appellant from October 2000 through to May 2001, noted in paragraphs [26], [27] and [28].

[29] On October 17, 2002, family physician Dr. Mallette wrote a report for legal counsel, and he states "my ability to respond to some questions will be compromised by my lack of knowledge regarding Mr. G.' current medical status. I can comment on his status up until July 2001". This report, which provides a detailed medical history up to July 2001, states "I really am not able to comment on whether or not Mr. G. is able to perform the duties of his usual employment at this time. I would anticipate that he should be capable of doing most of his usual activities by this time although not without considerable discomfort at times. He probably would also at this time be expected to need to leave work early and perhaps to miss certain days depending on the weather and whether or not he has been very active". It concludes "I think a more current orthopaedic assessment would be a better way of providing you with an accurate prognostication."

[30] The medical report filed with the Appellant's first CPP application was written by Dr. D.B. Davidson and dated May 13, 2003. This physician surgeon treated the Appellant between September 2001 and May 13, 2003. The report concludes that "prognosis is guarded" and that the Appellant "is totally permanently disabled and will never resume gainful employment."

[31] In September 2003, the Appellant is referred to Dr. Morris Charendoff, orthopaedic surgeon. After examination and review of x-rays, the opinion of the doctor is "Conservative management and rehabilitative measures should be pursued."

Post-MQP Medical Evidence

[32] The next medical reports are dated in 2005. An orthopaedic surgeon's report in August 2005 noted osteoarthritic changes. Dr. Baribeau testified that this is common in a man or woman of this age and expected in the general population with variation, but that this does not explain the pain that the Appellant testified having. A cardiologist saw the Appellant in September 2005 and noted in his September 1, 2005 report that "he had some atypical [chest] pain which I do not think is cardiac." In a November 14, 2005 report, the cardiologist states "I feel he is fully and effectively revascularized." Dr. Baribeau explained that these two reports show that the by-pass procedure in 1999 was still functioning and effective.

[33] In September 2006, the Appellant suffered an acute stroke and was admitted to hospital after going to an emergency room. Dr. Graham reported on September 15, 2006, among other things, that the latest stroke showed in a different lobe than the old strokes and that the Appellant was demonstrating some residual deficiencies with dysfunction noted in the left upper and lower limbs. He recommended in-patient rehabilitation but noted that the patient wanted to discharge himself. In December 2006, Dr. Graham wrote that the Appellant was admitted for stroke rehabilitation on September 15 and discharged "with out-patient OT [occupational therapy] follow-up for upper limb impairment" on September 28, 2006 and noted that he participated diligently and improved in his rehabilitation.

[34] Dr. Symington, family physician, began treating the Appellant in November 2006 and wrote two brief letters in 2007 “To whom it may concern” offering to “aid in his [the Appellant’s] appeal for CPP disability pension”. On May 18, 2010, Dr. Symington completed the Medical Report which supports the application which is the subject of this appeal.

[35] On March 27, 2007, Dr. Matthew, a neurologist, wrote a report which includes a chronology of the cardio and cerebrovascular events from age 37 to that date. Subsequent medical notes of the Sudbury Regional Hospital indicate that by November 2007, the Appellant’s “main problem continues to be his cerebral aneurysm” and that he has been referred to a specialist in Toronto. In June 2009, the Appellant had coronary angioplasty procedures performed and on July 7, 2009, Dr. Hourtovenko noted that the angioplasties had “improved his symptoms of angina”.

[36] Dr. Symington’s May 2010 report noted diagnoses as cerebrovascular accidents (strokes) x 3, coronary arteries stents insertion x 3, right shoulder osteoarthritis, post-accidents chronic neck and shoulder pain, functional limitations as class II heart, mild memory and concentration deficits, and prognosis as “stable – unknown progression”. In May 2011, he wrote “To whom it may concern” that the past heart attacks, strokes and residual mental deficits made it difficult for the Appellant to re-enter workplace when he tried recently, after an absence after selling his business. In July 2012, after an additional myocardial infarction (heart attack) in June 2012, Dr. Symington wrote “I believe this gentleman to be incapable of ongoing employment”.

[37] Medical notes of the Sudbury Regional Hospital from December 2011 to July 2013 were produced at the hearing and entered into evidence by the Appellant.

[38] At the hearing, Dr. Baribeau testified that having reviewed the extensive medical records, it is not surprising that over the years the Appellant became too incapacitated to work. However, it was Dr. Baribeau’s opinion that there was no medical evidence on the file which showed that the Appellant’s disability was “severe” as required for a CPP pension by December 21, 2003.

SUBMISSIONS

[39] The Appellant submitted that he qualifies for a disability pension because:

a) He was disabled and unable to work as of December 2003;

b) He attempted a return to work in 2008 as a co-owner of a tire business but he could not work because of his medical conditions; and

c) He remains incapable to return to work now.

[40] The Respondent submitted that the Appellant does not qualify for a disability pension because:

a) The burden is on the Appellant to show that he had a severe disability at the MQP;

b) The medical reports do not show that the Appellant was unable to do any substantially gainful work at or prior to the MQP; and

c) The Appellant did substantially gainful work after the MQP, in 2008 and 2009; and the earnings in these years are too high and for too long a period to be considered a failed attempt to return to work.

ANALYSIS

[41] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2003.

Severe

[42] A disability is severe only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation (*CPP*, subs. 42(2)).

[43] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when assessing a person's ability to work, the

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

[44] An extensive medical record was produced and all the evidence, oral and documentary, was considered by the Tribunal.

[45] The Appellant's significant cardiac history was resolved by October 1999 after bypass surgery. However, motorcycle accidents in 1999 and 2000 caused or affected other medical issues. Even after the pelvic and wrist fractures had healed, the Appellant continued to experience pain in the lower back, pelvic area and wrists.

[46] Medical reports relating to examinations of the Appellant in 2001 include the following recommendations and opinions: Dr. Tubin recommended conservative treatment and anti-inflammatories. Dr. Wallace recommended physiotherapy for the lower back pain and reassessment if the Appellant returned to the workforce and developed a problem. While Dr. Wallace did feel that the Appellant was unable to return to his previous occupation as a welder in September 2001, he noted that the Appellant reported that his injuries were not preventing him from working and the doctor made reference to a return to the workforce. Dr. Mallette stated, in October 2002 based on last having seen the Appellant in July 2001, he anticipated that the Appellant would be expected to leave work early and miss certain days. Both Dr. Wallace and Dr. Mallette indicated that the Appellant had work capacity.

[47] Dr. Davidson, in May 2003, opined that the Appellant is totally permanently disabled and will never resume gainful employment. In September 2003, Dr. Charendoff recommended conservative management and rehabilitative measures but made no comments in relation to work.

[48] The Appellant did return to work in 2008. He operated a tire shop, in partnership with others. I find as a fact that the Appellant worked at the tire shop for a period of about 17 months from April 2008 to September 2009. He eventually sold his share of the business to his son and one of his partners.

[49] While the physical work was done by others, the Appellant worked four hours a day, served customers and made sales, oversaw the employees and looked after the administrative role in the business. In *Palma v. MEI* (May 31, 1996), CP 4228, the PAB found capacity where actual work in the business was done partly by others and partly by the Appellant and the Appellant assumed responsibility for the operation of the business. The present appeal, in this way, is similar to the *Palma* case.

[50] The Appellant submits that this period of work was a failed work attempt. The Respondent submits that this period of work cannot be called a failed return to work attempt; it was substantially gainful employment.

[51] There is no firm line between employment that is substantially gainful and employment that can be considered a failed work attempt. That determination depends on the facts of each particular case. However, the Federal Court stated that a return to work which only lasted a few days would be a failed attempt whereas two years of earnings consistent with what had been earned before cannot be a failed attempt (*Monk v. Canada (A.G.)*, 2010 FC 48).

[52] In the five years preceding the MQP, the Appellant's average annual income was $26,485 (with a high of $36,869 and a low of $15,760). In 2008 and 2009, his average annual income was $28,345; over a 17 month period, the annual average would be $40,016. These two years (or part years) of earnings were consistent with what had been earned prior to the MQP. Applying the Federal Court's reasoning in *Monk*, two years of earnings consistent with what had been earned before cannot be a failed work attempt.

[53] Much of the medical evidence filed was dated in 2004 and later. In 2005, the Appellant experienced chest pains; in 2006, he has an acute stroke; in 2007, his main problem is a cerebral aneurysm; in 2009, he undergoes angioplasty procedures; in 2012 he has a heart attack, and by July 2012, his family physician is firmly of the view that he is incapable of ongoing employment.

[54] However, as at the relevant date of December 31, 2003, the Appellant did not have a "severe" disability within the meaning of the CPP and associated case law. In

saying this, I do not minimize at all the pain and discomfort the Appellant has been and is now experiencing. This Tribunal is simply bound by the wording of subsection 42(2) of the CPP and the associated case law.

[55] For the reasons stated above, I find that the Appellant did not have a severe disability at the MQP. He was not incapable regularly of pursuing any substantially gainful employment and, in fact, did substantially gainful work in 2008 and 2009.

Prolonged

[56] Since I have decided that the Appellant did not have a severe disability, I need not decide whether it is prolonged.

CONCLUSION

[57] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division