

Citation: *M. H. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 11

Appeal No: CP 28919

BETWEEN:

**M. H.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal Decision**

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SOCIAL SECURITY TRIBUNAL MEMBER: Valerie HAZLETT PARKER

HEARING DATE: November 22, 2013

TYPE OF HEARING: In Person

DATE OF DECISION: November 27, 2013

## PERSONS IN ATTENDANCE

The Appellant	M. H.
Counsel for the Respondent	Daniel Willis
Witness for the Respondent	Dr. Francois Mai
Observer	W. Z.

## DECISION

[1] The appeal is dismissed.

## INTRODUCTION

[2] On June 28, 2012, a Review Tribunal determined that a *Canada Pension Plan* (the “CPP”) disability pension was not payable.

[3] The Appellant originally filed an Application for Leave to Appeal that Review Tribunal decision (the “Leave Application”) with the Pension Appeal Board (PAB) on September 13, 2012.

[4] The PAB granted leave to appeal on January 15, 2013. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[5] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated August 30, 2013.

## THE LAW

[6] To ensure fairness, the Appeal will be examined based on the Appellant’s legitimate expectations at the time of the original filing of the Application for Leave to Appeal 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 *Canada Pension Plan* (CPP) as it read immediately before April 1, 2013.

[7] 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).

[8] 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.

[9] 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.

#### **PRELIMINARY MATTER**

[10] The Appellant attended at the hearing, and proposed that his wife, Ms. W. Z., be his interpreter between English and Chinese. Counsel for the Respondent objected to Ms. Z. acting as Interpreter, on the basis that he did not know her qualifications to do so, and since she has an interest in the outcome of the hearing, there is an appearance of bias as she is not seen to be impartial as an Interpreter. After some discussion, the Appellant agreed to proceed without any interpretation by Ms. Z. He was given the opportunity to adjourn the hearing, or to have a recess to discuss this matter. He declined, and stated that he wished to proceed without an interpreter. He also stated that he understood that not having an interpreter may be

a ground of appeal, and waived any right to appeal on the basis that he did not understand the hearing.

## **ISSUE**

[11] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[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 was born on August 26, 1953 in China. He completed an undergraduate degree in history, and a Master's degree in philosophy in China. He was teaching philosophy in China, and had to flee the country in 1990 for political reasons. He then worked teaching in France for approximately two years before moving to Hamilton, Ontario in 1992. The Appellant testified that when he came to Canada he attended English as a Second Language classes before obtaining work. He opened a franchise coffee shop in Brantford, Ontario which he subsequently closed when it was not profitable due to competition. He then worked in a biochemistry laboratory at McMaster University. On February 7, 2007 he was laid off work, as his position at the university was made redundant. The Appellant has not searched for work since then.

[14] The Appellant was diagnosed with Hepatitis B in July 2007. He also suffers from intermittent back pain, constant neck pain, and upper right quadrant pain which he claims render him disabled as that term is defined in the CPP. Clinical notes from the Appellant's family doctor confirm visits for these conditions prior to the MQP.

[15] The Appellant testified that his back pain began in 2007. The Appellant testified that approximately 4 or 5 times each year he will suffer from back pain for one to two months, when his back gives way after sneezing, coughing or trying to pick something up off the floor. The Appellant testified that because of his liver disease, he is restricted in what pain medication he can take. He treats the back pain with Advil, Tylenol extra strength or

sometimes Tylenol 3. He has attended for massage therapy but that provides no relief for this pain.

[16] The Appellant also has constant neck pain. As a result he is unable to lift his arms straight above his head, or turn his head completely to the right. He also has some numbness in the fingers on his left hand.

[17] The Appellant suffers from anxiety. He testified that this began when he was diagnosed with Hepatitis B. As a result of the diagnosis, he has become isolated. Friends do not wish to socialize with him if they know of the disease for fear of contracting it.

[18] The Appellant testified that some years ago he took medication for anxiety. This did not make much difference in his condition, so he stopped taking it. He did not seek any mental health treatment as this is not done in the Chinese culture. In the fall of 2013 the Appellant again began to take medication for anxiety, but he has not been referred to any mental health specialist.

[19] The Appellant has been treated regularly by his family doctor. Dr. Agarwal completed the medical report that accompanied his application for CPP disability benefits. He has known the Appellant since 2006. He diagnosed the Appellant with chronic Hepatitis B, neuropathy and radiculopathy. He stated that the Appellant had upper quadrant pain since the Hepatitis diagnosis and continues to be fatigued. Cervical neuropathy was diagnosed in 2006 and continues to be unresolved. The Appellant cannot use his hands or arms for detailed work for any length of time without pain. He is treated with Advil and Tylenol, and had a poor response to physiotherapy.

[20] The Appellant attended for a MRI of his spine on June 19, 2006. This revealed that the Appellant has multilevel degenerative changes and spondylosis, with moderate canal and mild to moderate foraminal narrowing.

[21] The Appellant testified that he discussed cervical surgery with his doctor, but was told that he had a 50% chance of improvement, 25% chance of no change and 25% chance of his condition worsening after surgery. He declined surgery.

[22] The Appellant's Hepatitis B has been treated and monitored by Dr. Witt-Sullivan, internist. She diagnosed the condition in July 2007. On July 30, 2007 she also reported that the Appellant's back pain had resolved.

[23] Dr. Witt-Sullivan recommended that the Appellant begin anti-viral therapy on January 2, 2008. By November 26, 2008 the Appellant's blood work was within normal range for Hepatitis B. It has been so controlled since that time with medication.

[24] Dr. Witt-Sullivan also reported on November 26, 2008 that the Appellant has had upper quadrant pain for over ten years. No specific treatment for this was recommended.

[25] The Appellant testified that he suffers from fatigue, which he attributes to Hepatitis B. Prior to the Hepatitis B diagnosis he was able to complete approximately 50% of the housework and cooking; now he does much less. He spends most of his time reading (in Chinese) or on the internet.

[26] Dr. Mai testified on behalf of the Respondent. He was accepted as an expert witness in general medicine and psychiatry. Dr. Mai had not met or examined the Appellant. His opinion was based on a thorough review of the medical records in Exhibit 1. He testified that there are no medical opinions that state that the Appellant was unable to do any work prior to the MQP. The Appellant suffers from Hepatitis B which is controlled with medication. He also has back, neck and upper quadrant pain, which are all managed conservatively. Dr. Agarwal discussed cervical surgery with the Appellant but could not guarantee the outcome.

[27] The Appellant began to have some knee pain and mental health issues, but these were not evident prior to the MQP.

## **SUBMISSIONS**

[28] The Appellant submitted that he or she qualifies for a disability pension because:

- a) He suffers from constant pain and Hepatitis B;
- b) He is isolated as a result of having Hepatitis B.

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

- a) There is no medical evidence that the Appellant had a severe medical condition at the MQP;
- b) The Appellant has not made any effort to obtain or maintain employment within his physical restrictions;
- c) The Appellant is very well educated and has a number of skills that could be utilized in employment within his restrictions.

## **ANALYSIS**

[30] The hearing proceeded with Ms. Z. attending as an Observer. She did not provide any interpretation. At no time during the hearing did the Appellant indicate that he did not understand the proceedings, the evidence or submissions being made. He was able to testify in English without difficulty.

[31] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2009.

### **Severe**

[32] 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. The Appellant was 56 years of age at the MQP. He has a wealth of education and skills. He holds a Master's degree with experience teaching in Europe and China. He ran a coffee shop business, so developed a number of business skills in so doing. He also has experience working in a lab at McMaster University. Although English is not the Appellant's first language, he is able to communicate effectively in English without the assistance of a translator. He was able to work in an English environment in Ontario for at over ten years. I find, therefore, that he has skills and abilities that could be utilized in a new field of work.

[33] It is clear that the Appellant has some medical restrictions. He has Hepatitis B, which is controlled by medication, and has been controlled for some time. He continues to treat this chronic condition with medication.

[34] The Appellant is also restricted by back, upper quadrant, and neck pain, and is unable to lift his arms straight above his head. He has some numbness in his left fingers, which his doctor states restricts him from fine motor control for prolonged periods.

[35] The Appellant suffers from fatigue, however, did not testify that this results in him not being able to attend to his self care. He can still manage light household duties, some cooking, searching the internet and reading. The Appellant's pain is managed conservatively. There was no evidence that his pain or fatigue prevents the Appellant from doing things. While he is restricted in medication options by his liver disease, he has not been referred to a pain specialist, nor has he been taught any chronic pain management techniques.

[36] For these reasons, I find that the Appellant had capacity to perform sedentary work at the MQP. In *Inclima v. Canada (A.G.)*, 2003 FCA 117 the Federal Court of Appeal concluded that 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 . The Appellant has not done this. He was terminated from his job at McMaster University in February 2007, being made redundant. He has not looked for any other position since that time.

[37] For these reasons, I conclude that the Appellant did not have a severe disability at the MQP as that term is defined in the CPP.

### **Prolonged**

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

### **CONCLUSION**

[39] The appeal is dismissed.



*Valerie Hazlett Parker*  
Member, Appeal Division