Citation: *M. T. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 29

Appeal No: GT-114878

BETWEEN:

M. T.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Jeffrey Steinberg
HEARING DATE:	September 17, 2014
TYPE OF HEARING:	Videoconference
DATE OF DECISION:	September 26, 2014

PERSONS IN ATTENDANCE

M. T., the Appellant, did not attend.

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is not payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on May 17, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was scheduled to be heard by videoconference for the reasons given in the Notice of Hearing (the "Notice") dated June 11, 2014. The Tribunal record confirms that the Notice was sent to the Appellant by registered mail but was unclaimed. The Tribunal record further confirms that the Tribunal also sent the Appellant a copy of the Notice by regular mail which was returned to the Tribunal and marked: "RTS Moved". The Tribunal Case Management Office (CMO) attempted to call the Appellant on July 8, 2014 at the telephone number listed in the file, however the telephone number was not the Appellant's. Notwithstanding non-receipt of the Notice by the Appellant, the Tribunal maintained the hearing date and waited 20 minutes after the appointed start time of the hearing in the event the Appellant were to attend. He failed to do so.

[4] Section 12(1) of the Social Security Tribunal Regulations (the "Regulations") provides that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received the Notice.

[5] In this case, the Tribunal is not satisfied that the Appellant received the Notice but has decided to proceed and make its determination on the basis of the documents and submissions contained in the hearing file by dispensing with service of the Notice. The

Tribunal finds its authority to do so in the following sections of the Regulations. Section 3(1) (a) requires the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. Section 3(2) provides that if a question of procedure that is not dealt with by the Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to the Regulations. Finally, Section 6 provides that a party must file with the Tribunal a notice of any change in their contact information without delay.

[6] The Tribunal is satisfied that the staff of the Tribunal made all reasonable efforts to serve the Appellant with the Notice and that he failed to provide the Tribunal with his updated contact information as required. Although the Regulation does not expressly contain a provision allowing the Tribunal to dispense with service of a Notice on an appellant, the Tribunal is guided by Section 3(2) which requires the Tribunal to proceed by way of analogy to the Regulations where a question of procedure is not otherwise dealt with. The Tribunal has looked to Section 3(1) (a) for direction concerning how to address the procedural gap relating to dispensing with service in the circumstances of this case, i.e., the Tribunal attempted to notify the Appellant who failed to provide the Tribunal with his updated contact information, of the hearing date, in light of the requirement that the Tribunal conduct the hearing as informally and quickly as the circumstances and considerations of fairness and natural justice permit.

[7] The Tribunal concludes that Section 3 permits it to proceed in the Appellant's absence and make its determination on the basis of the documents and submissions contained in the hearing file. In so doing, the Tribunal is proceeding as informally and quickly as the circumstances permit. In terms of the requirements of fairness and natural justice, the Tribunal's operational staff made all reasonable efforts to bring the Notice to the Appellant's attention. The Tribunal also considered the Respondent's legitimate interest in bringing some finality to the proceeding. Should the Appellant resurface and wish to challenge the Tribunal's decision to proceed and/or its substantive decision, he may seek legal advice concerning his options.

[8] In conclusion on this point, the Tribunal dispenses with service of the Notice on the Appellant. It has made its substantive determination on the basis of the documents and submissions contained in the hearing file. In dispensing with service, the Tribunal has complied with the requirement to conduct the hearing as informally and quickly as the circumstances and the considerations of fairness and justice permit.

THE LAW

[9] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[10] 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).

[11] 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.

[12] 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

[13] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010.

[14] 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 December 31, 2010.

EVIDENCE

Documents

[15] In his Questionnaire for CPP Disability Benefits dated April 20, 2010, the Appellant explains that he stopped working on May 22, 2009 after he injured his L shoulder due to a slip and fall. His other impairments include a "strenuous" heart condition, lung condition, diabetes and high cholesterol. He described limitations in walking, lifting, carrying, reaching, and bending. He is prescribed Gen-Nitro, Crestor, Glyburide and a muscle relaxant for his shoulder.

[16] The Appellant was born in 1959. He indicates he did not complete any schooling. Between September 1998 and his last day on the job, i.e., May 22, 2009, he worked cutting letters for furniture by hand.

[17] In the CPP Medical Report dated May 7, 2010, Dr. Samuel, the family physician, diagnosed diabetes mellitus (DM), dyslipidemia; kidney stones, L shoulder injury, MSK pain (neck, back and shoulders) and coronary artery disease (CAD). Dr. Samuel stated that the Appellant has suffered from uncontrolled DM for many years. Dr. Samuel indicated he would refer the Appellant to a clinic for DM education. After the slip and fall, the Appellant saw a specialist due to moderately severe pain and decreased range of motion in his shoulder. He is prescribed Nitro and was previously admitted to the hospital for chest pain. According to Dr. Samuel, the Appellant's coronary angiogram was within normal range, his dyslipidemia was stable and fairly controlled, his DM was suboptimally controlled, his L shoulder injury was not fully recovered and his MSK pain was likely to be chronic. Dr.

Samuel believed it would be very difficult for the Appellant to find and/or maintain competitive employment considering his education and past work.

[18] A May 25, 2009 x-ray of the L shoulder did not reveal any fracture, arthritic change or bony abnormality in the glenohumeral joint but showed a partial cranial subluxation of the clavicle, which might indicate injury to the capsule of the AC joint. In a September 22, 2009 report, Dr. Heller, an orthopedic surgeon, reported that he saw the Appellant for his L shoulder symptoms. On examination, the Appellant had limited range of motion of the L shoulder. Dr. Heller noted that x-rays showed a slight prominence of the L distal clavicle consistent with possible grade 2 AC separation and that a L shoulder ultrasound showed some fluid in the subdeltoid bursa. According to Dr. Heller, the Appellant would be best managed with aggressive physiotherapy to improve his range of motion.

[19] In a November 17, 2009 consultation report, Dr. Alsarraf, an internal medicine specialist, saw the Appellant for assessment of chest pain Not Yet Diagnosed. According to Dr. Alsarraf, the Appellant reported that his blood sugar control was adequate. Dr. Alsarraf noted an absence of retinopathy, neuropathy, or nephropathy. Dr. Alsarraf reported that the Appellant attended with chest pain on and off for the past 6 days, which "waxed and waned" without radiation. The EKG was sinus rhythm with L atrial enlargement and was otherwise normal. Dr. Alsarraf arranged a stress test and echocardiogram.

[20] In a February 8, 2010 report, Dr. Bhesania, cardiologist, reported on his assessment of the Appellant. He referred to a 15-minute episode of vertigo with presyncope in November 2009 and the Appellant's attendance at the Emergency Room on three occasions with vague chest pain and dyspnea. According to Dr. Bhesania, the Appellant may have had vestibular neuronitis. His other symptoms were atypical although he had several risk factors. Dr. Bhesania indicated he would arrange other cardiac investigations and noted that an ECG was mildly abnormal. In a handwritten notation, Dr. Bhesania noted "mild mitral stenosis only".

[21] A March 9, 2010 Bilateral Carotid Artery Duplex Evaluation was normal.

[22] A March 31, 2010 MRI L Shoulder did not reveal any tear of the rotator cuff tendons. The findings were consistent with mild biceps tendon tenosynovitis and mild subluxation at the AC joint likely due to an old injury.

[23] An April 8, 2010 chest x-ray revealed bibasilar subsegmental atelectasis and mild blunting at the L costophrenic angle. The upper lung zones were clear. There were no pleural effusions.

[24] In a Final Summary Report hospital report dated April 9, 2010, Dr. Sukhai, a family medicine specialist, noted that the Appellant had been admitted to the hospital to rule out an acute coronary syndrome. On the day of admission (April 8, 2010), the Appellant reported crushing left-sided chest pain radiating to his neck. According to Dr. Sukhai, the Appellant had an essentially normal angiogram, however his blood sugars had been "terrible" while in the hospital and he refused treatment with insulin. Multiple ECGs showed only poor R-wave progression. Troponins remained negative, and a CT to rule out pulmonary embolism and an angiogram were negative. The Appellant was diagnosed with mild 30% stenosis in the LAD and in the first diagonal.

SUBMISSIONS

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

a) He suffers from medical conditions which are severe and prevent him from doing any type of work; and

b) His condition is prolonged and is likely to last the rest of his life.

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

a) There is no indication that he experiences episodes of low blood sugars or other diabetic complications that would prevent a return to some type of work.

b) Cardiac investigations revealed only mild coronary artery disease.

c) An MRI of the L shoulder demonstrated mild arthritic changes in the shoulder joint and mild inflammation of the bicep tendon. The orthopedic specialist recommended aggressive physiotherapy.

d) None of the specialists indicated that the medical conditions prevented a return to work. Although he may not be able to do his usual work, he should be able to perform some type of work.

ANALYSIS

[27] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2010.

Severe

[28] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[29] 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 (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[30] The Tribunal is not persuaded that the Appellant's conditions, individually or cumulatively considered, were severe at the MQP. In terms of DM, although Dr. Samuel states that the Appellant has suffered from uncontrolled DM for many years, the evidence indicates that he worked with this condition until he stopped working because of the slip and fall. Dr. Samuel did not indicate any functional impairment, restrictions or complications resulting from uncontrolled DM at the MQP. The Tribunal has also considered the comments of Dr. Alsarraf who stated in his November 17, 2009 report that the Appellant indicated that his blood sugars were adequate and usually in the range of 7 to 9 when checked every 2-3 days. This would suggest that the Appellant, himself, did not consider the

DM to be uncontrolled or disabling. The Tribunal has also considered the comments of Dr. Sukhai who reported on April 9, 2010 that the Appellant's blood sugars had been "terrible" while he was in the hospital and that he seemed "adamant" in his refusal of insulin management for his diabetes. The Tribunal is unable to conclude based on a review of the evidence as a whole that the Appellant's DM was uncontrolled at the MQP. Dr. Sukhai's comments do however give rise to a concern that the Appellant may not have been fully compliant with the treatment of his diabetes in the hospital.

[31] Although the family physician reported dyslipidemia and kidney stones as additional diagnoses, the Tribunal has not been presented with evidence that these conditions, either individually or cumulatively, caused restrictions which would have rendered the Appellant incapable regularly of pursuing any substantially gainful employment at the MQP.

[32] In the CPP Medical Report, the family physician also diagnosed MSK pain and referred to mild-moderate MSK pain - neck and back stiffness. The Tribunal finds that the medical evidence does not support a finding of severity within the meaning of the legislation in relation to the neck and back. The focus of the medical imaging and clinical reports was on the L shoulder only. On September 22, 2009, Dr. Heller saw the Appellant for evaluation of the L shoulder problem. The evidence does not indicate that the Appellant was referred to specialists for evaluation of the neck and back pain or that these symptoms were not treatable.

[33] The Tribunal is not persuaded that the Appellant's CAD would render him incapable regularly of pursuing any substantially gainful occupation at the MQP. Although the medical record supports a finding of intermittent episodes of chest pain and several admissions to hospital for investigations, the investigations did not reveal any significant findings. The November 17, 2009 Consultation Report of Dr. Alsarraf noted a sinus rhythm with L atrial enlargement otherwise normal on the EKG. Dr. Alsarraf stated that the cardiac examination was unremarkable. In his February 8, 2010 report, Dr. Bhesania, cardiologist, opined that the Appellant may have had vestibular neuronitis in November 2009 with syncope of vasovagal origin. His other symptoms were considered to be atypical, although his ECG was found to be mildly abnormal. The April 9, 2010 Final Summary Report of Dr.

Sukhai reported a normal angiogram. He was found to have a mild 30% stenosis in the LAD and in the first diagonal and was discharged in stable condition.

[34] The Tribunal is satisfied, however, that the Appellant was incapable of performing his regular job resulting from injury to his L shoulder at the MQP. In a September 22, 2009 clinic report, Dr. Heller verified limited range of motion. Radiological evidence indicated a slight prominence of the L distal clavicle, consistent with possible grade 2 AC separation and an ultrasound showed some fluid in the subdeltoid bursa. An MRI of the L Shoulder indicated findings consistent with mild biceps tenosynovitis. Dr. Heller indicated that aggressive physiotherapy was warranted to improve range of motion. In the CPP Medical Report, Dr. Samuel, the family doctor, indicated that despite physiotherapy, the Appellant had not fully recovered.

[35] Although the Tribunal accepts that the Appellant's L shoulder condition would prevent him from carrying out his pre-accident physical job, the question remains whether he had residual capacity to perform work within his restrictions at the MQP or could be retrained.

[36] Although he is unable to use his L upper limb for physical work, the Appellant is R-hand dominant. The Tribunal has not been presented with any evidence that the Appellant does not have use of his dominant R hand and that he could not be retrained for work primarily involving his upper R limb and hand.

[37] The Tribunal has considered the Appellant's personal factors and appreciates that he does not have the equivalent of a High School education and has worked only in manual labour type jobs. In the CPP Medical Report, the family physician indicated that the Appellant has less than Grade 6. On the other, the Tribunal notes that the Appellant was relatively young, i.e., age 51 at the date of application and MQP. The Tribunal has also not been provided with any evidence that English is not the Appellant's first language, that he cannot read or write English or that he does not possess the requisite aptitude or capacity to be retrained for a job within his physical restrictions. Despite the difference in age between the Appellant and Mr. Keddy, an appellant in a different case, the Tribunal finds the

comments of the Pension Appeals Board in Keddy v. MHRD (September 11, 2001), CP 13197, relevant where it stated the following:

> [17] While the *Villani* case talks of "an air of reality" in assessing whether an applicant is incapable of pursuing any substantially gainful occupation; there is also a lack of an "air of reality" in this Appellant at the age of 42 making no effort to achieve a possible potential.

[38] The Tribunal concludes the Appellant had residual capacity to seek retraining for work within his restrictions at his MQP. Based on the available evidence, the Appellant has not met the onus which rests on him to persuade the Tribunal that he sought retraining for work within his restrictions prior to or at the MQP. As such his disability is not found to be severe.

Prolonged

[39] Having found that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criterion.

CONCLUSION

[40] The appeal is dismissed.

Jeffrey Steinberg
Member, General Division