

Citation: *K. B. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 40

Appeal No: GT-116781

BETWEEN:

K. B.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Vikki Mitchell

HEARING DATE: November 5, 2014

TYPE OF HEARING: In person

DATE OF DECISION: December 14, 2014

PERSONS IN ATTENDANCE

K. B. – Appellant

Mark Ansara – Appellant’s representative

Cheryl Shaw – Observer from Timmins-Temiskaming Community Legal Clinic

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 February 17, 2011. 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] This appeal was originally to be conducted by written questions and answers. Notice of hearing by question and answer was provided to the parties in a letter dated July 23, 2014.

[4] After reviewing the Appellant’s answers and the Respondent’s submissions, the Tribunal determined that an in person hearing would be required. Notice of Hearing was provided to the parties in a letter dated October 3, 2014.

PRELIMINARY MATTERS

[5] The Appellant’s representative provided written submissions regarding the weight to be given to the information relating to the Appellant’s employment in 2012 and 2013. This information was obtained by the Respondent in a telephone call to the Appellant’s employer.

[6] The Appellant’s representative contends that this is hearsay evidence and should be given no weight.

[7] The Respondent did not provide submissions on this issue.

[8] The information in the phone call contradicts the Appellant's testimony regarding why he stopped working in 2013.

[9] The Tribunal finds that, since neither the reason for leaving work as explained by the Appellant nor the reason given by the employer relates to the issue of disability, it is unnecessary for the Tribunal to address the weight to be given to the information.

THE LAW

[10] 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.

[11] 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).

[12] 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.

[13] 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

[14] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2013.

[15] 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

[16] The Appellant was 52 years old at his MQP. He has a grade 8 education. In the CPP questionnaire he stated that he worked as a truck driver for Duffy Enterprise from 1995 until 2008 when he lost his driver's license due to blindness. He worked 12-14 hours per day, 7 days per week. The work was seasonal – summer – June to October, winter - October to March. He stated that he could no longer work because of his medical condition in November 2010. He reported taking the following medications: Plavix, Lantus, Metformin, Crestor, Citalopram, Metoprolol, Amlodipine, Ramipril, and Zylprim.

[17] Information later in the file indicates that the blindness and the loss of driver's license did not occur until December 2010. At the hearing the Appellant agreed that the eye condition and the loss of his license occurred in 2010. He stated that in 2008 his job building ice roads had ended and he looked for other work but couldn't find any. The Appellant moved from Calgary to Englehart in 2008 and had been unemployed since that time.

[18] The CPP medical report was completed in January 2011 by Dr. Blunt who had known the Appellant and been treating him for 3 weeks. His diagnosis included: cerebrovascular with bilateral temporal hemianoxia, diabetes mellitus type II out of control, uncontrolled hypertension and hyperlipidemia. He had had a sudden visual field loss. He was hospitalized in December 2010 for initiation of insulin treatment. The prognosis was poor for any return of visual field. The doctor noted that abnormal liver function needed investigation but there had been no follow-up since the Appellant's discharge from hospital.

[19] In July 2010, the Appellant was seen by the nurse practitioner at the Englehart & District Family Health Team for a blood pressure follow-up and completion of a driver's

medical. He admitted lying to her about his heart problems and asked her for a letter stating that he did not have an alcohol problem. She could not provide that as she didn't know his habits. She advised him of the seriousness of his cardiac risk factors.

[20] In July 2010 the nurse practitioner completed an application to Ontario Ministry of Community and Social Services for a special diet allowance

[21] A report from the Temiskaming Diabetes program in August 2010 regarding his Lantus start indicated that he did not attend the scheduled appointment.

[22] In August 2010 he was seen in the Emergency at the hospital as a result of a motor vehicle accident.

[23] A CT scan on November 30, 2010 showed an infarct in the posterior limb of the right internal capsule in keeping with an old infarct.

[24] A transthoracic echocardiogram on December 14, 2010 and a Doppler ultrasound reported aortic sclerosis, mild left atrial enlargement, borderline ascending aortic enlargement, grade II LV systolic function with wall motion defects.

[25] The nurse practitioner noted that the Appellant reported decreased vision with floaters in his left eye in November 2010. He was seen again the following day with loss of lateral vision, no pain and green flashes in the right eye.

[26] The Appellant was referred to the Community Care Access Centre (CCAC) on November 25, 2010 regarding the start of insulin therapy and education regarding the life changes.

[27] The Appellant was admitted to hospital on December 1, 2010. His diabetes was uncontrolled and his wife requested admission to hospital for help with starting Lantus and education surrounding his diabetes. He also had a sudden vision loss.

[28] The discharge report from the hospital dated December 31, 2010 reported that the Appellant had had 2 myocardial infarctions – the first at age 32, the second at 42. He had 2 stents inserted at the time of the second. He was diagnosed with type 2 diabetes,

hypertension, and hypercholesterolemia at that time. He sought medical attention approximately 8 days prior to his admission to hospital when he developed bilateral left hemianopsia. He was seen by an optometrist who confirmed the pathology. There was neither evidence of detached retina nor evidence of significant diabetic retinopathy. No recent history of angina was reported. He was encouraged to be compliant with his medical regime and to see his optometrist in January or February concerning the status of his visual field impairment. He was again advised that he was not allowed to drive and voluntarily surrendered his driver's license. Dr. Blunt had indicated on December 6, 2010 that the Appellant's visual field did not meet the standard required to maintain a driver's license. He was to be followed by CCAC regarding his insulin dosages.

[29] A note from the Englehart & District Health Team social worker, dated January 18, 2011 indicated that the Appellant had missed an appointment on December 7, 2010. In a follow-up phone call, the Appellant's wife reported that she was unsure if the Appellant was still interested in meeting with the social worker.

[30] On January 27, 2011 the Appellant arrived in the emergency department via ambulance complaining of chest pain after an "assault" at his home. He was treated and sent home.

[31] The Appellant's wife called the Health Team in February 2011 regarding the status of his driver's license. She was advised that the reports from the optometrist showed no improvement and the license was returned to the Ministry of Transportation. The Team had also completed ODSP forms (health status and activities of daily living) for the Appellant.

[32] At an appointment with the Health Team on April 13, 2011 the Appellant requested a letter confirming his inability to work. At that time he was taking 50 – 75 Tylenol #3 per month for the neck and right arm pain from a car accident. The nurse practitioner stated he was well controlled on that. He was feeling depressed and was having trouble accepting that he could not drive. The Celexa hadn't really made a difference. He was seeing shadows a lot which made it hard to cross the street. He was sleeping only 3 hours per night. The doctor stopped the Celexa and prescribed Remeron in its place.

[33] In a letter dated April 17, 2011 Dr. Lee, optometrist stated that after 2 evaluations, the prognosis for the Appellant's recovery of enough visual field to regain a driver's license was very remote. He stated that he considered any job involving the operation of motorized equipment or requiring the detection of objects in his peripheral field of vision to be inadvisable.

[34] The Appellant testified at the hearing that a driver's license was not required for the heavy equipment employment he got in 2012. He stated that although there may have been some close calls because of his vision, he did not have any accidents. He stated that he was fired from that job. His employer stated that he quit. His not working there any longer was not related to his health and he stated at the hearing that he would have continued working there as long as he could.

[35] When asked at the hearing for the main reason he cannot work, he stated that he has very little energy which he relates to his Hepatitis C. He felt he could not work a 12 hour shift but he could work a ½ shift. A clinical note from September 2013 indicated that Hepatitis C results still had not been received. At the hearing the Appellant stated that he was waiting for an appointment in North Bay and that the Tribunal would receive documentation regarding his Hepatitis C diagnosis. No information has been received.

[36] At the hearing he also stated that his diabetes remains uncontrolled and he is taking insulin and metformin for this condition. His lower back and neck also cause him pain. In the response to the questions sent to the Appellant prior to hearing, there is an indication that the Appellant was being treated for PTSD. At the hearing the Appellant stated that this was incorrect. He had never been diagnosed with or treated for this condition.

[37] The Appellant has not sought part-time work. He stated that his limited education, particularly with respect to writing, restricts his opportunities either to retrain or to find another job. He does not use a computer.

SUBMISSIONS

[38] The Appellant's representative submitted that he qualifies for a disability pension because:

- a) The Appellant's entire working life has been spent driving a truck and he no longer has a driver's license due to his reduced field of vision.
- b) He has a grade 8 education and is functionally illiterate.
- c) The combined effect of his multiple conditions makes physical labour inappropriate.
- d) Despite the loss of his driver's license and the advice of the optometrist that he should not drive motorized vehicles, he attempted a return to work.

[39] The Respondent submitted, in writing, that the Appellant does not qualify for a disability pension because:

- a) After the stroke in 2010 which affected his vision, he was able to return to gainful employment in 2012 and 2013 and left that employment for non-medical reasons.
- b) There is no evidence that the Appellant has required mental health intervention for his depression.
- c) The clinical note in June 2010 noted generalized osteoarthritis. There is no radiographic or clinical examination findings to demonstrate severe pathology or impairment related to this condition.

ANALYSIS

[40] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013.

Severe

[41] 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. However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious

and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[42] The Tribunal accepts that the Appellant has a limited education and that his work history has been totally involved in heavy equipment operation. He also has several medical conditions. However he was able to work after his application for CPP disability benefits and left that job for non-medical reasons. The Tribunal finds that the Appellant's education, previous work history and medical conditions have not prevented from pursuing substantially gainful employment.

[43] 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).

[44] The Appellant worked in 2012 and 2013 following his stroke and the partial loss of sight. He left that job for non-medical reasons. The Appellant stated that although he could not work a full 12 hour shift, he could work a ½ shift. The Tribunal finds that the Appellant showed a capacity for work, obtained work and that his lack of success at maintaining this work was not by reason of his health condition.

[45] The Appellant's representative submitted that the effect of the Appellant's multiple health conditions precludes his ability to pursue any substantially gainful employment. The Tribunal accepts that the Appellant has multiple health conditions. He has shown however that despite these conditions he was able to obtain and maintain work in 2012 and 2013.

[46] The Appellant's representative argued that the Appellant attempted a return to work in spite of his vision problems. The Tribunal accepts this statement; however, the loss of this job did not relate to the Appellant's vision problems and he stated he would have continued working there as long as he could had it not been for a disagreement with his employer and the ultimate loss of the job.

[47] The Appellant has not satisfied the Tribunal that on a balance of probabilities he had a severe disability as defined in the CPP at the time of the MQP.

Prolonged

[48] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[49] The appeal is dismissed.

Vikki Mitchell

Member, General Division