

Citation: *G. B. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 6

Appeal No: GT-118027

BETWEEN:

**G. B.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security**

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SOCIAL SECURITY TRIBUNAL MEMBER: E. Joanne Sajtos

HEARING DATE: December 1, 2014

TYPE OF HEARING: In Person

DATE OF DECISION: January 19, 2015

## **PERSONS IN ATTENDANCE**

G. B., the Appellant

Kuldip Singh, the Appellant's representative

Karen Singh, the representative's associate

Qamar Farz, a Punjabi interpreter

## **DECISION**

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

## **INTRODUCTION**

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on January 10, 2011. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Social Security Tribunal.

[3] The hearing of this appeal was in person for the reasons given in the Notice of Hearing dated August 20, 2014.

[4] The hearing of December 1, 2014 was adjourned prior to the receipt of submissions from the Appellant's representative. The representative did not have a copy of the Appellant's file and questioned the Appellant without disclosing this fact to the Member or the Appellant. Upon learning that the representative did not have the file, the Member raised the issue as to whether the Appellant had received sufficient representation and he was given the opportunity to determine how he wished to proceed. As a result, the Appellant notified the Social Security Tribunal post-hearing that he had dismissed his representative and would represent himself.

[5] At the hearing of December 1, 2014, the Appellant's representative presented the Tribunal with a medical report, dated November 9, 2007, which was directly relevant to the issue before the Tribunal. Although it was not provided in a timely manner in

accordance with the Tribunal policies and procedures, the report was accepted given that the Appellant was illiterate and may not have been aware of the Social Security Tribunal procedure. In addition, the Tribunal had concerns with the sufficiency of representation and chose to give the Appellant the benefit of the doubt. Post-hearing, the medical report was forwarded to the Respondent. In correspondence dated December 5, 2012, the Respondent submitted, in part, that “as the report included is dated 2007, and as there is nothing in the documentation to suggest this information could not have been provided before the end of the Filing Period, we will not be reviewing the additional documentation.” Thus, the Tribunal has considered the document and provided the appropriate weight to the evidence in the determination of this appeal with submissions from the Respondent.

[6] Having reviewed the totality of the evidence and the Respondent’s written submissions, the Tribunal is satisfied that it can make a determination of this appeal without the need to reconvene.

## **THE LAW**

[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.

## **ISSUE**

[10] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2007.

[11] 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**

[12] The Appellant was 37 years old on the date of his MQP, December 31, 2007. He was employed with a furniture company as a fabric cutter from December 1991 until November 2005. He was involved in motor vehicle accidents on November 23, 2005 and December 26, 2007.

## **Testimony**

[13] The Appellant stated that in addition to his regular medication, he had ingested Tylenol 3 in advance of the hearing in order to diminish his pain. The medication, however, affected him cognitively in that it made his head “feel numb” and it caused memory impairment.

[14] The Appellant came to Canada from his native India in December 1991. In India, he obtained a grade five education and has not upgraded any further in Canada. He speaks very little English and cannot read and write in any language. The Appellant had been employed as a farmer in his country of origin.

[15] The Appellant was employed from shortly after the date of his arrival to Canada until his motor vehicle accident of November 2005. On the date of the accident, the Appellant was driving to work and did go to his job as a fabric cutter after the motor vehicle accident, but was only able to stay for approximately half an hour prior to going to the

hospital because his whole body became stiff and his back began to hurt. Subsequently, he was treated by Dr. Garg, his family physician and was given pain killers and prescribed physiotherapy. His injuries were to his back, numbness in his left leg, headaches, stiffness and pain in the right shoulder, and depression. He is right handed. The Appellant has never returned to work since November 2005.

[16] It was noted that Dr. Joshi, an intern cardiologist, in a report dated November 23, 2007, wrote that the Appellant walked six kilometers a day. When asked if this was correct, the Appellant stated that he “thinks he made a mistake.”

[17] In December 2007, the Appellant was involved in a second motor vehicle accident, which exacerbated his pre-existing injuries. He is now unable to use his right hand due to a tingling sensation and numbness.

[18] According to the Appellant, he suffers from “a lot” of depression and feels fearful “all of the time.” There are times when he feels that it would be better to “die” than live this “life.” His relationship with his spouse and children has deteriorated due to his poor health. Even with sleep medication, he is only able to sleep for 3 or 4 hour periods and often suffers from “bad dreams.” As a result, he is restless throughout the day.

[19] His activities of daily living have been severely limited due to constant pain. Since the time of the motor vehicle accidents, he has only been able to drive for no more than five minutes. If he walks two blocks, his legs become weak and tremble. Sitting and standing are limited due to pain.

### **Documentary Evidence**

[20] On September 23, 2013, Dr. Pinto, a rheumatologist, wrote that the Appellant continues to experience chronic pain attributable to the motor vehicle accident of 2005. The prognosis remains guarded and, the disability is severe and prolonged.

[21] In a report of July 31, 2013, Dr. Joshi, a psychiatrist, reported that that the Appellant had previously attended ACT Health Group in Brampton where he received physical treatment and 35 sessions of psychological help. It was stated that the Appellant started to

have physical and emotional problems from the date of his 2005 motor vehicle accident. His prognosis was guarded and it was felt that he would never return to “a degree to be employable at any kind of job.”

[22] Dr. Joshi, in a report of July 21, 2011, wrote that he began treatment on July 21, 2008. The Appellant was in a motor vehicle accident on November 23, 2005 and again in December 2007. The doctor wrote that the Appellant has suffered severe back pain since his first accident and it is “difficult to bend and physical activities are very painful such as walking, turning his body or sitting.” The second motor vehicle accident aggravated his physical problems. It was noted to be a very complex case with diagnoses of severe acute anxiety neurosis, major depressive disorder, adjustment disorder, possible untreatable obsessive personality traits, severe pain, headaches, suicidal ideas and extreme stress. He had a “severe impairment which is prolonged and probably it will continue until he dies.” He had reached maximum recovery and is “completely disabled from engaging in any kind of job. It was also noted that his English is poor.

[23] In a Medical Report, Service Canada, Dr. Joshi, on January 6, 2011, noted that he started treating the Appellant in July 2008. The diagnoses were major depression (severe), anxiety neurosis and panic attacks. Physically, he had multiple areas of pain due to two motor vehicle accidents in 2005 and 2007, and cardiac problems in 2008. There was no response to treatment and the Appellant had “further deterioration, more sad, more forgetful, anxious and isolated.” Prognosis was guarded.

[24] In a Questionnaire for Disability Benefits, Canada Pension Plan, dated December 30, 2010, it is noted that the Appellant completed grade 5 in school. He worked from December 1991 until December 2005 in the furniture industry and was prevented from returning to work due to injuries arising from the motor vehicle accidents. Functional limitations were extreme.

[25] On September 28, 2010, Dr. Joshi diagnosed anxiety neurosis with frequent panic attacks, major depression with mild psychosis, adjustment reaction. There were multiple stressors and “isolation.”

[26] On October 21, 2008, Dr. Singh, a cardiologist, stated that the Appellant had an acute anterior myocardial infarction that morning. He underwent an angioplasty.

[27] The Bay Medical & Health Services Corporation, in a report dated November 9, 2007, wrote an "Independent Assessment" for State Farm Insurance Company with respect to the Appellant's medical condition. The report was completed by Dr. Elmpak, a psychiatrist. It was noted that following the 2005 motor vehicle accident, the Appellant developed continued headaches, pain in his neck, lower back and left leg. His complaints of pain remained significant and limited him in his daily functioning. His diagnoses were major depressive disorder with anxious mood and pain disorder in the chronic range. The Appellant suffered from "a complete inability to engage in any employment for which he is suited by education, training or experience from a psychological and vocational perspective." The doctor was unable to state whether the Appellant was capable of any employment listed in a Transferrable Skills Analysis, as one had not been conducted in this case.

[28] Dr. Corless, the orthopedic surgeon, on February 7, 2007, based on the lack of objective findings in an MRI, encouraged the Appellant to return to work and a referral to a pain clinic. Dr. Corless, on September 20, 2006, wrote that the Appellant complained of a great deal of pain. It was noted that he could not take medication because it bothers his stomach. Almost all of the pain is in the back but he had some numbness and tingling in his low extremities. An MRI was ordered, but showed "no significant abnormalities." Dr. Corless, in a report of March 9, 2006, stated that the Appellant was attending physiotherapy, which was helping. X-rays were normal. The Appellant did not require an aggressive investigation and was to remain on physiotherapy until he returned to work.

[29] Dr. Garg, the Appellant's family physician, provided clinical notes from June 17, 2005 to July 23, 2008. The August 2008 notes indicate depression, low back pain going to the leg. On July 25, 2008, he was there for a follow up regarding depression and low back pain. June 24, and July 11, 2008 indicate low back spasm, depression, and headache. There were three visits in May and one in June 2008 for pain, headaches, low back spasms, feeling weak, suicidal and depression. January, February, March and April 2008

appointments were for low back pain, stiffness, low back spasm. October, November and December 2007, notes neck and low back pain, stiffness. March to July 2007, pain in low back, “can’t do anything.” Low back pain, stiff, spasm, headaches. January and February 2007, low back spasm, tenderness, needs psychological counselling. September, October and December 2006, tenderness at neck and trapezius muscles and low back pain. January to August 2006 neck, low back pain, spasm, tenderness. November and December 2005 low back spasm and tenderness, neck, upper and lower back sprain with cervicogenic headaches.

## **SUBMISSIONS**

[30] The Appellant did not provide submissions.

[31] The Respondent in submissions dated January 15, 2013, wrote that the Appellant does not qualify for a disability pension because:

- a) The Appellant did not start to receive treatment from the psychiatrist, Dr. Joshi until July 2008, which is after his qualifying period. The family physician’s clinical notes do not document any psychiatric symptoms until May 2008. Until December 2007, the medical notes only refer to neck and low back pain due to the two motor vehicle accidents and elevated blood pressure. A report from Dr. Garg of November 7, 2007, states that the Appellant has no psychiatric history, heart disease or neurological deficits. The orthopedic surgeon of February 7, 2007 indicates that the Appellant’s MRI findings are consistent with his age and suggests a pain clinic. An internist of November 23, 2007 wrote that he walks six kilometers a day without limitation and can exercise for 12 minutes on the Bruce Protocol (treadmill). In December 2007, the internist wrote that there was normal blood pressure and therapy was not recommended. Heart failure was not until October 2008.

## **ANALYSIS**

[32] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2007.



## Severe

[33] In this case, the balance of the evidence persuaded the Tribunal that the Appellant does have a severe disability. The objective medical evidence establishes that the Appellant was first diagnosed by his family physician with neck, upper and lower back sprain and cervicogenic headaches subsequent to his first motor vehicle accident in 2005. The Appellant was treated by his family physician approximately one time a month and his physical complaints never varied.

[34] The Respondent argued that the family physician notes do not document any psychiatric symptoms until May 2008, which is post MQP. The Respondent's submission omits the notation of February 2007, which states "needs psychological counselling." In addition, the Tribunal received a medical report from the insurance company on the date of the hearing, which suggests that additional medical evidence was available but not provided to the Tribunal. As noted, the Appellant does not speak English and is unable to read or write in any language and there was an issue as to the sufficiency of his representation. The insurance report is from a psychiatrist and was prepared before the MQP date. The Appellant is diagnosed with major depressive disorder with anxious mood, and pain disorder in the chronic range. The psychiatrist clearly establishes causation between the psychological conditions and the motor vehicle accident of 2005. The Respondent also notes that the orthopedic surgeon suggested a referral to a pain clinic in February 2007. The internist who stated that the Appellant walks six kilometers a day may have been mistaken, as alleged by the Appellant. The Tribunal notes that this statement is inconsistent with the totality of the medical reporting and has given the Appellant the benefit of doubt. The Tribunal has given the psychiatrist and the family physician's evidence substantial evidentiary consideration.

[35] The Appellant was 37 years of age on the date of his MQP, was illiterate and did not speak the English language. He was employed as a farmer and in a factory, which is his only employment experience. These factors must be considered in conjunction with his diagnosed medical conditions. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47,

the court ruled that one must not assess employability in the abstract, but rather consider “all of the circumstances,” which fall into two categories:

- a) The Appellant’s background (age, education level, language proficiency and past work and life experience), as set out in *Villani v. Canada (A.G.)*, 2001 FCA 248), and
- b) The Appellant’s medical condition (assessed in its totality).

[36] Although the Appellant was young at the time of his MQP, previous decisions from the Pension Appeals Board (PAB), although not binding but persuasive, have found that young age is not a reason for disqualifying an applicant from a disability pension (*Lewis v. MHRD* (September 3, 2002), CP 18177 (PAB)). The Appellant is also not well educated or literate, which supports a finding of unemployability. When combined with the medical issues, particularly the psychological conditions, the Tribunal is hard pressed to find that the Appellant would be capable of any employment given his inability to sit, stand or concentrate due to pain. Thus, the Tribunal finds that the Appellant is incapable of pursuing any substantially gainful employment.

[37] The Appellant has received ongoing and consistent treatment from his family physician. He testified that he took physiotherapy but that it was not helpful. There is no evidence to suggest that the Appellant refused reasonable medical treatment or modalities. Therefore, the Tribunal is satisfied that the Appellant has fulfilled his obligation to seek treatment, as set out in *MNHW v. Densmore* (June 2, 1993), CP 23 89 (PAB).

[38] Based on the Appellant’s ongoing pain and psychological conditions arising from the motor vehicle accidents of 2005 and 2007, the Tribunal finds that he is “incapable regularly of pursuing any substantially gainful occupation” in accordance with subsection 42(2)(a)(i) of the CPP.

### **Prolonged**

[39] The CPP, at section 42(2) (a) (ii) states that a disability is prolonged if it “is likely to be long continued and of indefinite duration or is likely to result in death.” As set out in *MHRD v. Scott* (July 10, 1998), CP 5741 (PAB), the focus of inquiry is not an expected

time of recovery, but rather an expectation of not being able to return to work that must be adjudicated.

[40] The Appellant's testimony, which was supported by the medical evidence, is that he began to suffer subsequent to the motor vehicle accident of November 2005 and his condition was exacerbated in the second motor vehicle accident in 2007. He also began to suffer from a depressive and pain disorders, both of which are longstanding. Based on the medical reports from family physician, orthopedic surgeon, rheumatologist and psychiatrist, all of the medical conditions are of indefinite duration, continuous and there is no expectation of recovery. Rather, the prognosis is poor.

[41] For these reasons, the Tribunal concludes that the Appellant's disability is "prolonged" in accordance with the statutory definition.

## **CONCLUSION**

[42] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2005, when he had his first motor vehicle accident. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in January 2011; therefore the Appellant is deemed disabled in October 2009. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of February 2010.

[43] The appeal is allowed.

*E. Joanne Sajtos*

Member, General Division