

Citation: *B. P. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 9

Appeal No: GT-118047

BETWEEN:

B. P.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

HEARING DATE: January 29, 2015

TYPE OF HEARING: In person

DATE OF DECISION: January 30, 2015

PERSONS IN ATTENDANCE

B. P.: Appellant

Deborah Hastings: Appellant's representative

L. P.: Appellant's wife

Marlene Finnegan: captioning

Jason Glover: Observer, Member of the Social Security Tribunal

Nicole Zwiers: Observer, Member of the Social Security Tribunal

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 January 10, 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] The hearing of this appeal was by videoconference for the reasons given in the Notice of Hearing dated October 14, 2014.

PRELIMINARY MATTER

[4] At the outset of the hearing, Ms. Hastings submitted a report dated January 26, 2015 from Dr. Sharda, chiropractor, which indicated that the Appellant had presented to his office on November 20, 2014 with a chief complaint of acute lower back pain with pain radiating down his legs bilaterally to his feet (upon exertion). The letter recommends custom foot orthotics, chiropractic, and physiotherapy. Since this report is more than five years after the December 31, 2009 MQP, the Tribunal determined that it has minimal relevance and should not be admitted at this late stage.

THE LAW

[5] 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.

[6] 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).

[7] 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.

[8] 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

[9] The Tribunal finds that the MQP date is December 31, 2009.

[10] 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.

BACKGROUND

[11] The Appellant was 43 years old on the December 31, 2009 MQP date; he is now 48 years old. His employment history includes mixing chemicals for Sports Chemicals, manual labour in a lumber yard, stacking skids for Mead Packaging, and lastly as a truck driver. The Appellant has not worked since February 2007, and is receiving ODSP benefits.

APPLICATION MATERIALS

[12] In his CPP disability questionnaire, date stamped by the Respondent on January 19, 2011, the Appellant indicated that he has a grade 12 education, and a truck driving certificate. He indicated that he last worked as a truck driver from October 2002 until February 2007, and that he stopped working because he was let go due to a lack of work. He claimed to be disabled as of February 10, 2007 but did not list any illnesses or impairments that were preventing him from working. He noted his other health-related conditions or impairments to include profound hearing loss (100%) in his left ear, and substantial hearing loss in his right ear (only able to hear with a hearing aid and rely on lip reading skills to communicate).

[13] A report dated November 11, 2010 from Dr. Dhillon, the Appellant's family doctor, accompanied the CPP application. Dr. Dhillon diagnosed deafness (left ear totally deaf, right has 15-20% hearing); dizziness off and on, and bilateral wrist, knee and foot pain. The report indicates that no further consultations or medical investigations are planned, and no medications or treatments are listed. The report notes that the Appellant uses a hearing aid in his right ear, and that no hearing aid is possible for the left ear because the Appellant is totally deaf in that ear. The prognosis is that the Appellant's main condition will not change.

[14] This is the Appellant's second application for CPP disability. His first application was date stamped by the Respondent on December 7, 1998 and denied on January 19, 1999. The Appellant did not request a reconsideration of that denial.

[15] A report dated November 25, 1998 from Dr. Seltzer, who was then the Appellant's family doctor, accompanied the first application. The report diagnosis profound and permanent hearing loss. The report notes that the Appellant recently lost his job as a skid loader on an assembly line, and that he is currently unemployed because he feels that employment opportunities are limited due his being hearing impaired.

ORAL EVIDENCE

Appellant's Evidence

[16] The Appellant reviewed his education and employment history. He stated that he started driving transport trucks in 2003. He did both shunting (transporting trailers to be picked up by a tractor trailer) and long distance driving. He travelled to Michigan for the long distance driving, and acknowledged that it was necessary for him to clear customs. When asked how he was able to clear customs, he stated that he just gave the paper work. The Appellant acknowledged that despite his hearing impairment, he was also able to pick up and drop off loads. He stated that he would make people look at him and talk, and that he was able to lip read sufficiently well in order to do this.

[17] He stated that his hearing has been gradually deteriorating as he gets older, and that sometimes he gets words mixed up when people are speaking to him. He stated that he is "somewhat" comfortable communicating in his day to day life. He testified that he hasn't worked at all since February 2007. When asked why not, the Appellant initially testified that Dr. Somechai, a neurologist, suggested that he surrender his commercial license because of his dizzy spells. When asked why there were no reports from Dr. Somechai in the Hearing File, Ms. Hastings indicated that it was difficult get copies of reports from Dr. Dhillon.

[18] When asked why he stopped working in February 2007, the Appellant indicated that this was because of two workplace accidents in the fall of 2006. He described the first accident in which the back of a trailer he was driving was hit by a train; he stated that he wasn't injured in this first accident. He then described a second workplace accident in which the trailer was again hit by a train, and in which he was thrown around and injured.

He stated that he was in pain and shaking. He didn't go to the hospital, but saw Dr. Dhillon who sent him for physiotherapy. He stated that he didn't make a WSIB claim because he didn't have enough hours, and that he was laid off so he could get Employment Insurance benefits. The Appellant was vague in his evidence as to whether he missed time from work after this workplace accident. Initially he claimed that he missed "quite a bit" of work after the accident, but after being questioned further, he stated he was training someone else and he didn't consider this to be working. He stated that the owner wanted him to train someone else because it wasn't safe for him to continue driving, but at a later point in his evidence he stated he had become an owner-operator because he was driving his brother's truck.

[19] The Appellant initially testified he hasn't looked for work since February 2007 because he no longer had a commercial driver's license. He stated that he had already used up one career opportunity, and that EI will only pay for him to be retrained once. He then stated that he had looked into other careers through EI and the Canadian Hearing Society, and that he was advised that he would have very limited opportunities because of his hearing impairment.

[20] When asked why he is unable to work, the Appellant stated that he has a hearing impairment; that when he walks he sometime loses control of his limbs and has balance problems; that he suffers dizzy spells; and that he suffers seizures because of his nerves. He stated that Dr. Dhillon keeps changing the medications for his nerves, because this keeps getting worse. His wife does all of the household chores, because he finds even doing simple tasks difficult because of his balance issues, dizziness, and nervousness.

L. P.'s Evidence

[21] Ms. L. P.'s testified that her husband wasn't the same after the accident in 2006. He continued working, but his condition was getting worse, his legs were shaking, he suffered tremors, and Dr. Samchai told him that his hearing loss was caused by scar tissue on the brain. He first saw Dr. Samchai in either 2009 or 2010, and Dr. Samchai told him that he couldn't drive a truck anymore, and prescribed medications. The Appellant was not taking any medications until he saw Dr. Samchai.

[22] She thinks her husband went for physiotherapy after the accident, and he told her that he wasn't making a WSIB claim because he wanted to keep working. He stopped working in February 2007, because the company wasn't calling him for work. He went on Ontario Works in November 2007, and is now on ODSP. She stated that her husband put in applications for work, and that he was trying to get a security job. He didn't receive any calls for jobs, and she stated that she isn't sure whether he could have worked because of his shaking and sleep apnea. Her husband doesn't help out around the house because he suffers dizzy spells when he bends down.

MEDICAL EVIDENCE

[23] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[24] On July 23, 2007 Dr. Siomra, otolaryngologist, reported that that an audiogram showed profound hearing loss on the left side and a severe loss on the right side with good recognition. Dr. Siomra further reported that the Appellant complained of tinnitus related to his hearing loss. Dr. Siomara noted that the Appellant's hearing aid was five years old, and he made arrangements for a new hearing aid trial. The report notes that the Appellant drives a transport [truck].

[25] On January 8, 2012 Dr. Dhillon reported to the Appellant's lawyer. The report indicates that the Appellant's hearing disability has been present since childhood. The report also notes that the Appellant suffered from frost bite injury to his feet in Quebec many years ago, and that he was in a motor vehicle accident (MVA) that caused some right leg problems, and that his knees were crushed between two bumpers in the remote past. The report indicates that no further help is possible for the Appellant's hearing loss; that he presently does not use any prescription medication for pain or for any other reasons; and that he is presently being assessed with a CPAP trial for sleep apnea.

[26] The report concludes:

The only restriction for him is to avoid any job that puts him at risk because of his profound hearing loss. I believe he used to drive [a] truck for a living

in the past and was advised to stop doing that. In my opinion, B. P.'s main limitation is his profound hearing loss from childhood and if this qualifies him for CPP disability pension then he should be granted this. And in the latter case, this should be retroactive as seems fit considering this disability has been there for almost all his life.

[27] A report dated July 30, 2013 from Rhonda Hogg of the Canadian Hearing Society indicates that the Appellant's hearing loss makes it very extremely difficult for the Appellant to live and work, and to carry out normal activities. She opined that finding and maintaining competitive employment would be very difficult for the Appellant.

SUBMISSIONS

[28] The Appellant submits that he qualifies for a disability pension because:

- a) His profound hearing loss should be considered in the context of his other disabling symptoms including his dizziness, balance problems, seizures, and pain;
- b) The Tribunal should also consider the Appellant's limited education and lack of transferable skills;
- c) The evidence satisfies the CPP severe and prolonged criteria.

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

- a) Even though the Appellant has been limited by his hearing loss since childhood, he has been able to complete high school, obtain his truck driving certification, and pursue gainful employment;
- b) He stopped work because he was laid off, and not because of a medical condition;
- c) The Appellant is young, and under no active treatments;
- d) There is no evidence of serious efforts by the Appellant to pursue alternative employment.

ANALYSIS

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

Severe

[31] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

Guiding Principles

[32] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[33] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2009 he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[34] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health: *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[35] It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB.

Application of Guiding Principles

[36] In determining this matter, the Tribunal focused on the December 31, 2009 MQP date and determined that there was no “credible and supporting” evidence to support a severe disability as of that date.

[37] It is clear that the Appellant’s hearing impairment creates significant limitations; however, the Tribunal is satisfied that, on the facts of this particular case, this does not equate to a severe disability in accordance with the CPP criteria. Although the Appellant in his oral evidence, indicated that injuries in a 2006 workplace accident gave rise to additional contributing conditions, there is no “credible and supporting evidence” (see *MHRD v S.S.*, supra) to support this contention.

[38] Although the Tribunal is satisfied that the Appellant was involved in some sort of workplace accident in 2006, the evidence does not support that this resulted in any significant disabling conditions:

- There is no mention of this workplace accident in the Hearing File, and the first time this was raised as a significant factor was in the oral evidence at the hearing
- In his CPP disability questionnaire the Appellant indicated that he stopped working in February 2007 because he was “let go due to a lack of work.” There is no mention of a workplace accident in the fall of 2006
- Although the Appellant testified that Dr. Dhillon sent him for physiotherapy, there is no mention of such an accident in either of her reports. Significantly, in her January 8, 2012 report Dr. Dhillon alludes to the Appellant’s previous injuries including a frost-bite injury to his feet, a MVA accident, and his knees being crushed between two bumpers in the remote past. If this workplace accident caused any significant medical impairments, it is difficult to accept that there would be no mention of this in either of her reports

- there is no medical evidence in the hearing file relating to any treatment for injuries sustained in this workplace accident
- the Appellant has acknowledged that he did not make any WSIB, or other claims, for injuries arising from this accident.

[39] A review of the hearing file, including the CPP applications and medical reports, makes it clear that the Appellant's disability claim relies primarily on his profound hearing loss. Although there is mention of other symptoms such as dizzy spells and pain, there is no evidence of any ongoing treatment for these conditions. Although the Appellant saw Dr. Samchai, a neurologist, we have no report from Dr. Samchai in the hearing file, and the neurological consultations did not begin until either 2009 or 2010. Copies of Dr. Samchai's consultation reports could have been obtained from Dr. Dhillon's files. The Appellant has the burden of proof, and if he considers Dr. Samchai's reports to be significant, he should have taken steps to ensure that they were provided. As matters now stand, the Tribunal cannot even determine whether the initial consultation with Dr. Samchai (the oral evidence is that it was in either 2009 or 2010) was before or after the December 31, 2009 MQP date.

[40] The primary issue in this case is whether the Appellant's hearing loss constitutes a severe disability. In determining this issue the Tribunal obtained guidance from the Pension Appeals Board (PAB) decision in *Buckley v MHRD* (September 20, 2001) CP15265, which the Tribunal considered persuasive although not binding. At paragraph 22 of its decision, the PAB stated as follows:

Being hearing-impaired is a serious limitation. It has an isolating effect on the individual and reduces the level of oral communication which can readily be undertaken, and, in the employment context, such communication is generally quite important. Technical aids can help, but they have their limitations. Nonetheless, I am not persuaded that Mrs. Buckley's level of impairment, given her age and her work experience, renders her incapable regularly of pursuing all forms of substantially gainful employment. The work place has room for the hearing-impaired and technological aids exist to help overcome the impairment. There are jobs in which the requirement for ongoing oral communication is minimal or less important, in which Mrs. Buckley could function satisfactorily

...

[41] In this case, the Tribunal noted that the Appellant was only 43 years old on the MQP date (40 when he last worked in February 2007); that despite his hearing impairment he was able to completed his high school education and commercial truck driving certification; that he was able to maintain gainful employment for many years including working as a long distance truck driver going through border security both to and from the United States; that he stopped working in February 2007 because of a lack of work and not because of a medical condition; and that there is no evidence of anything more than minimal efforts by the Appellant to pursue alternative employment (see *Inclima*, supra).

[42] The Appellant has the burden of proof, and after a careful review of the entirety of the evidence, the Tribunal has determined that the Appellant has not established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

[43] Having found that the Appellant's disability is not severe, it is not necessary for the Tribunal to make a determination on the prolonged criteria.

CONCLUSION

[44] The appeal is dismissed.

Raymond Raphael
Member, General Division