Citation: *N. T. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 7

Appeal No: GT-117053

BETWEEN:

N. T.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Jane Galbraith
HEARING DATE:	January 27, 2015
TYPE OF HEARING:	In person
DATE OF DECISION:	January 29, 2015

PERSONS IN ATTENDANCE

N. T. – the Appellant

Mark Grossman – the Appellant's representative

Issay Isaias- the Amharic interpreter

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 September 3, 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 in person for the reasons given in the Notice of Hearing dated August 29, 2014.

THE LAW

[4] 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.

[5] 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).

[6] 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.

[7] 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

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

[9] 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

[10] The Appellant was 30 years old at the date of his MQP.

[11] The Appellant emigrated from Ethiopia when he was 16 and didn't understand English. He successfully obtained his Grade 12 diploma in Canada after attending high school for 4 years. He is now able to read and write English. The Amharic interpreter at the hearing was used only on a couple of occasions to clarify something that was said or when the Appellant wanted to be sure he was understood.

[12] The Appellant testified he started working right after high school instead of continuing his education due to family issues and his mother was very sick with cancer and had only weeks to live. He later indicted that his mother had gone through chemotherapy treatments and was cured.

[13] The Appellant started working at Linemar and continued there until July 2007 when he stopped working. During his time working for this company he had been laid off and then rehired many times. He worked full time hours and often worked overtime. There was also a monetary bonus if extra piecework was done properly.

[14] The Appellant moved into an apartment after he had been working for 1 ½ years and has always had roommates. He cooks for himself, does his own laundry and helps out with some of the household cleaning.

[15] The Appellant injured his left shoulder at work in 2005 but then went back on lighter duties. He states that because he had to use the right arm more, his right shoulder also started to cause him pain. He had some difficulties with the lighter duties and while he was off on sick benefits he received a lay off notice in July 2007. He and many others were laid off which he reports occurred frequently at Linemar.

[16] In September 2005 Dr. Faraawi, Rheumatologist, assessed the Appellant and diagnosed him with chronic bilateral shoulder tendonitis which is worse on the left side. He provided a cortisone shot in the left shoulder and prescribed anti-inflammatory medication. (GT1-115)

[17] In February 2006 Dr. Faber assessed the Appellant in the WSIB Upper Limb Specialty Clinic. He recommended restrictions at work to include no repetitive use of his right or left upper limbs, no repetitive forward reaching or overhead work. He opined the Appellant should be doing a home exercise program and have some massage therapy. (GT1-99)

[18] He was provided with physiotherapy on a couple of occasions with no relief of his symptoms. He had not been given any exercises from the physiotherapists that he does regularly. His Family Physician, Dr. Ghally referred him to several specialists. Initially he states that she advised him to take anti-inflammatory medication and Tylenol for his pain. She also has advised him to stretch frequently and he indicates he follows this advice. He does not do any exercises but does sit in the bathtub to help manage his pain.

[19] In July 2007 the Appellant had an ultrasound done on both his shoulders. There was no tears found and muscle bulk is well preserved. The impression reported was that of a normal ultrasound. (GT1-70)

[20] In November 2007 Dr. Grosso, an orthopedic surgeon, evaluated the Appellant and ordered an MRI. He diagnosed him with myofascial pain and opined that he may require retraining to a different occupation. (GT1-42) Dr. Grosso re-evaluated the Appellant after reviewing an MRI done on his shoulders, which showed no evidence of a rotator cuff tear. He did not suggest surgery but indicated the Appellant was in significant pain. He opined the Appellant would have some element of permanent symptoms in his shoulder and neck area. (GT1-41)

[21] On March 17, 2008 the Appellant was discharged from his physiotherapy treatment as he failed to attend his scheduled appointments through his extended health care. He was initially evaluated on February 25, 2008. They recommend the Appellant participate in an active rehabilitation program as soon as possible. (GT1-48)

[22] In April 2009 Dr. Ghally indicated to Workers Safety and Insurance Board (WSIB) the Appellant required light duties due to myofascial pain in both shoulders. She suggested an increase in the number of hours worked. (GT1-40)

[23] In May 2009 the Appellant had a hearing with the WSIB. In the report it notes the Appellant had been told by his physician to get a different light duty job but the employer refused. He did receive sick Employment Insurance (EI) benefits, applied for long-term disability benefits and then he received Ontario Works. He has not tried any job nor has he looked for any work. The Appellant reported at the hearing that Tylenol #3 is the only medication he can tolerate. All other medications hurt his stomach. He had been prescribed Celexa for his depression but had stopped taking it in Dec 2008 as he could not afford it. He is still able to drive and is not sure if he can work. (GT1-277)

[24] In December 2009 Dr. Ghally indicated in a CPP Medical report the Appellant's diagnosis was chronic bilateral shoulder pain with bilateral tendonitis. She notes he has had this for many years. She recommended continuing physiotherapy. (GT1-226)

[25] Dr. Ghally had been prescribing Oxycocet for many years and he still takes some if needed. In the last several weeks he reports that Dr. Ghally has changed his pain medication to Vimovo, which is an anti-inflammatory medication with some stomach protection. The

Appellant reports that he sees his doctor every three months to have prescriptions renewed and evaluate how he is doing. He indicates his doctor has talked about sending him to a pain program to assist him in managing his pain.

[26] In March 2010 a vocational assessment was completed. They conclude the Appellant would have difficulty with any type of training other than practical hands on unless his academic skills were upgraded. Some occupations consistent with his restrictions were outlined. The barriers to his success at obtaining one of these occupations include significant pain issues, feelings of depression and the need for upgrading academic skills. (GT1-343)

[27] At some time in 2010 the Appellant was provided with Customer Service training by the WSIB. Due to his pain he stopped attending after 3 weeks. He did not attempt or attend any other training or education.

[28] He reports his pain is sharp pain stabbing in between his shoulder blades and when he does too much his pain increased. He has difficulty focusing when this happens.

[29] Dr. Ghally wrote a note to whom it may concern in 2010 stating the Appellant had a medical condition and he is not able to continue his upgrading course. (GT1-35)

[30] In May 2010 Dr. Ghally provided the diagnoses of bilateral shoulder tendonitis and depression to the WSIB. She reported the Appellant was taking one tablet of Percocet every 4-6 hours as needed, Cipralex 10mg daily and Tylenol Extra Strength as needed. She noted improved sleep and mood with the prescribed medication. (GT1-36)

[31] In August 2010 Dr. Ghally completed another CPP medical report and indicated the Appellant had a major mood disorder and she would be referring him to a psychiatrist. She opined the Appellant's condition was chronic and his physical and mental impairments would not allow him to function in any workplace. (GT1-222)

[32] The Respondent submitted an updated record of earnings showing that the Appellant had earnings of $6811 in 2012 and $10,665 in 2013, which the Respondent considered substantial. The Appellant's MQP did not change due to these earnings.

[33] The Appellant reports that his mother saw a position as a school bus driver and thought he might be able to do this job. He applied and was successful in obtaining the position. He had 2 days training for the position and obtained the appropriate drivers license that allowed him to drive a bus. He works early in the morning to get the bus warmed up and prepared for the route. He has the same route each day. He parks the bus close to his home until he does the return route when he takes the bus back to the depot. He continues to work in this job on a part-time basis. There is the opportunity at times to do more hours with special trips. The Appellant has not attempted to do this extra work as he believes it will cause too much pain.

[34] The Appellant has not attempted to increase his hours of driving or looked for any other positions that would accommodate his limitations.

SUBMISSIONS

[35] The Appellant's representative submitted on his behalf that he qualifies for a disability pension because:

a) The Appellant has done all recommended treatments. There is clear medical evidence of the Appellant's condition and limitations. The Appellant continues to be monitored regularly by the Appellant's Family physician.

b) The Appellant is only working approximately 4 hours per day, which cannot be considered substantially gainful and shows that he wants to be productive. The Tribunal is directed to consider *Dietrich v. MHRD* (March 22, 2012), CP 26650 (PAB), which was granted and addresses part-time work that is not substantially gainful.

c) The Vocational assessment indicated clerical work would be difficult for the Appellant and a job such as gas station attendant would be difficult with his shoulder pain as there is a requirement to stack shelves.

d) The Appellant needs to be assessed with a real world perspective.

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

a) Ergonomic and vocational testing on file revealed the Appellant was capable of modified employment or alternative employment with possible retraining.

b) He has a pending psychiatrist appointment but is being treated conservatively with a single medication for his mood disorder with no indication of needing crisis intervention.

c) The Appellant had substantial earnings in 2012 and 2013, which suggests the Appellant has returned to work and does not support an incapacity for all work as of his MQP.

ANALYSIS

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

Severe

[38] 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.

[39] The Appellant is young, educated in Canada and as he has shown in the past, he could acquire more education. There is nothing in the evidence to suggest to the Tribunal that the Appellant could not learn.

[40] As to the argument the Appellant would not do well at clerical work due to his education, the Tribunal agrees his current education could perhaps be a handicap but certainly not a total barrier to employment. The Appellant completed high school learning a new language in 4 years which not indicative of the Appellant having any difficulty with learning. The Appellant is well able to converse in English.

[41] It is clear there may be restrictions and jobs that the Appellant would not be suitable for, but positions have been identified that would accommodate restrictions. When considering the Appellant's identified limitations the Tribunal questions whether the part-time position the Appellant currently has is appropriate as it involves the substantial use of both his arms.

[42] The Tribunal has applied a real world analysis and taken into account the Appellant's personal characteristics discussed and his employability. It found these factors do not meet the severe criteria.

[43] The Tribunal notes the submission that there is adequate medical evidence provided indicating a severe condition. *Warren vs. (A.G.) Canada, 2008, FCA 377* confirms for the Tribunal the need for objective medical evidence when it states:

> In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Minister of Social Development*, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL)).

[44] The Tribunal found the Appellant was on an anti-depressant at a conservative dose. There is no medical evidence concerning the involvement of a psychiatrist or the need for ongoing counseling at the time of the MQP. The Tribunal does not find there is adequate evidence in support of a severe mental condition that would interfere with the Appellant's ability to work. The Appellant did not indicate in his testimony that his emotional state had any effect on his ability to work.

[45] Dr. Grosso evaluated the Appellant after reviewing an MRI. There were no tears noted and he had suggested the Appellant should retrain to a different position, as there would be some elements of permanent symptoms. Dr. Ghally was indicating in April 2009 that the Appellant would require light duties due to his myofascial pain in both shoulders. In May 2010 Dr. Ghally noted improved sleep and mood with the prescribed medication.

[46] The Tribunal has not been persuaded the objective medical evidence concerning his physical condition has demonstrated a severe condition precluding all types of work.

[47] The Tribunal was directed to find guidance in *Dietrich v. MHRD* (March 22, 2012), CP 26650 (PAB) with respect to the similar hours of work that were determined to be not substantial. The Appellant in the *Dietrich* case had significant psychological issues, had taken retraining on his own initiative and was able to demonstrate that he could not work longer than 20 hours a week. He attempted to work longer hours and when he did work more hours he found that his pain didn't allow him to work at all for days. Although the number of hours worked is similar to what the Appellant in this case works, there are many noteworthy differences in the situations. It is due to those differences why the Tribunal does not consider it should be influenced by this decision or assign it significant weight.

[48] The Tribunal cannot ignore that when 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).

[49] The Appellant has been working for several years on a part-time basis as a school bus driver. He has been regularly attending this split shift work but has not attempted to increase his hours at this job or find another job that would be more suitable.

[50] The record of contributions for the Appellant shows earnings increased between 2012 and 2013. The Tribunal places significant weight on the fact the Appellant did not attempt to retrain, test his capacity to do more hours of work when available or find alternate work more suitable for his condition.

[51] Some guidance is provided to the Tribunal in *Lombardo v MHRD*, (July 23, 2001), CP 12731(PAB) where it states:

> The Appellant should demonstrate a good-faith preparedness to follow appropriate medical advice and to take such retraining and educational programs as will enable him/her to find alternative employment when it is obvious that one's prior employment is no longer appropriate.

[52] The Tribunal finds the Appellant has not shown his condition has prevented him from obtaining and maintaining work that would be substantially gainful.

[53] The Tribunal has carefully reviewed the medical reports and listened attentively to the evidence of the Appellant. The Tribunal finds that the Appellant has not satisfied the Tribunal on a balance of probabilities that he had a severe disability within the meaning of the Act at the time of his MQP.

Prolonged

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

CONCLUSION

[55] The appeal is dismissed.

Jane Galbraith
Member, General Division