Citation: *G. S. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 145

Appeal No: GT-119400

BETWEEN:

G. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Glen Johnson
HEARING DATE:	February 26, 2015
TYPE OF HEARING:	Teleconference
DATE OF DECISION:	March 13, 2015

PERSONS IN ATTENDANCE

Appellant: G. S.

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 set as a telephone hearing for the reasons given in a Notice of Hearing dated October 10, 2014. The Respondent elected not to appear at the Hearing.

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, 2010.

[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 50 years old with a grade 10 education when he applied for a CPP disability pension benefit. He testified that he was employed operating a tow truck, gravel truck and front-end loader when he stopped working due to injuries from a motor vehicle accident (MVA) in April 2009. He said that he attempted a return to work driving a water truck for a weekend in 2010. This was not successful due to the requirement of manipulating large hoses in order to fill the truck from a fire hydrant. Otherwise he has not attempted a return to work, or attempted to retrain for alternate work.

[11] In a Questionnaire filed with his application the Appellant states that he stopped working because of neck and mid-back pain, spasms and weakness. Other health related problems include hypertension and morbid obesity. He said that his job was physically demanding, and he could no longer lift, turn wrenches, change tires, sit or stand for extended periods of time, or bend over. He had difficulty paddling a canoe, changing his truck oil, hunting, drawing a bow and chopping fire wood.

[12] The Appellant testified that he has considered becoming employed in an office job such as accounting, but he does not have access to funds to retrain.

[13] Dr. Lemiski, family physician, prepared a report on September 19, 2010. He treated the Appellant for soft tissue injuries since the MVA in April 2009. He says that an MRI performed in September 2009 showed a small central disc herniation at T4-5, but it was not relevant to the Appellant's complaints. Investigations were otherwise unremarkable to explain the ongoing back and neck pain from the MVA in April 2009. Physiotherapy and back injections did not result in significant improvement. A surgical solution was stated to be unlikely. He said that the Appellant had recently been performing less physically demanding work driving a water truck, but lifting large objects remained difficult for him. Dr. Lemiski stated: "*Long term it is difficult to predict how he will do because he does not have a definitive diagnosis from which to make that prediction*"

[14] The Appellant testified that Dr. Lemiski did not "*act like a doctor*" to him. He explained that he felt that Dr. Lemiski wasn't listening to him or ordering the appropriate investigations of the back and neck condition. He said that Dr. Lemiski failed to find a loss of cervical lordosis, or neck "*lesions*", and this delayed the Appellant from getting an accurate diagnosis and proper treatment. However, the Appellant could not refer the Tribunal to any medical document which supports that Dr. Lemiski misdiagnosed his condition, or conduct which delayed proper treatment.

[15] The Appellant said he reported Dr. Lemiski to the College of Physicians and Surgeons. The Appellant's filed a written submission dated February 7, 2014 (GT3-1) stating, among other complaints, that Dr. Lemiski "*told an untruth*". At the hearing the Appellant was not prepared to say that this was an accurate statement since he is not alleging that Dr. Lemiski lied, or otherwise intentionally tried to undermine the Appellant's condition, or mistreat him. He said that Dr. Lemiski was "*in my way*", and "*wouldn't work with me*". He said the complaint was dismissed by the College because they are an "*old boys club*", and would side with a fellow doctor.

[16] Dr. O'Farrell, orthopedic surgeon saw the Appellant on December 3, 2009. The physical examination was mostly unremarkable, and he states that the Appellant "*should be capable of returning to work at any time to full duties".* At the hearing, the Appellant said that Dr. O'Farrell's opinion should not be relied on because he is "*biased*", and when the Appellant

tried to tell Dr. O'Farrell his complaints he was "*brushed off*" and disregarded. The Appellant said that Dr. O'Farrell was biased toward helping the insurer in his MVA claim, but no further details were provided in support of this contention.

[17] On his own accord, the Appellant attended upon pain management specialist, Dr. de Wet. The Appellant testified that he him in late 2009 because he was not satisfied with Dr. Lemiski. He testified that once Dr. de Wet assessed the Appellant, Dr. de Wet "*hit the panic button*" due to lesions in his neck which the Appellant says explained the neck pain. Dr. de Wet's report dated January 6, 2010 confirms an MRI finding of a small central disc herniation at C4-5, but the appellant acknowledges that Dr. de Wet's report is in error, and should read T4-5. Dr. de Wet found no other abnormalities, and states that the Appellant takes Tylenol as required.

[18] Dr. Lemiski's chart note of October 20, 2010 indicates that the Appellant was walking 3-5 miles per day. At the hearing the Appellant acknowledged this to be accurate.

[19] In a report to CPP dated December 3, 2010, Dr. Lemiski stated that the Appellant had chronic thoracic back pain with exacerbation of degenerative back problems, causing continuing difficulty lifting, bending and sitting. The Appellant consumed the occasional Tylenol or ibuprofen, and his prognosis was guarded, with no significant improvement in the last 12 months.

[20] Dr. Lemiski's chart note of January 4, 2011 indicates that the Appellant had increased mid-back pain as a result of helping his daughter move out of her house, and a note of January 14, 2011 shows that the Appellant had another MVA, but no new injuries were reported. At the hearing, the Appellant was evasive in answering whether these recorded notes were accurate, but eventually denied that he told Dr. Lemiski that he had helped his daughter move or that his back pain worsened. He said he told Dr. Lemiski that he could **not** help her move. He acknowledged that he was in an MVA in January 2011, but denied any worsening of his medical condition. The Appellant was questioned as to why he would mention the MVA to Dr. Lemiski if he did not sustain injuries. He said that he wanted to be open with the doctor, but it was not due to a worsened medical condition.

[21] In March 2012 Dr. Ainsle, surgeon, states that the Appellant had progressive hand numbness over the previous 8-12 months and diagnosed bilateral carpal tunnel syndrome (CTS). The Appellant said that he agrees with this statement. Surgery was recommended. The Appellant said he has not had the surgery because he does not agree that CTS is the cause of numbness and loss of grip strength in his hands. He states that there is another cause, however, he could not refer the Tribunal to medical documents in support of his contention.

[22] The Appellant was referred to Dr. Govender, neurosurgeon. In his report of July 25, 2012 he states that the Appellant's main complaint is vertigo, neck pain and upper limb paresthesia. He did not find any evidence of neural impingement. The Appellant testified that Dr. Govender "*basically brushed me off*". He was referred to ENT physician, Dr. Povah, who could not explain the cause of vertigo complaints.

[23] In a report to CPP dated January 20, 2014, Dr. Fair, family physician, states that the Appellant has a poor tolerance to prolonged exertion and back pain limits activities to 1-2 hours. The prognosis was that the Appellant should be capable of low intensity work with weight loss and muscle conditioning. The Appellant testified that since the MVA in April 2009 he has not lost weight, or been following a diet, and has not joined a gym, hired a personal trainer or followed a formal exercise program to improve muscle conditioning. He said that he isn't able to afford to do these things. He said he saw a dietician a few years ago, but could not recall who or where.

SUBMISSIONS

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

a) Medical information from his family physician, Dr. Lemiski, is false, misleading and missed relevant important facts, and should not be relied upon;

b) Dr. Lemiski failed to follow through with proper investigations and referrals to medical specialists for consultation and treatment, which resulted in a delay in the diagnosis of his medical condition;

c) Medical information other than from Dr. Lemiski has revealed a medical condition which supports a severe and prolonged disability which was present prior to the MQP of December 2010, and continuously since.

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

a) The Appellant was not disabled from all work at the last time the Appellant qualified for benefits as of the MQP;

b) While it is acknowledged that the Appellant has chronic pain and physical limitations, and he may not be able to return to his former job as a truck driver, he is not precluded from all suitable work, including lighter or part-time work, by the MQP and continuously thereafter;

c) The medical documents support that with weight loss and muscle conditioning, the Appellant may be able to do low intensity work on a part-time basis;

d) In 2010 the Appellant was able to return to truck driving employment which was not particularly physically demanding, which does not support a severe and prolonged disability by the MQP.

ANALYSIS

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

[27] The Respondent is not required to prove that the Appellant is capable of working; a claimant bears the onus of proving that he or she suffers from a severe and prolonged disability prior to his or her MQP (*Dossa v. Canada (PAB*), 2005 FCA 387).

[28] The Tribunal is skeptical of the testimony of the Appellant. In the Appellant's written submission he contended that Dr. Lemiski "*told an untruth*", but in testimony he was evasive, and eventually said that he was not prepared to say that this was an accurate statement since he is not alleging that Dr. Lemiski lied, or otherwise intentionally tried to undermine the

Appellant's condition, or mistreat him. The Tribunal is not impressed with the Appellant's statement that a complaint to the College of Physicians and Surgeons regarding Dr. Lemiski was dismissed because it's an *"old boys club*".

[29] Despite the Appellant's claim, the Tribunal finds that the information from Dr. Lemiski is reliable, and there is no reasonable basis to exclude it. The Appellant is critical of Dr. Lemiski, as well as Drs. Govender, Ainsle and O'Farrell, but he has not established a reason for differing from their stated opinions, or referred to documents to support his argument. The Appellant contends that Drs. Govender and O'Farrell did not properly assess his condition and "*brushed him off*", yet the Appellant does not provide support in the medical documents for this contention.

[30] The Appellant exaggerated when he states that Dr. de Wet "*hit the panic button"* when the Appellant first saw him. Dr. de Wet's medical information does not support that there was any emergent finding, and certainly none that caused panic. Dr. de Wet said that he finds no abnormalities other than a small disc herniation, and said that the Appellant was taking Tylenol as required.

Severe

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

[32] The Appellant was 49 years old when he stopped working in April 2009 due to MVA injuries to his mid-back and neck. Aside from a weekend attempt at another physically demanding job driving a water truck, the Appellant has not attempted a return to work or to retrain for a lighter or more sedentary job. The Tribunal does not agree with the Appellant's claim that he cannot afford to retrain. No information is filed in support of this contention, and the Appellant is not a credible witness.

[33] The severity of a disability is not premised upon an individual's inability to perform his or her regular job, but rather his or her inability to perform any work (*Klabouch v. Canada (MSD*), FCA 33).

[34] In 2010 Dr. Lemiski confirms that lifting large objects remained difficult for the Appellant. However, this does not preclude sedentary work such as an office accounting job, which the Appellant said he has considered. Dr. Fair confirms a residual work capacity, albeit at a reduced level, where the Appellant is not exposed to prolonged exertion and has breaks each couple hours.

[35] 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).

[36] The Appellant claims that the medical information from Dr. Lemiski, who was his family physician for the first 2 years following the MVA in April 2009, is unreliable because it is false and misleading, and missed relevant important facts. The Appellant could not refer the Tribunal to documents in support of this contention. No other medical professional supports that Dr. Lemiski intentionally, or otherwise, failed to act as a competent professional in his treatment of the Appellant.

[37] The Appellant argues that Dr. Lemiski delayed in properly investigating and treating him, which resulted in a delay in the diagnosis of his medical condition. However, the Appellant has not produced documentary or other support for this contention. Drs. Ainsley, Govender, Povah and Fair saw the Appellant after December 2010, and wrote reports which are consistent with Dr. Lemiski's findings, and which do not mention Dr. Lemiski, or conflict with the reported findings of Dr. Lemiski.

[38] The Tribunal does not agree with the Appellant's assertion that the opinion of Dr. O'Farrell is biased against the Appellant. The Appellant has not offered support for this contention.

[39] Near the MQP of December 31, 2010, Dr. Lemiski's charts confirm that the Appellant had significant physical functioning ability. The Tribunal finds as accurate, references in Dr. Lemiski's charts indicating that the Appellant helped his daughter move, and that he was capable of walking 3-5 miles per day. This does not support a serious disability which would preclude suitable work. As early as December 2009 Dr. O'Farrell was of the view that the Appellant was able to return to work.

[40] The Appellant's consumption of over the counter pain relievers, on an occasional basis, as stated by Dr. Lemiski, does not support a serious disability.

[41] The Tribunal agrees with the Respondent' argument that while it may be that the Appellant has chronic pain and physical limitations, and he may not be able to return to his former physically demanding job operating a truck he is not precluded from all suitable work by the MQP and continuously thereafter;

[42] The Tribunal finds that the Appellant's carpal tunnel syndrome condition manifested after the MQP of December 2010. Dr. Ainsle reports that the Appellant had hand numbness 8-12 months prior to his visit in March 2012, and there is no record of earlier complaints. The Appellant confirmed the accuracy of Dr. Ainsle's records regarding onset of symptoms after the MQP.

[43] An essential element of qualifying for a disability pension is evidence of serious efforts by the Appellant to help himself. This requirement extends to the obligation of all Appellants to establish that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and her employability: *A.P. v MHRSD* (December 15, 2009) CP 26308 (PAB). The Tribunal finds that the Appellant has failed in his obligation to return to suitable work, or pursue weight loss and muscle conditioning as advised by Dr. Fair, in order to improve his work capacity.

[44] Having considered the totality of the evidence submitted, the Tribunal is not satisfied on a balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[46] The appeal is dismissed.

Glen J. Johnson
Member, General Division