

**Citation: *Y. M. V. v. Minister of Employment and Social Development*, 2015 SSTGDIS 28**

**Date: April 8, 2015**

**File number: GT-120463**

**GENERAL DIVISION- Income Security Section**

**Between:**

**Y. M. V.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Raymond Raphael, Member, General Division - Income Security Section**

**Heard by Videoconference on April 7, 2015**

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

Appellant: Y. M. V.

Seena Moorhead: Appellant's representative

Verlyn Francis: Observer, Member of the Social Security Tribunal

### **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 May 30, 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 following reasons:

- The form of hearing is most appropriate to allow for multiple participants;
- Videoconferencing is available in the area where the Appellant lives;
- The issues under appeal are not complex; and
- The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

## **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] The Tribunal finds that the MQP is December 31, 2012.

[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.

## **BACKGROUND**

[10] The Appellant was 41 years old on the December 31, 2012 MQP date; he is now 43 years old. He has a grade 12 education, but in 2008 he was assessed as having a grade 6 reading, writing and math level. His employment history involves working as a printer, a small engine worker, a house construction labourer, steel fabricator, and lastly as a furniture mover. He hasn't worked since April 2011, and is now receiving ODSP benefits.

## **APPLICATION MATERIALS**

[11] In his CPP disability questionnaire, date stamped by the Respondent on May 30, 2011, the Appellant indicated that he has a grade 12 education and that he last worked as a furniture mover for AMS Transportation Services from September 10, 2008 until April 4, 2011; he noted that he stopped working because of constant pain in his neck and back. He also noted that he worked as a production worker from 2006 to June 2008, and that he did not do a lighter or different job because his doctor immediately stopped him from working.

[12] He claimed to be disabled as of April 8, 2011 and noted the illnesses and impairments that prevented him from working to include osteoarthritis and Scheuermann's disease. He further noted that he suffers constant pain (24/7) in his neck and lower back; that he suffers numbness in both of his arms, hands, and legs; and that he is no longer able to do any heavy lifting or prolonged light lifting, walking, sitting, or standing. He further noted that he has only 2% vision in his right eye; that he does not have very good vision in the left eye; that he has a problem with his left thigh because of hole in a muscle caused by an accident; and that he suffers from carpal tunnel and tendonitis in his left and right wrists.

[13] When explaining his difficulties/functional limitations the Appellant indicated: that he can only sit/stand for short periods of time (15-20 minutes); that he can only walk for 5 minutes; that he is no longer capable of lifting/carrying, reaching, and bending; that he is no longer capable of doing household maintenance; that he has vision problems; and that sleeping is the hardest part of his life. He noted his medications to include Apo- carbamazepine (200 mg, every eight hours), and ratio-lenoltec #3 (30 mg, every eight hours).

[14] A report dated May 16, 2011 from Dr. Al-Tukmachi, the Appellant's family doctor, accompanied the CPP application. The report diagnoses early onset osteoarthritis with severe spine involvement; severe-moderate cervical spine degenerative disc disease; moderate central canal stenosis C5-C6 and C4-C5; Scheuermann's disease; and multi-level foraminal stenosis. The physical findings indicate functional limitations including heavy lifting, prolonged light lifting, prolonged walking, prolonged sitting, and inability to stand from long sitting. The report indicates that the Appellant is in pain 24/7, that medication slightly reduces his suffering, and that treatment is waiting the proper consultation. The prognosis is unfavourable.

### **ORAL EVIDENCE**

[15] The Appellant reviewed in detail his education and employment history. He stated that he has very poor reading and spelling skills, and that he has no vision in his right eye. When he reads or looks at a computer screen, his left eye goes blurry and starts to water. He had five eye surgeries when he was a child – three on his right eye and two on his left. He always needs someone to help him when he has to complete a form – he couldn't fill out an employment application form and all of his jobs were through friends. He has been told that there is nothing more that can be done for his eyes.

[16] He pushed himself to continue with his last job as a furniture mover, but on the last day he went to work the pain was so bad that he could barely bend over to tie up his boots. He saw Dr. Al-Tukmachi at the hospital. Dr. Al-Tukmachi arranged for x-rays and MRIs, and then told him that he should stop working. When discussing his previous work history the Appellant stated that all of his work involved hard labour and that he has never done a light duty job. He had problems with his eyesight when working as a printer and when he was doing small engine work, and because of this he couldn't last long at those jobs.

[17] When describing his disabling conditions the Appellant stated that there hasn't been any significant change in his condition since December 2012. He described his disabling conditions as follows:

- He suffers constant severe back pain. The pain feels like pins and needles, and like someone is stabbing him. The pain in his lower back radiates down his

legs, and the pain in his upper back radiates down his shoulders to his fingertips. On a good day he would rate his pain level as a seven, and on a bad day as a ten. He usually has only three good days a week, but when the weather is cold every day is a bad day.

- He experiences pain and numbness down both shoulders to his fingertips. If he tries to pick something up, or moves the wrong way, he will have no feeling in his arms and hands. He stated there “will be no feeling...just pure numbness.” He stated that this could happen anytime, and that he has to be very careful. He is left handed and his left side is worse than the right.
- He also experiences numbness from both hips down his legs to his toes (also worse on the left). If he twists or walks the wrong way his pain will be worse.
- He is only able to sleep for 2-4 hours a day – he is kept awake by the pain and can’t find a comfortable position. As a result, he has very poor energy and is always fatigued.
- He can’t concentrate or focus because he is always thinking about his pain, and trying to get rid of it.
- He suffers from carpal tunnel syndrome and tendonitis in both wrists.

Sometimes he isn’t able to grab anything, and if holds a pen he loses feeling in his fingers and his hands cramp up. Sometimes he drops dishes. He stated, “My wrist tendons don’t want to work anymore.”

[18] When he saw Dr. Wilderman in January 2013, he was taking gabapentin and Tylenol #4. Dr. Wilderman increased his gabapentin from two to three times a day, and, switched him to codeine from Tylenol #4. He took each of these three times a day – sometimes this took the edge of the pain but they didn’t really help. He suffered side effects from the increased medications including light headedness, a little nausea, not being able to sleep for two days, diarrhea, and stomach pain.

[19] He didn't pursue any treatment therapies after seeing Dr. Wilderman; he is paranoid of water so he can't do aquatherapy and there are no pools available for this near where he lives. He can't afford physiotherapy and he found that treatment from chiropractors hurt him – he felt more pain after chiropractic treatment. He tries to do exercises and stretches on his own that Dr. Wilderman showed him, but he can only do them on a good day. He walks a bit, and then sits a bit to try to keep himself moving. About a year after going to the pain clinic, he switched to Lyrica and long lasting codeine but these didn't have much effect. The doctors have told him that no surgery is available, and there are no pain clinics near where he lives. He had to drive for 1 ½ hours to see Dr. Wilderman in Thornhill. He has spoken to his family doctor about seeing another specialist or getting a second opinion, but his family doctor has told him that there are no more specialists for him to see.

[20] He believes his condition will get worse and that he will end up in a wheel chair. He believes that his problems stem from his spine deteriorating after he slipped two discs and damaged two nerves when he slipped on ice when he was six years old. He stated that he has done hard labour all his life and that he has never tried a lighter job. He stated, "I couldn't sit and push a pencil...I can't sit for long...I can't stand on my feet...I can't lift anything...I don't know what I could do." After he sits for 15-20 minutes, he feels pressure on his lower spine and his legs start to go numb; he can only walk for two blocks; he can barely lift anything and has to get his son or friends to do grocery shopping for him; he can't reach above shoulder level, and can't twist or bend; if he bends over his back seizes up when he gets back up and he has to move very slowly and be very careful when he bends over to put on his shoes or socks. He uses a cane on bad days. He has problems with grooming and showering – but he struggles through as best he can. His son and friends help with his housework (he lives in a mobile trailer), but he tries to do a little to keep himself motivated. He can't do any outdoor work and has difficulty taking out the garbage. He is very unhappy about being so dependant on his son and friends. He doesn't have any social activities and spends most of his time alone.

## **MEDICAL EVIDENCE**

[21] 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.

[22] A complete spine final report on February 15, 2011 revealed low bone density, premature cervical, thoracic and mid-lumbar degenerative disc degeneration and numerous Schmorl's nodes indicative of prior Scheuermann's disease.

[23] A MRI of the cervical spine on May 5, 2011 revealed moderate to severe lower cervical spine degenerative change; moderate central canal stenosis at C5-C6; a mild mass effect on the ventral aspect of the cord at C4-C5 and C5-C6; and high grade bilateral foraminal stenosis at C5-C6 and C6-C7.

[24] A MRI of the thoracic spine on May 7, 2011 revealed findings consistent with Scheuermann's disease; Modic type I endplate changes; and degenerative disc changes causing some mild mass effect on the cord.

[25] A MRI of the lumbar spine on May 9, 2011 revealed multilevel endplate Schmorl's nodes and straightening of the lumbar lordosis in the setting of Scheuermann's disease; mild disc bulges at L2-L3 and L4-L5 without significant central canal stenosis; mild disc bulge and superimposed left paracentral inferior extrusion showing evidence of annular tearing at L5-S1; and severe left foraminal stenosis contacting the existing left L5 root.

[26] In a Health Status report dated July 25, 2012 in support of the Appellant's ODSP application Dr. Al Tukmachi noted that the Appellant's conditions included Scheuermann's disease in the cervical and lumbar spine, degenerative disc disease with massive multi-level spine effect, and fibromyalgia.

[27] A report from Dr. Wilderman, pain consultant, dated January 2, 2013, indicated that the Appellant suffers from constant sharp, shooting, and stabbing pain in his lower back, neck, left thigh, and both wrists and hands. The causes of the pain were noted to include the Appellant slipping on ice when he was six, two car accidents, one jet ski accident, one motorcycle accident in the early 90's, and multiple injuries in hockey games. Dr. Wilderman



noted that an MRI on May 9, 2011 revealed L4/5 mild right intervertebral narrowing, L5/S1 mild right and moderate to severe left foraminal stenosis contacting the existing left L5 root. He further noted that an x-ray on February 15, 2011 revealed apparently low bone density, mildly narrowed disc spaces at L2/3 and L3/4; and Schmorl's nodes at each level from L1 to L4.

[28] The report notes the Appellant's history to include Scheuermann's disease, bilateral carpal tunnel syndrome, fibromyalgia, osteoporosis, pain in the left femur due to a motor vehicle accident, and five eye surgeries in childhood. Dr. Wilderman's impression was osteoarthritis of the lumbar facet joints and widespread osteoarthritis of the spine. The proposed management plan included further investigations, medication trials, the option of injections, and life style guidance including local heating, chiropractic, physiotherapy, avoidance of strenuous physical activity, and exercise as tolerated.

[29] On July 18, 2013 Dr. Al-Tukmachi reported to the Appellant's lawyer. Dr. Al-Tukmachi indicated that he started treating the Appellant in March 2011 and that his main complaint is his upper, middle, and lower back pain; that his back pain had been present for years; and that he had never been investigated before. The report indicates that the Appellant is very limited from doing any heavy duty job and prolonged light duties; that he is also limited for simple day to day activities such as prolonged walking, sitting, standing; and that it impossible for him to bend, twist , or squat. The report also notes that the Appellant has been impaired in his left [sic] eye since he was two years old

[30] Dr. Al-Tukmachi opined that the Appellant cannot work full-time since prolonged physical activity can lead to excruciating pain, poor concentration, and safety issues. He noted that the Appellant is living with tremendous restriction in his physical activity, and that he could not provide a definite point when the Appellant can go back to full time duties. The prognosis was very poor. The report concludes that the Appellant is closely monitored for compliance with his treatment program and that he has proved more than once that he is compliant with his treatment program.

## SUBMISSIONS

[31] Ms. Moorhead submitted that the Appellant qualifies for a disability pension because:

- a) The Tribunal should consider the cumulative effect of the Appellant's multiple conditions including early onset osteoarthritis with severe spine involvement, moderate degenerative disc disease in the cervical spine, and central canal stenosis at C5-6 and C4-5; Scheuermann's disease which causes multiple level foraminal stenosis in his back; carpal tunnel syndrome; and poor vision;
- b) The medical reports and imaging studies confirm the severity of the Appellant's disability with symptoms of constant diffuse severe pain, numbness in the limbs, significant limitations in standing, sitting, walking, and lifting, and impaired memory and concentration;
- c) The Appellant has a narrow work history involving physically demanding labour. His limitations preclude light duty employment because this would require some prolonged standing, repetitive light lifting, and walking and they preclude non-manual sedentary employment because these require computer skills, reading and writing skills, good concentration, prolonged sitting, and standing from long sitting;
- d) Considering the effect of the Appellant's functional limitations, as confirmed by his family doctor, and his experiencing constant pain even when at rest, it is unrealistic to consider that the Appellant is fit for any form of employment.

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

- a) Dr. Wilderman described only minimal treatment of the Appellant's pain complaints and made recommendations for medication in addition to other conservative treatment modalities;
- b) The evidence does not show that all treatment options have been exhausted and there is no evidence of participation by the Appellant in any treatment programs;

- c) Although the family doctor indicates that the Appellant cannot return to full time work, he notes the Appellant is able to increase his activity with the use of medication and there is no evidence of any attempts by the Appellant to pursue alternative lighter work within his limitations, even on a part-time basis;
- d) The Appellant is very young and with ongoing treatment and support, upgrading and/or retraining for suitable lighter work remains a viable option.

## **ANALYSIS**

[33] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2012.

### **Severe**

[34] 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.

### ***Applicable Principles***

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

[36] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2012 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.

[37] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada* (Attorney General), 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[38] 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. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

### ***Application of Guiding Principles***

[39] The Appellant gave credible and straightforward evidence concerning his multiple disabling conditions and about how they have affected his life and capacity to work. He impressed the Tribunal as a genuine person, who is eager to live a normal active life. He has a lengthy work history at hard manual labour which lays to rest any suggestion that he is a malingerer, and there is no suggestion in the medical evidence that the Appellant is in any way feigning or exaggerating his symptoms.

[40] Significantly, the Appellant's oral evidence was consistent with and supported by the medical evidence including the imaging studies in February and May 2011, the reports from Dr. Al-Tukmachi, and the report from Dr. Wilderman, chronic pain specialist. As the *Bungay* and *Barata* decisions, supra, indicate the Tribunal should consider the cumulative effect of the Appellant's multiple conditions which in addition to his long-standing vision problems include severe constant diffuse pain and numbness, sleep disturbance, focus and concentration difficulties, and carpal tunnel syndrome (see paragraph 17, supra). The oral evidence and medical reports confirm marked limitations in activities of daily living and that the Appellant is

dependant on his son and friends for household maintenance. Due to his vision problems he is unable to read or work at a computer for any significant period, and he has significant limitations in standing, walking, sitting, and concentrating.

[41] The Respondent acknowledges that the Appellant is unable to return to his previous physically demanding employment but submits that the Appellant has failed to pursue alternative less physically demanding employment. There is, however, no obligation to do when the Appellant lacks the residual capacity to seek such employment (see *Inclima and C.D. v MHRD*, supra). In this case, the Tribunal has determined that because of the Appellant's multiple conditions and his marked limitations he is unable to pursue any form of gainful employment. Due to his vision problems, carpal tunnel syndrome, inability to concentrate because of his constant pain, and his significant limitations in standing, walking, and sitting it is difficult to envision any type of work that the Appellant could pursue on a reliable basis. The Tribunal also took into consideration the Appellant's limited education skills (he was tested at a grade six level) and his narrow work history which has only involved heavy manual labour.

[42] The Respondent also submitted that reasonable treatment modalities have not been explored. The Tribunal disagrees. There is no suggestion that the Appellant has not followed the treatment recommendations of his family doctor. Significantly in his July 18, 2013 report Dr. Al-Tukmachi noted that the Appellant is closely monitored for compliance with his treatment program and that he has proved more than once that he is compliant. The Appellant travelled for 1 ½ hours to see Dr. Wilderman (there are no pain clinics in his area), has inquired from his family doctor about seeing further specialists, and has been told that this is not required. He has tried numerous pain medications, with varying dosages, with little benefit and significant detrimental side effects. He attended for chiropractic but found that the treatments hurt him. He cannot do aquatherapy because of his fear of water and lack of a nearby pool. He cannot afford physiotherapy, but pursues home exercises and stretching to the extent that he can tolerate this.

[43] Having regard to the totality of the evidence the Tribunal has determined, on the balance of probabilities, that the Appellant suffers from a severe disability in accordance with the CPP criteria.

### **Prolonged**

[44] Having found that the Appellant's disability is severe, the Tribunal must make a determination on the prolonged criteria.

[45] The Appellant's disabling conditions are long-standing and the evidence supports that they are permanent. The best that can be hoped for is that the Appellant will gradually learn to better manage and cope with his severe pain.

[46] The Appellant's disability is long-standing and there is no reasonable prospect of improvement in the foreseeable future.

### **Date of Onset**

[47] The Tribunal must also make a determination with respect to the date of onset of the Appellant's disability. In his oral evidence, the Appellant testified that Dr. Al- Tukmachi recommended that he apply for Ontario Works, and that he was advised by Ontario Works that he was required to apply for CPP disability. The CPP disability application forms were completed in May 2011 with the assistance of his Ontario Works case worker. The Appellant was incarcerated at the Central North Correctional Centre from June 2011 to June 2012. The Appellant testified that no work or vocational upgrading opportunities were available during this period of incarceration, and that the only medical treatment available was pain medication.

[48] Ms. Moorhead submitted that the period of incarceration is a "red herring" and noted that the CPP disability application was submitted prior to the incarceration and that Dr. Al-Tukmachi's May 2011 report confirms a severe disability as of May 2011. Having regard to the facts of this particular case, the Tribunal disagrees.

[49] The purpose of CPP disability is to provide some replacement income for eligible contributors who are unable to regularly pursue gainful employment because of a medical

disability. In this case, the Appellant had only been off work for a couple of months prior to his incarceration, and from June 2011 to June 2012 he was unable to pursue any employment because he was incarcerated which is not a medical condition. The Tribunal has determined that the appropriate date for onset of the Appellant's disability is June 2012.

## **CONCLUSION**

[50] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2012, when he was released from the Central North Correctional Centre. As of that date, his medical conditions (not his incarceration) precluded him from pursuing gainful employment. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of October 2012.

[51] The appeal is allowed.

Raymond Raphael  
Member, General Division