Citation: ***J. M. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 73**

Date: July 15, 2015

File number: GT-124112

GENERAL DIVISION - Income Security Section

Between:

J. M.

Appellant

and

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

Respondent

Decision by: Virginia Saunders, Member, General Division - Income Security Section

Heard In person on July 3, 2015, Surrey, British Columbia

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. M.	Appellant
H. M.	Appellant's representative/Witness
T. A.	Interpreter (by telephone)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 29, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) on December 14, 2012.

[2] 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. Accordingly, the appeal was transferred to this Tribunal in April 2013.

[3] The appeal was originally scheduled to be heard by teleconference on May 29, 2015 for the following reasons:

- 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.

[4] The hearing was adjourned on that date because the Appellant requested an interpreter. The appeal was then heard in person on July 3, 2015 to accommodate that need.

THE LAW

[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 be under 65 years of age; not be in receipt of the CPP retirement pension; be disabled; and 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, 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 December 31, 2012.

EVIDENCE

[10] The Appellant was born in India in 1963. He testified that he left school at age fifteen after completing a Grade 9 level which he stated was comparable to Grade 2 or 3 in Canada. He can read and write in Punjabi. He has had no formal English-language training and while he can read it a little he cannot write in English. He understands and speaks it just a little. He testified that his son in Grade 4 frequently corrects his English.

[11] In India the Appellant worked on a farm and then doing electrical work although he has no formal training. He immigrated to Canada at age 31, after which he worked as a farmer, in a chicken factory, as a truck driver, in a furniture shop and finally in a stone warehouse where he was driving a forklift and doing heavy lifting.

[12] In August 2011 the Appellant completed a questionnaire in support of his disability application. He stated that he stopped working as a forklift driver in January 2011 because of heart problems. He had been unable to work since that date because of heart blockage and heart surgery. He was unable to stand for long; he sometimes felt dizzy with walking or bending; he had weakness in his arms and legs; he had problems reaching because of his arms. He could look after his personal needs and his seeing, hearing, speaking, remembering, concentrating and breathing were "ok." He did not have difficulty driving a car or using public transportation. He got only four hours sleep and he was unable to do what he used to do for household maintenance.

[13] Dr. N. Ramani is the Appellant's family doctor. She completed a medical report on September 19, 2011 in which she stated that the Appellant developed angina in January 2011 leading to a diagnosis of severe two vessel disease. He underwent coronary artery bypass grafting and was currently in cardiac rehabilitation. He had poor exercise tolerance and fatigue, as well as muscle weakness and pain due to use of statins. In the previous two to three months he had developed bilateral frozen shoulders. He also had anxiety symptoms that were overwhelming at times due to a fear of recurrence of his coronary artery blockage. Dr. Ramani noted that the Appellant was showing some improvement with cardiac rehabilitation, and he was unable to afford physiotherapy for his shoulders but was doing exercises at home with very little improvement so far. She thought the Appellant would need supportive psychotherapy to overcome his anxiety.

[14] On September 30, 2011 the Appellant saw Dr. S. Gill, cardiologist, for muscle and joint pain that was getting worse. Dr. Gill's report of that date indicates that the Appellant complained of a seven-month history of pain in both shoulders, elbow, PIP and DIP joints as well as in the upper arms and lower legs. Dr. Gill thought the Appellant's pain was likely related to his statin medication, which he adjusted by taking the Appellant off Crestor and replacing it with Lescol. He suggested the Appellant try Tylenol for his pain and if that did not work to try Celebrex. If his pain persisted he would order an x-ray to rule out early osteoarthritis. He ordered a work-up to rule out secondary causes.

[15] A report by Dr. R. Hiralal, cardiologist, dated June 6, 2012 states that he saw the Appellant on that date for follow up after bypass surgery in February 2011. Dr. Halal stated that the Appellant had been doing quite well over the past year with no angina or shortness of breath, no orthopnea, PND, leg swelling or palpitations. He had occasional episodes of light-headedness. He was walking regularly without angina. An echocardiogram showed normal ejection fraction.

[16] The Appellant was referred to Dr. U.S. Harrad, a psychiatrist, in July 2012. Dr. Harrad's report dated July 16, 2012 indicates that the Appellant had a history of anxiety and depression dating back to February 2011 after he had coronary artery bypass surgery. He began feeling anxious, irritable, shaking and nervous, with an increased heart rate and fear of dying. He made multiple trips to his doctor's office and to emergency because of panic attacks. He had decreased sleep and felt sad, worried, had poor concentration and attention, low self-esteem, low self- confidence, feelings of hopelessness, periods of "spacing out" and forgetfulness. He had been unable to find a light job and was having financial difficulties. He was walking about one hour each day.

[17] Dr. Harrad noted that the Appellant was taking Clonazepam and Cipralex daily in addition to medications for his heart. He found the Appellant to have a sad mood and an anxious affect, with no disorder of thought form or suicidal ideation. His concentration and attention were low and his memory was fine. He noted that the Appellant was preoccupied with having another heart attack and was also worried about financial difficulties and future worsening of his psychological symptoms.

[18] Dr. Harrad diagnosed the Appellant with major depression with anxiety and panic attacks secondary to coronary artery bypass surgery and coronary artery disease. He stated that he advised and educated the Appellant about the role of psychotherapy and medication, and was told about thought stoppage and deep breathing techniques to deal with anxiety symptoms. He started him on Risperdal and Imovane, decreased Clonazepam and increased Cipralex. The Appellant was advised to see Dr. Harrad once a week for psychotherapy.

[19] A report by Dr. Ramani dated August 14, 2012 states that the Appellant's disability is due to his coronary artery disease and his inability to return to pre-illness fitness and

conditioning. She noted that the Appellant had always worked in manual labour and his language skills, age and education did not allow him to do any jobs that did not have physical demands. She noted that he had been unsuccessful in getting his old job back because he could no longer do the heavy lifting it required. Dr. Ramani stated that disclosing his history of heart disease had been detrimental as potential employers feared liability even if the job demanded a reasonable physical effort.

[20] Dr. Ramani stated that the Appellant was now more affected by his mental health, suffering from depression and anxiety. His predominant symptoms were fear of recurrence of heart disease, frustration and poor self-esteem because of his inability to return to a productive job to support his family. She felt the Appellant's prognosis was "very guarded particularly from a mental health point of view."

[21] In a letter dated March 13, 2014 Dr. Ramani stated that although he had recovered from his cardiac surgery, the Appellant continued to suffer from depression and severe anxiety, living in constant fear of another major cardiac event in spite of adequate medication and psychotherapy. He continued to have panic attacks and needed multiple clinic and emergency room visits for help.

[22] The Appellant testified that he first started to have problems with his shoulders shortly after his surgery. He attended rehabilitation for two to three months and was given weights to lift, but he was unable to lift more than five pounds because of his shoulder pain. He stopped attending because he could not afford it. He continues to try the exercises at home but continues to have pain even when lifting small items. He has not had any x-rays of his shoulders or any further treatment. He was told to take Tylenol or Advil for his pain, and he takes them together about three times a week.

[23] The Appellant testified that he developed a gastric problem of constant belching and gas pain before he had surgery. He saw a specialist whose name he could not recall a few years ago, and she told him that his stomach was fine. Dr. Ramani recently gave him some medication for gas, which has not helped. He has not been referred to any other specialists for this problem. He testified that Dr. Ramani has told him it is a minor problem, but he becomes anxious when he feels gas pain because he is worried that he will have a heart attack. This has

caused him to have panic attacks three or four times a month, which he deals with by lying down for a few hours.

[24] The Appellant testified that occasionally after his surgery he was so worried that he was having a heart attack that he went to the emergency department. This happened about four times. He was given medication for gas. He will sometimes visit a walk-in clinic for the same reason, or because of his shoulder pain.

[25] The Appellant testified that he has seen Dr. Harrad regularly since he first went in June 2012. At first he was going every two months; recently he has started going once a month because his medication has been adjusted and Dr. Harrad wants to watch him more carefully for side effects. The Appellant was unable to say what medication he is taking, except to say that other than the recent addition of one new pill it has not changed. When he sees Dr. Harrad he spends thirty to forty minutes receiving counselling, which he finds beneficial while he is there but not afterward.

[26] The Appellant lives in a house with his wife, his three children and his parents. Everyone in the family helps to look after the house, and the Appellant testified that he is able to do small things. He spends his days walking or lying down to alleviate his gas pain. He has a treadmill in his home and can walk on it for thirty or forty minutes. If he walks outdoors he will be out for about an hour, because he is able to sit down and rest. He does not have trouble sitting. He does not know how to use a computer. He testified that his sleep continues to be very disrupted, as he lies awake at night worrying and getting only a few hours of sleep. His wife confirmed this.

[27] The Appellant testified that Dr. Ramani told him to try to do a light duty job, but that nothing like that was available at his last employer. He has asked friends who own cleaning companies to hire him for light duties but they would not do so.

SUBMISSIONS

[28] The Appellant submitted that he qualifies for a disability pension because his mental and physical health leave him incapable regularly of pursuing any substantially gainful occupation.

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

a) the medical evidence has not identified any serious pathology which would have prevented the Appellant from doing some type of work suitable to his condition by the end of his MQP and continuously thereafter;

b) with regular ongoing treatment from a psychiatrist the Appellant's anxiety symptoms should improve;

c) the Appellant has the capacity to perform some type of work and the fact that it may be unavailable is not a consideration in determining whether a person is disabled.

ANALYSIS

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

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 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.

[32] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[33] 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).

[34] There is not sufficient evidence of any physical condition that would preclude the Appellant from performing substantially gainful work. His cardiac condition has been

repaired, his doctors are happy with his recovery and he has not been placed under any activity restrictions other than to be told not to do heavy physical work. His gastric problem has not been investigated for several years and Dr. Ramani told the Appellant it was of no concern. His muscle weakness and shoulder pain have not resulted in any significant treatment: in fact, Dr. Gill's suggestion of an x-ray was never followed up on.

[35] However, the Appellant's depression and anxiety is limiting for him. In spite of a physical recovery, he is extremely fearful of having a heart attack and he therefore limits his physical activity and disrupts his sleep with his worrying. He has seen Dr. Harrad regularly and continues to take medication. While treatment is somewhat helpful it has not allayed the Appellant's fears to the extent that he is able to regularly perform in the workplace. The Appellant is in extreme financial distress and would no doubt be working if he could. The fact that even his friends would not hire him for light cleaning jobs is an indication that the Appellant is unable to obtain or maintain employment because of his condition. With respect to the Respondent's submission that availability of suitable work is not a consideration, the evidence here is that light work was available but that the Appellant was not hired to do it. The logical inference is that he was not hired because prospective employers believed his physical or mental health was a liability.

[36] The truth is that, as a poorly-educated man with limited English and no computer skills, light physical work is the only realistic employment option the Appellant has. While it may seem irrational for a fairly young man who has recovered from cardiac surgery to be afraid of such work, his anxiety and depression are recognized by Drs. Ramani and Dr. Harrad.

[37] The Tribunal finds that the Appellant's depression and anxiety leave him incapable regularly of pursuing any substantially gainful occupation, and have done so since January 2011 when he stopped working because of his cardiac issues. While initially the focus was on the Appellant's physical recovery, Dr. Ramani identified these mental issues in September 2011 as already being a concern, and it stands to reason that they played a large role from the time the Appellant first had cardiac symptoms.

Prolonged

[38] In August 2012 Dr. Ramani stated that the Appellant's prognosis was very guarded particularly from a mental health point of view. The Appellant has received medication and regular counselling since that time, with no improvement in his symptoms. In March 2014 Dr. Ramani described the Appellant's mental health as refractory to treatment. There has been no improvement since that time.

[39] As the Appellant has not improved in spite of regular treatment of over three years, his condition is long-continued and likely to be of indefinite duration.

CONCLUSION

[40] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2011, as explained above. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of May 2011.

[41] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security