

Citation: *B. D. v. Minister of Employment and Social Development*, 2015 SSTGDIS 91

Date: August 21, 2015

File number: GT-125532

GENERAL DIVISION - Income Security Section

Between:

B. D.

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 August 4, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

B. D.: Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 19, 2012. 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) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was by Videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing;
- b) Videoconferencing is available in the area where the Appellant lives;
- c) There are gaps in the information in the file and/or a need for clarification;
- d) The method of proceeding is the most appropriate to address inconsistencies in the evidence;
- e) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] 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 Tribunal.

[4] 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).

[5] 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.

[6] 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

[7] The Tribunal finds that the MQP date is December 31, 2015.

[8] Since this date is in the future, 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 hearing.

[9] The Appellant's Record of Earnings (ROE) printed May 7, 2015 indicates earnings of \$30,315 in 2013 and \$33,940 in 2014. In a telephone conversation with the Respondent in May 2014 the Appellant indicated that this income was from the Workers' Compensation Board (WCB) and Great West Life. Accordingly, this ongoing income is not indicative of any work activity although it continues to advance the MQP.

LATE MEDICAL REPORTS

[10] On July 29, 2015 (less than a week before the scheduled hearing) the Appellant forwarded additional medical reports consisting of a July 28, 2015 report from Dr. Kholiaf (one page) and a consensus opinion released February 11, 2015 from the Office of the Medical Panel Commissioner with respect to a hearing at the request of the WCB which took place before three psychiatrists on January 30, 2015(37 pages).

[11] On July 30, 2015 the Tribunal wrote to the parties advising that the Tribunal Member will determine at the hearing whether the additional reports are to be admitted and if so, on what terms which will include giving the Respondent a reasonable opportunity to respond.

[12] At the outset of the hearing the Appellant explained that because of his depression and post-traumatic stress disorder (PTSD) he did not carefully review the notice of hearing and he did not realize that there was a hearing and the timeline for filing additional medical reports until he received the reminder phone call from the Case Management Officer. He then immediately attended at his family doctor's office and obtained copies of the additional reports and forwarded them to the Tribunal.

[13] The hearing proceeded and after the Appellant's oral evidence was completed, the Tribunal determined that the additional reports were of significant relevance and that in the interests of justice they should be admitted with the Respondent being given a reasonable opportunity to file additional submissions.

[14] The Tribunal, accordingly, adjourned the hearing on the following terms:

1. The Respondent shall have until Friday, September 11, 2015 to file additional submissions in response to the late documents.
2. Once the additional submissions are received the Tribunal will determine if a further hearing is required. If a further hearing is required, it will likely proceed by Teleconference.
3. If no further hearing is required, the Tribunal will deliver its reasons for decision.

[15] The Respondent's additional submissions were received on August 12, 2015 and the Respondent submitted that the additional evidence did not support a determination that the Appellant was disabled within the meaning of the CPP.

PERSONAL BACKGROUND

[16] The Appellant is 38 years old. He was born in Ethiopia and came to Canada in 1997. He had the equivalent of a grade 12 education in Ethiopia; in Ethiopia he worked on the family farm and also helped his mother in the family general store. After coming to Canada he

attended an English language instruction course for 40 weeks, and then attended NorQuest College and obtained mental health and health care certificates. While he was in school he worked as a dishwasher and kitchen helper in a hotel. After finishing college, he worked as a psychiatric aid at the Alberta Hospital in Edmonton from 2004 to 2007. In July 2007 he started working as a correctional officer at a provincial Remand Centre.

[17] On March 31, 2011 he slipped on an icy surface and fell in the parking lot at work, landing on his head and injuring his left wrist. He has not worked since April 2, 2011 and is presently receiving full WCB benefits.

APPLICATION MATERIALS

[18] In his CPP disability questionnaire, date stamped by the Respondent on March 19, 2012, the Appellant indicated that he had a grade 12+ education as well as mental health and health care certificates from NorQuest College. He noted that he last worked as a correctional peace officer from July 1, 2007 until April 4, 2011; he stated that he stopped working because he was injured at work. He also indicated that he had worked as a mental health aid worker from October 6, 2004 until June 30, 2007. He did not indicate a date as of which he was claiming to be disabled.

[19] In his questionnaire the Appellant stated that the illnesses or impairments that prevented him from working included a concussion, cervical (neck) muscle strain, left wrist strain, loss of permanent vision in his left eye, uncontrolled dizziness, daily dizziness and daily headaches, sensitivity to light, and inability to control himself when he changes position from sitting to standing and/or walking. He also stated that as result of his head injury he has developed depression, difficulty concentrating, continuous pain in his neck and other parts of his body, and inability to sleep without sleeping pills.

[20] He explained his difficulties/functional limitations to be as follows: unable to sit for more than 10 minutes and limited ability to stand; unable to walk for more than five minutes; unable to lift anything or carry more than two to three kilos; unable to bend; needs wife's help for some personal needs; not able to do household maintenance in way previously could; unable to see from left eye; speech, memory and concentration difficulties; sleep problems;

breathing problems when walking or continues a conversation for more than five minutes; and reduced driving and fear of using public transportation unless someone is with him.

[21] A report dated August 23, 2012 from Dr. Rosenstock, the Appellant's family doctor, accompanied the CPP application. The report diagnoses a blind left eye, depression, left wrist pain, reduced hearing in right ear, and dizziness. The report notes that the Appellant was seeing a psychologist and that he was to see a psychiatrist. The prognosis was poor.

ORAL EVIDENCE

[22] The Appellant described in detail his multiple disabling conditions as follows:

- ***loss of vision in left eye***: he stated that he is blind in his left eye and that this in his mind this is the biggest problem because it brings shame on his family;
- ***dizziness***: he described his dizziness as being very bad and stated that he feels like the room is running and that light bothers him – he can't sit for long and constantly feels like vomiting;
- ***depression and PTSD***: he can't concentrate and has difficulty sleeping; he doesn't trust anyone and can't enjoy basic life activities or socializing. He mentioned an incident when a school board asked him to go to a hearing as an interpreter, but when it came to the introduction he broke down because he felt everyone knew about his condition. He was so embarrassed that he had to go into the washroom and wasn't able to go back out. He has flashbacks of the accident, and whenever he tries to sleep he feels like he is falling down. He hides from people and just stays in the Mosque since his wife kicked him out of the house;
- ***left wrist***: he has a permanent injury to his left wrist and can't lift anything with his left hand;
- ***headaches***: he suffers from severe headaches every day and has to take medication and lie down in a dark room;
- ***right ear***: he has reduced hearing in his right ear;

- ***chronic pain:*** he has neck pain when he has headaches and he also suffers from lower back pain; he has pain when he sits or walks;
- ***diabetes:*** he has recently been diagnosed with diabetes;
- ***sleep difficulties:*** he can't sleep even when he takes sleeping medications. He is lucky if he gets two hours sleep and he wakes up exhausted.

[23] When asked about his efforts to return to work the Appellant stated that he attempted to do volunteer interpreter work on about ten occasions but always felt nervous and wasn't able to concentrate because he felt that people would find out about him. He tried to help a friend who has a convenience store by working as a cashier but could only do this for about one week; he could only stay for about ½ hour and broke down crying when he saw someone he knew. He has tried to do some work at the Mosque by doing office work but couldn't last for more than one day. Before the January 2015 WCB hearing he attended a WCB computer program where he was asked to type with one hand. They tried to find a job for him and initially reduced his payments because of a report indicating that there were different types of jobs that he could do. He has been receiving full WCB benefits since the January 2015 hearing.

[24] The Appellant described his usual day at the Mosque. He stated that he prays five times a day but sometimes has to sit when he prays; he spends most of his day lying down in a dark room; his friends bring him food; he never has a normal day and has no activities; he avoids people as much as he can; sometimes he will go with his children to a park but he isn't able to play with them; he doesn't go out socially.

[25] He takes medications for his depression and PTSD, pain, sleep difficulties, and cholesterol. His pharmacist organizes his medications and his sister calls to remind him to take his medications. He is now seeing a psychiatrist, a psychologist, and a counsellor for his depression and PTSD. He sees his family doctor and also a neurologist for his headaches and pain. He has been living on and off at the Mosque since May 2014 when his wife kicked him out of the house. He wants to get better but just sees himself getting worse. He would go back to work if there was anything that he could do – he wants to restore his dignity and respect.

MEDICAL EVIDENCE

[26] 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.

[27] On June 29, 2011 Dr. Roberts, neurologist, reported on his independent medical examination of the Appellant. He described the Appellant as an extremely limited historian who does not volunteer information and never responds to open questions. Dr. Robert's impression was that the Appellant was an extremely complex complainant and that he appears to have a catastrophic reaction to his injuries. Dr. Roberts stated, "He has catastrophic reactions to almost anything. For example, he considered having a mydriatic put in his eye, which is not particularly uncomfortable, a form of torture. He is extremely sensitive to even minimum discomfort. His level of scalp tenderness is not compatible with organic disease. There is extreme exaggeration of all symptomatology, which makes appreciation of his headache, his dizziness and all of his symptoms very difficult"

[28] Dr. Roberts opined as follows:

- The exam is invalid. I take the visual changes as being valid until proven otherwise. However, much of this symptomatology is grossly exaggerated on the basis of the reaction to symptoms
- The Appellant suffered a head injury with major catastrophic reaction to his injuries
- Currently, with his psychiatric problems and his reaction to it, he is not capable of any work
- Work restrictions and duration will depend on recovery of the psychiatric aspect of his illness. Neurologically, he will improve over the next three to six months and certainly will return to sedentary and light work, but the neurological aspects of his injury are relatively minor compared to the psychiatric.

[29] On July 4, 2011 Dr. Blackman, psychiatrist, reported on his independent psychiatric examination of the Appellant at the WCB office. Dr. Blackman described the Appellant's presenting complaints as follows:

The claimant presented as a very guarded and defensive man who initially gave the impression of suffering severe dementia. He could not remember his birthday, his age, his date of injury, or any other facts that would usually be forefront in the claimant's

mind. He was able to remember the accident although at the same time he stated he was unconscious and had a concussion. He complained of difficulty with concentration and memory, could not remember the various doctors he had seen or their conclusions. He perseverated on his "concussion". He stated that he had a written account of what had happened and I should refer to that. I suggested that the time would be better used if he explained himself. He did this with reluctance. As noted previously he complained of dizziness, some mild ataxia as well as nausea and vomiting three times daily. He also noted that he was now blind in his left eye. (Ophthalmic examination did not confirm this.)

[30] Dr. Blackman noted that the interview was very difficult, and that the Appellant was resistive and guarded and apparently so severely memory impaired that he could not deal with even simple questions. Dr. Blackman opined as follows:

- The results of this examination suggest invalid findings. It would appear based on the nature of his injury and the various medical examinations that there is no basis for his ongoing symptoms. He has not fulfilled the usual criteria for concussion and I am unsure as to where this diagnosis came from. *Based on the present interview I would have to determine that this claimant is displaying malingering symptoms for secondary gain.(emphasis added)*
- Apart from the suggestion of malingering he could not make and further psychiatric diagnosis
- The claimant requires a neuropsychological assessment with particular emphasis on response bias and personality variables
- The Appellant is not disabled from work from a psychiatric basis.

[31] On August 26, 2011 Dr. Gregg, physiatrist, diagnosed post traumatic recurrent left wrist ganglion with 1st carpometacarpal joint sprain.

[32] On October 26, 2011 Dr. Pokroy, neurologist, reviewed the Appellant symptoms and indicated that the Appellant describes chronic migraines as well as episodes of vertigo.

[33] On December 7, 2011 Dr. MacDonald, ophthalmologist, reported that the temporal profile of the case suggests there was an injury followed by loss of vision. He noted that the Appellant had undergone a full-field ERG which shows a significant decrease of the amplitudes of the waveforms in response to stimulation of the left eye. He wondered if the Appellant had a form of sympathetic ophthalmia with Dalen-Fuchs nodules.

[34] On December 21, 2011 Dr. Lobay reported that in the March 2011 fall the Appellant had reinjured his left hand and wrist, had injured his left eye and now had a blind eye, and that he complained of pain and swelling in his left wrist. Dr. Lobay opined that the Appellant's disability is likely permanent since he is many months out from the time of his injury.

[35] On June 18, 2012 Dr. Rosenstock noted that the Appellant suffered an injury causing loss of vision in his left eye and that he suffers from depression. The note indicates that the Appellant stated that he wants counselling.

Reports submitted by the Appellant on July 29/15

[36] On January 30, 2015 Dr. Els, specialist in psychiatry and addiction medicine, Dr. Bailey, specialist in psychiatry, and Dr. Elwell, specialist in psychiatry and addiction medicine, provided a Medical Panel Assessment following a request by the WCB due to the complexity of the medical condition and difference of medical opinion. The Panel reviewed 109 documents including the WCB worker's and employer's reports, extensive medical documentation, and correspondence. The Appellant provided information to the Tribunal including an overview of events, a list of his current psychiatric symptoms, his background history, as well as his medication history. The report notes that although the Appellant has had five suicide attempts in the past he has never been admitted to a psychiatric facility.

[37] The Panel reported that the Appellant fulfilled the diagnostic criteria for major depressive disorder, single episode, and posttraumatic stress disorder, chronic. The Panel noted that it observed a degree of language barrier that may have contributed to previous consideration of malingering. The Panel opined that the Appellant's current level of mental/behavioural impairment precludes a return to work in the short-term; that the Appellant has not reached maximum medical improvement; and that following the implementation of evidence based interventions, upon achievement of full remission of the medical conditions, he may potentially become fit for duty again.

[38] The Panel further opined that the Appellant's conditions of posttraumatic stress disorder and major depressive disorder are treatable if adequate doses and duration of interventions are offered. The Panel made numerous therapy and pharmaceutical recommendations. The Panel also recommended additional investigations and lifestyle modifications.

[39] On July 28, 2015 Dr. Kholiaf, certified that the Appellant was seen at his clinic on July 28, 2015, and that he had a work injury four years ago which left him permanently unable to work.

SUBMISSIONS

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

- a) He is a different person that he was before his injury;
- b) He is unable to do any kind of job and he is dependant on others for his basic daily needs;
- c) He suffers from multiple disabling conditions.

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

- a) In June 2011 Dr. Roberts, neurologist, opined that the Appellant's symptoms related to his concussion should resolve within three to six months;
- b) The specialists who assessed the Appellant in July 2011 noted "extreme exaggeration" of symptoms and a "tendency to magnify" complaints. Dr. Blackman diagnosed possible malingering but no other psychiatric condition;
- c) There is no information about further treatment of the Appellant's non-dominant left wrist ganglion, and a ganglion is readily treated with a minor surgical procedure;

- d) The loss of vision in his left eye does not equate to a permanently disabling condition that would preclude all types of employment; the Appellant retains his class 5 driver's license and is able to drive;
- e) The January 2015 Medical Panel Assessment indicates that the both the Appellant's PTSD and major depression are treatable conditions, that the Appellant had not yet reached maximal medical improvement, and that the Appellant had the potential to improve if a number of treatment recommendations were pursued;
- f) Although the Appellant might not be able to return to his former work which requires safety sensitivity, with appropriate treatment he would be able to pursue alternative suitable work.

ANALYSIS

[42] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before the date of the hearing.

Severe

[43] 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

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

[45] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of the hearing 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.

[46] 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).

[47] 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

[48] The Tribunal found the Appellant to be a credible and believable witness. Although the Appellant describes multiple disabling physical and psychiatric conditions, the Tribunal is satisfied that the Appellant's disabling condition is primarily psychiatric.

[49] The Respondent relies on Dr. Roberts' June 29, 2011 report which indicates that the Appellant will improve neurologically over the next three to six months. However, this report also indicates that the neurological aspects of the Appellant's injury are relatively minor

compared to the psychiatric and that with his psychiatric problems he is not capable of any work.

[50] The Respondent also relies on Dr. Blackman's July 4, 2011 report which suggests malingering symptoms for secondary gain. The Tribunal does not agree with this suggestion and placed substantial reliance on the January 30, 2015 Medical Panel Assessment from three psychiatrists who are totally impartial and conducted a hearing that lasted four hours. The hearing included a review of extensive documentation as well as oral evidence from the Appellant. The report found that the Appellant's current level of mental/behavioural impairment precludes a return to work in the short term.

[51] The Respondent submitted that the Medical Panel Assessment indicates that the Appellant has not reached maximum medical improvement, and that he "may" following implementation of recommended interventions "potentially become fit for duty again." The Tribunal considers this expectation to be overly optimistic. The Appellant's disabling conditions had at that point been ongoing for over three years and the appendix to the report confirms that the Appellant had already undergone extensive and continuing treatment with no improvement. The Tribunal also noted the Appellant's oral evidence that although he is seeing a psychiatrist,

psychologist, and a counsellor for his depression and PTSD, he is getting worse. Dr. Kholiaf's July 28, 2015 report confirms that the Appellant remains permanently unable to work.

[52] Although the Appellant is young and well educated, he unfortunately continues to be overwhelmed by his multiple conditions and the sequelae of his injury. The Tribunal is satisfied that he lacks the regular capacity to pursue any form of substantially gainful employment.

[53] The Tribunal finds that, on the balance of probabilities, the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

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

[55] The Appellant's disabling conditions have persisted for many years and despite extensive and ongoing treatment there has been no improvement. If anything, he appears to be deteriorating.

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

CONCLUSION

[57] The Tribunal finds that the Appellant had a severe and prolonged disability in April 2011, when he last worked. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of August 2011.

[58] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security