Citation: ***D. K. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 120**

Date: October 29, 2015

File number: GP-13-753

GENERAL DIVISION - Income Security Section

Between:

D. K.

Appellant

and

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

Respondent

Decision by: Michael Beauchesne, Member, General Division - Income Security Section

Heard by teleconference on August 13, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 25, 2012. The Respondent denied the application initially on October 30, 2012, and upon reconsideration by way of letter dated April 2, 2013. The Appellant appealed the reconsideration decision to the Tribunal on April 24, 2013.

[2] The hearing of this appeal was scheduled to occur by teleconference on August 13, 2015, for the following reasons as documented in the Appellant's Notice of Hearing:

a) The form of hearing is most appropriate to allow for multiple participants; and

b) 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.

PRELIMINARY ISSUE

[3] The Appellant failed to appear at his hearing within 30 minutes of its scheduled start time. The evidence includes an Xpresspost receipt and note to file that establishes the first notice of hearing – sent by priority post to the Appellant on May 5, 2015 – was returned to the Tribunal as "unclaimed" on June 8, 2015. During a phone conversation with the Tribunal on June 15, 2015, the Appellant confirmed his mailing address on file was indeed correct, but that he preferred receiving his Notice of Hearing by regular mail. The Tribunal resent the Appellant's Notice of Hearing by regular mail that same day, and verbally advised him of his hearing details before ending the call. In this case, section 19 of the *Social Security Tribunal Regulations* applies, which states that documents sent to a party by the Tribunal are deemed to have been communicated to that party ten days after the day on which it was mailed to the party if sent by ordinary mail.

[4] During the month of August 2015, the Tribunal attempted to contact the Appellant by phone on two separate occasions to confirm his intention to appear at his hearing – once on

August 7 and once on August 10. A voice mail message with call back details was left each time. The Appellant did not return either of these calls.

[5] The Tribunal then placed a third call to the Appellant on August 13, 2015 – the day of his scheduled hearing. The Appellant returned the Tribunal's phone call later that afternoon, and was given an opportunity to provide a reasonable explanation for failing to attend his hearing. The Appellant initially appeared to be unaware he had missed his scheduled hearing. However, he confirmed he had received his Notice of Hearing sent by ordinary mail, and, upon reviewing that notice letter during the call, offered only that he thought the hearing had been scheduled for a later date and time.

[6] When a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if it is satisfied the party received notice of the hearing (subsection 12(1) *Social Security Tribunal Regulations*). The Appellant's Notice of Hearing was sent to him on June 15, 2015, by ordinary mail per his request, and was deemed communicated within 10 days of that date pursuant to section 19 of the *Social Security Tribunal Regulations*. Further, the Appellant confirmed he received written notice of his hearing date and time, and several reasonable attempts were made by the Tribunal, as a courtesy, to remind him of his hearing date and time.

As such, the Tribunal opted to proceed with the hearing in the Appellant's absence.

THE LAW

[7] 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).

[8] 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.

[9] 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

[10] There was no issue raised with regard to the Respondent's calculation of the Appellant's MQP, and the Tribunal too finds that the MQP date is December 31, 1997.

[11] Therefore, 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

[12] The Appellant is now 60 years old. He reported unadjusted pensionable earnings in all but two years of his 20-year employment history up to 1992. He first applied for a CPP disability pension on March 14, 1994. This application was initially denied by the Respondent in a letter dated July 5, 1994, and the Appellant did not request a reconsideration of that decision.

[13] In his 1994 application, the Appellant indicated he was not presently working; that he had stopped work in November 1992 because he was laid off; that he believed he could no longer work as a result of his medical condition in November 1993; that he initiated a workers' compensation claim that same year because of his dermatitis; and that did not plan to seek or return to work in the near future. His claimed disability was "occupational" dermatitis to his hands – caused by workplace chemicals and working in cold conditions during winter months – and very poor eye sight. He further indicated he had no other health-related conditions or impairments, and listed limitations pertaining to hand pain when lifting and carrying as well as vision issues that caused reading difficulties and prevented him from driving.

[14] The medical report that accompanied the Appellant's 1994 application – completed by Dr. Humphries (family physician) on February 14, 1994 – included a diagnosis of contact dermatitis that produced hand pain made worse by flexing. His treatment consisted of ointments, and Dr. Humphries advised him to retrain for a job that avoided irritants like solvents.

[15] The Appellant made a second application for a CPP disability pension on May 25, 2001. This application was initially denied by the Respondent in a letter dated April 10, 2002, and the Appellant did not request a reconsideration of that decision.

[16] In his 2001 application, the Appellant indicated he stopped working completely in September 1994 because of pain and bleeding in his hands, and that did not plan to seek or return to work in the near future. In fact, he believed that by September 1995, he could no longer work as a result of his medical conditions. The Appellant initiated a workers' compensation claim in 2001 that, according to him, resulted in a partial pension for injury caused by chemical contact dermatitis. His claimed CPP disability was contact dermatitis in both hands and a vision impairment caused by rapid eye movement. He listed no other health-related conditions or impairments, but described limitations pertaining to driving, concentration and sight because of poor vision, as well as lifting and carrying limitations due to his dermatitis. He also credited his dermatitis with causing him to need extra time and effort for personal needs and household maintenance.

[17] In addition to wearing prescription eyewear and using a topical medication to treat his conditions, the Appellant indicated he had completed an alcohol abuse program and subsequent counselling between August 2000 and April 2001. However, he did not identify this as a basis for his disability claim, nor any medical conditions or limitations arising from his alcohol abuse, in his application.

[18] The medical report that accompanied the Appellant's 2001 application was completed by Dr. Halder (family physician) on May 23, 2001, and included a diagnosis of eczema and contact dermatitis in both his hands from petroleum products, as well as ocular albinism with limited vision. Dr. Halder noted no functional limitations arising from the Appellant's hand condition, which he described as being "OK" at the time he completed his report. He did,

however, reference vision impairment for which there was no treatment available. Dr. Halder indicated the Appellant's hands were treated with ointments at the time, and that this condition was stable.

[19] The Appellant has a grade 11 education. His 2001 application indicates he attended a post-secondary institution for a period of either three months or two years. He did not specify what he studied, or whether he obtained a diploma or degree. In his current application questionnaire, dated July 18, 2012, the Appellant notes he completed a five-month, automotive service advisor course. The Appellant did not specify when this occurred, but offered that it was part of a Workplace Safety and Insurance Board (WSIB) rehabilitation program. Although he indicated he did not plan to return to work in the near future, the Appellant believed service advisor work would suit his medical conditions.

[20] In his current application questionnaire, the Appellant also shared that he had obtained his certification as a sewing equipment technician in September 1983. He was employed in this role for essentially his entire career up to the time of his claimed disability, and explained in his current questionnaire that he became unable to work in 1995 because his hands were no longer working. He listed contact dermatitis, back pain, and bad vision as the main medical conditions that prevented him from working, and explained that these conditions caused his hands to breakout, as well as pain from sitting or standing more than 20 minutes. He added that he experienced nervousness, concentration problems, and has a social anxiety disorder.

[21] In his Notice of Appeal, the Appellant raised the issue of "profound psychological difficulties" that resulted in addiction issues as the basis for his disability. He added that this condition had precluded all work since December 1997.

[22] The Appellant's medical report was completed on May 29, 2012, by Dr. Corinna Chung (family physician), who indicated she had known the Appellant since 2002 and had started treating him for his main medical conditions that same year. Dr. Chung listed diagnoses of irritant contact dermatitis, a partial absence of skin pigment (albinism), social phobia and attention deficit disorder, abnormal alignment in the left eye (strabismus), and a head injury sustained in 2001. She described physical findings of extremely sensitive skin and noted the Appellant had a good response to topical cream treatments and a Paxil prescription that was

increased the day of her report. Dr. Chung's prognosis was that the Appellant's skin condition would be lifelong and debilitating. She also offered that fatigue resulting from the Appellant's eye problems would continue for an unspecified period of time, and that the Appellant's anxiety was currently under control. Dr. Chung, however, did not comment on any functional limitations arising from the Appellant's conditions, or their implications for the Appellant's capacity to work.

[23] The earliest medical evidence on file for this case is a handwritten note from Dr. Edwards (specialty not disclosed) that was dated October 18, 1993. Dr. Edwards reported that the Appellant's unaided and aided vision in his right eye was 20/50. The unaided vision for his left eye was 20/200 and his aided vision was 20/100. He determined the Appellant's eyesight to be poor in both eyes due to constant rapid eye movement from birth. He attributed this condition to a poorly developed region of the retina where the center of the field of vision is located (fovea centralis) and noted there was no known cure for this problem.

[24] Dr. Mahler (dermatologist) submitted a letter, dated February 2, 1994, that documented his visit with the Appellant. Dr. Mahler reported having previously seen the Appellant in the spring of 1991 for his hand problems, and that his eczema had since been worsening. His physical examination revealed ill-defined red patches of skin (erythema), scaling, and deep cracks (fissures) that were evident only on the backs and knuckles of both hands. He diagnosed the Appellant's immediate problem as irritant eczema and recommended a number of topical treatments to treat this condition. Dr. Mahler further expressed his support for job retraining, and indicated his next employment should avoid contact with external irritants like the solvents and greases he used to repair sewing machines.

[25] On December 5, 1994, Dr. Hradsky (dermatologist) completed a report that indicated the Appellant's hand difficulties started in 1990 as a result of handling various industrial chemicals while conducting repairs of sewing equipment. She confirmed his diagnosis as primary irritant contact dermatitis and documented physical limitations that consisted of considerable pain when performing any fine motor skills movements. Dr. Hradsky qualified these movements as fine repairs or activities requiring a strong grip, although she also noted the Appellant had no difficulties playing hockey. She further specified that work involving ordinary soaps and

detergents would also adversely impact his hands. Dr. Hradsky's prognosis was that his condition appeared to be chronic and possibly irreversible. She concluded that his condition posed up to a five-per-cent impairment to his whole person at the time of her assessment, and added that he was currently on a waiting list for retraining.

[26] The Appellant was seen by Dr. Francis (opthamologist) on March 8, 1995, for an ocular visual assessment. A physical examination revealed rapid and involuntary eye movement (coarse nystagmus) that was consistent with observations of reduced eye pigmentation (ocular albinism) in the iris and inner retina (fundi) of both eyes. He assessed the Appellant's vision as 20/60 in his right eye and 20/300 in his left eye. A year later in March 1996, he determined the Appellant's vision to be 20/80 in his right eye and 20/100 in his left eye. Dr. Francis concluded that he was unable to improve the Appellant's vision by changing his eyewear prescription, but recommended he use eyewear capable of protecting his eyes from sunlight.

[27] On November 29, 1995, Dr. Mahler followed up on the Appellant's skin condition. He noted the hand irritation from workplace chemicals had stabilized since the Appellant had stopped working at that job, and that the minor episodes of eczema which continued to periodically occur were controlled with topical medication. Dr. Mahler reiterated his recommendation that the Appellant retrain for a job that did not involve contact with chemical irritants like solvents and greases, as he deemed it extremely likely that returning to his previous job would cause his hand problems to reoccur.

[28] Addictions counsellor Scott Bulmer provided an undated report that summarized the Appellant's participation in a three-week, intensive addictions treatment program between August 15, 2000, and September 8, 2000. Mr. Bulmer detailed the Appellant's abuse of alcohol to cope with the pain of his dermatitis, as well as the stress of losing his job and the subsequent failure of his marriage. There were no functional limitations identified in the report and he offered no prognosis for work capacity. However, Mr. Bulmer noted that the program helped the Appellant to break the pattern of using alcohol to respond to stress and pain. He also referenced a discharge plan that he believed to be realistic, which included an approved recovery home placement as well as other supports for his short and long-term goals, such as exploring employment and training options. Mr. Bulmer recommended the Appellant

additionally explore a stress management program, although the Appellant did not provide any evidence of taking action on this.

[29] Dr. John Copen (psychiatrist) submitted his medical notes of interactions he had with the Appellant from June 2007 to August 2007. Those notes list a medical history that included contact dermatitis which started in 1992, but that now affected him only rarely; “severe” astigmatism that is corrected by glasses; and a fall in 2000 that caused fractures to the Appellant’s vertebrae and ribs. Dr. Copen indicated diagnoses of moderate depressive episode with onset in June 1994, social anxiety disorder with onset in June 1960, and other “specified” behavioural and emotional disorders of a chronic nature with onset in June 1960.

[30] On June 4, 2007, Dr. Copen noted that the Appellant’s moclobemide prescription was reducing the Appellant’s anxiety. His notes for the next appointment on July 31, 2007, include an annotation that the Appellant was doing well on moclobemide, and that his social phobia and ADD has improved “a lot.” On August 20, 2007, Dr. Copen observed that the Appellant looked well and no issues were evident. He noted the Appellant’s depression and anxiety disorder were resolving over time with increasing medications, and that his other disorders were also improving with treatment. Dr. Copen started the Appellant on Ritalin, but discontinued this prescription the following week when the Appellant experienced hot flashes and increasing joint pain that he attributed to this medication. He then increased the Appellant’s dose of moclobemide.

[31] Dr. Copen subsequently wrote Dr. Chung on September 13, 2007, to advise that the Appellant’s mental health issues were stable on his current medications, and that he was fully discharging the Appellant to her care at the end of November 2007. He recommended a couple of professional colleagues for any psychiatric follow-up that might be required.

SUBMISSIONS

[32] In his Notice of Appeal, the Appellant submitted that he qualifies for a disability pension because:

a) He had profound psychological difficulties resulting in addiction that precluded all work since December 1997.

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

a) The evidence does not support he had a severe disability within the meaning of the CPP at his MQP and continuously thereafter.

ANALYSIS

[34] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 1997.

Severe

[35] The Appellant is presently claiming medical conditions that rendered him unable to work since 1995 and, according to his Notice of Appeal, rendered him unable to work since December 1997. In 1994, these conditions consisted of "occupational" dermatitis to his hands and very poor eye sight. In 2001, his claimed disability was similarly based on contact dermatitis in both hands and vision impairment caused by rapid eye movement. The Appellant's current application adds back pain and a social anxiety disorder to his earlier lists of medical conditions. His Notice of Appeal underscores "profound psychological difficulties" that resulted in addiction issues.

[36] Over the years, the Appellant has attributed a number of functional limitations to his medical conditions. These have included lifting and carrying difficulties due to hand pain; reading, concentration, and driving difficulties due to poor vision; sitting and standing restrictions of up to 20 minutes because of back pain; and nervousness due to mental illness. He also indicated that his personal needs and household maintenance took longer to do and required more effort because of his medical conditions.

[37] However, the Tribunal notes that despite these limitations, none of the medical professionals involved in the Appellant's care have deemed him unable to work. In February 1994, Drs. Humphries and Mahler advised the Appellant to retrain for a job that avoided irritants like solvents. Dr. Mahler reiterated this recommendation the following year. In December 1994, Dr. Hradsky noted that the Appellant was currently on a waiting list for

retraining. Although she noted that activities involving fine motor skills and gripping were painful for the Appellant to perform, Dr. Hradsky assessed his hand condition as meriting only up to a five-per-cent disability to his whole person. Further, sometime after April 2001, Mr. Bulmer indicated the Appellant had set a realistic goal to explore employment and training options. And Drs. Edwards, Hadler, Francis, Chung and Copen did not offer any prognosis with regard to the Appellant's employability in their reports.

[38] The medical evidence establishes that the Appellant's vision was indeed poor prior to his MQP. In October 1993, Dr. Edwards reported that the Appellant's vision difficulties arose from an incurable medical condition that was present at birth. Two years later, Dr. Francis concluded that he was unable to improve the Appellant's vision by changing his eyewear prescription. The assessments of these professionals seem to show that the clarity of vision of Appellant's right eye deteriorated to 20/80 from 20/50 between 1993 and 1996. During that same period, the vision in his left eye appeared to improve to 20/100 from 20/200.

[39] This inconsistent trending of eye performance made it difficult for the Tribunal to establish whether the Appellant's overall vision was deteriorating, improving or remaining the same over time. Neither specialist offered an opinion in this regard, and, unlike Dr. Edwards, Dr. Francis did not specify in his notes whether his vision findings were aided by corrective lenses during testing, or whether they were unaided results. As such, the Tribunal was unable to determine, based on this medical evidence, how the Appellant's vision impairment affected his work capacity, if at all. Further, the Tribunal remained mindful that the Appellant's longstanding eye problems did not prevent him from working in the past. In fact, the Appellant reported unadjusted pensionable earnings in all but two years of his 20-year employment history up to 1992, when he was laid off for unknown reasons.

[40] The Appellant's hand difficulties began in 1990, and he was first seen for this condition by Dr. Mahler in 1991. Three years later in February 1994, Dr. Mahler observed the condition had worsened and prescribed a treatment of topical ointments. At the end of that year, Dr. Hradsky reported that the Appellant was experiencing considerable pain when performing fine motor skills movements, such as fine repairs or activities requiring a strong grip. But by November 1995, Dr. Mahler observed that the Appellant's hand condition had stabilized, which

he attributed to avoiding work that required handling of irritants. Dr. Mahler also noted that the minor episodes of eczema which continued to periodically occur were controlled with topical medication – an observation shared by Dr. Chung, who noted the Appellant's good response to topical cream treatments in her 2012 report. The rare frequency of these breakouts was further underscored in Dr. Copen's 2007 notes, suggesting a 17-year period of stability.

[41] The Appellant's mental health issues were diagnosed by Dr. Copen as moderate depressive episode with onset in June 1994, social anxiety disorder with onset in June 1960, and other "specified" behavioural and emotional disorders of a chronic nature with onset in June 1960. This suggests that most of the Appellant's mental health issues were present throughout his entire work history. However, the Appellant provided no evidence of work difficulties arising from these disorders during that 20-year period, and continuously thereafter to his MQP and beyond. Further, he did not raise any concerns about mental health issues in his 1994 and 2001 CPP disability applications. In fact, there is no objective medical evidence of any treatments or assessments for mental illness prior to Dr. Copen's involvement in 2007.

[42] The Tribunal also relied on Mr. Bulmer's undated account of the Appellant's substance abuse treatment in 2000, which notes the Appellant abused alcohol to cope with the pain of his dermatitis, as well as the stress of losing his job and the subsequent failure of his marriage. The onset of the Appellant's alcohol abuse is not clearly specified in Mr. Bulmer's report, although he attributes the Appellant's return to drinking to a workplace accident. The only references to accidents in evidence are the fall in 2000 cited by Dr. Copen and the 2001 head injury mentioned by Dr. Chung – both of which occurred post-MQP. Further, the Tribunal notes the Appellant did not raise a relationship between his alcohol abuse and his claimed disability until his 2013 appeal, which was also well after his MQP.

[43] Notably, Mr. Bulmer's report makes no mention of "profound psychological difficulties" leading to alcohol abuse as claimed by the Appellant, nor did Mr. Bulmer recommend intervention for psychological difficulties by a mental health specialist in the Appellant's discharge plan. Mr. Bulmer did not identify any functional limitations arising from the Appellant's alcohol abuse, and characterized the Appellant's plan to explore employment and training options as realistic. Similarly, Dr. Copen's reports did not identify any limitations

arising from the Appellant's diagnoses or resulting symptoms. And Dr. Copen deemed his condition as sufficiently stable to discharge him from specialist care in November 2007 – just five months after he began treating the Appellant with medication in June of that same year. In 2012, Dr. Chung confirmed the Appellant's mental health was continuing to respond well to his prescribed medication.

[44] The Appellant provided no objective medical evidence to support his claim of back pain. The Tribunal notes only Dr. Chung's reference to a 2001 head injury – for which no supporting documentation was provided – and Dr. Copen's unsupported reference to a 2000 fall that caused fractures to the Appellant's vertebrae and ribs. Notably, the Appellant did not raise back pain as a primary or secondary issue in his 2001 application for a CPP disability pension. And in any event, the fall and head injury would have occurred post-MQP.

[45] When evidence of the Appellant's medical conditions are viewed in totality, they do not, in the Tribunal's view, indicate a severe disability as defined by the CPP. The dermatitis was largely a situational-specific event that had resolved itself well prior to the Appellant's MQP. And there is no medical evidence of the Appellant's vision or mental health difficulties having a cumulative effect on his capacity to work throughout his employment history. In short, the Appellant retained the capacity to work at this MQP and was not suffering from a serious medical condition.

[46] 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). In this case, the Appellant failed to do so. He completed a retraining program to earn an auto service advisor certification – a job the Appellant indicated he was capable of performing as of 2012 when he submitted his disability application. However, he produced no evidence of a work attempt in this field or otherwise.

[47] On the basis of these findings, the Tribunal could only conclude, on a balance of probabilities, that the Appellant was not suffering a severe disability at the time of the MQP that rendered him incapable regularly of pursuing any substantially gainful occupation.

[48] Normally, the severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). However, in this case, the Tribunal relies on *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187, which determined it is not necessary to apply the "real world" approach where the Tribunal is not persuaded that the Appellant suffered from a severe and prolonged disability at the time of the MQP. As well, *Inclima v. Canada (A.G.)*, 2003 FCA 117, supported the reasonableness of the Pension Appeal Board's refusal to assess a "real- world" context on the basis that paragraph 50 of the *Villani* decision requires that medical evidence – as well as evidence of employment efforts and possibilities – is still required to arrive at a finding of disability. This rationale is also evident in *Eng v MSD*, 2007, CP 24980 (PAB), which establishes that the Tribunal must first be satisfied that the Appellant suffered from a serious disability at his MQP before it can consider the "real-world" context of *Villani*.

[49] In this case, the Appellant has not established that he had a severe medical condition consistent with a disability at his MQP, and the Tribunal therefore did not assess the *Villani* factors.

Prolonged

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

CONCLUSION

[51] The appeal is dismissed.

Michael Beauchesne
Member, General Division - Income Security