**Citation: *K. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 124**

**Date: November 6, 2015**

**File number: GP-14-786**

**GENERAL DIVISION- Income Security Section**

**Between:**

**K. S.**

**Appellant**

**and**

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

**Respondent**

**Decision by: Jane Galbraith, Member, General Division - Income Security Section**

**Heard In person on November 5, 2015, Hamilton, Ontario**

## REASONS AND DECISION

## INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 1, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The hearing of this appeal was in person for the following reasons:

- The issues under appeal are complex.
- There are gaps in the information in the file and/or a need for clarification.
- 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.

[3] The Appellant signed for the Notice of Hearing on July 2015. The Appellant called the Tribunal on September 1, 2015 asking for another copy of his hearing file to be sent to him. On September 2, 2015 another copy of the hearing file was sent to the Appellant by Xpresspost. These documents were delivered and signed for on September 4, 2015.

[4] A reminder call was made to the Appellant on October 26, 2015 but no message was left as there was no voicemail. The Appellant had called the Tribunal on October 30, 2015 to ensure the Tribunal had received an adjournment request he had sent. Staff informed the Appellant that they did not see evidence of this request and advised the Appellant to email the request to the Tribunal. He was provided with the email address.

[5] The Appellant did not appear for the in person hearing. The Member contacted the Tribunal at the time of the hearing to determine if a message had been left by the Appellant indicating whether he was going to participate in the hearing or if he had sent an email requesting an adjournment. No call or request had been placed to the SST. Tribunal staff called the Appellant at home twice at the time of the hearing. There was no answer and no voicemail

available to leave a message on the first call. Twenty minutes after the hearing was to start the Appellant was called again by the Tribunal and a woman answered indicating the Appellant was not at home. A message was left for the Appellant to call the Tribunal as soon as possible and the direct telephone number was given.

[6] The Tribunal member waited an hour to see if the Appellant would attend the hearing.

[7] As is indicated in the Notice of Hearing the Tribunal may proceed in the absence of the party if they are satisfied the party has received the Notice of Hearing. The Tribunal member is satisfied in this case that the Notice of Hearing was received and will proceed in the absence of the party.

[8] Due to the difficulties in communicating with the Appellant, the member waited a full day after the hearing before issuing the decision.

**THE LAW**

[9] 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).

[10] 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.

[11] 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

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

[13] In this case as the MQP 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.

## EVIDENCE

[14] The Appellant was 48 years old at the time of the MQP. He completed one year at college.

[15] The Appellant has done general factory work in the past. From 2004 the Appellant worked as a plumber but had a workplace accident. He had returned to work with lighter duties but was frequently aggravating his symptoms.

[16] His last employment was from August 2008 to March 2012 the Appellant worked as a customer service representative and went off work on sick leave. He collected regular Employment Insurance (EI) benefits from March 2012 to March 2013. At the time of applying to CPP he was receiving Ontario Works benefits.

[17] Dr. Park summarized the results of the MRI of the cervical spine done on March 5, 2005. He indicated it revealed a left central disc protrusion at C5-C6 level resulting in moderate spinal stenosis. At the time the Appellant was having intermittent pain. (GD3-42)

[18] Dr. Park saw the Appellant in 2005 at CPM Health Centres and indicated the Appellant had sustained traumatic cervical disc herniation on September 17, 2004. An MRI confirmed this diagnosis. The Appellant was taking Oxycontin for pain. Dr. Park injected his nerve with Marcaine and the Appellant felt immediate relief. Dr. Park wanted the Appellant to reduce his ingestion of Oxycontin and advised that he could no longer work as a plumber or any job that requires heavy lifting. Workers Safety and Insurance Board (WSIB) was retraining him. (GD3-43)

[19] In August 2006 Dr. Kachur assessed the Appellant. At the time the Appellant was attending school for computers. The Appellant described numbness in his left arm that is there

on a fairly consistent basis but goes into a throbbing pain when he is doing physical work. He also feels some generalized weakness in his left arm. His right arm is okay and he was walking okay. Dr. Kachur indicated that he was a candidate for surgery. He reported the Appellant was very scared of an operation. Dr. Kachur also indicated that conservative treatment and monitoring the situation was also a viable option.

[20] In June 2013 Dr. Sewchand, family physician, gave a diagnosis of C5 radiculopathy. He indicated the Appellant had a moderate reduction in his range of motion in his neck. He reported that surgery was his only treatment option that could benefit him but he was afraid of surgery. He felt that it was a poor prognosis for the Appellant doing any physical labour. (GD3-40)

[21] Dr. Sewchand wrote further in December 2013 that the Appellant's pain had increased and was now affecting the right arm. He is in constant pain and unable to work. His medications were Naproxen, Pantoloc and Tylenol #3. (GD1-4) The Appellant had reported on his questionnaire in August 2013 that his medications included Naproxen and Tylenol #3.

**SUBMISSIONS**

[22] The Appellant submits on his Notice of Appeal application that he qualifies for a disability pension because:

a) His disabilities are both severe and prolonged.

b) He is not able to engage in any employment.

c) His last employment was sedentary as a customer support worker and he had to leave that employment.

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

a) The Appellant is receiving conservative treatment with no future consultations or investigations planned.

b) The supporting documentation is from 2005-2006 and the Appellant worked from August 2008 to March 2012 indicating he was able to work with his condition.

c) The Appellant describes depression and anxiety but his symptoms have not become significant enough to warrant aggressive intervention and there were no reports from a mental health professional.

d) The Appellant is not precluded from all types of work.

**ANALYSIS**

[24] 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**

[25] The onus of satisfying the Tribunal that the Appellant's disability, physical or mental, meets the deemed definition in the CPP legislation lies squarely on the Appellant, see Dhillon vs. MHRD, (November 16, 1998), CP 5834 (PAB)

[26] The Appellant did not attend the hearing and provide the Tribunal with oral testimony. No additional or updated medical documents were received for the Tribunal to review after the Appellant received the Notice of Hearing.

[27] The Tribunal finds the Appellant was provided with ample opportunity to participate or request an adjournment.

[28] Warren *vs. (A.G.) Canada, 2008, FCA 377* confirms for the Tribunal the need for objective medical evidence when it states:

> In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Minister of Social Development*, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL)).

[29] There is no documentary evidence of the involvement of specialists in the Appellant's care past 2006. His Family physician wrote letters of support in 2013 but was not specific about why the Appellant could not work.

[30] The Tribunal notes *Braun v MHRD*, (October 5, 1999), CP 09172(PAB) when it addresses the issue of chronic pain with respect to the severe criteria when it states:

> The seminal issue is whether her condition, viewed objectively, can be considered severe. The Board readily acknowledged that Appellant does experience pain from various areas of her body. Pain, however, is not itself indicative of severe impairment, particularly when its degree greatly exceeds the objective clinical findings.

[31] In June 2013 Dr. Sewchand wrote the Appellant had a poor prognosis for doing any physical labour and then in December 2013 stated the Appellant could not work. There is no evidence or explanation why this change of opinion occurred. No specific information was provided about his condition and how it affected his functional abilities.

[32] The Tribunal acknowledges the Appellant has been dealing with pain. However the Tribunal is lacking documentary evidence and oral testimony about how that pain impacts his functional abilities. The Tribunal could not make a finding of severe based on the evidence provided.

[33] The Tribunal could not make a finding of severe based on the evidence provided. It is clear that the evidence provided to the Tribunal has not demonstrated the Appellant had a severe condition at the time of the hearing that prevented him from working at any type of job.

[34] 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).

[35] The Appellant took computer courses after he had an injury. There is no evidence that the Appellant has attempted any type of alternate work that would be more suitable for him and been unsuccessful maintaining employment due to his health condition.

[36] The Tribunal has carefully reviewed the medical reports. The Tribunal finds that, on a balance of probabilities, it has not been persuaded that the Appellant has a severe disability within the meaning of the Act.

**Prolonged**

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

**CONCLUSION**

[38] The appeal is dismissed.

Jane Galbraith
Member, General Division - Income Security