Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *T. P. v. Minister of Employment and Social Development,* 2016 SSTGDIS 32

Tribunal File Number: GP-14-3530

BETWEEN:

T. P.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Vikki Mitchell

HEARD ON: April 19, 2016

DATE OF DECISION: May 2, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

T. P. – Appellant

P. P. – Appellant's mother as witness

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 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 by personal appearance for the following reasons:

a) The method of proceeding provides for the accommodations required by the parties or participants.

b) There are gaps in the information in the file and/or a need for clarification. [3] The Appellant's hearing is very minimal and he reads lips.

[4] When it became clear that the Appellant was more comfortable speaking French, the hearing continued primarily in that language.

[5] The Appellant's mother assisted when the Appellant did not hear or read lips effectively.

[6] The decision is written in English as that was the language of communication indicated in the application for CPP disability benefits.

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 regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2014.

[11] 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 was 45 years old at his MQP. He has a grade 12 education and training but no certification in sheet metal fabrication. He worked from November 2003 until September 2012 when he was laid off due to lack of work. In the CPP questionnaire he stated that he received regular Employment Insurance benefits from October 2, 2012 until August 17, 2013. He stated that he was unable to work because of his medical condition as of September 17, 2012.

[13] When people communicate with him, they must be directly in front of him so that he can read lips. He cannot take directions over the phone. He cannot understand directions in a noisy

environment. He needs closed captioning for television, has a bed shaker alarm and for any tests needs someone to help him understand the questions. Communicating with people is difficult because they do not always understand what he is saying or asking.

[14] The CPP medical report was completed by Dr. Seguin who had known the Appellant since September 1999. The diagnoses were congenital deafness for which the Appellant uses hearing aids and a left tibia/ fibula fracture. Dr. Seguin noted obvious chronic difficulties with communication and obvious difficulty walking. He was being followed by an orthopedic surgeon for the fractures and surgery was performed in August 2013. In the notice of appeal, the Appellant stated that he had recovered from the fractures and his disability application was based on his difficulty hearing.

[15] A report dated August 12, 2003 from the North Bay Audiology Clinic indicated a severe sensorineural deafness bilaterally and new hearing aids were recommended. In a letter dated February 4, 2014, the audiologist, Ms. Davidson-Bertrand, stated that the Appellant has a congenital severe to profound hearing loss bilaterally and has been using hearing aids since age five. Beginning in 1997 his speech discrimination ability has deteriorated even with the use of hearing aids. His speech discrimination was 28% for the left ear and 68% for the right ear even at elevated voice levels or while wearing his hearing aids and in a quiet environment. This means he could potentially miss 7 out of 10 words in his left ear and 3 out of 10 words for the right ear in a quiet environment. In noisier environments his ability to differentiate speech would deteriorate even further.

> In light of this, … would be challenged in various types of work environments requiring strong communication skills such as cashier in a busy store, customer service agent in a fast food restaurant, cab driver, bus driver, open concept office settings, teaching/classroom environment trying to field questions from students, and noisy construction work which could also exacerbate his current hearing loss to name only a few.
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> … will also struggle to hear and understand conversations in group situations. Unless the speaker is within close proximity, in a quiet environment, with visual contact, … will encounter significant communication difficulties.
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> In summary, … severe to profound sensorineural hearing loss coupled with reduced speech discrimination ability will pose significant challenges in his ability to communicate in a number of work settings.

[16] In a written submission his mother described his education history. From grade one to eight he was either in special education classes or regular classes with a helper. He was moved from grade to grade without actually passing. This continued in high school. In his tinsmith apprenticeship program his practical work was very good but he failed the written tests and exams due to lack of comprehension. He failed an exam to license him to do tinsmith work in residential housing even with help to explain things he did not understand.

[17] He was hired for a summer job while in high school by a family friend who was very patient in explaining how to do the work. After high school he was hired full time by this person and remained there until he was laid off by the owner's son who had taken over the business. His mother then started a business so that the Appellant would have a job. She dealt with the customers, schedules and all aspects of the job except the actual physical work. After approximately 5 or 6 years he went back to the original company and was laid off due to a shortage of work. When he contacted his employer in late January 2014, he was told that he would not hire him again because he did not have a license to do this work.

[18] In his notice of appeal the Appellant stated that he had been applying for jobs for two years but when employers realize he is deaf, he has not been considered. He believes that he is not hired because of safety concerns- for himself and for others.

TESTIMONY AT THE HEARING

[19] He attended elementary school completely in French. In high school he attended school in English. He attended trade school in tinsmithing in Ottawa in 1992 and in Sudbury in 1994. These courses were in English and he was not able to pass the written part of the course even with assistance. He tried to write the tests for residential tinsmith twice in approximately 2010. The tests were English. He was assisted by his mother in these efforts but was not successful.

[20] He was first hired for a summer job by Mr. R. O while he was in high school. He worked as helper with a licensed tinsmith. When Mr. R. O retired and his son took over, the Appellant was laid off. His mother started a lawn care business in order to provide the Appellant with a job. She took the phone calls, did the paperwork and organized the schedule. The Appellant cut grass, worked on flowerbeds and did general lawn maintenance. This job

lasted from May until approximately October. After approximately 7 years working for his mother, he was rehired by the original tinsmith company. He worked at job sites but there was too much noise. He was more comfortable working in the shop. He worked on layouts, cutting the metal, and helping to install the heating and air conditioning duct work. In 2012 he was let go because he did not have the proper certification required by the Ministry of Labour. At this point his mother was not able to start another company.

[21] After being laid off he registered with YES employment for assistance. They assisted him with his resume. He looked for other jobs at Tim Horton's, a car rental agency, a ski hill, Ontario Northland, and taxi companies. His hearing impairment prevented his hiring at these companies.

[22] His deafness was identified at 5 years of age when he began school. His family considered sending him to a school for the deaf in Belleville but he was only 5 years old and the school was in English while the family language was French. A teacher from the school came to their home and showed his mother how to teach him. Sign language was considered but they felt it would limit his ability to communicate with the majority of society. In his French elementary school he was in a special class with 3 deaf students. He only began to speak English in secondary school when he again had special classes.

[23] His major impediment is communication. In 2015 he had a cochlear implant in his left ear but he does not hear anything with that ear. He hears a little with his right ear but he depends on lip reading.

SUBMISSIONS

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

a) Although he would like to work, his inability to hear and to communicate effectively prevents him from working.

b) The only reason he has been able to work in the past was because of a very understanding employer and because his mother was able to start a business of her own.

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

a) He received regular Employment Insurance benefits from October 2012 until August 2013 indicating that he was ready willing and able to work.

b) His hearing impairment has not prevented him from getting employment in the past.

c) He stopped work for non-medical reasons.

d) While securing alternate employment may be a challenge, lack of suitable work within an appropriate environment is not a determining factor when assessing an ability to work

ANALYSIS

[26] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2014.

Severe

[27] The Appellant has a hearing loss which was first detected at 5 years of age. In 2014 his condition was described as severe to profound. A cochlear implant to the left ear was done in 2015 but was not successful and he hears nothing in that ear. He requires a quiet environment and face to face placement in order to read the lips of someone speaking to him. At the hearing it was evident that he did not hear or lip read some of the questions and required repetition or clarification from his mother.

[28] A Pension Appeals Board (PAB) case, *Buckley v. MHRD* (November 29, 2001) CP 15265 dealt with a situation in which the Appellant had a moderate neurosensory hearing loss in both ears. Her capacity to hear spoken words was “rated in the range of 80% of normal.” In this case the PAB found that the Appellant was not eligible for CPP disability benefits, stating that, “There are jobs in which the requirement for ongoing oral communication is minimal or less important, in which Mrs. … could function satisfactorily.”

[29] The Tribunal is guided by but not bound by previous PAB decisions. The Tribunal finds that the facts in the current case can be differentiated from those in *Buckley* – specifically the Appellant's hearing loss has been described as severe to profound not moderate as in *Buckley* and in 2014 his speech discrimination was rated at 28% in his left ear and 68% in his right ear.

The Tribunal finds that the Appellant's severe to profound hearing loss renders him incapable regularly of pursuing any substantially gainful occupation.

[30] *MSD v. Ridley* (August 23, 2007) CP25040 (PAB) assists the Tribunal. While this case dealt with chemical sensitivities rather than deafness, it relates to the need for a controlled workplace environment.

> The termination of her employment by Hartford was a huge setback for her. Hartford had taken substantial steps to deal with the atmospheric problems in its workplace which had afflicted its employees, and in particular the Respondent, whose sensitivities were apparently outstanding compared to the other employees. Hartford had thus created a controlled workplace environment that accommodated the Respondent's chemical sensitivities.
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> However, having lost her job at Hartford, the Respondent was faced with finding new employment in a workplace with a controlled environment.
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> In paragraph 46 of the judgment in *Villani v. Canada (Attorney General)* (C.A.) [2002], 1 F.C. 130, Isaacs J.A. writes "What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation."
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> As a consequence of the Respondent's requirement of a controlled employment environment she is, in my opinion, in realistic terms incapable regularly of pursuing any substantially gainful occupation.

[31] The Appellant in the case at hand requires a controlled environment. As stated by the audiologist on February 4, 2014, "He will also struggle to hear and understand conversations in group situations. Unless the speaker is within close proximity, in a quiet environment, with visual contact, … will encounter significant communication difficulties. In summary, … severe to profound sensorineural hearing loss coupled with reduced speech discrimination ability will pose significant challenges in his ability to communicate in a number of work settings." The Appellant has testified that he has attempted to find work at a number of different workplaces. He has not been hired because his disability was considered incompatible with the work environment or unsafe. The Tribunal finds that, as in *Ridley*, the Appellant's requirement of a

controlled employment environment renders him, in realistic terms, incapable regularly of pursuing any substantially gainful occupation.

[32] *L.F. v. MHRSD* (September 20, 2010) CP26809 (PAB) guides the Tribunal. Paragraph 42(2)(a) does not mean that any kind of job will suffice to qualify as a substantially gainful occupation. Paragraph 42(2)(a) is concerned with the capacity of an applicant to work in a meaningful and competitive work environment. It cannot be said to be a meaningful and competitive environment where an employer may have to make accommodations, as in the case of the Appellant, by creating a flexible work environment to enable him to have a job that he would not otherwise be able to perform in a normal competitive work environment.

[33] While the Appellant could work successfully in the shop environment, he was not able to function effectively at job sites, thus requiring his employer to create a flexible work environment. This would apply to any other workplace in which any part of the job was outside the controlled environment in which the Appellant was able to function.

[34] The Tribunal refers to *Chaisson v. MHRD* (July 14, 1998), CP4821. As often stated by the Board, it is difficult at best, to decide a disability case when the circumstances are such that the capacity to work is predicated upon a flexible work environment and an understanding employer. The Board has tended in all appropriate cases to not impose upon an applicant for benefits the burden of earnestly seeking employers possessed of these qualities to an exceptional degree, before holding that he/she is incapable of pursuing a substantially gainful occupation.

[35] The Respondent argues that the Appellant received regular E.I. benefits from October 2012 until August 2013 indicating that he was ready, willing and able to work. The Appellant testified at the hearing that he was then and still is willing to work <u>if</u> an understanding employer with an appropriate controlled work environment were willing to hire him. The Tribunal recognizes this argument by the Respondent but in view of the principle in *Chaisson* cannot give it significant weight.

[36] 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).

[37] The Appellant has registered with YES employment services. He has applied for several positions in various types of workplace. He has not been hired. At Tim Horton's (or any fast food restaurant) the noise levels and the use of headphones would make it impossible for him to work. Ontario Northland and taxi services require use of telecommunications which he cannot use. The ski hill lift operator job required an ability to hear in case of problems. The Tribunal finds that the Appellant's efforts at obtaining employment have been unsuccessful by reason of his medical condition.

[38] 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.

[39] The Appellant was 45 years old at his MQP. His age therefore is not a factor that would affect his employability. He has a grade 12 education. The Tribunal accepts that he required special assistance all through his educational history and that he was moved from grade to grade without completing all the academic requirements. The Tribunal gives weight to the fact that he has attempted several times to complete the written requirements as a licensed sheet metal worker. He was unsuccessful during his attempts while at school in the early 1990s and again in approximately 2010. In all these attempts he was provided with assistance in understanding the questions.

[40] The Appellant's first language is French. He did not attend school in English until high school. All the written tests required for qualification as a licensed sheet metal worker were in English. It is clear that his comprehension of written material is weak. While his verbal skills in English are adequate, he is more comfortable in French.

[41] He was fortunate to have been hired in high school by a family friend who patiently explained and taught him the work required of a tinsmith. He worked with senior employees

who were also accepting of the Appellant's disability. The Appellant was eventually laid off after the owner's son took over the business. At this time he could not find another job because of his deafness and his mother started a lawn care company in order to employ him. She looked after all aspects of this work other than the physical work of general yard maintenance. After 5 or 6 years he was rehired by the original company in 2003 and was laid off in 2012 due to a shortage of work. When he contacted the employer in early 2014, he was advised that he could not be rehired because he did not have the required certification.

[42] The Tribunal finds that the Appellant's educational history and particularly his test writing history show a lack of capacity for comprehension of written work. Even with assistance he was unsuccessful at passing the written test for certification even though his manual skills were considered acceptable. While he speaks both French and English, his oral comprehension is limited in both languages by his severe deafness. As explained in the audiology report he could potentially miss 7 out of 10 words in his left ear and 3 out of 10 words for the right ear even at elevated voice levels or while wearing his hearing aids and in a quiet environment. Even this has diminished in his left ear after the cochlear implant has failed. He has worked in two jobs both of which are physical in nature. The Tribunal recognizes that physically he has been able to perform the tasks required; however this ability to perform adequately was based on an understanding and patient employer in the sheet metal job and his mother being able to co-ordinate all the non- physical aspects of the lawn care company. He was unable to continue the tinsmith job the second time because of his inability to pass the written test.

[43] The Tribunal finds that although his age is not a factor, when his academic background, and his work and life experience are considered, based on the principles articulated in *Villani*, the Appellant's disability meets the severe criterion of the CPP.

[44] The Appellant has satisfied the Tribunal that on a balance of probabilities he had a severe disability as defined in the CPP on or before the date of the MQP.

Prolonged

[45] The Appellant's hearing loss was identified at five years of age. His hearing has deteriorated since then. A cochlear implant in 2015 was not successful.

[46] The Tribunal finds that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[47] The Tribunal finds that the Appellant had a severe and prolonged disability in September 2012 when he was let go from his job as a sheet metal worker. Although he was let go from his job for non-medical reasons, his congenital severe to profound deafness resulted in his inability to find further employment. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of January 2013.

[48] The appeal is allowed.

Vikki Mitchell
Member, General Division - Income Security