



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. M. v. Minister of Employment and Social Development*, 2016 SSTGDIS 105

Tribunal File Number: GP-14-1204

BETWEEN:

H. M.

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: Connie Dyck

HEARD ON: May 17, 2016

DATE OF DECISION: May 19, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, H. M.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 21, 2011. The Respondent denied the application initially. The Appellant made a request for a late reconsideration in June 2013, which was granted. Upon reconsideration, the Respondent maintained their decision in November 2013 to uphold their decision to deny. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) General Division in November 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 within a reasonable distance of the area where the Appellant lives
- c) The issues under appeal are complex.
- d) There are gaps in the information in the file and/or a need for clarification.
- e) Credibility is not a prevailing issue.
- f) 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] 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).

[4] 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.

[5] 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.

[6] Subsection 60 (8) of the CPP states that where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[7] Subsection 60 (10) states that for the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

ISSUE

[8] The Appellant stated that his MQP should be 4 years prior to his date of onset which was in 1987 and not 1993. The Tribunal looked to Section 44 of the CPP legislation. In this case, the Appellant did not meet the criteria of having 4 valid years of earning in the last 6 years and he did not have 3 valid years of earnings in the last 6 years and at least 25 years of earnings.

He also had not paid into in CPP in each year since a previous disability pension ceased. Therefore, the only way that the Appellant could be eligible for CPP disability benefits is by the late applicant provision which allows consideration of a disability that was severe and prolonged and continuous, when an Appellant had contribution to the CPP to qualify. In this case, that date is December 31, 1993. The Tribunal finds that the MQP date is December 31, 1993.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

EVIDENCE

[10] The Appellant was 43 years old at the time of his MQP. The Appellant has a grade 12 education and five years of post-secondary education. The Appellant also completed a transport driver's course from August to November 2011. He noted that he last worked as a teacher in 1987 and stopped due to symptoms related to his mental health issues.

[11] A copy of the Appellant's 1989 Income Tax Return shows gross business income on line 162 is \$22,877. (GT 7-25) At the hearing, the Appellant testified that this business involved selling wood and making speciality machines. However, there were costs involved to making the equipment and his net income was substantially less. The Appellant explained that he did not do this for any length of time as he could only build the machines when he was well and it often took 4 months for him to complete it. He further explained that he approached the Parks department for possible contracts, but they only purchased one machine.

[12] A copy of the Appellant's 1990 Income Tax Return shows gross business income on line 162 is \$17,852. (GT 7-24)

[13] A copy of the Appellant's 1991 Income Tax Return shows gross business income on line 162 is \$2,665. (GT 7-23)

[14] A copy of the Appellant's 1992 Income Tax Return shows gross business income on line 162 is \$2,096. (GT 7-22)

[15] A copy of the Appellant's 1993 Income Tax Return shows gross business income on line 162 is \$1,200. (GT 7-21)

[16] A copy of the Appellant's 1994 Income Tax Return shows gross business income on line 162 is \$8,892. (GT 7-20)

[17] A copy of the Appellant's 1995 Income Tax Return shows gross business income on line 162 is \$15,000. (GT 7-19)

[18] At the hearing, the Appellant stated that his daughters were born in 1993 and 1991. He explained that when they were older, he would get the lady across the street to babysit them while he cut up wood to sell or built machines, but this income was not sustainable.

[19] A copy of the Appellant's 1996 Income Tax Return shows gross business income on line 162 is \$36,223. (GT 7-18)

[20] A copy of the Appellant's 1997 Income Tax Return shows gross business income on line 162 is \$26,111. (GT 7-17)

[21] A copy of the Appellant's 1998 Income Tax Return shows gross business income on line 162 is \$48,878. (GT 7-16)

[22] A copy of the Appellant's 1999 Income Tax Return shows gross business income on line 162 is \$36,659. (GT 7-15)

[23] A copy of the Appellant's 2000 Income Tax Return shows gross business income on line 162 is \$56,005. (GT 7-14)

[24] A copy of the Appellant's 2001 Income Tax Return shows gross business income on line 162 is \$51,434. (GT 7-13)

[25] A copy of the Appellant's 2002 Income Tax Return shows gross business income on line 162 is \$17,640. (GT 7-12)

[26] A copy of the Appellant's 2003 Income Tax Return shows net business income on line 135 is \$3,319. (GT 7-11)

[27] A copy of the Appellant's 2004 Income Tax Return shows gross business income on line 162 is \$8,012. (GT 7-10)

[28] A copy of the Appellant's 2005 Income Tax Return shows gross business income on line 162 is \$12,000. (GT 7-9)

[29] A copy of the Appellant's 2006 Income Tax Return shows gross business income on line 162 is \$15,249. (GT 7-8)

[30] A copy of the Appellant's 2007 Income Tax Return shows gross business income on line 162 is \$20,120. (GT 7-7)

[31] A copy of the Appellant's 2008 Income Tax Return shows gross business income on line 162 is \$36,794. (GT 7-6)

[32] A copy of the Appellant's 2009 Income Tax Return shows total earnings (T4) on line 101 is \$2,845. (GT 7-5)

[33] In a letter dated June 9, 2010, Dr. Hallatt, psychiatrist, stated that the Appellant had Bipolar Mood Disorder and a case of mild to moderate cognitive impairment. He noted that the Appellant's Bipolar illness was difficult to treat and for most of the time his thinking was driven by his various moods. He stated that when the Appellant was in a manic state he was unable to perform activities with appropriate judgement He was distractible and had poor attention. When depressed the Appellant sleeps most of the time, has difficulty thinking, concentrating or making decisions, as well as having recurrent thoughts of death or thoughts of suicide. In regards to his cognitive impairment he can make tentative plans to carry out projects, but not the ability to see them through. It was Dr. Hallatt's opinion that the Appellant was impaired most, if not all of the time, by his medical conditions. (GD 10-1)

[34] A copy of the Appellant's 2010 Income Tax Return shows total earnings (T4) on line 101 is \$14,271. (GT 7-4) In an Employer Questionnaire K. W., owner of KRW Enterprises, stated that the Appellant had been employed from January 20, 2010 to December 13, 2010 as a part-time truck driver working approximately 75 hours per month as this was all the work that was available. His attendance was described as good and had no absences other than to take care of his daughter or for the occasional doctor's appointment. His work quality was described as good and he required no special arrangements or help from his co-workers. The employer further noted that the Appellant had the ability to hand the demands of the job and that he quit

his employment on December 13, 2010. (GT 1-74 – GT 1-76) In a brief letter dated May 11, 2011, Dr. Hallatt noted that the Appellant's daughter became quite ill in the week of December 12, and it was necessary for the Appellant to be exempt from work the week of December 12 as he was preoccupied with a major family condition. (GT 1-111) At the hearing, the Appellant testified that he stopped working on December 13, 2010, because he needed to take care of and help his daughter and his employer would not give him a leave of absence. The Appellant further explained that after stopping employment with KRW Enterprises, he applied for and received regular Employment Insurance benefits.

[35] A copy of the Appellant's 2011 Income Tax Return shows total earnings (T4) on line 101 is \$1,104. (GT 7-3)

[36] A copy of the Appellant's 2012 Income Tax Return shows total earnings (T4) on line 101 is \$11,685. (GT 7-2) An Employer Questionnaire completed by A. B. of R.'s Sewer & Water Ltd., stated that the Appellant was employed from April 3, 2012 to May 15, 2012 for seasonal work from April to May, as a truck driver. The Appellant was employed 8 hours per day. It was noted this was part-time work as this was all the work that was available. His attendance was described as good and he had no noted absences. The employer stated that the Appellant had the ability to do the job, his work was satisfactory and he needed no help from his co-workers or special arrangements. (GT 5-21 – GT 5-23)

[37] An Employer Questionnaire completed by T. P. of P. Trucking, stated that the Appellant was employed from June 26, 2012 to August 31, 2012 on which date he was dismissed because he was ignoring instructions regarding certain tasks such as checking the oil and pre-trip inspections on the trucks. He was employed as a truck driver and drove a tandem dump truck, hauling mud. The Appellant was employed 7-10 hours per day and 35-50 hours per week. His attendance was described as good, he had no absences and he had the ability to do the job. The employer stated that the Appellant "didn't like to be told to do things a certain way. He would do things his way." (GT 5-7 – GT 5-9)

[38] In July 2008, Dr. Fred Shane, psychiatrist was of the opinion that the Appellant needed a reason and a vision in terms of his life and that the Appellant had not been able to organize some sort of a structure for his future. On the Appellant's behalf, Dr. Shane made some

inquiries and connected to Safety Manitoba who offered a short term course in front end loaders. (GT 5-77) In his notes dated August 18, 2008, Dr. Shane stated that the Appellant's mood was definitely improved and that his mood disorder appeared to be diminishing in terms of intensity related to his depressive symptoms. (GT 5-76) In October 21, 2008, Dr. Shane noted that the Appellant was attending a job skills seminar learning how to make resumes and go through mock interviews. (GT 5-71) In a clinic note of November 5, 2008, Dr. Shane stated that hopefully the Appellant would obtain a job which would make a significant difference for him. (GT 5-68) Notes of Dr. Shane on November 20, 2008, indicate that the Appellant was distressed about a number of situations including being granted a pardon which is an issue in terms of applying for jobs, as well as having ongoing issues with his sister and daughters. It was Dr. Shane's assessment that the Appellant's symptoms were more reactive to his current life stresses than anything else. It was Dr. Shane's plan to talk to the Appellant's lawyer about accelerating the process of a pardon. (GT 5-67) On November 28, 2008, Dr. Shane noted that the Appellant was looking for jobs in a more enthusiastic manner but was trying to deal with the issue of a criminal charge which he cannot have erased from his record for one year. (GT 5-66) Dr. Shane noted on December 4, 2008 that the Appellant had applied for jobs, but had not yet heard back from potential employers. It was Dr. Shane's plan to offer the Appellant some support in terms of looking for a job by telling him to follow up his past inquiries. (GT 5-65) The week previous on December 10, 2008, Dr. Shane stated that the Appellant continued to struggle but was looking for a job and was frustrated by his job situation. It was Dr. Shane's assessment that the Appellant was managing and clinically it was more unhappiness than a clinical depression. It was Dr. Shane's plan to encourage the Appellant to look for work. (GT 5-64) On December 16, 2008, Dr. Shane noted that the Appellant was very frustrated in terms of obtaining a job because of his problems with getting an official pardon. (GT 5-63) Clinic notes of Dr. Shane dated December 22, 2008 stated that the Appellant was feeling somewhat better using Effexor and was beginning to look for work. It was Dr. Shane's assessment that the Appellant looked reasonably stable and less symptomatic. (GT 5-62) The Appellant last saw Dr. Shane in January 2009, due to Dr. Shane moving to another province. In January 2009, Dr. Shane stated that the Appellant was feeling relatively stable and was not clinically depressed and that most of his dysphoria was related to a lack of work. He noted that the Appellant

continued to find a job and was optimistic about a recent application. The Appellant was being transferred to the care of Dr. Hallat. (GT 5- 134)

[39] In a letter dated December 13, 2008, Dr. Shane advised Dr. Hallat that the Appellant's diagnosis was most likely Bipolar I. It was noted that the Appellant's depressions were usually relatively minor in terms of symptomatology and handled by psychotherapy and medication. Dr. Shane explained that the Appellant had two children who had certainly given him some adolescent angst and that he was a teacher but retired because of struggles with coping under the stress. Dr. Shane reported that the Appellant had various businesses over years which had really been borderline and at the time of the letter, the Appellant was looking for work but he had some minor offences where he got angry at a school trustee and it resulted in a conditional discharge which gave him a criminal record which has given him problems in terms of applying for a job. It was noted that the Appellant was looking for work but this was a struggle for him and he has been trying to get a pardon which may take another year. Dr. Shane stated that with support, the Appellant has managed to navigate his life and cope and that he had never been hospitalized or psychotic, although on occasion his mood does get somewhat elevated but never at a manic level. (GT 5-135)

[40] In a Certificate of Incapability dated November 16, 2012, Dr. David Hallett, psychiatrist stated that the Appellant had good general knowledge of what was happening to his money or investments, had sufficient understanding of the concept of time in order to pay bills on time and had sufficient memory to keep track of financial transaction and decisions. He noted that the Appellant had significant impairment of judgment due to altered intellectual function, but was of the opinion that the Appellant was capable of managing his own affairs. He further stated that the Appellant's condition make him incapable of forming or expressing the intention to make an application and that the Appellant's incapacity began in August 1987. (GT 1-91 – GT 1-92)

[41] The Appellant stated that there is no end date to his incapacity and that it has not ceased. He stated that his condition has had improvement since he began seeing Dr. Hallett in 2009. He stated that Dr. Hallett prescribed other medication and his condition has stabilized and he does not have as many lows and highs and it seems to have stabilized the highs and lows, however,

they still occur. The Appellant advised the Tribunal that he last saw Dr. Hallett in 2013 and that he was unable to receive a response from Dr. Hallett in 2014 and he is unaware if he died or retired. The Appellant testified that he has had no ongoing psychiatric care since 2013. He continues to see his family doctor who monitors various levels with occasional blood tests and provides prescription refills. The Appellant stated that there is an inhouse psychiatrist at Access that he hopes to see in the future, but it cannot be on a continue basis as that is not possible with the inhouse psychiatrist.

[42] The Appellant stated that he resides on his own and relies on OAC, CPP and a supplement. The Appellant stated that he lives in an apartment and that he pays his own rent and manages his own financial affairs.

[43] The Appellant stated that he did his own typing and was able to use a computer and type his information and put it in a USB and bring it to Staples to print. He stated that he was only able to do this after his condition improved and stabilized with Dr. Hallett's care.

SUBMISSIONS

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

- a) he has been unable to maintain on a regular business a sustainable income;
- b) the MQP should be 4 years prior to the date of onset in 1987 and not 1993;
- c) he did not have the intent to make an application or he would have done so earlier.

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

- a) The evidence before the Tribunal does not support a determination that the Appellant was disabled within the meaning of the *Canada Pension Plan (Plan or CPP)* on or prior to his Minimum Qualifying Period (MQP) of December 31, 1993, and continuously thereafter; and
- b) The Income Tax Reports provided by the Appellant support that after the Appellant's MQP of December 1993 he had income from a viable business venture and as such, he

did not meet both the severe and prolonged criteria at December 31, 1993, and continuously thereafter.

ANALYSIS

[46] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 1993.

Incapacity

[47] The Tribunal considered the Appellant's submission that he was incapable of forming or expressing the intention to make an application and that his incapacity commenced in August 1987 and continued to the date of the hearing. The Tribunal looked to *Morrison v. Minister of Human Resources Development*, Appeal CP04182, March 7, 1997, wherein the Board stated that it was necessary to look at both the medical evidence and "the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so "forming and expressing" the intent" (*Ibid.* at p. 5). This approach was approved by the Federal Court of Appeal in *Canada (Attorney General) v. Danielson*, 2008 FCA 78 at paragraph 7 and *Canada (Attorney General) v. Kirkland*, 2008 FCA 144 at paragraph 7. The approach is also consistent with the fact that "the capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity." Thus, "nothing in the scheme requires us to give to the word "capacity" a meaning other than its ordinary meaning" (*Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86 at paragraphs 3-4). The Tribunal considered the evidence of the Appellant that during the Appellant's claimed period of incapacity, from August 1987 to the date of the hearing, he held a valid driver's license, had periods of employment, made an application for regular Employment Insurance benefits when his employment in 2010 ended, resides on his own and at the time of the hearing was responsible for all of his finances including paying rent and bills. The Tribunal also considered that while the Appellant has stated that his period of incapacity began in August 1987 and continued to the date of the hearing, he completed an Application for CPP disability benefits, in

his own handwriting in March 2011 and provided evidence to the SST without representation and on his own, in support of his appeal. The Tribunal finds that the Appellant does not meet the criteria of incapacity as defined in the legislation.

Severe

[48] 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.

[49] However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[50] The Tribunal finds that the evidence of Dr. Shane does not support that the Appellant's medical condition would preclude him from all types of work, including part-time work. Further, the Tribunal looked to *Klabouch v. Canada (MSD)* 2008 FCA 33 for guidance which states that it is the capacity to work and not the diagnosis of a disease that determines whether the disability is "severe" under the CPP. Dr. Shane, who treated the Appellant for bi-polar and depression symptoms for many years, was supportive of the Appellant finding employment and further noted in December 2009 that the Appellant looked reasonably stable and less symptomatic. The Tribunal finds that the evidence does not support that the Appellant had a severe disability as defined in the legislation at the time of his MQP and continuously thereafter.

[51] The Tribunal also considered the evidence of the Appellant that there had been improvement in his condition since he began treatment with Dr. Hallett in January 2009. In fact, one year after treatment with Dr. Hallett, the Appellant began employment with KRW Enterprises in January 2010. The evidence of the employer is that the Appellant had been employed from January 20, 2010 to December 13, 2010 as a part-time truck driver working

approximately 75 hours per month as this was all the work that was available. His attendance was described as good and had no absences other than to take care of his daughter or for the occasional doctor's appointment. His work quality was described as good and he required no special arrangements or help from his co-workers. The employer further noted that the Appellant had the ability to hand the demands of the job. 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). The testimony of the Appellant and the evidence of the employer was that the Appellant stopped this work on December 13, 2010, not because of his medical condition, but because his daughter needed care and help. The Tribunal finds that the evidence of the Appellant's successful part-time employment for the 2010 year shows evidence of work capacity.

[52] Further, after the Appellant stopped working on December 13, 2010, he applied for regular Employment Insurance benefits. In order to qualify for these benefits, an applicant must be capable of and willing to work. The Appellant stated that he received regular Employment Insurance benefits and therefore was capable of and willing to work.

[53] The Tribunal also considered the work of the Appellant in 2012. In an Employer Questionnaire A. B., stated that the Appellant was employed from April 3, 2012 to May 15, 2012 for seasonal work from April to May, as a truck driver. The Appellant was employed 8 hours per day. It was noted this was part-time work as this was all the work that was available. His attendance was described as good and he had no noted absences. The employer stated that the Appellant had the ability to do the job, his work was satisfactory and he needed no help from his co-workers or special arrangements. One month after this seasonal job ended, the Appellant began working with P. Trucking and was employed from June 26, 2012 to August 31, 2012 on which date he was dismissed because he was ignoring instructions regarding certain tasks such as checking the oil and pre-trip inspections on the trucks. He was employed as a truck driver and drove a tandem dump truck, hauling mud. The Appellant was employed 7-10 hours per day and 35-50 hours per week. His attendance was described as good, he had no absences and he had the ability to do the job. The employer stated that the Appellant "didn't like to be told to do things a certain way. He would do things his way." While the Appellant may have been fired from this employment due to insubordination, the evidence shows that the

Appellant had the capacity to regularly attend work, with minimal absences and what has been described as “good attendance” and was able to meet the demands of both jobs without assistance. The Tribunal finds that this further shows that the Appellant had work capacity in 2012.

[54] The Tribunal also considered the evidence of the Appellant that since he began being treated by Dr. Hallett and had a change in his prescription from medications prescribed by Dr. Shane, he had some improvement in his condition. In fact, the Appellant has had no ongoing psychiatric care since 2013.

[55] The Appellant has submitted that his employment since 1987 was not sustainable and that he was unable to work regularly. However the courts have determined (*Canada (MHRD) v. Scott*, 2003, FCA 34) that the word “regularly” is meant to describe the incapacity rather than the employment. Further, the Tribunal looked to *Chandler v. MHRD* (November 25, 1996), CP 4040 (PAB) for guidance which stated that “regularly” means the Appellant must be capable of coming to work as often as is necessary. Predictability is the essence. The evidence of the Appellant’s employers in 2010 and 2012 show that the Appellant’s attendance was good and he was able to attend to work when required and was able to meet the demands of the job.

[56] Having considered the totality of the evidence and the cumulative effect of the Appellant’s medical conditions, the Tribunal is not satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[58] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security