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

Citation: *S. T. v. Minister of Employment and Social Development*, 2016 SSTGDIS 47

Tribunal File Number: GP-14-3005

BETWEEN:

S. T.

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: Verlyn Francis

HEARD ON: June 1, 2016

DATE OF DECISION: June 28, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: S. T.

Interpreter (Tamil): Placid Vimalarajan

INTRODUCTION

[1] The Appellant was 49 years of age at his MQP. He has a Grade 10 education, his first language is Tamil, and he does not write English. He worked as a cleaner from January 1, 2009 to July 21, 2009 when he stopped working due to his car accident.

[2] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 30, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

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

a) The Appellant will be the only party attending the hearing.

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

c) Videoconferencing is available within a reasonable distance of the area where the Appellant lives

d) There are gaps in the information in the file and/or a need for clarification.

e) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[4] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[5] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[6] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[8] 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

Application Materials

[9] In the Questionnaire for Disability Benefits which accompanied his application, the Appellant stated that due to his accident, he is unable to proceed with any physical work. His broken ankle is limiting his ability to work properly. He indicates that his broken ankle impairs

him from doing any work because of constant pain and difficulties manipulating. He has Type II diabetes. He indicates that his accident-related injuries have deprived him of his hobbies such as gardening, bike riding, playing cricket and going on long walks. It has also limited his social activities.

[10] Under difficulties and functional limitations, the Appellant indicated that he cannot stand for a long period; he can walk only for a few minutes. He is unable to carry/lift a lot of weight due to difficulties with balancing. His reaching is normal and he can bend only a bit. He is able to attend to his personal needs and he has no problem with speaking, remembering, concentrating and breathing. He has difficulty with his bowel movements. He can help his wife with household maintenance with some difficulty. He has difficulties with his vision due to diabetes. His sleeping is normal on some days and he has difficulty falling asleep and staying asleep on other days. He is able to drive his car just within the city, not very far. He does not use public transportation due to his leg injury. His medications at that time were NovoRapid 100 units three times daily, Lantus 100 units daily, Crestor 10 mg daily, Amoxicillin 500/125 mg twice daily, Metoprolol 25 mg half tablet twice daily, and Candesartan 16/12.5 mg twice daily. Surgery was planned for November 15 for his left ankle and heel. He was using a brace for his left leg.

Oral Testimony

[11] The Appellant testified that he had Grade 10 education in Sri Lanka. He immigrated to Canada in 1987 and had no further education and did not undertake ESL classes. His native language is Tamil. He can speak some English and understands simple English but cannot write. He does not have any other language skills.

[12] In 1987 he worked for High Light Auto Collision. After two years, he then worked for Lisbon. After two or three years, he went to A & K that he did the same work. Then he went to Rexdale Auto Collision and he was with them for two or three years. He started his own business in 2002 doing auto painting and mechanic. He had two employees. His duties were administrative and he was also doing auto painting and body work. He closed his business in 2009. In 2009, he worked for a cleaning company and ran his business concurrently.

[13] In 2009 he had an auto accident, fractured his left ankle and stopped working. Now he cannot walk properly. There was a "T" fracture and it has not completely healed which affects his walking. For the type of work he had been doing, the ankle joint is very important because it deals with kneeling down, standing up and lifting heavy weights. After the fracture, he was not completely balanced and that makes it difficult. His ankle has continued to affect his ability to work because he cannot stand up for long periods, carry weight or walk long distance. He has also lost his balance and fallen down. After the injury to his ankle, he was in a cast for some period of time but it did not heal completely. He did not have any other treatment. He took Tylenol if necessary. Before leaving work completely, he missed time from work and when he needed to take leave, he did. He had surgery on both kidneys and he had to take time off to remove kidney stones in 2000 at St. Michael's Hospital. At that time, he was working for Rexdale auto collision.

[14] The Appellant testified that from 2002 he had kidney stones and also had pneumonia and had to be hospitalized. He could not handle any job so he was not working at that time. From 2002 to 2011, he was running his own business. In 2009, he had an accident and he could not attend to his business which ran at a loss and he closed it in 2011. Soon after the accident, he could not go in to work because of the pain. He then went in but was not working. He went in to supervise and he was using a crutches. The accident was in 2009 but he had been running that business since 2002. After the accident in 2009, the business started losing money and in 2011 he closed it.

[15] He has diabetes, cholesterol, high blood pressure which started about 12 to 15 years ago. It was diabetes that led to kidney failure. He has been visiting specialists about his kidneys for about three years. Last year his kidney was working at 19 percent capacity and then it subsequently failed completely and for the last five months, he has been going for dialysis three times a week. The side effects of the dialysis are not conducive to continuing working.

[16] The Appellant testified that after dialysis he is completely tired so he does not have the ability to handle people. He has breathing problems and sleeping problems and he has to wear a mask. He cannot walk long distances because he has pain in his ankle.

[17] He had no limitations before Dec 2009 with regard to his diabetes, cholesterol and high blood pressure. He was on insulin at that time. He is able to look after his hygiene without assistance. He lives in a house and, apart from heavy jobs, he can handle other tasks at home. He cannot clear snow but he can water the garden. In 2009 he was sleeping about six hours a night but he did not require medication to sleep.

[18] Since he closed his business in 2011, he has not attempted to work again. He also developed some problem with his eyes after 2011 (about three or four years ago around when he applied for CPP). Because of the severity of the diabetes, he was completely blind for about three months. He had laser treatment and injection for his eyes and he slowly regained his sight. For three months, he could not walk. He tried to get into driving but he could not because of his eyesight. He continues to take medication and treatment for his eyes. Every four months, he has to get injections for his eyes that cost $15,000.

[19] Before 2009, the control of his diabetes was by diet and Metformin tablets but it did not control his diabetes. When he visited his doctor, he said things are going from bad to worse and he was referred to various kidney specialists close to 2009, he thinks. The doctor advised him to apply for benefits and that is when he applied for CPP. He went to the community centre and they helped him to apply for CPP benefit and he was advised to apply for social security benefit.

Medical Evidence

[20] The Medical Report dated April 13, 2012 completed by Dr. Chanmugam Mahendira, family physician accompanied the application. He indicated that he had been treating the Appellant for his main medical condition since July 2005. The diagnoses are insulin dependent diabetes mellitus, bilateral ankle and back pain; and early renal failure with proteinuria. The history was the Appellant fractured his left ankle in 2003, injury to left ankle in motor vehicle accident in 2009, and deterioration of ankle pain / swelling and diabetes. The relevant findings were swollen/tender legs, orthopnea and difficulty with walking. He had been investigated by urologist, internist, endocrinologist, and a cardiologist. His medications were Insulin, Atacand 10/125 and Crestor 10 mg o.d. The prognosis was “unlikely to improve any further”. Under

additional information, Dr. Mahendira indicated that the Appellant was unfit for any physical work; had difficulty coping with even day-to-day activities.

[21] On April 1, 2013 a second medical report was received from Dr. Mahendira indicating that the diagnoses were Type II diabetes, hypertension /congestive heart failure, fracture of left ankle – chronic pain; obesity, old lacunar stroke; peptic ulcer disease, renal calculi, chronic constipation; and benign prostatic hypertrophy. In the history, he indicated the Appellant has multiple problems: bilateral pedal edema, shortness of breath, impaired mainly by chronic ankle pain. The relevant findings were dyspnea/allopenia, bilateral pedal edema and difficulty walking. He was being followed by an endocrinologist, nephrologist, cardiologist and urologist. His medications were Candesartan 16/125, ECASA 81 mg, Crestor 10 mg, Insulin, and Lactulose 30 ml. The prognosis was uncertain / guarded. In additional information, he indicated "unfit for any physical work. Has difficulty in coping with day-to-day activities".

[22] Dr. Xi Shan, nephrologist, wrote to Dr. Mahendira on October 27, 2015 that he had assessed the Appellant regarding CRI with nephrotic range of proteinuria secondary to diffuse and nodular diabetic glomerulosclerosis (biopsy proven). The Appellant's medications at that time were Furosemide 40 mg bid, Metoprolol 12.5 mg bid, Amlodipine 5 mg bid, ECASA 81 mg od, Crestor 5 mg od, NovoRapid 10 U t.i.d, Lantus 20 U qhs, and Allopurinol 100 mg od. The Appellant had an angiogram on October 15, 2015 and his creatinine increased dramatically to 440. Dr. Shan's plan was to check the creatinine every two weeks, refer the Appellant to the Kidney Care Clinic to prepare him for future renal replacement therapy, order tests and see him in the Kidney Care Clinic in December 2015.

[23] The Appellant had an appointment to attend an education session on January 8, 2016 regarding options for Advanced Chronic Kidney Disease which was arranged by his nephrologist.

[24] On January 23, 2016, the Appellant was admitted to hospital and discharged on January 30, 2016. Dr. Pieter Josef Jugovic reported that the diagnosis was acute–on-chronic renal failure at admission and discharge. The Appellant's past medical history were hypertension; Type 2 diabetes; and advanced renal disease, stage 5, secondary to diabetic nephropathy. His symptoms were increasing bilateral lower leg edema and exertional dyspnea and orthopnea in the days

preceding admission. His family physician directed him to the Emergency Department and at admission he had a high serum creatinine of 686. At his admission, the Appellant had symptoms consistent with volume overload secondary to acute-on-chronic renal failure. He was aggressively diuresed to improve his fluid status and at the time of his discharge, he was feeling better. He was seen by Dr. Shan from nephrology who assisted with the Appellant's diuresis.

His medications were adjusted and his pre-admission medications were stopped. This elevated his blood pressure. There were follow-up appointments scheduled to determine whether he should start peritoneal dialysis. He medications on discharge were: Enteric-coated aspirin 81 mg p.o. daily, Allopurinol 100 mg p.o. daily, Norvasc 5 mg p.o. b.i.d., Calcium carbonate 500 mg p.o. t.i.d., Colace 100 mg p.o. b.i.d., Ferrous fumarate 300 mg p.o. at bedtime, Lasix 80 mg p.m. b.i.d., Metolazone 2.5 p.o. b.i.d. taken before Lasix doses, Metoprolol 50 mg p.m. q.12h., Senokot 2 tabs p.o. at bedtime, Sodium carbonate 1 g p.o. b.i.d., Crestor 5 mg p.o. at bedtime, PEG 3350 at 17 g p.o. daily, and Lantus insulin 10 units subcutaneously at bedtime.

[25] At discharge on January 30, 2016, the Appellant's creatinine level was down to 766 from a high of 833. Dr. Shan saw a need to strike a balance between the Appellant's peripheral edema and his need to have a functional renal reserve should he start peritoneal dialysis and he scheduled follow-up appointments with the Appellant to move to the next step.

SUBMISSIONS

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

a) His is disabled by Type II diabetes, hypertension, congestive heart failure, chronic ankle and back pain, bilateral pedal edema chronic pain, obesity, peptic ulcer, and advanced chronic kidney disease, and acute-on-chronic renal failure which requires him to undergo dialysis three times a week.

b) The Appellant submits that he should receive SST benefits because he has no other source of income and he has to generate income.

c) He had been working with various companies since 1987 to 2000. He had always been working and paying taxes since he came to Canada. He could not work in 2002 developed pneumonia and was suffering from kidney stones and had surgery.

d) From 2002 to 2011 he was running his own business and generating income. He was sick during this time but he did not keep track of it because it was his own business. In 2009, he had the accident and suffered the fracture of his ankle and he eventually had to close down.

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

a) The Appellant bases his disability claim on his broken ankle when he stopped working in July 2009 due to the car accident, and a long history of type 2 diabetes mellitus. However, the medical evidence does not show a serious pathology or impairment which would prevent him from doing any suitable work on or prior to his MQP and continuously thereafter.

b) While he developed complications relating to diabetes, including retinopathy and nephropathy, there is no indication that these conditions were severe and would have prevented him from performing all types of work at his MQP of December 31, 2009.

ANALYSIS

[28] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2009.

Severe

[29] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A person with a severe disability must not only be unable to do their usual job, but also unable to do any job they might be reasonably expected to do. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Guiding Principles

[30] The principles set out in the following cases assisted the Tribunal in determining the issues on this appeal.

[31] The severe criterion must be assessed in a real world context. 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 when determining the "employability" of the person having regard to his or her disability (*Villani v. Canada (A.G.),* 2001 FCA 248).

[32] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[33] The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work (*Ferreira v. Canada (A.G.*), 2013 FCA 81).

[34] The profitability of a business venture is not necessarily an indicator of capacity (*Kiriakidis* v. *Canada (A.G.),* 2011 FCA 316.

[35] If the Appellant did not have a severe disability at the time of his or her MQP, it is not relevant that the Appellant's condition deteriorated after his or her MQP (*Gilroy v. Canada (AG),* 2008 FCA 116).

Application of the Guiding Principles

[36] The Appellant gave credible, straightforward evidence concerning his disabling conditions and how they have affected his life and ability to work. There is no suggestion in the medical evidence that he is a malingerer or is exaggerating his symptoms. To the contrary, the medical evidence supports his evidence.

[37] In assessing the severe criterion in a real world context as required by *Villani*, the Tribunal takes into consideration that, at the time of his MQP in December 2009, the Appellant was 49 years old. He has a Grade 10 education from Sri Lanka and his English language skills are minimal. Since his immigration to Canada in 1987, he has done physical work in automobile repair and office cleaning.

[38] The Respondent submits that while the Appellant bases his disability claim on his broken ankle and a long history of Type II diabetes mellitus, the medical evidence does not show a serious pathology or impairment which would prevent him from doing suitable work on or prior to his MQP and continuously thereafter. The key question for the Tribunal in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work (*Ferreira)*. The Appellant claims that he has been unable to work since July 2009 because of a fractured ankle which causes him constant pain and difficulties walking. In addition, he has a history of insulin dependent diabetes mellitus, hypertension, congestive heart failure and early renal failure with proteinuria. In the medical report which accompanied the application, Dr. Mahendira indicated that the Appellant fractured his left ankle in 2003. He again fractured the same ankle in 2009 in a motor vehicle accident and this resulted in the deterioration of his ankle pain. As the doctor noted in his report, the Appellant was impaired mainly by chronic ankle pain. This confirms the Appellant's evidence that he had to leave his cleaning job and, although he tried to keep his automobile repair work going, he was limited in his ability to kneel down, stand, lift heavy weights, balance, and walk after the July 2009 "T" fracture. He indicates that it has not healed, it affects his walking and he is in severe pain. He testified that, because of his ankle, he loses his balance and falls and this also affects his ability to work.

[39] The Appellant testified that he did not officially close his business until 2011. This, however, does not negate the fact that he was not able to carry out any substantially gainful employment after July 2009. While the profitability of a business is not necessarily an indication of capacity (*Kiriakidis)*, the failure of a business under the Appellant's supervision might be an indication of lack of capacity. In this case, his Record of Contributions showing his last earnings were in 2009 lends credence to his testimony that he was not able to continue working after July 2009. The Tribunal finds that the Appellant's ankle injury was severe at his

MQP in December 2009 and left him incapable regularly of pursuing any substantially gainful occupation.

[40] The Respondent submits that while the Appellant developed complications relating to diabetes, including retinopathy and nephropathy, there is no indication that these conditions were severe and would have prevented him from performing all types of work at his MQP. The Tribunal agrees with this submission. The Appellant testified that by January 2016, he was hospitalized with a diagnosis of advanced renal disease, stage 5, secondary to diabetic nephropathy. However, the medical reports do not indicate that the Appellant's diabetes and renal medical problems were severe at the time of his MQP. As *Gilroy* indicates, it is therefore not relevant that his diabetes and renal condition deteriorated after his MQP.

[41] Taking into consideration all the evidence before it, the Tribunal is satisfied that, on a balance of probabilities, the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[42] The Tribunal must also determine whether a disability is prolonged as set out in the CPP legislation.

[43] In his oral evidence, the Appellant indicated that the second fracture of his ankle was in July 2009. At that time, he was working as a cleaner and also in his own automobile business and he could no longer do either job. His automobile repair business started losing money in 2009 and had to close it in 2011 after he attempted to supervise on crutches and he could not do the work himself. At the hearing, the Appellant testified that his ankle has not healed properly and it continues to affect his ability to work and his activities of daily living since he cannot stand for long periods, carry weight or walk long distance. He has also lost his balance and fallen.

[44] In April 2013, Dr. Mahendira set out the history of the problems with the Appellant's ankle and indicated that the Appellant's limitations are bilateral ankle and back pain which started with an initial ankle fracture in 2003, a second fracture in 2009, and deterioration of ankle pain and swelling. On examination, he found that the Appellant's legs were swollen and

tender and he had difficulty walking. At that time, the doctor noted that the Appellant was unfit for any physical work, and had difficulty coping with even day-to-day activities.

[45] Based on all the evidence, the Tribunal finds that, in accordance with the CPP, the Appellant's disability is prolonged.

CONCLUSION

[46] The Tribunal finds that the Appellant had a severe and prolonged disability in July 2009, when he left work as a result of the car accident that further damaged his ankle. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in April 2013; therefore the Appellant is deemed disabled in January 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of May 2012.

[47] The appeal is allowed.

Verlyn Francis
Member, General Division - Income Security