



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *T. E. v. Minister of Employment and Social Development*, 2016 SSTGDIS 50

Tribunal File Number: GP-14-1925

BETWEEN:

**T. E.**

Appellant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Virginia Saunders

HEARD ON: June 10, 2016

DATE OF DECISION: July 7, 2016

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

T. E.	Appellant
S. S.	Witness
S. M.	Observer

### INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on September 20, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The appeal was originally scheduled to be heard by videoconference on June 8, 2016. It was adjourned to June 10, 2016, due to a scheduling conflict at the Tribunal. The Tribunal also changed the form of hearing to a teleconference for the following reasons:

- a) The issues under appeal are not complex; and
- b) 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] Before the hearing began, the Appellant stated that although his submissions referred to discrimination on the basis of sexual orientation, he was not raising a constitutional challenge to a provision of the CPP or any other legislation. He indicated that he was subjected to discrimination in the workplace, as a result of which he could not maintain employment. This submission is discussed in the Analysis section below.

## **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, 2008.

[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**

[9] The Appellant was born in 1974. He grew up and continues to live in X, a suburb of Vancouver. The Appellant testified that he was frequently teased and bullied when growing up because of his sexual orientation, and that he had a very difficult childhood as a result. He became sensitive to comments made by others, and to invasion of his personal space. He

preferred to be at home where he did not have to worry about being attacked physically or verbally.

[10] After graduating from high school the Appellant began studying part-time at Kwantlen College. In 1995 his mother found him a job at the B.C. Liquor Distribution Branch (BCLDB), and he worked there while attending college. He continued to live in his parents' home, and after his parents separated around 2000 he remained in the home with his mother.

[11] The Appellant testified that the BCLDB was an extremely homophobic work environment, and that he was teased and belittled by his colleagues. This caused him great discomfort, anxiety and claustrophobia. In 2003 he was the victim of an armed robbery while at work, and this was essentially the last straw that caused him to leave that job.

[12] The Appellant was referred by workers' compensation to a psychologist, Maria Undurraga. Ms. Undurraga confirmed by letter dated April 24, 2014, that she saw the Appellant regularly once a week or bi-weekly between April 15 and September 30, 2003, to treat him for the psychological effects of the robbery. She stated that she no longer had records of the sessions other than the dates of the appointments.

[13] The Appellant testified that his sessions with Ms. Undurraga were focused on the effects of the robbery rather than his reaction to the atmosphere in his workplace, although he recalled telling her that he would not be able to return to the BCLDB because of the latter. The sessions ended because Ms. Undurraga told him that he was ready to stop; however, the Appellant did not return to the BCLDB.

[14] In September 2004 the Appellant enrolled in a Bachelor of Fine Arts degree program at Emily Carr University in Vancouver. He was able to transfer some credits from Kwantlen College. He attended the program part-time. He testified that he struggled somewhat with a learning disability and had difficulty focusing, but he managed to graduate in 2006.

[15] In the summer of 2006 the Appellant worked at Air Care as a vehicle tester. Again, he was subjected to harassment in the form of homophobic comments and verbal aggression. These caused discomfort, anxiety and claustrophobia, and at one point he had a fall at work

caused by people screaming and shouting at him. He sprained his ankle and lower back. He resigned from this position after several months.

[16] The Appellant was unemployed for a period, and then through a family member was hired at Costco in Vancouver in December 2006. He testified that he was hired to work as a cashier but he was subjected to harassment and bullying by a co-worker. He was accommodated by the manager, who was his cousin's husband, and so was reassigned to collecting shopping carts and working in the tobacco cage. This was tolerable for a period until the Appellant again felt that he was being subjected to rude and discriminatory comments. He brought these to the attention of management, and at his request his hours were reduced to about three days a week because of the difficulty he had putting up with the workplace environment.

[17] In September 2007 the Appellant enrolled in the Bachelor of Education program at the University of British Columbia. He testified that he had a heavy workload at UBC, and he struggled with his undiagnosed learning problem. He also found that the work at Costco was overwhelming although he had reduced his hours to one day a week.

[18] The Appellant testified that when Costco wanted him to increase his hours, he obtained an Attending Physician's Statement dated October 8, 2007, from Dr. P. Wodynski at his primary care clinic. This stated that he had anxiety and depression related to difficulties at work; that he had sleeplessness, headaches and nausea; and that he displayed hand-wringing, circumlocution and scattered thoughts. The statement indicated that the Appellant's symptoms had occurred over a period of weeks, and that he stopped working because of them on September 30, 2007. He received counselling but no medication.

[19] Subsequent medical forms completed by Dr. B. Klein, the Appellant's family doctor, indicated that the Appellant was determined to have moderate concentration impairment and to be unable to work at regular or modified duties at November 11, 2007. On December 7, 2007, he was declared capable of returning to regular duties. The Appellant testified that his employer was unhappy with his attendance and his reluctance to work more hours, and he was let go that month.

[20] The Appellant testified that he encountered numerous difficulties at UBC. He felt that this was due in part to anxiety and depression that carried over from his experiences at Costco. The UBC program consisted of lectures, classroom work and a practicum. He found the lectures were easiest to manage because he could sit by himself. In the classroom setting there were 25 to 30 other people who he felt were talking about him and invading his personal space, and he had difficulty working with them. His attendance was poor. He started a practicum at a high school in the fall of 2007 but he had difficulties with the supervising teacher and the school ended it after the first week.

[21] The Appellant testified that after failing this practicum he saw his advisers at UBC frequently for assistance. They expressed concerns about his preparation, lack of focus, and the length of time he was taking to complete assignments. One of his professors spent extra time with him but without success. He tried another practicum the following spring and was able to complete it; however, it was recommended that he not continue with the education program. He dropped out of the program in April 2008.

[22] After leaving UBC the Appellant began to work for a drug marketing firm. He got this job through his brother, and he worked with him visiting drug stores to manage shelving, advertising and moving of the product. He began to find the store employees were rude to him, and he started limiting his hours. After three or four months, he quit.

[23] The Appellant then stayed out of the workforce. He continued to live with his mother, along with a brother and a sister who lived in a separate suite. He concentrated on building a portfolio of his art work, and he visited coffee shops and sent applications to participate in art shows. He did not hear back from any of these. He helped with household chores such as cooking and yard work. He testified that he felt comfortable in this setting because he did not have to worry about being bullied or discriminated against.

[24] In the fall of 2009 the Appellant's mother became ill very suddenly. She was hospitalized and died soon after. The Appellant testified that this was extremely traumatic for him and was the catalyst for further mental deterioration. He managed in the short term by becoming somewhat reclusive and focusing on caring for his disabled uncle, who had recently

lost his main caregiver and had moved into the Appellant's home. The Appellant looked after his uncle's feeding, medication and attendance at day programs.

[25] In May 2010 the Appellant decided to take a trip to Mexico. He testified that his siblings were worried about his mental state and tried to convince him not to go. He planned to be there for two or three weeks, but just a day or two after arriving someone said something that did not sit well with him, and he became upset and called his family to help him to get home. He was unable to care for his uncle, who had gone to stay with a cousin and who did not return to the Appellant until late 2010 or early 2011.

[26] After returning to Vancouver the Appellant went to see a counsellor as arranged by a cousin. He believes that as a result of comments he made during that session he was then admitted to hospital over concerns about his mental health. He described that hospital stay as being very traumatic, particularly as it reminded him of his mother's last days. After several days he was discharged on a promise to see a psychiatrist, and this led him to see a Dr. Kogan. He found him very blunt and demanding. Dr. Kogan prescribed medication for the Appellant but told him that he was too young to not be working. The Appellant then determined to find some work. He continued to build his portfolio, and to care for his uncle.

[27] In August 2011 the Appellant found a job caring for patients in a caregiving facility. He testified that he got this job through an acquaintance. He found it very distressing because it reminded him of when his mother was in the hospital. Soon after he began working, he was hired as a community support worker and caregiver at a different facility in X. He enjoyed this job more because it mostly involved taking clients on outings, and he was able to work independently. It also offered him more hours. He found that around this time the employees at the first facility began to make homophobic remarks. He decided to quit that job in January 2012, and he kept the job in X.

[28] The Appellant testified that at first he was given quite a bit of work, but then his hours were reduced somewhat. This was partly at his request, because he was afraid that things would go wrong again as they had at previous workplaces. He worked about 18 to 30 hours a week. He was off work for a few weeks in June 2012 for gall bladder surgery. When he returned the atmosphere in the workplace deteriorated. Again he felt that he was subjected to slurs and

innuendo because of his homosexuality. This culminated in an incident in August 23, 2012, where he felt he was in danger. He left that job and began to collect medical Employment Insurance (EI) benefits.

[29] Dr. R. Taylor completed a medical certificate for EI sickness benefits, dated September 11, 2012. He stated that the Appellant was incapable of working until November 1, 2012, because of anxiety and depression.

[30] After 15 weeks the Appellant began to collect regular EI. He testified that he did not believe he was capable of working at this time, but that he was desperate financially. He testified that he finds any workplace intolerable because of the continued harassment and discrimination he experiences as a result of his sexual orientation. He testified that being at work inevitably leads to stress, anxiety and depression which affect his memory, his concentration and his sleep.

[31] The Appellant's Record of Earnings indicated that he earned income of \$10,628.00 and \$22,630.00 in 2011 and 2012 respectively.

[32] The Appellant stated that he has maintained contact with Dr. Klein, and that he sees several doctors in other clinics as well, including Dr. Taylor and Dr. Van Eeden. He has sought help for his symptoms regularly over the years, although he finds it difficult to talk about what has happened in his past. He testified that most of the counselling he receives tends to focus on whatever incident brought him there, rather than helping him with his general reaction to the continual abuse he perceives in any workplace. He has tried different medications since he first started working at BCLDB. He took risperidone while working at his last two jobs, and found that it helped with some of his symptoms but decreased his happiness. He took it while he was working but has since stopped. He now takes Ativan (lorazepam).

[33] Dr. J. Van Eeden is a general practitioner who the Appellant began seeing in January 2013. Dr. Van Eeden submitted a medical report dated September 11, 2013, to accompany the Appellant's disability application. He stated that the Appellant had symptoms of anxiety and depression that increased at work. He had been hospitalized for one week in May 2011 [2010] for delusional disorder. He was taking risperidone and was responding to treatment, but his



work situation increased his symptoms of anxiety and depression. In a note dated January 11, 2014, Dr. Van Eeden stated that the Appellant needed income assistance because of anxiety and depression, and that he “is not able to work now.”

[34] S. S. is the Appellant’s sister. She testified that she lives in X, also near Vancouver, and that over the years she has seen the Appellant about once a week. She recalled that when they were growing up the Appellant was bullied and beaten up regularly by his schoolmates. He would run home from school or take different routes to avoid being attacked, and he had to attend a different high school to be away from people he had known as a child. She recalled hearing many negative comments directed at her brother.

[35] Ms. S. S. testified that when the Appellant was in his early 20s he seemed to cope reasonably well, although she now realizes that he was probably repressing his trauma and anxiety. When he started working at the BCLDB he began to show signs of being unable to manage his reaction to the atmosphere in the workplace. She felt that the Appellant’s problems were partly a result of his traumatic childhood making him overly sensitive, but that he was truly encountering instances of homophobia and bullying. She stated that “every single thing was a problem” for the Appellant, and that he would complain that people were staring at him or bothering him in other ways. He began to come home and spend time alone in his room.

[36] Ms. S. S. testified that the entire family began to feel that the Appellant needed professional help when he was working at BCLDB. They managed to get him to see a few counsellors over the years, but she felt the Appellant was able to disguise his problems so that whomever he was seeing did not get a true picture of his situation. Their mother was very concerned about the Appellant’s ability to keep a job.

[37] Letters in the file from Ms. S. S. and another sister indicated that the Appellant struggled with work throughout his adult life, and that his condition became worse after their mother died in October 2009. He was diagnosed with anxiety, depression and delusional disorder in 2011. Ms. S. S. stated that Dr. Kogan was wrong in telling the Appellant that he should be able to work, because while he is able to get jobs he cannot keep them. He is reclusive and paranoid, and is often unable to leave the house even when he is on his medication.

## **SUBMISSIONS**

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

- a) He has been diagnosed with anxiety, depression and delusional disorder, which are severe and prolonged and which have kept him from the workforce.
- b) If he reveals his diagnoses to prospective employers, he will not be hired.
- c) He is unable to remain employed because he is constantly under attack in the workplace due to his sexual orientation, and he is fearful of any the workplace and cannot deal with the trauma of these attacks.
- d) His employment from September 2011 to August 2012 did not last and is evidence that he is unable to work.
- e) Discriminatory taunts and bullying such as he endured should not be tolerated. He should not be forced to suffer homophobia at any workplace.

[39] The Respondent submitted that the Appellant does not qualify for a disability pension because he has not established a disability within the meaning of the CPP on or before his MQP of December 2008 and continuously thereafter.

## **ANALYSIS**

[40] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2008. As stated above, these terms are given a specific definition in the CPP. 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.

[41] 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.

[42] It does not matter whether the Appellant was in fact encountering the discrimination he claims, or if he was misinterpreting or hyper-sensitive to normal behaviour by others. Whatever the cause, the Tribunal accepts that the Appellant experienced distress and anxiety in his employment for many years, and that these had an impact on his ability to maintain employment at various times. The Tribunal also accepts that the Appellant made reasonable efforts to obtain treatment, and that he has tried hard to remain in the workforce in spite of repeatedly encountering or perceiving a hostile working environment.

[43] A person should not be forced to work where he or she is subjected to homophobic or discriminatory remarks or bullying. However, this Tribunal does not have jurisdiction to remedy the effects of workplace health and safety issues. The Tribunal is created by statute and only has the powers granted to it by its governing legislation. In this case, its only authority is to determine if the Appellant had a mental or physical condition that was severe and prolonged – as those terms are defined in the CPP – when he last met the contributory requirements to receive a CPP disability pension. That date was December 31, 2008.

[44] The sudden death of the Appellant's mother in 2009 appears to have caused deterioration in his mental state, leading to a breakdown and hospitalization the following year. This does not necessarily mean that the Appellant's condition was not severe and prolonged prior to that.

However, other evidence indicates that it was not.

[45] First, in December 2007, after being off work for over two months because of anxiety and depression caused by the work environment, the Appellant was determined by a physician to be fit to return to his regular duties. Although he continued to have difficulties with his studies and his employment after that, there is no evidence that his psychological or physical condition changed significantly or at all in 2008 from what it was in December 2007.

[46] Second, after his mother's death the Appellant was able to provide daily care to his disabled uncle, except for a period from May 2010 to the end of the year. In spite of previous health issues he was then able to be hired for and hold down two jobs well after he last met the minimum contributory requirements for a CPP disability pension. He chose to leave the first job

after several months, but he kept the second one for almost a year. While this employment may have been difficult for the Appellant, there is no evidence that he was accommodated to any great extent or that he had a “benevolent” employer. He was remunerated for services rendered, and he earned over \$30,000.00 in a period of just over a year. That is a sufficient length of time and amount of income to indicate a regular capacity for substantially gainful employment. It also indicates that, although the Appellant at various times may have had difficulty remaining in particular jobs because of his mental state, his condition was not prolonged; that is, likely to be long-continued and of indefinite duration, by December 31, 2008.

[47] These two factors persuade the Tribunal that the Appellant’s condition was not severe and prolonged on or before December 31, 2008. The Tribunal makes no finding as to the Appellant’s condition after that date.

[48] In reaching this decision the Tribunal does not intend to minimize the difficulties the Appellant experienced in the past or that he may encounter in the future. However, the CPP disability pension is not intended as a broad income assistance program. It has specific eligibility requirements, and the Tribunal does not have jurisdiction to disregard them for compassionate or any other reasons.

## **CONCLUSION**

[49] The appeal is dismissed.

Virginia Saunders  
Member, General Division - Income Security