



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *P. K. v. Minister of Employment and Social Development*, 2016 SSTGDIS 59

Tribunal File Number: GP-15-374

BETWEEN:

**P. K.**

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: Patrick O'Neil

HEARD ON: August 4, 2016

DATE OF DECISION: August 10, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

Appellant P. K.

Appellant's spouse (witness) D. K.

### **INTRODUCTION**

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 17, 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 In person 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) The issues under appeal are not complex.
- d) 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.

## **ISSUE**

[6] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2013.

[7] 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**

[8] The Appellant testified on his own behalf. He was fifty-nine years old at his MQP and sixty-one years old at the hearing. He has a Bachelor of Commerce university degree. He worked as a chartered accountant from September 1, 1979, until he retired November 30, 2006, and save working part time for a friend on small construction projects for other friends for five months in the summer of 2013, has not worked since.

[9] The Appellant was a partner in the Windsor office of a national accounting firm. He noted in the Questionnaire for Disability Benefits (Questionnaire) dated October 11, 2013, he retired November 30, 2006. He testified the accounting firm gave him an option, on four days' notice, either retire or be fired, as he was not adequately fulfilling his duties in the firm. He chose retirement. He was not permitted to attend the accounting firm's office after being forced out. The Appellant's CPP Contributions Statement indicates the Appellant had substantial

earnings from 2007 to 2009, inclusive. The Appellant testified those amounts represent money paid to him as part of the forced retirement settlement, and are not earnings from work during the period 2007 to 2009. The Appellant characterized the money received from 2007 to 2009 in the Questionnaire as administrative, as he did not know how to otherwise report the money received during those years. The Appellant testified he did not work for/at the accounting firm subsequent to November 30, 2006.

[10] The Appellant reported in the Questionnaire and testified the illnesses/impairments that prevent him from working are hearing loss and adult onset Attention Deficit Disorder. In addition, he testified he has suffered from anxiety and depression since his mother died in 1981. He hid this from his wife and employer for many years, as he was afraid of the ramifications of an accountant being labeled as having a mental illness. He said he was initially diagnosed as suffering from Attention Deficit Disorder in 1984, and severe hearing loss several years prior to stopping work in 2006. The Appellant said he has been unable to work since the forced retirement from the accounting firm in November 2006, notwithstanding he claimed in the Questionnaire he has been disabled since September 2009, the date he received the balance of monies owed to him by the accounting firm following his forced retirement.

[11] The Appellant said he has been unable to hear others and accordingly, unable to receive and follow instructions since 2006. Since November 2006, he has been unable to work as he has been unable to concentrate, is easily distracted, procrastinates, is impulsive and inappropriate, hot tempered, rude, and unable to start and complete tasks, all of which he attributes to severe Attention Deficit Disorder, profound hearing loss, depression, and anxiety, all of which intensified since 2006. He testified he has no recollection of events, even those events that occurred the yesterday, last week, or last month. He said his wife provides an agenda to him each day detailing planned activities, and without such written agenda, he is unable to follow instructions or a plan. He testified he becomes anxious if his wife is out of the house for more than a few minutes, as he cannot function without her guidance, and is unable, because of profound hearing loss, to learn of any possible emergency, or call for help. He has tried a multitude of hearing aids, none of which have helped, and instead amplified area noise.

[12] The Appellant was asked regarding the \$7,000 earnings in 2013 noted on his CPP Contributions Statement. He said \$3,500 was received as payment for working with a friend on construction projects for other friends, and \$3,500 was a discretionary payment from a family trust. He said the work for the family friend was heavily accommodated in that he could/did show up for work whenever he chose to attend, worked when he attended only for one to two hours, and often just watched his friend work. He said he believes his friend was paid to hire him by another friend to address his depression and assist him with his finances. The Appellant testified, whenever he did physical work during summer of 2013, he suffered from severe back pain, and required chiropractic treatment.

[13] The Appellant has not looked for work since he was forced to retire from the accounting firm in November 2006, and has not worked, save for the part time work for the friend in the summer of 2013. He said he has not done so, as he has been unable to work due to his physical and mental condition, specifically profound bilateral hearing loss, Attention Deficit Disorder, depression, and anxiety. He was asked if he has been able to do basic bookkeeping type work, as opposed to the more challenging work of a chartered accountant, since 2006. He said he has been unable to do so, as he is unable to focus and concentrate. In this regard, he testified his wife has made all financial decisions for the family since 2006, activities he was responsible for, and competent to do prior to his forced retirement. He testified he has been unable to follow a schedule, take instructions, communicate with an employer or customers, or commit to a job since November 2006. He was asked if he has any intention to look for work in the future. The Appellant responded he would love to be normal and able to work, but has not been normal or able to work since 2006.

[14] The Appellant's demeanor and conduct throughout his testimony and the testimony of his wife was considered by the Tribunal as largely inappropriate. He frequently interrupted the Tribunal member, interjected during his wife's testimony, and was noted to be distracted, irritable, anxious, angry, rude, profane, and loud throughout the hearing. The Appellant was initially unable to hear remarks and questions of the Tribunal member, with the result it was necessary to have the Appellant sit within a foot of the member, and required the member to speak loudly into his left ear throughout the hearing. It was clear the Appellant had severe difficulty focusing, hearing, concentrating, and following instructions from the Tribunal

member throughout the hearing. It was often necessary for the member to provide questions to the Appellant in writing in order to elicit a response.

[15] The Appellant's spouse of forty years testified the Appellant's presentation to the Tribunal was typical the Appellant's conduct since he was forced to retire from the accounting firm in 2006. She noted he has been unable to hear others, unable to take instructions, is quickly frustrated, and becomes angry, fidgety and anxious. She noted he last wore hearing aids some twenty years prior to the hearing. He stopped wearing hearing aids because they did not clarify his hearing, amplified area noise, and increased the Appellant's anxiety and frustration. The Appellant's spouse testified the Appellant's Attention Deficit Disorder has progressively worsened since 1984, and caused in serious difficulties in their marriage, and the Appellant's relationship with his son.

[16] The Appellant's spouse testified the Appellant has not worked at the accounting firm since November 2006. She confirmed he received monies from the firm during the years 2007 to 2009, inclusive, but did not work. She understands the money received was not income from work, but rather part of the settlement of the Appellant's partnership interest.

[17] The Appellant's spouse testified the Appellant, at her urging, worked for a childhood friend briefly in the summer of 2013 doing light construction projects for other friends. She said the friend was aware of the Appellant's inappropriate behaviour and shortcomings, but as a friend, was able to tolerate/handle such behaviour.

[18] The Appellant's spouse testified the Appellant was prescribed new medications for treatment of ADHD since he applied for CPP disability benefits, without significant benefit. She said his depression has progressively worsened since he stopped working, and he has taken an anti-depressant for the past several years.

[19] The Appellant's spouse noted that he and the Appellant used to socialize extensively, but have not done so since the Appellant's hearing loss and ADHD symptoms progressively worsening after he was forced to retire in 2006. She noted the Appellant is unable to hear the telephone or doorbell ring, and it is always necessary to talk directly into the Appellant's face in order to communicate. The Appellant's spouse opined the Appellant has been unable to work

since his forced retirement from the accounting firm in 2006. She acknowledged the Appellant's retirement in 2006 was dictated by his poor job performance. She said, in her opinion, the Appellant has been even unable to do simple jobs, such as basic bookkeeping, since shortly thereafter because of his physical and mental condition.

[20] Dr. Ziter, the Appellant's family physician for thirty-five years, completed the medical report dated December 23, 2013, that accompanied the Appellant's benefit application. His diagnoses were deafness-right ear and adult ADHD, resulting in poor concentration. He noted in the report that he had completed a medical report in 2010 required by Canada Revenue Agency for the Appellant to obtain a Disability Tax Credit (DTC) certificate. He noted the Appellant's current medication was Methylphenidate Hydrochloride (Concerta). He reported the Appellant's impairments are severe and prolonged, and markedly restrict his performance of basic activities of daily living. Dr. Ziter opined in the DTC physician's report the Appellant was markedly restricted regarding hearing and performing mental functions for everyday life and these conditions have existed since 2005.

[21] The Canada Revenue Agency reported March 11, 2011 the Appellant had been determined eligible for the DTC for 2005 and future years.

[22] Dr. Ziter's clinical note of the Appellant's attendance on September 24, 2014, indicated the Appellant reported he is unable to concentrate and cannot complete tasks. Dr. Ziter noted the Appellant's wife said the Appellant is impossible to live with, and is extremely irritable and depressed. Dr. Ziter noted he discontinued Concerta and prescribed Vyvanse and added Cipralex, which the Appellant's spouse testified was for depression.

[23] Dr. Ziter reported October 3, 2014 the Appellant suffers from severe adult Attention Deficit Disorder and depression. He reported the Appellant has been permanently and totally disabled, and was unable to continue working as a chartered accountant. He noted the Appellant has been unable to concentrate and perform tasks needed in his line of work. Dr. Ziter reported the Appellant has had a poor response to medication, and some medication modifications were recently made. In this regard, the Appellant testified Concerta was discontinued, and he was prescribed Vyvanse and Zopiclone in September 2014 without benefit.

[24] Dr. Ziter reported further December 4, 2014 the Appellant has been his patient for over thirty years. He indicated the Appellant is not a malingerer. He opined, as a result of the continuous and uninterrupted nature of the Appellant's disabilities, he is unable to do any substantially gainful occupation in a competitive workforce. He reported the patient's disabilities and multiple medical problems are severe and prolonged, and render him incapable of any substantially gainful occupation in a competitive workforce for the following reasons:

- 1) An inability to maintain attention and concentration for extended periods;
- 2) An inability to perform activities within a schedule, maintain regular attendance, and be punctual within a competitive workforce;
- 3) An inability to sustain an ordinary routine without special supervision;
- 4) An inability to work in coordination with or proximity to others without being distracted by them;
- 5) An inability to accept instructions and respond appropriately to criticism;
- 6) An inability to maintain socially appropriate behaviour;
- 7) An inability to tolerate normal levels of stress; and
- 8) An inability to hear and comprehend communication within a competitive working condition.

Dr. Ziter opined in the report that the Appellant is disabled accordingly to CPP legislation.

[25] Dr. Ziter completed an ADHD Checklist December 4, 2014. He reported the Appellant's current multiple symptoms. He noted the Appellant's current medication was Vyvanse, Cipralext, and Zopiclone. The checklist noted the Appellant has a multitude of severe ADHD symptoms including problems with attention, hyperactivity/impulsivity, and oppositional defiant disorder. The symptoms included difficulty organizing tasks and activities, being easily distracted, forgetful in daily activities, fidgety, talking excessively, interrupting or intruding on others, blurting answers before questions have been completed, temper loss, a refusal to comply with requests or rules, and being angry, resentful, and argumentative.

[26] Ms. Stewart, audiologist, reported December 4, 2014, an audiologic reassessment completed November 24, 2014, showed the Appellant has profound sensorineural hearing loss



in his right ear and moderate sensorineural hearing loss in his left ear. She noted deterioration in the Appellant's hearing since a previous audiologic assessment in May 2009. In this regard, Ms. Stewart noted the assessment in May 2009 showed a moderately-severe sensorineural hearing loss in the right ear and normal hearing in the left ear. She noted the Appellant's spouse reported great difficulty communicating at home, even when in quiet environments. Ms. Stewart noted the Appellant reported he has been diagnosed with ADHD and treated for depression in recent years, and, in combination with his hearing loss, has been prevented from gaining and maintaining employment. Ms. Stewart noted in his better (left) ear, the Appellant has a word recognition score of 56%, meaning, when speech is presented loud enough for him to hear, he is still only able to understand 56% of what is said in a quiet environment, and, given that score, the Appellant always requires face to face communication using visual cues given by the speaker. She noted the Appellant is relying entirely upon his diminished left ear hearing to compensate for the total hearing loss in his right ear. Ms. Stewart noted, sensorineural hearing loss is a permanent hearing loss, and there is no expectation of the Appellant's hearing improving over time.

[27] Dr. Medoro, chiropractor, reported December 4, 2014, the Appellant has been a patient under her care since February 2002. She reported he suffers from hip pain and chronic neck, thoracic and lumbar spine pain. She noted activities of daily living, such as walking, sitting, standing, lifting, and turning his neck, are restricted.

## **SUBMISSIONS**

[28] The Appellant submitted that he qualifies for a disability pension because his disability is both severe and prolonged. He submits he has suffered from depression since 1981, ADHD since 1984, progressively worsening hearing loss since the early 1980s, and back pain since 2002, with severe cognitive difficulties, behavioural difficulties, depression, an inability to communicate, and limitations with respect to walking, lifting, sitting, and bending, making it impossible for him to work at any occupation on a regular basis since he was forced to retire in November 2006.

[29] The Respondent submitted that the Appellant does not qualify for a disability pension because he did not have a severe and prolonged disability on or before his MQP of December 31, 2013.

## **ANALYSIS**

[30] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013.

### **Severe**

[31] The evidence established the Appellant has suffered from ADHD and severe hearing loss since at least 2005, back pain since 2002, and depression since 2013. The Appellant was forced to retire from a longstanding position with an accounting firm or be fired in November 2006 as a result of poor job performance. The evidence established the Appellant worked part time for a few months in the summer of 2013, helping a friend do some renovations for other friends, including building patios and fences. The Appellant was heavily accommodated in that he could attend when he chose, worked only one to two hours when he attended, and sometimes didn't work at all when he attended. He received \$3,500 for five month work.

[32] The Appellant's family physician of some thirty-five years, noted in a medical report that accompanied the Appellant's application for the Disability Tax Credit in 2010, the Appellant has suffered from severe deafness and adult ADHD since 2005, and was markedly restricted in hearing and in performing mental functions necessary for everyday life since. The family physician's report in December 2014 set out numerous reasons he concluded the Appellant was incapable of performing any substantially gainful occupation do to the continuous and uninterrupted nature of his disability. The numerous reasons given, included the inability to maintain attention and concentration, accept instructions and respond appropriately, maintain socially appropriate behaviour, tolerate normal levels of stress, hearing loss, and being unable to comprehend communications.

[33] The symptoms Dr. Ziter reported as precluding the Appellant from working were evident to the Tribunal throughout the hearing. These same issues were noted by the Appellant's spouse

in her testimony. In this regard, the Appellant's behaviour throughout the hearing was generally inappropriate, and noted as inconsistent with behaviour expected of a person seeking favour.

[34] The evidence of the Appellant, his spouse, family physician, audiologist, and chiropractor is to the effect the Appellant's condition has not improved, and has progressively worsened since he last worked in November 2006.

[35] 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).

[36] In *Adatia v. MHRD* (July 22, 2003), CP 20124 (PAB), the Pension Appeals Board (Board) considered the failure of an Appellant to make any effort to retrain and/or obtain less strenuous work. The Board noted there was evidence the Appellant was permanently disabled. The Board stated the following:

“[14] There is no satisfactory evidence before the Board that the Appellant could have worked at lighter work on a regular, gainful basis from December, 1995, onwards. On the contrary, the medical evidence tends to prove the opposite. [15] Under the circumstances, there should be no requirement for the Appellant to show that she has made reasonable efforts at retraining to do less strenuous work, and to make efforts to secure less strenuous work.”

[37] The Appellant has not looked for work since he was forced to retire in November 2006. The Tribunal determined there was no requirement for the Appellant to make any effort to obtain work, or attend any educational upgrading program, as the evidence substantiates he has been incapable regularly of pursuing any substantially gainful occupation since November 2006.

[38] The Appellant and his spouse were considered by the Tribunal as credible witnesses. The Tribunal accepted their evidence describing the debilitating symptoms the Appellant has suffered from and his difficulty functioning on a daily basis since November 2006. There was no indication of exaggeration in their presentation and no mention of it in the reports which support much of their evidence. None of the Appellant's treatment providers or assessors

suggested the Appellant's symptoms did not exist or were exaggerated, and none suggested he is malingering or has been able to work since November 2006.

[39] The Appellant worked for several months in the summer of 2013 for a family friend doing some minor construction projects for family friends. The evidence substantiated he was heavily accommodated, working only one to two hours a day when he chose to attend, and was paid \$3,500 for five months work. The Tribunal concluded it is most unlikely any other employer would accommodate the Appellant to such an extent. In addition, even if accommodated, the Tribunal concluded the Appellant has been unable to work regularly, even at accommodated employment, since he stopped working in November 2006. The Tribunal does regard the Appellant's work with a friend, who the Tribunal regarded as a benevolent employer, in the summer of 2013, as evidence of work capacity.

[40] The Tribunal determined the evidence of the Appellant, his spouse, his longtime family physician, audiologist, and chiropractor substantiate the Appellant has suffered from profound bilateral hearing loss, severe ADHD, depression, and moderate back pain since he was forced to retire from work in November 2006, and has been incapable regularly of pursuing any substantially gainful occupation since. The Tribunal finds the Appellant's disability since November 2006.

### **Prolonged**

[41] The evidence substantiates the Appellant has suffered from depression since 1981, ADHD since 1984, hearing loss since the 1980s, and back pain since 2002, without improvement or expectation of improvement. The Tribunal concluded the Appellant's disability is likely to be continued and of indefinite duration, and accordingly, prolonged.

### **CONCLUSION**

[42] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2006, when he was forced to retire, as he was unable to fulfil the duties of his job. 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 October 2013; therefore the Appellant is deemed disabled in July

2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of November 2012.

[43] The appeal is allowed.

Patrick O'Neil  
Member, General Division - Income Security