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

Citation: *J. D. v. Minister of Employment and Social Development*, 2016 SSTGDIS 71

Tribunal File Number: GP-15-1085

BETWEEN:

J. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Connie Dyck

HEARD ON: August 16, 2016

DATE OF DECISION: September 6, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, J. D.

The Appellant's representative and mother, E. D.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 23, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Appellant was 31 years old at the time of his MQP and in the Questionnaire included with his CPP disability application dated December 23, 2013, he indicated that he had completed grade 9. He noted that he last worked cleaning on November 9, 2009 and that he stopped working because of fear of cross contamination of people saliva. The Appellant stated that he was no longer able to work because of his medical condition on October 10, 2009. He listed the illnesses or impairments preventing him from working to include OCD, panic attacks, high anxiety, social phobia, hear and HSV. As a result of his condition, he was prevented from working because he does not want to be near people because of fear of contamination. He is hyper vigilant towards saliva and cross contamination from himself and others and spends excessive time cleaning after contact and even with the thought of contact. (GD 2-115 - GD 2-121)

[3] This appeal was heard in person for the following reasons:

a) More than one party will attend the hearing.

b) The method of proceeding is most appropriate to allow for multiple participants.

c) The issues under appeal are not 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

[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, 2005. Section 19 of the CPP provides that when an appellant's earnings and contributions are below the year's basic exemption for that year, their earnings and contributions can be prorated if they became disabled during the prorated period. In this case, the prorated period is from January 1, 2006 to January 31, 2006.

[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 or became disabled in 2006 by the end of January.

EVIDENCE

[9] In a letter to the Tribunal, the Appellant's mother stated that she would like to have certain matters dropped and not discussed at the hearing. In particular, she stated that after 2005, the Appellant started to spiral downward with his last job ending in a serious accident to his hand. She stated that there had been enough effort on their part to try to explain the situation without having to go over it again at the hearing and she would like to ask that they follow up from the years 2010 and on and leave the years prior to 2010 in the past. Further, the Appellant's mother stated that they accept the loss of 2005 to 2009 and accept the fact that the Appellant was working these years. (GD 7-1 – GD 7-2)

[10] At the hearing, the Appellant stated that for several months in 2005 he worked 4 nights per week for Direct, driving a 3 ton delivery truck and delivery merchandise to Shoppers Drug Mart. He stated that he started this job in March or April of 2005 at which time he started getting more herpes outbreaks, wasn't sleeping at night and tried numerous medications and finally Restotral. He advised the Tribunal that he was in two accidents with the truck and injured his finger in summer of 2005 and went on Worker's Compensation for a short period. The Appellant stated that he attempted to return to work at Direct, but only day shifts were available. He said he thinks he returned for one or two day shifts but it did not work because he was not sleeping at night.

[11] The Appellant testified at the hearing that he picked up and dropped off bundles of newspapers from the end of 2006 to middle of 2008. He explained that his mother's boyfriend got him this job and in lieu of cash payment, he had the use of a vehicle. The Appellant stated that the job involved working 2-3 hours per night, 6 days a week. He would be at Winnipeg Sun at 1:30 am and pick up the bundles of newspapers and then drop off the newspapers for delivery in the morning. The Appellant stated that he was dismissed from this employment because his employer lost the contract. He further advised the Tribunal that during this time he continued to experience symptoms related to his OCD, however he was able to wear gloves and did not have

to touch any items or have contact with too many people. He noted that he did have 3 vehicle accidents during his employment. The Appellant's mother stated that her son's employer called her and asked what was wrong with her son's mind. The Appellant testified that this employment ended in mid-2008 and his next employment was with Bison Janitorial.

[12] In an Employer Questionnaire, T. L., office manager of Bison Janitorial stated that the Appellant began working for their company as a cleaner cleaning washrooms, offices, and garbage cans on March 2, 2009 and that he quit this employment on November 12, 2009. He worked 4 hours per day, 5 days per week, as this was all of the work available. The Appellant's attendance at work was described as good, his quality of work was satisfactory and he did not need any special equipment or accommodations. Ms. T. L. stated that the Appellant had the ability to handle the demands of the job. (GD 2- 4 – GD 2-6)

[13] At the hearing, the Appellant explained that his job was to wash the floor on the main floor, clean the bathroom and provide security at night. He said the cleaning took about ½ an hour and there was minimal work involved. He stated at he would leave work during his shifts and go home to shower, but his employer did not know this. He stated that if his absence was noticed, he would say he had been downstairs. The Appellant's mother stated that she received a few phone calls from her son's employer during his employment, inquiring as to his whereabouts. She testified that she would make excuses for her son. The Appellant said that he stopped smoking during this time and that his condition worsened and he therefore quit his employment with Bison Janitorial.

[14] The Appellant testified that his condition continued to worsen after he stopped working and he started using gloves all of the time.

[15] In a report dated October 9, 2013, Dr. Lorraine DeWiele, psychologist, stated that the Appellant was seen by herself for treatment of anxiety on one occasion. Dr. DeWiele noted that the Appellant was attempting to complete his Grade 12 education at the Adult Education however he struggled with preservative ideation within in the classroom context. It was noted that the Appellant was generally able to attend class, but he must immediately shower following his departure. It was Dr. DeWiele's opinion that the Appellant would benefit from coping strategies to assist him with alleviation of his anxiety. Specifically, an understanding of the

origin of his anxiety and potential maintaining factors would be of benefit. She further recommended collateral community resources to include the *Obsessive Compulsive Disorder Centre of Manitoba.* The Appellant stated this was 3 hours, twice a week and he had not completed this yet, as it was a struggle to complete and he had conflict with the teachers about them touching their mouths and handling papers. (GD 1-13 – GD 1-14) At the hearing, the Appellant testified that he went a few times to the Mood Disorders clinic and went to one group session in 2014, but instead he had done a lot of research on his own and had seen Dr. Rocquigny since 2014. He explained that he sees Dr. Rocquigny once a month when he talks to him for approximately ½ an hour. The Appellant advised the Tribunal that this has provided some improvement as has using Effexor since 2013 or 2014. He stated that his memory has increased and his OCD symptoms have lessened, although his OCD symptoms remain, but have been slightly alleviated. He further explained that the thoughts are still there, but seeing Dr. Rocquigny and the Effexor help with anxiety.

[16] In a report dated August 10, 2015, Dr. A. de Rocquigny, psychiatrist, stated that he was familiar with the Appellant as the Appellant used to see a colleague of Dr. de Rocquigny when the Appellant was 8 or 9 years old. In addition, the Appellant's mother has been a patient of his since the late 1970s. Dr. de Rocquigny was advised by the Appellant that he started to develop obsessive-compulsive symptoms in 2006 after being diagnosed with herpes. Dr. de Rocquigny further explained that in mid-2005 the Appellant started washing frequently as he had more and more sores. In 2005, he was diagnosed with depression from his family doctor and recommended to see Dr. DeWiele, however, the Appellant did not go. The Appellant was seen by a psychologist in October 2013, which the Appellant reported was the year in which he was at his worst. It was noted that the Appellant's mother has supported him financially since 2009. It was Dr. de Rocquigny's opinion that the Appellant was chronically unemployable for medical reasons. (GD 5-1 – GD 5-3)

[17] Dr. Sud reported on November 12, 2005 that the Appellant had a depressed mood since approximately 2004, was not eating, had poor sleep and poor concentration and memory. He was referred to Dr. DeWiele for depression. The next entry in Dr. Sud's clinic notes is on January 17, 2006 and he noted that the Appellant's depression was much better. (GD 2-95) It was further noted on May 2, 2006 that the Appellant was experiencing stress due to his step-

father's death and on September 27, 2006 it was noted that the Appellant had ongoing stress regarding his employment. In October 2009, clinic notes stated that the Appellant was working as a cleaner, had crying spells and self-neglect. (GD 2-41 – GD 2-59)

SUBMISSIONS

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

a) The symptoms of his OCD prevent him from being able to work;

b) He has a fear of contamination including saliva and cross contamination from himself and others; and

c) He spends excessive amounts of time cleaning after contact and even with the thought of contact.

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

a) while the Appellant cannot currently work, the medical evidence supports that the Appellant would have been capable of work within his limitations in December 2005 and January 2006; and

b) the Appellant demonstrated capacity to work after his MQP and possible pro-rated date as he worked as a cleaner from March 2009 to November 2009.

ANALYSIS

[20] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2005 and continuously thereafter or became disabled in 2006 by the end of January and has been disabled continuously thereafter.

Severe

[21] 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.

[22] 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.

[23] The Appellant's primary condition is symptoms and the effects of OCD. However, it is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of the disability under the CPP. An Applicant must adduce before the Tribunal not only the medical evidence in support of the claim that their disability is "severe" and "prolonged", but also evidence of efforts to obtain work and to manage their medical condition. *Klabouch v. Canada (MSD),* [2008] FCA 33. In this case, while the Tribunal is sympathetic to the Appellant's situation, the Tribunal finds that the evidence does not support that the Appellant's disability is severe as defined in the CPP legislation.

[24] The Tribunal first considered the work history of the Appellant. The Appellant was employed in 2005 and able to regularly work as a delivery person for 4 nights per week. This employment stopped not as a result of the Appellant's medical condition, but because when he returned to work after a workplace injury, his employer could not no longer accommodate him with a night position. The evidence supports that the Appellant was awake at night and therefore working during the daytime was not suitable for him. However, this would not preclude all types of work and in fact the Appellant was willing to return to this position if his night position had remained available to him. The Tribunal also considered the evidence of the Appellant that he was employed for two years between 2006 and 2008 picking up and delivery newspaper bundles. The evidence of the Appellant was that he worked 2-3 hours per night, 6 days per week and was able to do this employment as he wore gloves and it was suitable to him limitations. The employment stopped not because of the Appellant's medical condition, but because his employer's contract ended. The Tribunal looked for guidance to *Petrozza v. MSD* (November 7, 2003), CP 20789 (PAB) which stated that it is not the diagnosis of a condition

that automatically precludes one from working, but it is the effect of the condition on the person that must be considered. In this case, the Tribunal finds that the evidence shows the Appellant had work capacity, although with limitations.

[25] 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 Tribunal considered the evidence of the Appellant's work with Bison Janitorial in 2009. While the evidence of the Appellant was that he would often leave during his shift and go home and shower, the evidence provided by the employer was that his work quality was satisfactory and he was able to handle the demands of the job. Further, the Appellant was able to regularly attend his scheduled shifts which were 4 hours per day, 5 days per week. The Appellant was not dismissed from this employment and there is no evidence to support that his work was unsatisfactory or that he was unable to maintain this employment because of his health condition, but rather the Appellant chose to terminate his employment with Bison Janitorial as he felt his condition was worsening, especially after he stopped smoking.

[26] The Tribunal also considered the medical evidence of Dr. Sud who reported in November 2005 that the Appellant had a depressed mood since approximately 2004, was not eating, had poor sleep and poor concentration and memory. The Appellant was referred to Dr. DeWiele for depression, but he did not attend any appointment with Dr. DeWiele until 2013 when he saw her on one occasion. The next entry in Dr. Sud's clinic notes is on January 17, 2006 and he noted that the Appellant's depression was much better. The evidence of the Appellant was that this was not the case and in fact his depression was not improving. However, the further evidence of the Appellant was that there was some improvement in his condition since 2013/2014 when his condition was being treated with an anti-depressant, Effexor, and that his memory had increased and his OCD symptoms had lessened with medication and therapy.

[27] The Tribunal further considered the medical evidence of Dr. Sud who noted in May 2006 that the Appellant was experiencing stress due to his step-father's death and in September 2006 that the Appellant had ongoing stress regarding his employment. In October 2009, clinic notes recorded that the Appellant was working as a cleaner, had crying spells and self-neglect.

Despite the noted limitations and symptoms of the Appellant's medical condition and his employment, there is no medical evidence to support that his physicians were of the opinion that the Appellant's symptoms or condition prevented him from being able to be employed.

[28] The evidence shows that in 2005, the Appellant was referred to Dr. DeWiele, although he did not attend to see her and that he had stopped taking his anti-depressant medication. An essential element of qualifying for a disability pension is evidence of serious efforts by the Appellant to help himself. This requirement extends to both the obligation to seek treatment and to the burden which accrues to all Appellants of establishing that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and her employability: *A.P. v MHRSD* (December 15, 2009) CP 26308 (PAB). The medical evidence and the evidence of the Appellant support that there was some improvement in the Appellant's condition since 2013/2014 when the Appellant began receiving treatment for his condition in the form of medication and therapy.

[29] While the Tribunal is sympathetic to the Appellant's situation and his limitations, 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 at the date of his MQP or became disabled in 2006 by the end of January.

Prolonged

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

CONCLUSION

[31] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security