



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. H. v. Minister of Employment and Social Development*, 2017 SSTGDIS 8

Tribunal File Number: GP-15-2461

BETWEEN:

M. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Jeffrey Steinberg

HEARD ON: January 9, 2017

DATE OF DECISION: January 19, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. H., the Appellant

Michael Tabar, the Appellant's legal representative

PRELIMINARY ISSUES

[1] On January 4, 2017, the Appellant's representative submitted a package of medical documents to the Tribunal (GD6). A copy was sent to the Respondent the same day. These documents were filed late outside the Filing and Response periods.

[2] At the hearing, the Appellant's representative explained that the reports contained in GD6 were not previously sent to the Tribunal through inadvertence. He asked that they be accepted into evidence. The Tribunal accepted GD6 into evidence.

[3] At the conclusion of the hearing, the Tribunal indicated that it would provide the Respondent with an opportunity to provide any Reply Submissions to GD6. The Tribunal gave the Respondent until January 23, 2017 to provide any Reply Submissions. Upon receipt, a copy would be shared with the Appellant. The Tribunal would then determine whether it required a resumed hearing following receipt of any Reply Submissions. If required, the hearing would be via teleconference. If the Tribunal determined that a resumed hearing was not required, the Tribunal would proceed to render its decision based upon the information before it at that time.

[4] On January 13, 2017, the Tribunal received the Respondent's Addendum Submission. GD8-1. A copy was shared with the Appellant.

[5] The Tribunal determined that it did not require to reconvene the hearing or hear further from the Appellant and proceeded to determine the issue before it based on the evidence received to date.

INTRODUCTION

[6] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 25, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[7] This appeal was heard by Videoconference for the following reasons:

- a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;
- b) There are gaps in the information in the file and/or a need for clarification; and
- c) 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

[8] 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).

[9] 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.

[10] 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.

[11] Pursuant so subsection 66.1(1.1) of the CPP and subsection 46.2(2) of the Regulations, an individual can request the cancellation of a retirement pension in favour of a disability pension only if he is deemed to be disabled before the month the retirement pension became payable.

ISSUE

[12] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2016.

[13] However, the Appellant began receiving a retirement pension in May 2015. Pursuant so subsection 66.1(1.1) of the CPP and subsection 46.2(2) of the Regulations, an individual can request the cancellation of a retirement pension in favour of a disability pension only if he is deemed to be disabled before the month the retirement pension became payable. Therefore, he must be found to be disabled on or prior to April 30, 2015.

[14] 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 April 30, 2015.

EVIDENCE

Documentary Evidence

[15] In his Questionnaire dated August 19, 2014, the Appellant states he completed Grade 10 in Pakistan. He worked between August 20, 2013 and July 7, 2014 as a heavy equipment operator. He stopped working due to a wrist injury. He previously worked in a juice factory in 2011 for one month. He described a left wrist distal radial fracture resulting in constant pain and inability to lift more than 20 lbs. He also described Type 2 diabetes controlled with medication. He stated he cannot sit more than 25 minutes and then starts to experience pain in the legs. He stated the weakness is probably due to age. He has no problem walking and can lift a maximum of 20 lbs with the left hand. He can reach and bend but takes an hour and a half just to get ready in the morning due to his wrist. He stopped cooking because pans are too heavy. He eats out

and does very little household chores. He has a bit of a language barrier and requires a lot of assistance with paperwork. He forgets a lot and has poor concentration which is age related. He has broken sleep and has to get up every 4-5 hours due to diabetes. He can drive a car for short distances only. He is prescribed Tylenol, Diamicron and Janumet. He does home physiotherapy exercises. He uses a splint to keep his wrist from moving around. (GD2-61)

[16] In his CPP Medical Report dated August 18, 2014, Dr. Mughal, family physician, diagnosed healing left distal radius fracture. The Appellant is prescribed Tylenol prn and received physiotherapy. Under Prognosis, he stated “left radius fracture”. (GD2-54)

[17] On June 4, 2014, Dr. Tuli reported on his Trillium Health Centre WSIB Hand Program reassessment of the Appellant. He noted the Appellant was only slightly better after his left distal radial fracture. He had completed 6 weeks of therapy. He continued to complain of weakness and pain. He would continue doing work on modified duties. His lifting capacity was 20 lbs. He was heavy equipment operating and was using all machinery except a larger scraper. He would have a permanent disability with that hand in the future. He had a partial recovery at that point and no further recovery was anticipated. He had reached his maximum medical recovery. (GD6-2)

[18] On June 26, 2014, R. Teufal, OT Reg, reported that the Appellant attended the Trillium Health Partner’s WSIB Specialty Hand and Wrist program for a course of hand therapy focusing on strengthening. He was working on modified duties during therapy. He reported he was running a packer and working 10 hour shifts. He had not returned to work using all equipment, in particular a scraper (which requires high levels of force through the steering wheel) and variable forces being exposed to his upper extremities. R. Teufal recommended that the Appellant be discharged to permanent restricted activities and that his lifting be restricted to a maximum weight of 20 lbs bilaterally on an occasional basis. The Appellant had some limitations gripping with his left hand and might need to reduce his forceful and sustained grip on the left side. He appeared motivated to return to his former duties but voiced some ongoing concerns on discharge about returning to the scraper. R. Teufal stated that the Appellant should be tested to ensure his safety in operating all equipment. He was discharged with some ongoing limitations. (GD6-3)

[19] On September 25, 2014, CRA (Canada Revenue Agency) sent the Appellant a letter advising him that he was eligible for the disability tax credit for the 2013 to 2018 tax years. (GD2-21)

[20] In an Attending Physician's Statement dated July 24, 2015, Dr. Mughal set out a diagnosis of left wrist fracture dating from October 30, 2013. He stated the present condition affects the Appellant's ability to work as he is unable to use his left hand to operate heavy machinery. (GD2-55)

Oral Testimony

[21] He is a surviving spouse. He is turning age 63.

[22] He completed Grade 10 in Pakistan. He took five classes in English. He left high school at age 17. He then went to technical school at a cement factory for 3 years where he studied to be a mechanic and heavy equipment operator. After 3 years, the company provided him with a job operating heavy equipment. He worked there for nine years. He then worked at another company, MK, for six years. He then worked at Cogifor for 10 years. He then worked at PWD for 3 years. During his previous work in Pakistan, he operated a grader, scraper, bulldozer, excavator and crane.

[23] He came to Canada in 2002 and started operating heavy machinery excluding a crane. He was operating a scraper before he injured his hand. He would use his right hand to operate the levers and his left hand for steering. With the grader and bulldozer, he would also require use of both hands to steer and operate the levers. At the end of the day, he would have to use a grease gun to grease the machines. He would have to climb onto the scraper to reach some hard to reach areas and use both hands to operate the grease gun. The scraper had more than 30 spots for greasing. He would also have to check the oil/water/coolant and top them up as required. This did not require reaching high.

[24] The last heavy machine he operated was a packer. It had 4-5 areas which required greasing that were easy to reach. However, he could not grease the machine since he could not operate the grease gun due to pain and weakness in his left hand. Co-workers greased the packer for him.

[25] He previously worked at a juice factory for approximately 3 months doing general labour. He was out of work at the time. He would move cartons weighing 6-10 lbs. He got the job through a recruiting agency. He could not do this work now. He had two functioning hands at that time. Now his left hand is weak. Since he hurt his hand, he has not contacted other employment agencies. He cannot work due to his hand condition. He has not performed work other than operating heavy equipment or general labour work. Once he joined the Union, the Union Hiring Hall would send him to job sites. He would check off a box on a sheet of paper indicating the various machines he knew how to operate.

[26] He has a work related medical condition and a WSIB claim (inadvertently omitted from his Questionnaire). On October 30 2013, he fell while checking a machine and broke his hand. He tried to do his job duties operating the scraper but had to stop due to pain. He went off work. He returned to work as a flag man. While holding a flag, he would command one truck to stop while another truck would pass. He received one hour training on site. He did this job for one week to 10 days. He had to work outside in minus 30 deg. weather. There was no need for a flagger. A driver asked him why he was there, noting that there were only two trucks on site. During holidays, he was required to go on site when no one else was there. There were only two company trucks on site. He would flag the whole day from 7 am to 4 pm and break for lunch. He was told there was no more flagging job that he should operate a packer machine.

[27] After the flag job, he operated only a packer machine. He was not given regular work. He could operate the packer using his right hand for both steering and using the levers. He was given an 8 hour shift and would work on average 1 day a week. The employer did not give him a 10 hour shift. He was able to do the work and would have been able to work an additional two hours if they were provided. In terms of mounting the machine (3 point contact), another operator would park their machine next to the packer he was using, which the Appellant would use to climb onto his machine. Otherwise, he would climb the machine using only his right arm. He could not use his left hand to mount the machine. There were only two steps. He was not able to grease the machine as he could not use his left hand to operate the grease gun. He would check and top up the oil. He last worked on July 2, 2014. The employer stopped calling him over a 16-17 day period.

[28] WSIB never sent anyone to talk to him about his ability to operate the heavy equipment or assess/evaluate the safety of each machine he would operate. WSIB never offered him retraining.

[29] During modified work, he had to fill in a work log reporting when he worked and details about machine breakdowns.

[30] After he was laid off, he did not look for other work such as at the juice factory. He filed for regular Employment Insurance Benefits. He filed his application electronically. He went on the computer himself. He required some assistance to understand a question or two the first time he applied.

[31] In terms of the information in his Questionnaire which states that he cannot sit for a long time due to pain in his legs, the Appellant testified that this condition is much better now, "okay now". While operating the packer, he did not have issues with back pain. He could operate the packer with one hand. He has no issues with standing, walking or climbing stairs. He cannot lift with his left arm due to left hand pain/weakness. He places a grocery bag across his left wrist for carrying.

[32] He cannot cook or wash pots. He buys instant/disposable packaged food. He uses his right hand to fasten buttons. He uses one hand for bathing/washing due to pain. He uses one hand to clean the floor, vacuum and change the bed sheets.

[33] He has no difficulty with speaking but has some difficulty with understanding. He requires assistance with more complicated paperwork or writing a letter with "nice wording." At work, he completed his own paperwork in a daily log. The letters he received from WSIB were handled by the Union.

[34] He has problems with memory due to his diabetes. His memory is "disturbed". He forgets names, etc.

[35] He has difficulty sleeping. He gets up 4 times at night to pass urine. He does not fall back asleep right away (not less than one-half hour). He informed his doctor who said it related to his diabetes. He has been diabetic 5-7 years. The doctor does not want to give him pills to

sleep. Diabetes makes him weak and affects his stomach. He sits on the computer at home after he wakes up or has tea. Sometimes, he naps during the day.

[36] He drives for short distances. He has no problems but does not like going far distances or on high speed roads using one hand. He travels 6-10 kilometres from home and sometimes longer to attend Trillium or his union. He can take public transportation on his own.

[37] After he fractured his left wrist in October 2013, he was treated with a wrist splint. He still wears it. It helps a lot. No other investigations are being considered right now.

[38] He takes Tylenol and Voltaren cream for hand pain. The doctors tell him that his pain will not go away. He completed 6 weeks of hand therapy. In terms of the OT recommendation that he be tested to ensure his safety in operating all equipment, neither WSIB nor anyone else ever carried out such testing. He felt that his progress output on the packer was reduced by 30 % given the fact he was operating it with one hand. The employer saw that his progress was not good.

[39] During an average day he buys some food and visits a friend. He cannot do anything else.

[40] Since he stopped working he has not considered finding other employment or retraining. He is aged and very weak. There is no other type of work he could do. He could not do customer service due to his education. He cannot do other work as he has only one functioning hand. He can read but at times he does not know the meaning. He can spell okay. He cannot write a letter to CPP. He can use a computer for limited purposes. He can use a cell phone.

SUBMISSIONS

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

- a) the cumulative effects of his medical condition amount to a severe and disabling condition. He could not regularly attend and retain a job that could be considered “pursuing any substantially gainful occupation”.

b) the cumulative effects of his conditions, coupled with his 10 years of education received in Pakistan, limited transferable skills centered around physically demanding work, and his difficulty with the English Language, meets the “air of reality” test provided in the *Villani* decision.

c) he was born on X X, X and graduated from high school in Pakistan (2 years of high school). After graduation, he secured work in Pakistan primarily as a heavy equipment operator and mechanic. In 2001, he moved to Canada and continued his career as a heavy equipment operator. He joined the international Union of Operating Engineers in 2003 and relied on the Union Hiring Hall to find him employment. His English language comprehension was limited.

d) In October 2013, he sustained a work related left wrist distal radial fracture, which WSIB recognized as a permanent impairment. He returned to modified work as a flag person. However, he protested the idea that he provided any objective benefit to the company in this role and noted a lack of training. He described this modified position as consisting of intervals standing outside in the extreme cold for an hour or so, then moving back to his car or the work trailer to warm up. This led to two return to work meetings with WSIB to find an alternative suitable offer of modified work. He later attempted the offer of operating the compactor machine. He did not return to consistent full-time hours since the injury. He attributes his limited hours and the fact his injury employer breached their re-employment obligations to his inability to produce on the jobsite.

e) his last day worked was July 2, 2014. He has not been gainfully employed since then. He thought about another attempt working the compactor machine with a different company. He later understood no other employer would be obligated to accommodate him with his left wrist restriction and removed his name on the Union’s Hiring Hall.

f) he received a September 25, 2014 letter from CRA stating he satisfies the eligibility criteria for the disability tax credit.

g) Dr. Tuli discharged him confirming he was only slightly better after the fracture. Given the restrictions, he would not be able to safely mount heavy equipment or service his machine (greasing), an essential duty of the job.

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

a) he is a 60 year old with a Grade 10 education from Pakistan. He describes his main disabling condition as a left wrist fracture. He was not under the care of any specialists and was provided with physiotherapy until well enough to be discharged. Treatment consisted of a simple wrist splint. Between August 2013 and July 2014, he worked as a heavy equipment operator. He stopped working due to his injury. He did not provide a claim date for disability.

b) in the CPP Medical Report, Dr. Mughal stated the only medical issue was a healing left wrist fracture from October 2013. The Appellant reported pain and weakness of the left hand treated with Tylenol 2 and home exercise. In an Attending Physician's Statement (July 2014), Dr. Mughal stated the Appellant was unable to operate heavy machinery. The Appellant, who is now two years post wrist fracture, has recovered sufficiently to work in an alternative job. This type of injury to the non-dominant hand would not result in the level of continued severity or restrictions that would prevent him from working in many suitable jobs.

c) the evidence does not support the presence of a continuously severe medical condition which would prohibit him from returning to the workforce in many types of suitable jobs. The full or partial loss of the use of hand or limb by a person who is otherwise able bodied does not prevent that person from seeking and obtaining employment. There is no evidence suggesting he is unemployable.

d) Additional evidence (employment records spanning from 2001 to 2014, a work history chart for November 2002 to June 2014, and a physical demands analysis (October 2004) while informative, does not support a severe and prolonged disability as of April 2015.

e) Dr. Tuli, orthopedic surgeon, pointed out he returned to his job as a heavy equipment operator. He was deemed capable of working with modifications concerning his lifting ability. In June 2014, Mr. Teufel, OT, reported that the Appellant attended physiotherapy regularly with improvement in his range of movement but voiced concern with respect to the use of the large scraper.

f) the Appellant clearly demonstrated the ability for modified work. Other than the radial fracture which has healed and left him with some limitations (no lifting over 20 lbs.) he does not have any other medical conditions which would warrant receipt of a CPP disability benefit.

ANALYSIS

[43] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before April 30, 2015.

Severe

[44] The Tribunal is satisfied the Appellant would not be able to operate most heavy equipment due to his non-functional left hand, which as he explained in his testimony, requires the use of both hands, one to operate the levers and the other to steer.

[45] This leaves the question whether the Appellant retained residual capacity regularly to perform other work which falls within his functional restrictions.

[46] The Appellant testified that after his workplace injury, he operated a packer machine. He was able to operate it using his right hand both to steer and operate the levels. He indicated that the employer stopped calling him to perform his job, not that he was unable to operate the machine. Although he stated he believed he had reduced productivity output of 30 percent due to the way he was using one hand to operate the machine, the Tribunal has not been provided with any evidence from the employer or WSIB confirming that the Appellant was not productive in carrying out his job duties.

[47] The Appellant also testified that he could not use both upper limbs to climb onto the packer. Either another operator would park their machine next to his, which he would use to

climb onto his packer or he would mount his packer using only one arm. Although the Appellant's representative states that the Appellant could not safely mount the machine and referred to GD414 to support his position, the Tribunal notes that GD14 consists of a document entitled 'The Physical Demands of Operator Maintenance Duties (Operating Engineers Training Institute of Ontario)' which indicates that climbing up and down equipment can be awkward. Some machines do not have proper steps and handrails. This generic information sheet does not indicate that the Appellant's method of mounting the packer was dangerous. The Tribunal notes that the Appellant returned to driving the packer machine following a WSIB return to work meeting. The Tribunal has not been provided with any evidence from WSIB or an on-site Occupational Health and Safety report indicating that the Appellant's method of mounting the machine was dangerous to the Appellant and exceeded his restrictions.

[48] Although the Appellant's representative correctly points out that R. Teufel, OT, stated in his June 4, 2014 WSIB Hand Program Discharge report that the Appellant should be tested to ensure his safety in operating all equipment, the Tribunal notes this was in the context of the Appellant expressing concern about returning to operate the scraper. In any event, this report does not constitute evidence that the Appellant's method of mounting the machine was dangerous or unsafe.

[49] Although the Appellant's legal representative correctly points out that the Appellant was unable to grease the packer given his inability to operate the grease gun with both hands, which he states was an essential duty of the job, the Tribunal notes that the job performance description provided by the Appellant's representative at GD4-8 describing as an essential job duty 'Oil and Lubricate machine on a fixed schedule, applies to the scraper machine, not the packer which the Appellant was performing on modified duties. In any event, assuming that greasing the machine was also an essential part of the Appellant's job duties as a packer operator, there is no issue that the Appellant was capable regularly of driving/operating the packer machine with minor accommodation required to perform the greasing task. This signifies some residual capacity on the Appellant's part regularly to pursue a substantially gainful occupation operating machinery within his restrictions.

[50] If the Tribunal is in error in concluding that the Appellant demonstrated residual capacity to perform the packer job given his need for accommodation to performing the greasing, the Tribunal is satisfied the Appellant was capable regularly of performing the position of flagger or flag man. His discontent with this job appears to relate more that the fact he was working out in the cold and performing what appeared to be an unnecessary job function. He did not testify that he could not perform this job due to his physical condition. He stated he had no difficulty with walking or standing. Although it may be understandable that the Appellant wished to be transferred from flagger to a job which utilized his previous job experience and expertise, the test for CPP disability benefits requires a consideration whether or not the individual is incapable regularly of pursuing any substantially gainful occupation.

[51] The Tribunal is not satisfied that the Appellant was incapable regularly of pursuing the position of flag man either on a full or part-time basis.

[52] Although the Appellant also testified that he has diabetes which affects his memory and sleep in terms of urinary frequency, the Tribunal notes that the medical record is bereft of any evidence concerning the Appellant's diabetes and any associated complications. Also, although the Appellant testified that he has to get up 4 times at night to go to urinate, in his Questionnaire completed in August 2014, he indicated he has to get up every 4-5 hours due to diabetes. The Tribunal notes that terms of an 8 hour sleep, this would signify having to get up once at night. Absent evidence of poorly controlled diabetes which affects the Appellant's memory and sleep, the Tribunal is not satisfied that this condition gave rise to a severely disabling condition on or before April 30, 2015.

[53] Finally, the Tribunal is not persuaded that the Appellant's personal factors precluded him from pursuing suitable work within his accommodations. He performed the modified job of packer operator and was most certainly capable of performing the job of flagman. Neither his age, past work history, education, or language skills rendered him unsuitable for such semi-skilled or unskilled work.

Prolonged

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

CONCLUSION

[55] The appeal is dismissed.

Jeffrey Steinberg
Member, General Division - Income Security