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

Citation: *G. K. v. Minister of Employment and Social Development,* 2017 SSTGDIS 10

Tribunal File Number: GP-15-2440

BETWEEN:

G. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Freda Shamatutu

HEARD ON: January 18, 2017

DATE OF DECISION: January 24, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

G. K. – Appellant

PRELIMINARY ISSUES

[1] The hearing of this appeal was initially scheduled for November 10, 2016 but was rescheduled to January 18, 2017, at the Respondents request as they wanted to develop further information.

INTRODUCTION

[2] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on November 10, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] This appeal was heard by Teleconference for the following reasons:

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

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.

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, 2014.

[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 34 years old when he applied for CPP disability pension benefits. He was born in Ireland and migrated to Canada when he was 7 years old with his family. He has a grade 12 high school education, 4 years college/apprenticeship as an electrician and ESA training as a master electrician. He has worked as an electrician for most of his employment history. He worked as an electrician for Canadian Tire Warehouse from March 28, 2005 until February 13, 2011. He was last employed as an electrician for Greater Toronto Airport Authority from February 14, 2011 to October 19, 2012 when he stopped work due to a brain aneurysm. He is currently still employed by the Greater Toronto Airport Authority but is on long term disability. He has not been cleared to return to work due to an aneurysm suffered on October 19, 2012. He reported inability to work as of October 22, 2012.

[10] The Appellant testified that the impairments that prevent him from working are a brain aneurysm suffered on October 19, 2012 which has resulted in short term memory loss, difficulty concentrating, confusion, difficulty processing information, difficulty multi-tasking, headaches and neck pain. He gets easily overwhelmed, confused, tired, light headed and irritable.

[11] He indicated his functional limitations in the Questionnaire attached to his application and dated October 24, 2014 as sitting more than an hour gives him a sore neck and standing more than 5 minutes makes him tired. He is able to walk for about 30 minutes and can lift weights of up to 20lbs for 5 minutes before he gets tired and has a sore neck. Reaching hurts his neck and bending makes him dizzy and light headed. He is able to complete household chores by pacing himself. He wakes up from sleep every hour. He is able to drive a car for an hour and then has to take a break because his neck becomes sore. His medical history includes mild chronic stutter and mild hypertension.

[12] His treatment includes an endovascular repair of the aneurysm, cognitive behavioural therapy, physiotherapy and medication. He has monthly follow up visits with his family physician to discuss his recovery from the brain aneurysm. His medications include coversyl and atenolol for high blood pressure and Pristiq an antidepressant.

[13] On October 22, 2012, Dr. Neil S. Antman reported that on October 19, 2012, the Appellant experienced an explosive headache which was followed by nausea, vomiting and diarrhea. The headache persisted for 3 days and was associated with neck stiffness and some photophobia. He said a CT scan showed subarachnoid blood in the right Sylvain fissure extending centrally into the subsella cistern. He said the Appellant was admitted to the Intensive Care Unit and underwent a CT angiogram to determine his course of treatment. He noted that the Appellant at the time had borderline hypertension but was not on medication (GD2 – 54).

[14] On October 23, 2012, Dr. D. Rosso reported that the Appellant had a successful endovascular repair of his aneurysm (GD2 – 57).

[15] On October 19, 2013, Dr. P. Marchetti reported that the Appellant’s subarachnoid hemorrhage had resulted in a small bleed but with no damage to the underlying brain and that he had challenges with chronic daily headaches, neck pain, fogged mentation described

variously as confusion or feeling hung over or slow on the uptake. He said the Appellant had reported being poor tempered, impatient and having an aversion to crowds and noise. He reported that the Appellant's neck pain had improved considerably with physiotherapy but continued to have mild to moderate headaches a few times per week lasting one hour or two. The Appellant is said to have graded his pain at about 5/10 and to have indicated that it rarely intensified to a throbbing nauseating headache. It was said to respond to a walk or to off-the-shelf analgesia. Dr. Marchetti reported that on examination, the Appellant was alert, attentive, coherent and fluent in providing his history. His naming and repetition were reported as intact. His tasks of ideomotor praxis and constructional praxis were normal and his short term memory was intact. He noted vague cognitive complaints which he thought were likely due to chronic pain and exertion-related exacerbations of that pain. He did not think it was associated with significant cognitive challenge or injury to the brain. He recommended medication, counselling and cognitive behaviour therapy (GD2 – 53).

[16] On February 11, 2014 the Appellant underwent an Independent Examination Neuropsychological Assessment with Dr. J. Douglas Salmon (Rehabilitation and Neuropsychology). Dr. Salmon reported that an Occupational Rehabilitation Progress Report from Centric Health LifeMark dated December 10, 2013 (not submitted to the Tribunal) had documented that the Appellant continued to present with general deconditioning and functional weakness. He said from a musculoskeletal perspective, there were no barriers to progressing treatment and that the Appellant had been deemed ready to return to a work conditioning program. Dr. Salmon stated that the Appellant had attended cognitive therapy to assist him in his transition to returning to work and other roles of productivity. He said the Appellant had demonstrated weaknesses in areas having to do with attention, memory and psychomotor speed. He diagnosed him with mild to moderate Cognitive Disorder Not Otherwise Specified; Adjustment Disorder with Anxiety/Depressed Mood; Personality change due to subarachnoid haemorrhage; and subdural haematoma. He reported his Global Assessment of Functioning (GAF) with respect to emotional ability and cognition as mild to moderate symptoms and noted difficulty in role functioning. He said the Appellant's cognitive and behavioural deficits likely adversely affected his ability to return to his job as an electrician. He recommended Neuropsychological Reassessment to monitor his progress and the permanency of brain impairment and reassessment (by him) in 10 months. He also recommended brain training to

improve attention mechanisms and cognitive stamina; psychotherapy to address issues with respect to headache, pain, anxiety, depression, and sleep disorder; headache biofeedback to familiarize the Appellant with relaxation/mindfulness techniques and reduce the muscle tension levels, headache frequency and intensity; sleep management to learn sleep hygiene techniques; Neuro-vocational Assessment to assess ability to return to his former occupation; volunteer work to enhance and improve his rehabilitation prospects by providing increased structure to his day, promote social interaction and enhance his sense of self-worth and productivity (GD5 – 52).

[17] The standard medical report in support of the Appellant's application was completed by his family physician, Dr. Nicole Mathews. It is dated November 4, 2014. She reports having known the Appellant since 2012 and that she started treating his main medical condition in October 2012. She diagnosed him with subarachnoid hemorrhage, anxiety and hypertension and said he suffers from some cognitive challenges post subarachnoid hemorrhage worsened by anxiety. She said he had persistent confusion, subjective complaints about poor memory, difficulty multi-tasking and overwhelming anxiety. She said he had ongoing cognitive behavioural therapy and reported his prognosis as "unlikely to improve given length of time since injury".

[18] On November 18, 2014 Dr. Mathews referred the Appellant to Central Intake for his symptoms of generalized anxiety disorder. Donna Campbell-Sterling a registered nurse (CPMHN) reported that at her assessment, he presented as fairly stable and engaged easily in conversation. She said his thought form was well organized and coherent and he had no stuttering. She described his mood as irritable at times and that he had reported his mood as fluctuating with irritability, worry and feeling low at times. She said he had denied any perceptual disturbances and delusions. She said his insight with respect to ongoing treatment and follow-up was good and that he was motivated to follow through with psychiatric supports. She said he had reported having had some benefits from his Pristiq medication which he had been taking since spring 2014. She recommended a referral to the Medication Review Clinic for further diagnostic clarification and to Halton Acquired Brain Injury Association for added support (GD5 – 19).

[19] On January 22, 2015 Dr. Joanna Kis a psychiatrist, diagnosed the Appellant with a longstanding speech dis-fluency syndrome, manifested as stuttering, as well as symptoms of social anxiety partly related to his stuttering. She said the Appellant had increased irritability, impulsivity and increased anger outbursts since his aneurysm in October 2012 and that he endorsed some symptoms of depression but that its severity and duration did not meet the criteria for major depressive disorder. She diagnosis him with social anxiety disorder, in part related to his stuttering, as well as lingering emotional and cognitive sequelae of his ruptured brain aneurysm. She recommended a trial of Risperidone augmentation to his Pristiq to target both his social anxiety symptoms and his stuttering and as a mood enhancer /stabilizer. She said other medications could be considered in the future to tackle his anxiety, decrease his stuttering and increase his speech fluency. She said the Appellant was not sleeping continuously for any great length of time but was getting eight hours of total sleep time per night. She said sleep aid medication could be considered in the future (GD5 – 13).

[20] On June 29, 2016, Dr. Joanna Kis, diagnosed the Appellant with social anxiety disorder related to stuttering; adjustment disorder with mixed anxiety and depressed mood; and cognitive disorder. She recommended medication and psychotherapy and listed his medication as Abilify and Pristiq (GD5 – 14)

[21] On November 1, 2016, Dr. Nicole Mathews, reviewed the Appellant's medical history and reported that he suffered from bleeding into the brain from a ruptured brain aneurysm in October of 2012 and was admitted to the hospital at Trillium Health Partners for coiling of his aneurysm and became her patient shortly after. She reported dealing with sequelae of the brain injury and having been treating symptoms related to his anxiety disorder and high blood pressure. She said after his injury, he suffered from chronic headaches, neck pain and stiffness, persistent dizziness and lethargy and was unable to tolerate loud noises or concentrate. She said in January 2013 he complained of short term memory problems and slower cognitive processing and constant problems taking care of things at home and being overwhelmed with mundane and routine tasks. She said in February 2013 he had an improvement in his headaches, neck pain and dizziness but continued to have persistent problems with poor concentration, irritability and confusion. She said by October 2013, he reported a delay in processing information and constantly forgetting things and inability to concentrate on anything for a

sustained period of time. She reported having diagnosed him with Generalized Anxiety Disorder and severe anxiety in March of 2014 and that he had problems sleeping due to his mind constantly racing. She said treatment with medication improved his anxiety symptoms but did not help his cognitive concerns. She said by August 2014 he continued to complain about difficulty multitasking, poor memory and persistent confusion, inability to focus on details of tasks and to complete tasks that were to complex. She reported having referred him to the Anxiety Day Program but said it did not offer him any benefit and then to Dr. Kis, who suggested a trial of Risperidone which was also not beneficial. She said the Appellant was compliant with treatment and follow up but continues to complain of poor memory, inability to complete complicated tasks, and inability to concentrate on difficult and complicated tasks. She opined that due to the length of time since his injury, he was unlikely to improve and that his cognitive concerns made it impossible to return to his job (GD5 – 3).

SUBMISSIONS

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

a) He has been unable to return to his job since his brain aneurysm in October 2012.

b) He suffers from reoccurring headaches which can be triggered by anything including being in a grocery store or being in the same room as his children and suffers from chronic neck pain despite having had physiotherapy.

c) He suffers from anxiety, gets easily overwhelmed and has difficulty understanding and learning new things. When interrupted he is easily distracted and has a hard time remembering what he was doing.

d) He is unable to multi task or to be in a busy or loud environment. He suffers from short term memory and has great difficulty retaining new information.

e) His family physician has not cleared him to return to work.

f) It is unlikely that his physical and cognitive disabilities will improve enough such that he will be able to return to work.

g) His condition is severe and prolonged.

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

a) The evidence does not support a determination that he is disabled within the meaning of the CPP on or prior to his MQP of December 31, 2014 and continuously thereafter.

b) His disability claim is based on a brain aneurysm and he has diagnoses of a subarachnoid hemorrhage (bleeding in the brain), anxiety and hypertension.

c) His neurologist Dr. P. Marchetti reported that his neck pain improved with physiotherapy and his headaches are said to be mild to moderate and occur only a few times per week, lasting one to two hours and responding to a walk or to "off-the-shelf analgesia".

d) The evidence does not support a finding of a severe condition that would have prevented his regular pursuit of suitable employment at his MQP of December 31, 2014 and continuously thereafter.

e) In an Occupational Therapy Program Progress Report dated December 10, 2013, his occupational therapist is said to have reported that he may be able to return to working as an electrician subject to a neuropsychological assessment identifying his strengths and weakness with respect to his ability to return to his previous occupation.

f) While he feels he is unable to work, the evidence does not show any severe pathology or impairment which would have prevented him from doing suitable work within his limitations on or prior to his MQP of December 31, 2014 and continuously thereafter.

ANALYSIS

[24] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2014.

Severe

[25] 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.

[26] The Appellant was 34 years old with a post-secondary college education as a master's electrician when he applied for CPP disability pension benefits. He was last employed as an electrician until October 2012 when he stopped work due to a brain aneurysm. He described his main disabling condition as a brain aneurysm. He is currently on long term disability with his insurers. He felt he could no longer work as of October 2012.

[27] In November 2014, his family physician Dr. Nicole Matthews diagnosed him with a subarachnoid hemorrhage, anxiety and hypertension and relayed that he suffers from cognitive challenges post subarachnoid hemorrhages which are worsened by anxiety. She, at the time, concluded that he was "unlikely to improve given the length of time since injury". In a subsequent report dated November 2016, she again opined that he was unlikely to improve.

[28] The Tribunal is aware that it is not the diagnosis of a condition or disease that automatically precludes one from working. It is the effect of the disease or condition on the person that must be considered *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB). According to case law, the measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. Furthermore, the determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development),* 2008 FCA 33). This means, the definition of disability under the CPP is inextricably linked to capacity to work. To be entitled to a disability pension an applicant must demonstrate that he or she has a condition which renders him or her incapable of work.

[29] The Appellant suffered a bleeding in the brain from a ruptured brain aneurysm in October 2012 which was successfully repaired. The aneurysm resulted in headaches and neck

pain. His pain was however reported to respond to "off-the-shelf analgesia" and was reported by his family physician family physician Dr. Mathews to have improved by February 2013. Currently his headaches and neck pain are intermittent and are managed with over the counter pain medication. In October 2013, Dr. P. Marchetti, a Neurologist, said the Appellant's neck pain had improved with physiotherapy and that he only had mild to moderate headaches a few times per week. Dr. Marchetti did not find any significant abnormalities on examination and concluded that his vague cognitive complaints were not associated with any significant cognitive challenge or any injury to his brain. The Appellant's headaches and neck pain are not debilitating. He has not required further treatment or consultation in order to deal with the source of the pain. He is able according to what he said in the Questionnaire attached to his application and dated October 24, 2014 to sit for about an hour and able to drive a car for an hour before his neck gets sore. He is able to go for walks for about 30 minutes and able to lift reasonable weights and able to complete household chores by pacing himself. So while he does get headaches and a sore neck, he is otherwise reasonably functional.

[30] Furthermore, in November 2016 his family physician Dr. Mathews reviewed his medical condition from the time of his aneurysm to the date of her report. She documented that his headaches, neck pain and dizziness had improved and only indicated ongoing issues of concern as difficulty multitasking, poor memory and persistent confusion, inability to focus on details of tasks and inability to complete complex tasks. While she opined that he was unlikely to improve and that his cognitive concerns make it impossible for him to return to his job as an electrician, she did not rule out his ability to work at a job suitable to his limitations (GD5-3). This opinion is similar to that made by Dr. J. Douglas Salmon, (Rehabilitation and Neuropsychology) who in February 2014 said the Appellant's cognitive and behavioural deficits "likely adversely affected his ability to return to his job as an electrician". He then recommended measures to improve the Appellant's condition including brain training, brain biofeedback and participating in volunteer work to enhance and improve his rehabilitation prospects and hopefully his ability to return to his employment.

[31] The Tribunal acknowledges that the Appellant has some cognitive issues (memory, concentrations and inability to focus on complex issues) and behaviour issues (anxiety and inability to stand being in crowds) and that these issues affect his ability to return to his job as

an electrician due to his inability to focus on complex issues and his short term memory. These cognitive and behavioral deficits would adversely affect his work performance and efficiency and make him unsafe to work in his trade but they do not preclude him from all work. Case law states that the measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his disability "prevents him or from earning a living". The Appellant is also not precluded from retraining to a job suitable to his limitations or to a job which does not require the same skill set and safety measures as that required of an electrician. He has indicated that he is able to drive for periods of one hour and able to complete household chores albeit while pacing himself. He has been encouraged by his consultants to get involved in volunteer work in order to become more active and to enhance his recovery. Cognitive issues may affect his ability to perform his previous job but would not preclude him from working in a less demanding job or a type sedentary job.

[32] The Appellant is diagnosed with generalized anxiety disorder. In March 2014 his family physician, Dr. Mathews, said his anxiety symptoms had improved with Pristiq. To date, he continues to use Prestiq. It appears that alternate medication has not been required as he has responded well to Prestiq. There are no medical reports submitted to show that his anxiety has worsened. In a mental status examination done in January 2015 (which is post the Appellant's MQP), Dr. Joanna Kis, a Psychiatrist relayed that she did not find any significant abnormalities. She in fact stated that Prestiq "helped to calm him down" and "helped with some emotional ability".

[33] The Appellant is also said to endorse some symptoms of depression. However the severity and duration of these symptoms were found by Dr. Kis, the Appellant's consulting psychiatrist not to meet the major depressive disorder criteria. She recommended adding Risperidone to augment the Pristiq. This however was stopped as the Appellant did not benefit from it and in June 2016, he was reported by the mental health program outpatient services to be using Abilify in addition to Prestiq.

[34] The Appellant's generalized anxiety disorder and his depression do not therefore preclude him from working at a job suitable to his limitations.

[35] In February 2014, Dr. J. Douglas Salmon a Rehabilitation and Neuropsychology specialist diagnosed the Appellant with mild to moderate Cognitive Disorder, Adjustment Disorder with Anxiety/Depressed Mood, Personality change due to subarachnoid haemorrhage, and Subdural haematoma. He documented that his emotional and cognitive Global Assessment of Functioning was mild to moderate and recommended measures to improve his condition. The recommendations included Neuropsychological Reassessment (by him) to monitor the Appellant's progress and the permanency of his brain impairment. He also recommended brain training to improve the Appellant's attention mechanisms and cognitive stamina; psychotherapy to address his headache, pain, anxiety, depression, and sleep disorder; headache biofeedback to learn relaxation/mindfulness techniques so as to reduce his muscle tension levels and headache frequency and intensity; sleep management to learn sleep hygiene techniques; neuro-vocational assessment to assess his return to his former occupation; and volunteer work to enhance and improve his rehabilitation prospects (GD5 – 52). No updated medical report from Dr. Salmon has been provided to show that these recommendations have been implemented and or that they have failed to help the Appellant.

[36] The Tribunal acknowledges that the Appellant continues to experience some physical, psychological and cognitive issues sequelae to his subarachnoid hemorrhage. He however does not endorse severe symptoms or limitations to preclude him from all work. His physical and psychological issues for the most part have improved with treatment and while he continues to have some cognitive issues, these are not so severe as to preclude all work.

[37] Case law says 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).

[38] As of the date of hearing this appeal, the Appellant has not attempted alternate work. According to *Villani*, not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. A claimant must still demonstrate that he or she suffers from a serious and prolonged disability that renders him or her incapable regularly of pursuing any substantially gainful occupation. Medical evidence is required, as is evidence of employment efforts and possibilities. As the Appellant has not attempted any work, there is no

evidence to support that effort at obtaining and maintaining employment has been unsuccessful by reason of the Appellant's health condition.

[39] The Tribunal has considered the *Villani* factors. The Appellant was only 34 years old at his MQP of December 31, 2014. He has a good college education and is proficient in the English language. While he has some ongoing cognitive issues, his family physician and his consultants have not ruled out the ability to work at a job suitable to his limitations. Brain training to improve his attention ability and cognitive stamina have been recommended and remain a possibility. Retraining to a job suitable to his limitations also remains a possibility.

[40] The totality of the evidence does not support that the Appellant suffered from a severe disability that made him regular pursuing any substantially gainful occupation at his MQP of December 31, 2014 and continuously thereafter.

Prolonged

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

CONCLUSION

[42] The appeal is dismissed.

Freda Shamatutu
Member, General Division - Income Security