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

Citation: *L. D. v. Minister of Employment and Social Development*, 2017 SSTGDIS 20

Tribunal File Number: GP-14-3159

BETWEEN:

L. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: February 9, 2017

DATE OF DECISION: February 13, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

L. D.: Appellant

Hadeel Kamal: Appellant's representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 30, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on August 21, 2014.

[2] The hearing of this appeal was by videoconference for the following reasons:

a) The Appellant will be the only party attending the hearing;

b) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;

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

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.

ADJOURNMENT

[3] The appeal was initially scheduled to be heard on September 28, 2016. On October 20, 2016 the hearing was adjourned at the request of the Appellant to February 9, 2017 because the Appellant's representative required additional time to obtain and file WSIB documents as well as medical reports relating to additional treatment.

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] The Tribunal finds that the MQP date is December 31, 2011. [ROE: GD2-4]

[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.

BACKGROUND

[9] The Appellant was 41 years old on the December 31, 2011 MQP date; he is now 46 years old. He was born in India and came to Canada in 1995. His employment history in Canada includes working as a gas station attendant for a Shell station; working as a packer/shipper for a window manufacturing company; and lastly working as a long haul truck driver. On November 25, 2009 he suffered multiple injuries when a truck in which he was asleep in the trailer's back cabin plunged 85 feet from a bridge to the river below. He has not worked since the motor vehicle accident (MVA).

APPLICATION MATERIALS

[10] In his CPP disability questionnaire, signed on October 25, 2013, the Appellant indicated that he had a grade 10 education in India and that he has a truck driving license. He noted that he last worked as a self-employed truck driver from April 18, 2004 until November 25, 2009; he stated that he stopped working because he was injured. He claimed to be disabled as of November 25, 2009. He indicated "see doctor report" with respect to his medical information and his difficulties/functional limitations. He stated that he was taking Celebrex (200 mg, once daily), that he had gone for physiotherapy and that no future treatments or medical tests were planned. [Questionnaire: GD2-69 to 75]

[11] A report dated October 22, 2013 from Dr. Dhillon, the Appellant's family doctor, was submitted in support of the disability application. The report diagnoses a left distal radial fracture with open reduction, a left ankle fracture with internal fixation, and a back injury with L4-L5 disc bulge with possible impingement of traversing L5 nerve compression. The report notes that the Appellant sustained multiple injuries in a MVA in November 2009. The prognosis is chronic pain. [GD2-44]

Initial Application

[12] This is the Appellant's second disability application. His initial application was date stamped by the Respondent on November 28, 2012 and denied on March 5, 2013. The Appellant did not request reconsideration.

[13] In his CPP disability questionnaire, signed on November 26, 2012, which accompanied his initial application the Appellant indicated that the illnesses or impairments that prevented him from working include a broken left wrist, a broken left ankle and an injured back. With respect to difficulties/functional limitations he indicated that he could sit, stand and walk for one hour; that his back hurts when he reaches; that he cannot bend; that he cannot sleep for more than one hour; and that he can drive for one hour. [Questionnaire: GD2-123 to 129]

[14] A report received on December 4, 2012 from Dr. Dhillon was submitted in support of the initial application. The diagnoses were similar to those in his October 22, 2013 report. The prognosis was "unknown at present." [GD2-98]

ORAL EVIDENCE

[15] The Appellant reviewed his education and employment history both in India and in Canada. He described the accident in November 2009. He described his injuries and subsequent medical treatment. He stated that as a result of his injuries he has ongoing limitations with his left hand (he is left handed), his left foot, and his back. He stated that he also suffers from depression and sleep difficulty.

[16] With respect to his left hand he stated that it becomes very painful if he uses it; that he can't lift more than 5 lbs; that he can't cut the grass or clean the snow; that he can only use his left hand "a little bit"; and that this is very difficult for him because he has been left handed his whole life and now he can only use his right hand. He also stated that his left hand isn't painful when he doesn't use it. With respect to his left foot he stated that it is swollen and that he has difficulty putting on shoes – he usually wears slippers. He stated that he can walk and stand for 1 to 1 ½ hours and then his ankle starts to swell up and be painful. With respect to his low back he stated that he can't sit for long – a maximum of 1 to 1 ½ hours.

[17] He stated that he has been taking two Tylenol #2 a day since the MVA for his pain. He was not taking any other medications as of the December 2011 MQP. He started taking sleep medications and an anti-depressant about four months ago. With respect to his depression he did not undergo any further counselling since he last saw Dr. Pilowksy in December 2010. He was not undergoing any treatment for depression as of the MQP date. He started seeing a psychiatrist about 4-5 months ago and has seen him twice – the psychiatrist prescribes an anti-depressant. He could not recall the name of the psychiatrist. Other than the Tylenol #2 prescribed by his family doctor, he has not undergone any other treatment for his conditions since 2010.

[18] He has not looked for work since the MVA. When asked why not, he stated, "I can't put my shoes on or lift any heavy stuff...I can't read or write in English...I can't do any kind of job." He has not made any efforts to upgrade his English language and employment skills. When asked why not, he stated, "I don't know about that kind of stuff."

[19] He has recently been approved for WSIB benefits. Apparently this was delayed because there was a dispute as to whether he was an employee or self-employed at the time of the accident. Ultimately the WSIB determined that he was an employee and he has only recently started to receive WSIB benefits. He is now receiving full Loss of Employment (LOE) benefits of $450 per week from the WSIB. He recently underwent a psychovocational assessment (which was not in the hearing file) and is starting to receive treatment through the WSIB. It is not clear at this point as to the extent and nature of treatment that he will be undergoing and whether the WSIB will be placing him in a Labour Market Re-entry (LMR) program.

[20] He lives in a two-story house with his wife and two children ages 15 and 17. He described his usual day and stated that there has not been a significant change since the MQP. He might go for a 15 minute walk; watches television; walks around inside the house; sits on the sofa; and sleeps. He stated "that's it." He reads Punjabi newspapers. He doesn't know how to use a computer. He doesn't like to go out anymore and stated that he no longer attends functions and rarely goes to the Temple. He stated that his whole life has changed...he had his truck and most of his house paid off ...now he can't even think about the future. He stated, "Now my brain is almost dead ... 10 years ago I had everything ... now I have nothing."

MEDICAL EVIDENCE

[21] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[22] A CT of the lumbar spine on July 23, 2005 revealed mild diffuse disc bulge at L4-5 causing minimal indentation on the anterior thecal sac. [GD8-10]

[23] On December 4, 2009 Dr. Karabatsos, orthopaedic surgeon, reported that the Appellant had sustained a fracture of his left wrist and also complained of left foot pain. On examination his left foot was entirely unremarkable although there was some swelling; no fracture was identified in the foot; and Dr. Karabatsos thought the left foot would gradually improve with time. He referred the Appellant to Dr. Kim for further management of his left wrist. [GD8-19]

[24] There are reports from Dr. Kim, orthopaedic surgeon, running from December 10, 2009 to August 5, 2010.

[25] Dr. Kim's December 10, 2009 report notes that the radiograph indicates a left distal radius fracture with a dorsal tilt of 20 degrees and that the Appellant will need a left distal radius open reduction internal fixation. [GD8-22]

[26] On December 16, 2009 Dr. Kim performed a left carpal tunnel release and a left distal radius interarticular open reduction internal fixation. [GD8-27]

[27] Imaging on January 16, 2010 revealed post fracture related uptake distal left radius and possible mild bone contusion uptake in the left greater than right ankle with no demonstrated fracture. [GD2-48]

[28] On January 28, 2010 Dr. Kim reported that the Appellant has been doing his occupational physiotherapy and that he continues to have some slight index and long finger numbness. They were going to increase the aggressiveness of the Appellant's therapy with no restrictions. [GD2-53]

[29] On March 25, 2010 Dr. Kim reported that according to their therapist the Appellant had become quite obsessed with his left volar wrist wound and was using that as an excuse not to be pushing harder with his therapy. [GD8-462]

[30] On April 1, 2010 Dr. Kim reported that the Appellant "has become quite obsessed over a swollen area at the distal end of his FCR (flexor carpi radialis) incision on the left wrist and this has become quite a barrier for him in therapy." The Appellant had no new complaints at that time. Dr. Kim noted that the ultrasound demonstrates that there is no abscess or seroma and that there is some tenosynovitis of the flexor carpi radialis tendon. He reviewed the results with the Appellant and "tried to appease his centre of focus of his obsession." [GD2-56]

[31] On July 15, 2010 Dr. Pilowsky, psychologist, reported that the Appellant's pain, physical discomfort and decreased psychological functioning following the MVA have prevented him from fully resuming all activities of daily living and that due to his pain symptoms and intense fear of driving trucks he is not able to work at this time. Dr. Pilowsky diagnosed post-traumatic stress disorder and assessed a Global Assessment of Functioning (GAF) of 45. She recommended 12 psychotherapy sessions. [GD8-474]

[32] On August 5, 2010 Dr. Kim reported that the Appellant complains of some stiffness to the left wrist; that he has difficulty making a fist; and that he complains of pain to the palm. Dr. Kim noted that the Appellant no longer has any swelling or erythema at the volar wrist incision and that the radiograph demonstrates that the left distal radius has healed well. Dr. Kim opined that the Appellant has done very well in consideration of the type of trauma that he received and that he has reached the point of maximal medical improvement. [GD2-64]

[33] On August 20, 2010 Dr. Keeling, psychologist, in a rebuttal report addressed to the Appellant's lawyers reported that the Appellant appears to have predominantly an ongoing pain problem; that this is a limitation for him in terms of returning to his pre-accident housekeeping functions; that his chronic pain condition has not been acknowledged by the physical assessors who assessed the Appellant for the insurer; and that this needs to be recognized in the holistic sense of dealing with a person as an integration of various impairments. He opined that the Appellant has a substantial inability to engage in his pre-accident housekeeping tasks and recommended a psychological assessment from a chronic pain perspective. [GD8-451]

[34] On December 16, 2010 Dr. Pilowsky reported that the Appellant had completed his ninth psychotherapy session and that he intendsSally1952 to complete the twelve approved sessions. She again diagnosed post-traumatic stress disorder and assessed a GAF of 55 (in July 2010 she had assessed 45). She recommended an additional six sessions. [GD8-419]

[35] On February 23, 2011 Dr. Stevens, chiropractor, reported to the insurer on his chiropractic assessment of the Appellant on February 15, 2011. The Appellant's chief complaints were neck pain, lower back pain, wrist pain and left ankle pain. Dr. Stevens' impression was cervical spine myofascial pain (resolving); lumbar spine myofascial pain (resolving); and left wrist sprain/strain and associated pain (resolving). He noted that testing revealed that all of the above may be subject to symptom magnification and pain limiting behaviour. He indicated that Waddell's testing was significantly suggestive of pain magnification and/or psychological overlay with 5/5 tests positive. He concluded that from a chiropractic musculoskeletal perspective no further treatment or rehabilitation was required at that time. [GD8-373]

[36] On January 12, 2012 Dr. Stevens reported to the insurer on his Functional Abilities Evaluation of the Appellant on December 10, 2011. The report indicates that the Appellant gave

inconsistent effort with 18 of 24 consistency measures and stated that no definite conclusions regarding the Appellant's ability to return to his pre-MVA employment responsibilities could be given. The report sets out a functional summary which could only provide baseline information regarding function and states that "it must be considered that the evaluee may be able to perform at a higher level." The functional summary included: sitting for 60 minutes; standing for 80 total continuous minutes; walking at frequent ability with lower back pain reported; stooping and crouching with lower back pain reported; lifting at the light level; carrying 10 lb. weight for several repetitions only; sustained balance tasks without using external support; reaching at shoulder level; low handgrip strength; and full cervical spine active ranges of motion with mild pain reported at the end ranges. He opined that the Appellant does not suffer a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. [GD8-286]

[37] On January 12, 2012 Daniel Egarhos, vocational consultant, and Dr. West, neuropsychologist, reported to the insurer on their psychovocational assessment of the Appellant on December 16, 2011. The Appellant reported that he was not participating in any organized rehabilitation at the present time and noted that he did participate in the past and it was helpful. He also reported that he now just performs some home based physiotherapy exercises and that he also has a treadmill and a gym machine at home which he utilizes regularly. Although the Appellant reported some physical limitations he reported no limitations or restrictions with regards to any domain of functioning from a purely mental health perspective. Based on a transferable skills analysis taking into consideration the Appellant's work history aptitude profile, work history job duties and education the report concluded that the Appellant should be able to undertake his pre-accident vocation of truck driver provided he was not required to undertake any manual loading/unloading of freight (most long-haul truck driving jobs do not include handling of freight); that his earlier vocation of gas station cashier was included as a viable transferable skill; and that his other pre-accident jobs of shipper and delivery driver were omitted since they were both rated at medium strength level. The report also details other vocational options including parking lot attendant or variant, bus driver and public works maintenance equipment operator. After extensive testing the report concluded that the Appellant does not meet the specific criteria for any DSM-1V diagnosis and assessed a GAF

of 70-75. The report opines that from a purely mental health perspective the Appellant does not suffer a substantial inability to engage in the essential tasks of his employment. [GD8-261]

[38] On January 12, 2012 Dr. Sekyi-Out, orthopaedic surgeon, reported to the insurer on his orthopaedic assessment of the Appellant on December 20, 2011. The Appellant described his symptoms in order of severity as left wrist pain, left medial mid foot pain and low back pain. The Appellant reported that he was presently not working; that he had made no attempt to return to work; and that he was unable to return to work because of difficulty wearing shoes. He described a walking tolerance of two hours; a standing tolerance of two hours; and a sitting tolerance of less than two hours. After a detailed review of the history and medical documents and a thorough physical examination, Dr. Sekyi-Out concluded that that although the Appellant had sustained a permanent impairment in function of his left wrist, he should be able to participate in his pre-accident job tasks at regular hours and regular dates. He opined that the Appellant does not suffer a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. [GD8-248]

[39] On January 12, 2012 Dr. Trotti, neurologist, reported to the insurer on his neurological assessment of the Appellant on December 29, 2011. He noted that that the Appellant continued to complain of intermittent left ankle pain and swelling, as well as left wrist pain and a sensation of reduced pain in the left hand. He also complained of an interrupted sleep pattern and stated that he was troubled by persistent low back pain. He was using sedatives to aid in his sleep and utilized analgesics as needed. After conducting a clinical examination and reviewing the medical documents, Dr. Trotti concluded that from a clinical neurological perspective there is nothing to prevent the Appellant from engaging in all of his pre-accident employment and non-employment related activities. [GD8-239]

[40] A MRI of the Appellant's lumbar spine on August 30, 2012 revealed a L4-L5 disc bulge with possible impingement of the traversing left L5 nerve root and congenital shortening of the pedicles. [GD2-102]

[41] On August 23, 2013 Dr. Wilderman, pain management, and Dr. Maano, chiropractor, reported on their assessment of the Appellant. The Appellant reported that he continued to experience left wrist pain, lower back and left lower limb pain, and left ankle pain. The

Appellant also related feelings of depression and reported decreased energy levels, increased fatigue and lethargy, and feelings of stress and anxiety stemming from the MVA. The report opines that the Appellant is substantially unable to perform the essential tasks of his pre-accident employment. The report recommends structured physical rehabilitation efforts. The report also recommends a comprehensive multi-disciplinary assessment to determine catastrophic impairment including a psychological assessment, an orthopaedic assessment, a neurological assessment, a functional abilities evaluation and an occupational therapy home site catastrophic assessment. [GD1A-13]

[42] A MRI of the left ankle on September 28, 2014 was within normal limits and no cause for the Appellant's symptoms was seen. [GD8-122]

SUBMISSIONS

[43] Ms. Kamal submitted that the Appellant qualifies for a disability pension because:

a) The MVA has left the Appellant with chronic pain in his left wrist, left foot and back as well as depression and post-traumatic stress disorder;

b) The Appellant has been unable to do any type of work since the MVA;

c) The Tribunal should take into account the severity of the MVA and impact of both his physical and psychological conditions;

d) The medical evidence confirms that all of the disabling conditions were extant prior to the MQP and the Appellant has followed all recommended treatments – he should not be faulted if his family doctor failed to send him for further treatments;

e) The Tribunal should also take into consideration the Appellant's limited education, his limited English language skills (he cannot read or write in English), his narrow work history which has involved only physical work, as well as his physical and psychological barriers due to his conditions.

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

a) The evidence does not show any severe pathology or impairment which would have prevented the Appellant form performing suitable work within his limitations on or prior to the December 2011 MQP, or continuously thereafter;

b) There is no evidence of any further treatment or follow-up with a specialist for the Appellant's conditions (left wrist, left ankle, back, depression) since 2010;

c) There is no evidence of the Appellant requiring chronic pain management or of his being referred to a chronic pain specialist;

d) There is no indication that the Appellant has attempted alternate work.

ANALYSIS

[45] The Appellant must prove on a balance of probabilities he had a severe and prolonged disability on or before December 31, 2011.

Severe

[46] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

[47] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2011 he was disabled within the definition. The severity requirement must be assessed in a "real world" context (*Villani* 2001 FCA 248). The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[48] It is clear that the Appellant continues to suffer from significant chronic pain in his left wrist, left ankle and back. However, chronic pain is not sufficient to establish a severe

disability; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB).

[49] When describing his difficulties/functional limitations in his November 2012 disability questionnaire (paragraph 13, *supra*) the Appellant indicated that he could sit, stand and walk for one hour. In his oral evidence at the hearing the Appellant stated that he can walk and stand for 1 to 1 ½ hours and that he can sit for a maximum of 1 to 1 ½ hours. Dr. Sekyi-Out's January 2012 report (paragraph 38, *supra*) notes that the Appellant described a walking tolerance of two hours, a standing tolerance of two hours, and a sitting tolerance of less than two hours. These limitations are not suggestive of a severe disability.

[50] There are four January 2012 specialist reports to the insurer (Dr. Stevens, paragraph 36, *supra*, Daniel Ergohos and Dr. West, paragraph 37, *supra*, Dr. Sekyi-Out, paragraph 38, *supra*, and Dr. Trotti, paragraph 39, *supra*) which relate to assessments of the Appellant in December 2011 which coincides with the MQP. All of these reports support that as of that date the Appellant was not pursuing any treatment modalities; that his last treatment and specialist consultation was in 2010; and that he did not suffer a complete inability to engage in any employment for which he was reasonably suited by education, training or experience.

[51] The January 2012 psychovocational assessment by Daniel Egarhos and Dr. West (paragraph 37, *supra*) indicates that the Appellant was not participating in any organized rehabilitation and that although the he reported some physical limitations he noted no limitations or restrictions with regards to any domain of functioning from a purely mental health perspective. The report details several vocational options suitable for the Appellant; opines that he does not meet the specific criteria for any DSM-1V diagnosis; and assesses a GAF of 70-75. In his oral evidence the Appellant stated that the WSIB has recently performed a psychovocational assessment; however, there is no report in the hearing file relating to that assessment. The Tribunal can only speculate as to the conclusions from that assessment and whether they relate to the Appellant's condition as of the MQP.

[52] Ms. Kamal relies on the August 2013 assessment report from Dr. Wilderman and Dr. Maano (paragraph 41 *supra*). This report, however, was not prepared until 1 ½ years after the MQP and the Tribunal is satisfied that the January 2012 assessment reports (which relate to

assessments performed in December 2011) better speak to the Appellant's condition as of the MQP. The Tribunal also noted that the August 2013 report opines that the Appellant is unable to perform the essential tasks of his pre-accident employment but does not speak to his capacity to pursue alternative employment suitable to his limitations. Further there is no evidence that any of the recommendations from that report were pursued.

[53] Ms. Kamal also relies on the reports from Dr. Pilowsky in July 2010 (paragraph 31, *supra*) and December 6, 2010 (paragraph 34, *supra*) to support that the Appellant suffers from post-traumatic stress disorder and depression. However, there is no evidence to support that these were significant disabling conditions as of the MQP. In his oral evidence the Appellant acknowledged that he did not undergo any treatment for mental health issues after 2010 until he saw a psychiatrist about five months before the hearing. There is no report from the psychiatrist in the hearing file and the Tribunal again can only speculate as to his findings and conclusions.

[54] The Tribunal also noted that there is no mention of depression or any mental health issues in the Appellant's two disability questionnaires (paragraphs 10 and 13, *supra*) or in either of the medical reports from Dr. Dhillon (paragraphs 11 and 14, *supra*) submitted in support of the disability applications.

[55] It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB). There is no credible and supporting evidence to establish that depression and/or post-traumatic stress disorder were significant disabling conditions as of the MQP.

[56] Not only must there be medical evidence to support a claim that disability is "severe" and "prolonged", but also evidence of efforts by the Appellant to obtain work and to manage his medical condition (*Klabouch* 2008 FCA 33; *Angheloni* 2003 FCA 140). The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health: (*Inclima* 2003 FCA 117.).

[57] The Appellant was only 39 years old at the time of the MVA and he has acknowledged that since the MVA in November 2009 he has made no efforts to pursue any form of

employment or to upgrade his English language and work skills. The Tribunal is satisfied that the Appellant retains the residual capacity to purse employment suitable to his limitations and that he has made no efforts to do so. He has failed to meet the test set out in *Inclima, ibid.*

[58] The Appellant has the burden of proof and although he is suffering hardship by reason of his chronic pain he has not established, on the balance of probabilities, that he is disabled in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[60] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security