



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *F. G. v. Minister of Employment and Social Development*, 2017 SSTGDIS 165

Tribunal File Number: GP-16-4063

BETWEEN:

F. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Virginia Saunders

HEARD ON: September 27, 2017

DATE OF DECISION: November 3, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on June 9, 2015. The Appellant claimed that he was disabled because of severe anxiety; low mood; depression; PTSD (Post-Traumatic Stress Disorder); knee, chest and back pain; allergies; and sleep apnea. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2017.

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

- a) The issues under appeal are not complex.
- 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.

[4] The Appellant attended the hearing, as did a Farsi interpreter, Afshin Nikravesh.

[5] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

PRELIMINARY ISSUES

[6] The appeal was originally scheduled to be heard on September 12, 2017. It was adjourned because technical difficulties prevented the Appellant from connecting to the teleconference. After the hearing on September 27, 2017, the Tribunal adjourned to allow the Appellant time to submit documents to explain his 2016 income and to update his condition since March 2017. The

Respondent was given an opportunity to reply to these documents, and it did so. The Tribunal then determined that no further hearing was required.

EVIDENCE

[7] The Tribunal considered all of the evidence contained in the file and given in testimony at the hearing. The Appellant's testimony was generally consistent with what he reported earlier and what his doctors observed. The Tribunal determined that any differences were likely caused by language issues or by the Appellant's poor memory. Any relevant inconsistencies are discussed below. This narrative refers to the evidence which the Tribunal found to be most relevant to the outcome of this appeal.

Background and Work History

[8] The Appellant is now 51 years old. He was born in Iran where he went to school until age 15 when he left to join the army to fight in the Iran-Iraq war. He was on the front for several years. When the war ended he helped his father run a newspaper kiosk. He immigrated to Canada in 2005 with his wife and his older son. A younger son was born in Canada in 2006.

[9] After arriving in Canada the Appellant and his family lived in Vancouver. He worked in a grocery store for a short time, and then moved to Toronto. The Appellant then attended English classes for two or three months. He speaks, reads, writes and understands English well enough to function in a workplace but he has difficulty with important or more complex matters.

[10] The Appellant worked as a walking courier in Toronto for several months, and then returned to Iran for about a year and a half because his father was sick. He did not work in Iran. When he returned to Toronto he took a course to qualify as a taxi driver. In 2008 he began driving a taxi in Toronto, and he continued to do this for seven or eight years.

[11] The Appellant last worked in Toronto in May 2015. He moved to the Vancouver area one or two months later because the weather was better, and because the arrival of Uber in Toronto had cut into his business significantly. He had to drive for at least 12 hours each day to make enough money to cover his driving expenses, and he was not able to do this because of his back pain from sitting so long. As his financial difficulties mounted he found it hard to control his

emotions. He could not manage troublesome passengers and he sometimes ended up in physical altercations.

[12] The Appellant hoped to obtain a taxi licence in B.C. but he could not understand the material he was supposed to study. He was able to pass the exams in Ontario because he had in-person instruction, whereas in B.C. the material was written. He was also concerned that Uber would start operating in B.C. and he would then be unable to earn a living. He decided not to pursue this line of work.

[13] The Appellant testified that he then tried working in construction jobs he found through ads in an Iranian-language newspaper. The work was difficult because it caused pain in his knees and back. He also had arguments with his employers and he ended up not being paid for some jobs.

[14] The Appellant's Record of Earnings indicated that in 2009 – the first year of earnings posted – his income was below the yearly basic exemption which at the time was \$4600.00. In the following three years he earned about \$15,000.00 per year. In 2013, 2014, and 2015 he earned \$7047.00, \$5798.00 and \$4020.00 respectively. In 2016 he had earnings of \$11,500.00. All of his earnings after 2009 were from self-employment (GD8-7).

[15] The Appellant could not explain his 2016 earnings at the hearing. He could not recall working more than a few days in 2016. After the hearing the Appellant's accountant provided a written statement which indicated that when the 2016 tax return was prepared the Appellant had explained to him that "his physical situation was not appropriate to do any physical work therefore he received his earning from consulting in construction work" (GD10-2).

Psychological Conditions

[16] After his experience in the Iran- Iraq war the Appellant began to struggle with anger control, irritability, verbal aggression, forgetfulness, anxiety, stress, nightmares, mood fluctuations and multiple somatic complaints. These continued after he moved to Canada. They caused difficulties with employment and with his family relationships. At one point he had to leave the family home and he lived in his car for six months.

[17] The Appellant's family doctor at the time, Dr. Mohammady, prescribed different medications for anxiety and depressed mood; and when these failed to improve his condition she referred him to a psychiatrist, Dr. Showraki.

[18] The Appellant saw Dr. Showraki in May 2011. Dr. Showraki noted the Appellant's past history of PTSD and stated that he seemed to suffer from major depression. He prescribed Cipralex (escitalopram). He later increased the dosage and added amitriptyline; then lowered both dosages as the Appellant improved. The Appellant saw Dr. Showraki monthly until July 2012 (GD2-16, 175).

[19] The Appellant testified that when he last saw him Dr. Showraki was satisfied with his progress and told him that he did not need to see him anymore. He was to follow up with his family doctor, exercise, and refrain from watching disturbing news or movies. Dr. Showraki told him to come back if he started to feel worse again. The Appellant later asked Dr. Mohammady to refer him again but she told him that he did not need to see a psychiatrist.

[20] After moving to Vancouver the Appellant was referred for mental health treatment at Vancouver Coastal Health in December 2015. Their records showed that he was seen but he declined further services because he did not have the language skills (GD6-49). His new family doctor, Dr. Karimirad, referred him for another psychiatric assessment, this time with a Farsi interpreter, and he saw a Dr. Iro in May 2016.

[21] Dr. Iro's report described his interview with the Appellant as a difficult and drawn-out process limited by the language barrier and by the fact that the Appellant was 20 minutes late. He noted the Appellant's anger with the intake clinician and his intense focus on the denial of his disability pension. Dr. Iro stated that this "makes one suspicious of secondary gain". He observed that most of the Appellant's complaints were those of anxiety, stress, irritability and anger; and of pain in various body parts. The Appellant denied panic attacks or feeling depressed. His general function was essentially normal, including sleep, appetite, and energy levels.

[22] Dr. Iro stated that the Appellant did not appear to be in any significant psychological distress, nor was he depressed or significantly anxious. His cognition was not tested but he

seemed to have a good knowledge of his spatial, personal and temporal orientation and his insight was adequate.

[23] Dr. Iro did not think the Appellant should be taking bupropion because of his anxiety disorder. He recommended discontinuing this and suggested some replacement options. He also encouraged the Appellant to connect with community agencies for support and counselling. He discharged the Appellant and stated that his diagnosis was unclear but he would default to that of PTSD (GD6-47-48).

[24] Dr. Karimirad noted that the Appellant did not want to stop taking bupropion, and she continued to prescribe it.

[25] The Appellant saw psychiatrist Dr. Mirmiran in September and November 2016. He reported difficulty keeping jobs because his employers thought his pace of work was too slow or because he was arguing with co-workers. He reported poor concentration and memory, sleep apnea, and leg and back pain. Dr. Mirmiran noted the Appellant's struggles with mood disorder and PTSD, but did not rule out other disorders. He observed that the Appellant had appropriate behaviour and did not demonstrate thought disorganization. His mood was irritable and depressed but he showed good range of affect and he had good insight and judgement. His cognition was impaired by history. He had stressors relating to his finances and his sons. Dr. Mirmiran noted that the Appellant reported that his PTSD symptoms had improved significantly.

[26] Dr. Mirmiran diagnosed the Appellant with PTSD in partial remission; chronic lower back pain; hypertension; dyslipidemia; arthritic pain; and moderate psychosocial stressors mostly related to work, finances, and conflict with his son. He noted that the Appellant's GAF (Global Assessment of Functioning) score was 61 to 70. He recommended that the Appellant continue attending a 12-week Farsi group therapy program at Vancouver General Hospital.

[27] Dr. Mirmiran discharged the Appellant in November 2016. He noted that the Appellant was currently taking escitalopram, Wellbutrin (bupropion) and quetiapine; and he was tolerating these and had noticeable improvement since starting on them. Dr. Mirmiran felt that the Appellant needed to remain on his medications, obtain financial advice, and see a family

therapist about his sons. He noted that the Appellant had had difficulty attending the therapy program because of its distance and because it had interfered with his jobs (GD6-34-38).

[28] The Appellant testified that he told Dr. Mirmiran that he was feeling better because he felt more stable on Cipralex and bupropion. He did not feel that his overall condition had changed at all. He wanted to see Dr. Mirmiran again, but he was unavailable for reasons that were not explained to the Appellant. Dr. Karimirad referred him to another psychiatrist, and he has seen this doctor's assistant for therapy every month or so since March of this year.

[29] The Appellant could not remember the name of the psychiatrist or the therapist, but he described the latter as an Iranian lady who has been helpful. He has started taking resperidone but has not noticed any great difference in his symptoms after four months.

Physical Conditions

[30] The Appellant's back pain began during the war when he was required to carry heavy loads. In May 2016 he had a CT scan of the lumbar spine which showed mild to moderate bulges, moderate bilateral foraminal stenosis, and mild to marked facet osteoarthritis (GD2-17-18). He has seen a specialist at the University of British Columbia who prescribed medication and exercise. He was to return to see her but he does not have an appointment yet. He recalled being told by the doctor not to lift more than five kilograms.

[31] The Appellant testified that he began having pain in both knees when he was working as a courier. He was told by his doctor that he had arthritis. In 2014 he fell and suffered a meniscal tear to his left knee. In March 2015 he had arthroscopic surgery to repair this. He is now pain-free on that side; however, his right knee continues to bother him and he finds it hard to climb, twist or use the stairs.

Functional Limitations

[32] In his application the Appellant stated that because of pain, depression and stress, he could not work enough to pay his expenses; and that he had problems sleeping at night. He stated that he has had to stop sports, reading, playing with his children "and other normal activities".

He described limitations with sitting, standing and walking; lifting, reaching and bending; concentration and memory; breathing, sleeping and driving.

[33] The Appellant lives in a house with his wife and his two sons. He spends his days trying to read and exercise. He does not have many computer skills and so uses the computer only a little. He avoids driving because his back hurts and because he is nervous. His sleep has improved a bit with resperidone, but he still wakes up two or three times a night. He continues to have a low mood and irritability, and he does not want to have any social connections.

[34] The Appellant's family doctors – Dr. Mohammady in Toronto and Dr. Karimirad in Vancouver – both speak Farsi. They support the Appellant's claim for disability. They both provided letters describing his multiple medical problems, his need for regular treatment, his failure to improve, and their belief that he is unable to work (GD2-13, 14; GD1-5; GD10-1).

SUBMISSIONS

[35] The Appellant submitted that he qualifies for a disability pension because his multiple medical conditions and the medication he takes for them have left him incapable regularly of pursuing any substantially gainful occupation for many years.

[36] The Respondent submitted that the Appellant does not qualify for a disability pension because the evidence does not support a determination that he has a medical condition that is severe or prolonged as those terms are defined in the CPP. In particular:

- a) His difficult personal circumstances, financial and other hardships are not relevant to the issue of whether he is disabled.
- b) He maintains the capacity for employment.
- c) Psychiatric reports from 2015 and 2016 do not indicate that his condition was severe, and these should be preferred over the opinions of his family doctors.
- d) His physical conditions are either under control or not so debilitating as to preclude all employment.

ANALYSIS

Test for a Disability Pension

[37] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that he was disabled as defined in the CPP on or before the end of the MQP.

[38] 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 MQP.

[39] 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.

Severe

[40] The Appellant's physical conditions do not meet the definition of "severe", however, his psychological conditions do.

i. Physical Conditions

[41] The Appellant's sleep apnea has been controlled by use of a CPAP machine. His hypertension and hyperlipidemia are managed with medication. No cardiac issues have been identified to explain the Appellant's chest pain, and in fact it does not appear to be a major concern for him or for his doctors. There is no evidence that these conditions have any effect on his ability to pursue substantially gainful employment.

[42] The Appellant's left knee pain has resolved. While he may have right knee pain and back pain, these conditions appear to be reasonably well-managed with medication and a regimen of light exercise and stretching. He has not been warned off any activity except to limit his lifting.

[43] 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. 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 substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[44] The Tribunal accepts that the Appellant has degenerative conditions in his knee and his lumbar spine which cause some pain and discomfort. These may prevent him from working at jobs with significant physical requirements such as construction; however, they would not prevent him from pursuing lighter work.

ii. Psychological Conditions

[45] The Appellant suffers from a number of psychological symptoms, as documented in the medical reports. The Tribunal accepts the Appellant's evidence of the difficulties he regularly encounters with these which make it impossible for him to work at a substantially gainful rate. In particular, his anger and his inability to control his temper make it difficult for him to function in a work setting for very long. His series of jobs since moving to British Columbia is evidence of this.

[46] Dr. Iro and Dr. Mirmiran described the Appellant as being relatively functional; however, they did not state that he could work. They did not address that issue. Their observations of his condition do not necessarily support a conclusion that the Appellant was capable regularly of working.

[47] In any case, the Tribunal prefers the opinions of Drs. Mohammady and Karimirad over those of Drs. Iro and Mirmiran. The Appellant's family doctors saw him regularly over a much longer period. A review of their clinic notes since 2014 indicate that although at times he is stable he has struggled repeatedly with his various symptoms. These doctors believe the Appellant has been disabled for several years.

[48] The Respondent submitted that financial or other non-medical hardships experienced by the Appellant were not relevant to the issue of his disability. The Tribunal disagrees with this. If the stressors in the Appellant's life affect his mental health, then they are relevant.

iii. Villani Considerations

[49] 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.

[50] The Appellant is over 50, with limited education and poor English skills. These restrict his job opportunities to the type he has already tried and is unable to do at a remunerative rate. More importantly, he spent his teenage years participating in a war, and this has caused psychological damage which has affected his ability to function in any workplace for any length of time.

iv. Substantially Gainful Employment

[51] While the Appellant may have had periods where he was better than others, and was in fact working, he has not been capable regularly of pursuing any substantially gainful occupation.

[52] Section 68.1 of the *CPP Regulations* states that "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. In 2014 the amount was \$14,836.20; in 2015 it was \$15,175.08; and in 2016 it was \$15,489.72.

[53] The Appellant's earnings have not been at or above the substantially gainful rate at any time since section 68.1 of the *CPP Regulations* came into effect in 2014. His earnings in the year before that were equally poor. While some of this may be attributed to the arrival of Uber in Toronto, the Tribunal notes that even when the Appellant stopped driving a taxi, moved to Vancouver and attempted to perform light work, he did not meet the substantially gainful threshold.

[54] 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).

[55] The Appellant has obviously struggled for many years. As a taxi driver he worked long hours in spite of back pain and psychological problems. He is in severe financial difficulty which is making his condition worse. The Tribunal is satisfied that if he could have worked more than he did, he would have done so. He is incapable regularly of pursuing any substantially gainful occupation.

Date of Disability

[56] It is difficult to state precisely when the Appellant became disabled. In July 2012 Dr. Showraki thought he was much improved. The Appellant's income dropped significantly after 2012, but some of that must be attributed to socio-economic conditions. There is no medical evidence of his condition in 2013.

[57] Dr. Mohammady's clinic notes indicate that in January 2014 and regularly after that the Appellant reported difficulties with his mood, stress and other psychological symptoms. In November 2014 Dr. Mohammady described significant symptoms that had not responded to treatment and which she felt were permanent. The Tribunal finds on a balance of probabilities that the Appellant's condition became severe in January 2014.

Treatment

[58] The Tribunal is satisfied that, taking into account his circumstances, the Appellant has made reasonable efforts to comply with treatment suggestions. While he has had difficulty with his medications and has questioned their efficacy or complained of side effects, there is no suggestion in the medical reports that he is not generally compliant in taking medication.

[59] The Appellant's ability to access suitable therapy has been limited by his language skills, his finances, and his mood. It is apparent from the medical reports and his testimony that he becomes frustrated quickly which does not generally work to his advantage. He is simply unable to make use of some of the support services that have been offered to him. Since arriving in

Vancouver he has regularly tried to access mental health services, and has attended to the extent he is able.

[60] Dr. Iro's report indicated that the Appellant was seen in the summer of 2015 and that he declined treatment because he felt that he did not need a psychiatrist and he was not looking to change his medication. The Appellant disputed this at the hearing. He recalled that he wanted to try medication other than CipraleX, and he did not remember telling anyone that he did not want to see a psychiatrist. The Tribunal notes that Dr. Iro's account is not consistent with the notes of the Appellant's visit which were kept by the counsellor who actually saw him. As described above, she believed that he declined services over language issues.

Prolonged

[61] The Appellant's condition is prolonged. He has been unable to work in any significant way because of his condition for more than three years. He has had regular medical treatment since then, and he has not had any lasting or meaningful improvement. While he continues to receive treatment and hopes that he will improve, his experience to date indicates that this will be difficult. His condition is therefore likely to be long-continued and of indefinite duration.

CONCLUSION

[62] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2014 for the reasons set out above. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) of the CPP). The application was received in June 2015; therefore the Appellant is deemed disabled in March 2014. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of July 2014.

[63] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security