



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *BK v Minister of Employment and Social Development*, 2017 SSTGDIS 219

Tribunal File Number: GP-16-1756

BETWEEN:

**B. K.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: George Tsakalis

HEARD ON: September 22 and November 23, 2017

DATE OF DECISION: December 27, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on June 16, 2015. The Appellant claimed that he was disabled because of depression. 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, 2013.

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

- The issues under appeal are not complex.
- There are gaps in the information in the file and/or a need for clarification.
- 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 following people attended the hearing: B. K., Appellant; C. T., Appellant's common-law spouse.

[5] The Tribunal has decided that the Appellant is not eligible for a CPP disability pension for the reasons set out below.

### PRELIMINARY ISSUES

[6] The teleconference hearing was scheduled to proceed on September 12, 2017. However, the hearing could not be completed due to technological issues. The teleconference hearing was eventually completed on November 23, 2017.

## **EVIDENCE**

### **Age, Education and Work Experience**

[7] The Appellant was born in 1973. The Appellant stated in his Questionnaire for Disability Benefits that he has a Grade 10 education. He went to community college for one year where he took a welder operator course. He last worked in October 2009 as a welder operator. He stated in his Questionnaire for Disability Benefits that he was laid off because of a shortage of work.

[8] The Appellant testified that he worked from 1991 to 2009 on a full-time basis. He was laid off in October 2009 for non-medical reasons. He looked for welding work after being laid off. He was not sure when he stopped actively seeking work. The Appellant testified that he obtained a license to drive a truck, but he never worked in that field. He did not renew his truck driver's licence in 2016 because he could not afford the fees.

### **Medical Condition and Treatment**

[9] Dr. R. Galliver, family physician, drafted a Medical Report for Service Canada that was date stamped on July 10, 2015. He diagnosed the Appellant with depression and anxiety. He noted that the Appellant had a poor response to therapy. The Appellant was taking Fluoxetine, Bupropion, and Quetiapine.

[10] Dr. R.W. Book, Psychiatrist in a consultation report dated May 28, 2012, stated that he first saw the Appellant on March 6, 2012 for depression. The Appellant was on Cipralex at that time. He was working as a welder. Dr. Book diagnosed the Appellant with a probable major depressive disorder. He instructed the Appellant to continue with his medications. The Appellant did not book any follow-up appointments with Dr. Book. Dr. Book decided to close his file.

[11] The Appellant previously applied for CPP disability benefits in 2013. Dr. M. Raja, family physician, authored a Medical Report for Service Canada that was date stamped on March 18, 2013. Dr. Raja diagnosed the Appellant with severe depression. He noted that the Appellant had a history of depression and he questioned post-traumatic stress disorder. The Appellant had a history of being abused as a child. Dr. Raja noted that the Appellant had poor motivation and an

extremely low mood. The Appellant had attended a depression group. The Appellant was taking Cipralex and Abilify. Dr. Raja provided the Appellant with an unknown prognosis.

[12] Dr. P. Sharma, Psychiatrist in a consultation report dated February 25, 2015, stated that the Appellant had suffered from depression for the last several years. He had seen a psychiatrist in the past. The Appellant was not taking medication at that time. The Appellant had tried antidepressant medication previously, but the medication did not work. The Appellant had passive suicidal thoughts. The Appellant had seen psychiatrists in the past. A counselor had diagnosed him with post-traumatic stress disorder. Dr. Sharma diagnosed the Appellant with major depressive disorder, and started him on Prozac.

[13] The Appellant received counselling for depression and anxiety with Joanne Martin, Social Worker. Ms. Martin stated in a note dated March 12, 2015 that the Appellant underwent 12 counselling sessions which included cognitive behavioural therapy. A discharge note also dated March 12, 2015, stated that the Appellant was referred to further group and individual counselling. However, the Appellant did not feel that further support would be helpful at that time.

[14] Dr. Sharma, Psychiatrist in a consultation report dated March 30, 2015, stated that she had seen the Appellant since January 2015. The Appellant did not feel that medication or counselling was helping. The Appellant felt discouraged, hopeless, and helpless. He had suicidal thoughts all the time, but was not an active suicide risk. The Appellant was taking Prozac, Seroquel, and Wellbutrin. Dr. Sharma stated that she would see the Appellant a few more times, but she did not have any further treatment interventions to offer. She recommended that the Appellant's family physician refer the Appellant to a mood disorder clinic in Hamilton. Dr. Sharma also stated that the Appellant could be referred to another psychiatrist.

[15] The Appellant's common-law spouse wrote a letter to Service Canada dated March 17, 2016, outlining the Appellant's medical condition. The Appellant's grandfather passed away in 2009. The Appellant was laid off from work later in 2009. He also became estranged from his family. His employment insurance benefits finished in 2011, and his depression worsened that year. The Appellant tried counselling through his spouse's employer in 2011. The Appellant attended his appointment, and within two to three minutes the spouse was called into the office.

The counsellor would not treat the Appellant as he expressed suicidal thoughts. The Appellant's spouse was advised to take the Appellant to the hospital. The Appellant approached his family physician in 2012 and discussed his depression, anxiety, and occasional suicidal thoughts. The Appellant was referred to a psychiatrist. The Appellant was started on Cipralex, Venlafaxine, and Abilify. However, these medications did not help the Appellant.

[16] The Appellant's common-law partner in her March 17, 2016 correspondence stated that the Appellant saw Dr. Book, Psychiatrist on March 6, 2012. This appointment only lasted 10 minutes. The Appellant's father passed away in May 2012, but the Appellant did not attend his father's funeral because of the strain with his family. This was hard on the Appellant. The Appellant became frustrated with the lack of change through his medications, and he decided to discontinue them in 2013. The Appellant applied for CPP disability benefits in March 2013, but was denied in April 2014. The Appellant dealt with stomach issues in 2014. He began seeing Dr. Wang. Dr. Wang conducted tests and scopes and could not find anything to suggest that it might irritable bowel syndrome. It was suggested that a gluten and dairy-free diet could improve the Appellant's symptoms. However, the proposed diet was expensive. Dietary changes had no impact on the Appellant's stomach issue, which continued to the date of the letter. The Appellant was referred to Outpatient Mental Health and Addiction Services in November 2014. He had his first appointment on November 17, 2014. The Appellant was told that this was a 12 session service. The Appellant felt uncomfortable and he did not feel that these appointments were helping him. The Appellant could not concentrate during his appointments because of the telephone ringing. He wanted to open up, but was concerned about the short duration of treatments. His last session was on March 12, 2015. The Appellant began seeing Dr. Sharma on January 16, 2015 on a bi-weekly basis. By March 2015, he was seeing her on a monthly basis. The Appellant continued to see Dr. Sharma until July 2015, when he was discharged from her care. Dr. Sharma stated that there was further that she could do to help him. The Appellant stopped taking his medication in July 2015, which included Fluoxetine, Trazodone, Quetiapine, and Bupropion. The Appellant applied for ODSP, but his application was denied because his spouse earned too high an income.

[17] The Appellant's common-law spouse stated that the Appellant did not originally go off work for medical reasons. However, the Appellant's health issues have progressed to where he

has poor motivation, sleeping, concentration, and lack of interest. The Appellant's spouse agreed that further treatment would help the Appellant return work. However, the Appellant's treatment to date had not been of assistance. The Appellant needed someone that was approachable for psychiatric treatment and counselling. However, the Appellant had not found such an individual.

[18] The Appellant sent correspondent to the Tribunal on May 15, 2017. He stated that he underwent a left knee arthroscopy on April 19, 2017. He had a follow-up appointment with Dr. Woolfrey, Orthopedic Surgeon on June 12, 2017. The Appellant also had an X-ray and ultrasound that showed possible findings in his gallbladder. The Appellant was seen by Dr. Schnider, General Surgeon. A gallbladder test was scheduled for June 20, 2017, and the Appellant was to see Dr. Schnider on June 28, 2017 to go over test results. The Appellant was referred to Dr. Book on April 10, 2017. He was given a prescription of Duloxetine on May 4, 2017. His next appointment with Dr. Book was scheduled for June 15, 2017.

[19] Dr. Michael Woolfrey, Orthopedic Surgeon in a consultation report dated January 26, 2017, stated that the Appellant was complaining of left knee pain for about one year. A November 10, 2016 MRI showed a meniscal tear. The Appellant was also complaining of right knee pain. Dr. Woolfrey assured the Appellant that this was likely related to added stress from the left knee and that this pain would likely resolve when the left knee improved. The Appellant decided to proceed with arthroscopic surgery on his left knee, which was performed on April 19, 2017.

[20] Dr. Book in a consultation report dated June 26, 2017, stated that he initially assessed the Appellant on April 10, 2017. He subsequently had two follow up visits with the Appellant with the last appointment being on June 15, 2017. Dr. Book diagnosed the Appellant with probable major depressive disorder and he queried whether the depression was treatment resistant. He adjusted the Appellant's medications, including Cymbalta and Lithium. He was going to see the Appellant again in July 2017.

[21] The Appellant's spouse testified that the Appellant is not able to work. The Appellant was withdrawn and upset. The Appellant saw a family counsellor in 2011, but treatment was stopped because the Appellant expressed suicidal thoughts. The Appellant saw Dr. Book in March 2012. The Appellant was under the impression that Dr. Book would contact him for a

follow-up appointment. The Appellant was discharged from Dr. Book's care. The Appellant had stomach issues in 2013 and he became frustrated. He discontinued medications that included Cipralex, Venlafaxine, and Abilify. The Appellant did not have a regular family physician. He would attend a family practice clinic and would see a different doctor each time. He was referred to Dr. Sharma and eventually saw her in 2015. The Appellant saw Dr. Sharma on six to eight occasions from January to July 2015. Dr. Sharma advised that she could not provide further help to the Appellant. The Appellant also had a 12 week counselling session at a hospital. The Appellant was referred to extra counselling, but he did not go. The Appellant did not have treatment in 2016. The Appellant began seeing Dr. Book again in 2017. He also had knee surgery on April 10, 2017.

[22] The Appellant testified that he was diagnosed with depression in 2012 and had previously been diagnosed with Post-Traumatic Stress Disorder (PTSD). He did not recall undergoing counselling prior to 2011. The Appellant testified that he had back problems in 2014 or 2015. He has problems lifting because of his back condition. He visited a physiotherapist but never had treatment. He was asked to fill out a questionnaire at the physiotherapy office, but he became frustrated and decided to leave. The Appellant testified that his stomach problems began in 2014. He eventually had a colonoscopy. The Appellant developed right knee problems because he was using his right leg to compensate for his left knee problems. The Appellant has not obtained relief from medications. He currently takes Quetiapine and Lithium.

### **Ability to Function at Work and in Activities of Daily Living**

[23] The Appellant was born in 1973. The Appellant stated that he was diagnosed with depression in January 2012 in his Questionnaire for Disability Benefits that was date stamped on June 16, 2015. The Appellant stated that depression prevented him from working. He suffers from poor motivation and a low mood level. He suffers from irritability, limited social interactions, fatigue, sleep difficulties, and poor concentration. The Appellant stated that his standing tolerance was 20 minutes, and his sitting tolerance was 45 minutes. He stated that prolonged noise increases his agitation and impacts his concentration. The Appellant felt that he could no longer work as of January 2012.

[24] The Appellant, in his Questionnaire for Disability Benefits arising from his 2013 application for CPP disability benefits, referenced a loss of focus, reduced concentration, increased anxiety, decreased socializing, mood swings, erratic sleep, and fatigue. However, he did not reference any difficulties with sitting, standing, walking, lifting, housekeeping or driving.

[25] The Appellant testified that he had poor concentration due to his depression and erratic sleep patterns. He reported no difficulties with driving. He reported being able to walk for 20 to 30 minutes. The Appellant can still shower and bathe on his own. The Appellant testified that he did 50 percent of the household chores when he was at his healthiest, but this went down to 10 to 25 percent prior to his MQP. He did the outdoor home maintenance work, but this went down to 25 percent by the time of his MQP. The Appellant testified that he is not motivated because of his depression. The Appellant's left knee became problematic in 2015 and he went on to have surgery in 2017. The Appellant stated that his health has worsened since his MQP. He did not believe that he was capable of doing any type of work in 2013. He testified that his symptoms were variable. He has had no type of job training since 2009. He has not done any type of volunteer work since 2009. He does not want to deal with people. He does not do the grocery shopping, socialize, travel or use a computer. He reported being able to sleep only three to four hours a night with medication.

## **SUBMISSIONS**

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

- a) The Appellant has not been able to work because his depression.
- b) Just because the Appellant was not actively seeking treatment does not mean that he does not have a severe disability under the CPP.

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



- a) The evidence does not support a finding that the Appellant had a severe and prolonged disability under the CPP.

## **ANALYSIS**

### **Test for a Disability Pension**

[28] 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.

[29] 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.

[30] 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**

[31] The Tribunal finds that the Appellant has failed to prove on a balance of probabilities that he had a severe disability as defined in the CPP on or before his December 31, 2013 MQP.

[32] 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. This does not mean that everyone with a medical condition is entitled to disability benefits. The Appellant must demonstrate on a balance of probabilities that he had a disability that rendered him incapable regularly of pursuing any substantially gainful

occupation or before December 31, 2013. The Appellant has failed to demonstrate that he had such a disability.

[33] The Federal Court of Appeal in *Warren v. (A.G.) Canada*, 2008 FCA 377 confirmed that the Tribunal requires objective medical evidence of an applicant's disability and it is well established that an applicant must provide some objective medical evidence to support a finding of a severe disability under the CPP.

[34] The Tribunal in reviewing the medical evidence provided does not find objective medical evidence to support a finding of a severe disability under the CPP. Dr. Book diagnosed the Appellant with probable major depressive disorder in his May 28, 2012 report. However, Dr. Book did not comment upon any functional limitations with working. Dr. Raja diagnosed the Appellant with severe depression in his Medical Report for Service Canada that was date stamped on March 18, 2013. Dr. Raja noted that the Appellant had poor motivation and an extremely low mood. However, Dr. Raja did not comment upon the Appellant's employability. The Tribunal notes that the bulk of the medical evidence in this case arose after the MQP. The Appellant's testified that his back and knees became problematic after the MQP. He also had a colonoscopy in 2014 after his MQP.

[35] In making its finding that the Appellant did not have a severe disability under the CPP, the Tribunal is not relying solely on the medical evidence, but also on the hearing and documentary evidence. The Appellant referred to mental health problems and fatigue in his Questionnaire for Disability Benefits in relation to his 2013 application for CPP disability benefits. However, he did not reference any difficulties with sitting, standing, walking, lifting, housekeeping or driving. The Appellant also did not reference problems with driving in his Questionnaire for Disability Benefits that he completed in relation to this appeal. He indicated that he had no restrictions with driving at his hearing.

[36] The Tribunal finds that the evidence does not support a finding that the Appellant was precluded from returning to work in his former occupation as a welder in 2013. The Appellant in his Questionnaire for Disability Benefits arising from his 2013 application referenced loss of focus, concentration and low mood, but there was no objective medical evidence to support the assertion that he could not work as a welder. The Appellant did not lose his welder position

because of a shortage of work and not as a result of his medical condition. Even if the Tribunal were to find that he could not return to his former occupation as a welder, the Appellant's appeal would still be dismissed because 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, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The Tribunal finds that the Appellant was capable of working in a driving occupation at the time of his MQP. The Appellant in his Questionnaire for Disability Benefits arising from his 2013 application for CPP disability benefits did not note any driving restrictions. The Appellant testified that he failed to renew his truck driver's licence the year before his hearing because he could not afford to do so. However, the fact that the Appellant renewed the licence up until 2016 is evidence that he thought he had capacity to return to work as a truck driver at the time of his December 31, 2013 MQP. In addition, the Appellant was only 40 years old at the time of his MQP. He understands English, but he has not pursued any type of retraining. He has also not pursued occupations that are sedentary in nature and require little training, such as working as a security guard.

[37] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant was laid off at his job as a welder in October 2009 for non-medical reasons. The Tribunal finds that he had the capacity to work in a driving job or in a sedentary occupation that required little retraining on or before his December 31, 2013 MQP. The Appellant did not pursue such work. He therefore fails the *Inclima* test.

[38] The Tribunal is also dismissing this appeal because the Appellant has not managed his medical condition appropriately. The Federal Court in *Klabouch* stated that applicants must adduce evidence of their efforts to manage their medical condition. The Appellant did not follow-up with Dr. Book for further treatment in 2012. The Appellant's spouse testified that the Appellant was under the impression that Dr. Book would contact him for a follow-up appointment. However, the Appellant did not have any further psychiatric treatment until 2015. It appears that the Appellant was not taking proactive steps to manage his psychiatric condition. His spouse testified that he discontinued medications including Cipralex, Venlafaxine, and Abilify in 2013. The Appellant eventually received psychiatric treatment from Dr. Sharma in

2015, who suggested a referral to another psychiatrist. However, the Appellant did not see another psychiatrist until 2017. Dr. Sharma also suggested a referral to a mood disorder clinic in Hamilton. There is no evidence that the Appellant went to a mood disorder clinic in Hamilton. The Appellant underwent counselling for depression and anxiety with Joanne Martin, Social Worker in 2015. The discharge summary from Ms. Martin stated that the Appellant was referred to further group and individual counselling. However, the Appellant did not feel that further support would be helpful at that time. The Appellant's spouse in correspondence to the Tribunal advised that the Appellant did not feel comfortable about the counselling that he was receiving. However, the Appellant did not proactively pursue treatment over the years and the Tribunal finds that he failed to mitigate his condition.

[39] The Tribunal must consider whether the Appellant's refusal to undergo treatment is unreasonable and what impact that refusal might have on the Appellant's disability status should the refusal be considered unreasonable (*Lalonde v. Canada (Minister of Human Resources and Development)*, 2002 FCA 211). The Tribunal has considered the possibility that the Appellant's mental condition has led him to refuse or delay treatment. However, the Tribunal notes that the evidence does not disclose that the Appellant was incapable of managing his personal affairs. The Tribunal finds that the Appellant has deliberately chosen to refuse treatment in the past and has discontinued medications. These actions did not assist in improving the Appellant's condition and probably exacerbated his medical condition. The Tribunal also acknowledges that the Appellant's care might have been complicated by the fact that he did not have a regular family physician. However, the Appellant obtained a referral from a primary care physician to see Dr. Book in 2012, but he failed to follow-up with Dr. Book. The Appellant managed to obtain a referral to Dr. Sharma, who saw him in 2015. He refused a referral for further counselling in 2015. The Appellant began seeing Dr. Book again in 2017. Dr. Book in his most recent report of July 26, 2017, queried whether the Appellant's depression was treatment resistant. However, Dr. Book continues to treat the Appellant and adjust his medications. The Appellant has not exhausted his treatment options. The evidence shows that the Appellant has a poor response to treatment, but it does not demonstrate that he has reached his maximum medical recovery.

[40] The Tribunal in making its decision is not minimizing the Appellant's struggle with mental health issues. However, the Tribunal is bound by the wording of the subsection 42(2) of the CPP and the related jurisprudence in reaching its decision that the Appellant did not have a severe disability under the CPP.

**Prolonged**

[41] As 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.

George Tsakalis  
Member, General Division - Income Security