



### Decision of the Review Tribunal

Appeal #: 106302

FEB 26 2010

On January 5, 2010 in Surrey, British Columbia, a Review Tribunal heard an appeal under subsection 82 (1) of the *Canada Pension Plan* between:

Ronaldo Obregon

Appellant

and

the Minister of Human Resources and Skills Development

Respondent

The appeal was heard before the following three panel members:

John Hanson

Shelby Entner

Mahmood Awan

The decision of the Review Tribunal is to **allow** the appeal.

The reasons for this decision are as follows:

#### **Appearances**

[1] The Appellant, Mr. Ronaldo Obregon, was present at the hearing. He was represented by Mr. Kirk Wirsig. He was accompanied by his wife, Mrs. Louise Obregon, who also gave evidence on his behalf, and by his eleven year old daughter, Shyann, who provided moral support. The Respondent, the Minister of Human Resources and Skills Development, was represented by Ms. Kay Birring.

## **Documents Submitted at the Hearing**

[2] The following document was submitted at the hearing by the Respondent:

M1 Letter dated December 23, 2009 (2 pages).

## **Preliminary Matters**

[3] The Respondent's representative, Ms. Birring, suggested that since the Appellant's wife was giving evidence, her evidence should be given first. The Appellant's representative did not object to this.

## **Introduction**

[4] The Appellant suffers from back pain and headaches. He applied for a disability pension under the *Canada Pension Plan* (CPP) in April 2008. The Respondent denied his application because he did not fully meet the requirements for a disability benefit. The Appellant's request for reconsideration was denied on the basis that he was not disabled as of December 31, 2008. The Appellant's appeal was received by the Office of the Commissioner of Review Tribunals on June 1, 2009.

## **Issues**

[5] The parties agreed and the Review Tribunal found that the Appellant's Minimum Qualifying Period (MQP) ended on December 31, 2008. This means that to be eligible to receive CPP benefits, the Appellant must establish that he had a severe and prolonged disability as those terms are defined in the CPP legislation on or before December 31, 2008, and his disability has continued since that date.

## **Evidence**

[6] The Appellant was forty-six years of age at the time of the hearing. He has a grade 12 education. His last job was as a truck driver. His only upgrading skill was truck driving training.

## **Oral Testimony**

[7] Mrs. Louise Obregon, wife of the Appellant, testified first. She testified she is presently a school bus driver. She has also been a veterinary assistant. From 1995 to 2002, she was a stay-at-home mother.

[8] In 2006, her husband hurt his back while he was working. Since the time that he hurt his back she describes him as being twenty-four hours in pain. A year after the accident, he started to get headaches, which still persist to the present.

[9] She noted that he attempted to go back to work on lighter duties on three occasions, but all of these were unsuccessful. Her evidence was that he tried, in her words, 100% to return to work, but simply could not do so.

[10] A lot of the time he stays in bed because he is in so much pain as well as having the headaches. He does do some minor things around the home, but does not contribute very much. According to her, the Appellant has not much motivation to get out of bed.

[11] She describes him as now being difficult to live with because he gets very aggravated and snaps a lot at her and the children. He can no longer drive so she has to drive him to his appointments. She does all of the housework and yard work.

[12] A couple of years ago she bought a truck to try to establish a landscaping business. He helped her with the paperwork, but did not work in the business other than

that. The business was only active one summer and only had a few clients. She sold the vehicle at the end of the season.

[13] She also indicated that the Appellant's memory is not good. She has to keep track of his medications. She described his irritability as starting after he had his accident. She was of the opinion that her husband could not work at any job because she does everything around the house and he has a very low level of concentration.

[14] The Appellant testified after his wife's testimony was complete. In 1972, he came to Canada from the Philippines. He has a grade 12 education. His only upgrading was when he obtained a Class 1 driver's licence, which enabled him to drive heavy vehicles.

[15] He worked in various jobs such as dishwasher, busboy, working on an assembly line, working in a warehouse, working in shipping and receiving, and driving a forklift. According to him he could no longer do any of those jobs because of his back.

[16] His last job was with a company called Capital Disposal at which he drove a large garbage truck. He was injured when he attempted to move a very large container. His injury was to his back. He went on Workers' Compensation and took all appropriate treatment. According to him, he returned to work either two or three times to attempt to get back to work. His evidence was that his returns to work just did not go right. At his last return to work attempt, his company gave him the smallest truck which it owned which he attempted to drive. He still could not drive the truck because he was in so much pain.

[17] The Appellant had taken lots of therapy for his back, but nothing seemed to work out. Eventually, on the advice of his doctor, he decided to have epidural needles in his spine. This he had, but it did not appear to help him. Shortly after he took the epidural needles he started to get headaches, which persist to the present day. No doctor has correlated the headaches with the epidural needles, but he feels that there has to be some connection.

[18] He describes himself as being in constant pain in his back. In addition to that, he has headaches. On good days he can manage, but on bad days he simply cannot manage anything and spends a lot of time in bed.

[19] He was on depression medication for a while, but has stopped that. He has seen a counsellor.

[20] It was recommended that he do pulsed signal therapy by a treating physician. He advised that he did not have the finances to do that therapy although he did not know whether it would help him.

[21] He acknowledged that he has not applied for any job because he is in so much pain. He attempted to seek an opinion whereby he could have an operation in his spine, was sent to a spine clinic and was advised that an operation was not feasible. He has gone to a pain clinic, but this has not helped him.

[22] Since his epidural injections, which were in March of 2007, he continues to have headaches which persist until now. His evidence is that he knows his limits and does not push himself.

### **Evidence of Health Care Professionals**

[23] We considered all of the health care evidence on file and below are excerpts from these reports which we found to be the most significant in arriving at our decision.

[24] His family doctor, Dr. Anil Soni, said in his medical report (Record, page 36) that the diagnosis was chronic lower back pain due to bulging L4-5 disc sustained during a work related injury. His prognosis was guarded (Record, page 49).

[25] The Appellant consulted an orthopaedic surgeon, Dr. Moustafa Elkoussy, who said in his medical report (Record, page 51) that the Workers' Compensation Board (WCB) should expedite this investigation to direct the Appellant back to work on a gradual basis.

[26] Dr. Elkoussy also wished to refer him to a pain clinic (Record, page 53) because the Appellant was not keen on surgical intervention. He noted that the Appellant had the right attitude for a good prognosis.

[27] On March 8, 2007, at the Langley Surgical Centre, he was given the epidural injections (Record, page 55). Unfortunately for the Appellant, in a report dated March 22, 2007 (Record, page 56), the surgeon reported no improvement in the symptoms after the March 8<sup>th</sup> injections.

[28] He was then referred to Dr. Dean J. Foti, a neurologist, because of the headaches which he was beginning to suffer, after having received the epidural injections. He saw Dr. Foti on June 18, 2007. Dr. Foti recommended medication to try to help with his headaches (Record, page 58).

[29] He was referred to Dr. Allan J. Smyth, a clinical neurologist, who was of the opinion that the headaches, nausea and dizziness are secondary to the muscle spasm in his neck and back. He recommended that the Appellant be more physically active and get into a regular program of stretching exercises and to try and cut back on medication (Record, page 65).

[30] Notwithstanding all of the recommendations of the various doctors, it would appear that nothing seems to have helped him. Dr. Soni noted that the Appellant had been compliant with all recommendations made by specialists and the rehabilitation team had been followed, but it would appear that there is no improvement (Record, page 71). He was referred to a physiotherapist who, on August 8, 2008, gave a report wherein she was of the opinion that the Appellant was unable to work at his present job or a sedentary job (Record, page 81).

## Submissions

[31] Mr. Wirsig, on behalf of the Appellant, argues that the medical and other evidence supports the conclusion that the Appellant's disability is sufficiently severe that it prevents him from regularly pursuing any substantially gainful occupation, given his age, education level, language proficiency and past work and life experience, and cites the case of *Barlow v. MHRD* (November 22, 1999), CP 7017 (PAB), and also the *Villani v. Canada (Attorney General)*, 2001 FCA 248 case.

[32] He further argues that the Appellant's prior work history has been in the area of manual labour with no special skills and no transferrable skills. Thus he argues that the application of the *Villani* case clearly shows that the Appellant is disabled and that the disability is severe inasmuch as the Appellant could not do any other type of work with any degree of success.

[33] The Respondent's representative argues that the medical reports show some improvement of the Appellant's condition. The Respondent's representative points to the report which says that the medication appears to help with his headaches. She also argues that the Appellant has not taken the pulsed signal therapy and therefore argues that the appeal should be dismissed.

## Analysis

[34] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP 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 disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

[35] Evidence is needed to show it is more likely than not that a person meets the definition of "disabled." However, the severity requirement must be assessed in a "real world" context: *Villani v. Canada (Attorney General)*, 2001 FCA 248. This means that the Review 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.

[36] There is no dispute that the Appellant has an MQP ending December 31, 2008. The focus of our inquiry is whether, on that date, he had a disability which was "severe" and "prolonged" and, if so, whether he has had a severe and prolonged disability continuously since then.

[37] The Review Tribunal has considered with great care and attention the totality of the oral and written evidence presented during this hearing.

[38] The Review Tribunal found the testimony of the Appellant and his wife to be credible and sincere. We accept the Appellant's evidence, and that of his wife, that once he had his injury at work, he simply could not go back to his old job, notwithstanding three attempts to do so.

[39] The Review Tribunal also accepts the evidence of the Appellant and his wife that once he had the epidural injections, the Appellant started to develop headaches, which, in turn, made the Appellant even more unlikely to be able to return not only to his old job but to any job.

[40] There is no evidence which would suggest that the headaches are improving. There is no evidence which suggests that the back problem is resolving itself. All the Review Tribunal is left with is evidence which shows that the Appellant, on many days, has to stay in bed because of the pain and at best can function at a very low level.

[41] It is clear from the Appellant's evidence as to his job skills and life training, that he has no transferrable skills. The Review Tribunal accepts the fact that the Appellant is not a candidate for retraining; he has only worked in manual labour type jobs all of his life. There is no suggestion in the oral evidence and in the written evidence that the Appellant would be able to take some training or do some other job which would enable him to go back into the workforce.

[42] The Review Tribunal also is of the opinion that the Appellant, even if offered a light sedentary job, could not attend at a place of work on a regular basis that a reasonable employer would require.

[43] Thus, the Review Tribunal concludes that, applying the test in *Villani*, the Appellant is simply not employable and not retrainable.

[44] It is clear that the problem is also prolonged. From the time that he was injured until the date of the hearing, the Appellant has tried everything to make his health better. Nothing has worked; no doctor has suggested that any other treatment might work other than the so-called pulsed signal therapy.

[45] The Appellant's evidence that he could not afford to do the pulsed signal therapy is, in the opinion of the Review Tribunal, acceptable. While the pulsed signal therapy may improve the Appellant's condition, there is no suggestion that an appellant who does not have the financial means to take specialized treatment not covered by Medicare or other like paying institutions, must do so before being deemed disabled.

[46] On the balance of probabilities, the Appellant has convinced the Review Tribunal that he has a severe and prolonged disability.

[47] The Review Tribunal finds that the Appellant is disabled as of March 22, 2007, being the date on which the Appellant had his epidural injections, which did not appear to assist him.

**Conclusion**

[48] The Review Tribunal allows the appeal of the Appellant. The disability benefits are to start in July 2007 that is four months after the deemed date of disability in accordance with section 69 of the CPP.