



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. K. v. Minister of Employment and Social Development*, 2018 SST 476

Tribunal File Number: GP-17-198

BETWEEN:

K. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: April 12, 2018

DATE OF DECISION: April 14, 2018

REASONS AND DECISION

DECISION

[1] The Appellant is not eligible for a CPP disability pension.

OVERVIEW

[2] The Appellant was 48 years old when she applied for a CPP disability pension in June 2016. She was born in India and came to Canada in August 1992. She stated that she stopped working as a general labourer in January 2015 because she was unable to see, and claimed that she was unable to work as of May 2015 because of severe back and leg pain.¹ The Respondent denied the application initially and upon reconsideration, and the Appellant appealed to the Social Security Tribunal.

[3] The Appellant must prove on a balance of probabilities that she became disabled on or before the end of her Minimum Qualifying Period (MQP), which is calculated based on her contributions to the CPP.² The Appellant's MQP ended on December 31, 2015.

[4] The Appellant attended the hearing and was represented by Rajinder Johal. Harinderjeet Goel attended as a Punjabi interpreter.

ISSUES

1. Did the Appellant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by December 31, 2015?
2. If so, is her disability long continued and of indefinite duration?

ANALYSIS

Test for a Disability Pension

[5] Subsection 42(2) of the CPP provides that a qualifying disability must be severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any substantially

¹ Disability Questionnaire signed May 18, 2016: GD2-63 to 69

² Updated Record of Earnings: GD6-7

gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

Severe Disability

The Appellant has failed to establish a severe disability as of the MQP

[6] The CPP is an insurance regime based on contributions. Under the CPP, the Appellant was only covered for a severe disability on or before December 31, 2015. The case law is clear that medical evidence is required to support a claim that a disability is severe.³

[7] The Appellant testified that she stopped working in January 2015 because she wasn't able to see the glue needed to attach the paper when she was working as a machine operator. She looked for other work but she wasn't able to find another job. She claims that on May 28, 2015 she hurt her back when felt a click in her back while she was trying to sit on a sofa. She felt dizzy and just sat on the sofa, and then went upstairs to her bedroom. The next morning she wasn't able to get out of bed, and went to a walk-in clinic where she saw Dr. Kahlon, family doctor. Dr. Kahlon prescribed muscle relaxants and sent her for x-rays. Dr. Kahlon did not prescribe any other treatment. She hasn't gone for physiotherapy because she can't afford it.

[8] Even though the Appellant's representative wrote to Dr. Kahlon on November 28, 2017 requesting copies of all clinical notes, investigations, and consultations from January 1, 2015 to date,⁴ Dr. Kahlon's only office notes in the hearing file are from October 2016 to December 2017.⁵ No explanation was provided as to why there are no office notes from Dr. Kahlon prior to October 2016.

[9] I consider this to be especially significant since the Appellant testified that she initially saw Dr. Kahlon in May 2015 when she injured her back. The Appellant has the burden of proof and she has failed to produce this clearly relevant and readily available medical evidence. If the Appellant's back problems were severe prior to the MQP there should be copies of Dr. Kahlon's

³ *Villani* 2001 FCA 248; *Warren*, 2008 FCA 377

⁴ GD5-18

⁵ GD5- 4 to16

office notes for the period 18-month period from May 2015 to October 2016 to substantiate this, or some persuasive explanation as to why they have not been provided.

[10] The Appellant did not visit a specialist until she saw Dr. Fennel, physiatrist, in November 2016 (which was 10 months after the MQP). There are reports of other specialist consultations and the Appellant's attendance at a pain clinic starting in February 2017. Although these reports related that the Appellant had experienced back problems since 2015, they do not speak to the severity of those problems as of the MQP.

[11] The only medical evidence in the hearing file prior to the MQP is the imaging studies taken from June 2015 to September 2015.⁶ These imaging studies reveal mild to moderate degenerative changes. Significantly, there is no evidence of any follow up for treatment after these studies until Dr. Kahlon's October 2016 office note which indicates a complaint of ongoing back pain.⁷

[12] I have considered Dr. Kahlon's May 2016 CPP medical report which diagnoses lumbar disc degenerative disease with herniation and bulging and stated that the Appellant had severe back pain which was getting worse.⁸ This was, however, more than four months after the MQP and does not speak to the severity of her condition as of the MQP. I also noted that on February 10, 2017 Dr. Kukreja, pain specialist, reported that the Appellant's main complaint was ongoing lower back pain for the last two years that had become progressively worse, specifically in the last four to five months.⁹ This is consistent with the Appellant's back worsening after the MQP and flaring up around October 2016, which was nine months after the MQP.

[13] There is no medical evidence in the hearing file to support that the Appellant's back problems were severe as of the MQP. It is my duty and responsibility to act only on credible and supporting evidence and not on speculation.¹⁰

⁶ GD2-57 to 62

⁷ GD5-6

⁸ GD2-53 to 56

⁹ GD2-107

¹⁰ *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB). This decision is not binding but I consider it persuasive.

[14] Although the Appellant's back problems appear to have significantly deteriorated after the MQP, this is not relevant unless she can establish that they were severe as of the MQP. The Appellant testified that her back problems prevented her from working as of the MQP because they created sleep problems and she had to take her medications every 4-6 hours. There is, however, no medical evidence to support that her back problems were severe as of the MQP.

[15] Since I am not persuaded that the Appellant suffered from a severe disability as of the MQP it is not necessary for me to apply the "real world" approach.¹¹

[16] I find that the Appellant has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP requirements.

Prolonged Disability

[17] Since I found that the disability is not severe, I do not need to make a finding on the prolonged criterion.

CONCLUSION

[18] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security

¹¹ *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187