



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. S. v Minister of Employment and Social Development*, 2018 SST 1398

Tribunal File Number: GP-17-292

BETWEEN:

D. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Anne S. Clark

Teleconference hearing May 8, 2018
on:

Date of decision: June 12, 2018

REASONS AND DECISION

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Minister received the Claimant's application for a disability pension on March 3, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant worked in a call center and sold internet service contracts. In December 2014 he developed Bell's Palsy and was not able to continue working. The reports and opinions of the health professionals do not all agree about the severity of the Claimant's ongoing symptoms or his capacity for work. The Claimant believes that he is completely disabled from all forms of work and has not made any efforts to pursue alternate employment except to participate in vocational rehabilitation assessments and testing required by his insurer.

[4] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant 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 Claimant's contributions to the CPP. I find the Claimant's MQP will end on December 31, 2018.

ISSUE

[5] Do the Claimant's conditions result in him having a severe disability, meaning he is incapable regularly of pursuing any substantially gainful occupation?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. A person is considered to have a severe disability if 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. A person must prove on a balance of probabilities the disability meets both parts of the test. Therefore, if the Claimant meets only one part, he does not qualify for disability benefits.

Severe

[7] The Claimant described ongoing and persistent symptoms including high levels of fatigue; left side facial weakness; poor speech; left eye does not blink causing dryness with poor vision; pain; ringing in ears; and, choking and drooling. He believes he is incapable of working in any capacity. He cannot do work requiring physical exertion because any activity causes him to experience increased fatigue and pain. He feels sedentary work is not possible because he cannot work at a computer screen due to his poor vision and he is unable to talk for long periods without becoming hoarse and slurring his speech. He participated in and completed all testing that was required of him and he believes the test results demonstrate that he cannot do any job where he could make a living.

[8] In support of his position the Claimant referred me to the following facts: he can only work if he is able to sit when he becomes fatigued²; he showed a significant decrease in performance after four hours of testing³; and, his family physician, Dr. W. Broeren considers him totally disabled⁴. He feels test results did not show the impact of the testing on his pain and fatigue levels. He found the effects of testing was significant and demonstrated he is unable to work at all. He participated in two sessions to identify his transferrable skills and he believes the evidence shows there is no suitable employment considering his past work experience⁵. The

¹ Paragraph 42(2)(a) *Canada Pension Plan*

² GD4-23

³ GD4-41

⁴ GD4-37

⁵ GD2-84

testing process left him with symptoms including headaches, tiredness and facial twitching. He said that made it clear to him that he is not able to do any job where he could make a living.

[9] The Claimant manages his symptoms by using drops in his eyes; moving slowly; walking and yoga for general exercise and fitness. There is nothing he can do to manage his facial weakness or speech problems.

[10] Dr. Broeren's reports to the insurer over 2015 and 2016 confirmed that her prognosis for recovery was guarded and later poor; the Claimant's speech was problematic and his primary limitation; he tires easily after minimal exertion; by December his condition was stable; and, he had reached maximum medical recovery⁶. His other conditions include hypertension and impaired fasting glucose. Dr. Broeren's progress notes⁷ show her observations in 2016 and included the Claimant had persistent facial weakness and fatigue, with fatigue being the most significant. He was showing signs of anxiety and he felt he could not return to part time work.

[11] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It's not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work⁸.

[12] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment⁹. The Claimant attributes his inability to work to the ongoing symptoms caused by Bell's Palsy, including fatigue, impaired vision and poor speech. He also manages high blood pressure and impaired glucose fasting. There was some mention that he had depressive and anxious symptoms and possible functional overlay of his symptoms. There is no evidence to show the Claimant's ability to work is likely limited by one or more mental health conditions.

⁶ GD2-61, 71, 73 & 75; GD4-11

⁷ GD4-7 to 10

⁸ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

⁹ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

Does the Claimant retain the capacity for work?

[13] The Claimant participated in all assessments his insurer required. He believes, however, the reports prepared for the insurer were slanted against him. He disagreed with many conclusions but did not offer any evidence or other explanation to support his belief. In the absence of evidence I cannot conclude the reports are unreliable simply because they were prepared at the request of the insurer.

[14] In 2016 a Lifestyle Restoration Assessment showed the Claimant had no limitations sitting; standing and walking were limited by fatigue; he could use a computer for 60 minutes and was limited by fatigue and occasional pain; he requires exercise and diet changes; sees himself as permanently disabled; would benefit from occupational therapy to address his return to work attitudes and “illness beliefs”¹⁰. In May 2016 the Claimant was discharged from the program having demonstrated no improvement in his occupational performance¹¹. During the course of the program he participated in sessions with a Kinesiologist, Psychologist and Occupational Therapist. He was found to have the perception he would never get better and was resigned to never return to work. He complied with exercise sessions and reported a willingness to increase his exercise as recommended. He made small gains addressing his depressive and anxious symptoms. There was no psychological evidence to indicate he could not attempt a return to work however he continued to remain rigid in his belief that he is not capable of working.

[15] Since he first experienced symptoms of Bell’s Palsy the Claimant participated in other tests and assessments to determine his functional abilities and limitations. Most recently his abilities were assessed by Ruth Billet, a certified vocational evaluator and rehabilitation counsellor; and, Gabrielle Oliver, an occupational therapist certified to conduct functional capacity evaluations.

¹⁰ GD2-89

¹¹ GD2-120

[16] Ms. Billet conducted a Transferrable Skills Analysis¹². She referred to Ms. Oliver's findings in a Functional Abilities Evaluation¹³ that showed the Claimant was capable of work at a sedentary level with accommodation to allow him to sit when necessary. Ms. Oliver concluded the Claimant is likely capable of full time sedentary work that accommodates his limitations. Ms. Billet identified various jobs the Claimant could do given his limitations, education and work experience.

[17] Caroline Roy is a registered occupational therapist. She evaluated the Claimant's ability to complete computer tasks in a four-hour assessment¹⁴ in August 2017. He required frequent breaks to use eye drops and reported increased fatigue. He completed all tasks. There were no changes in his voice or speech. He demonstrated the tolerance for doing computer tasks for a maximum of three to four hours per day but would not be able to work at a computer for prolonged periods "day in and day out" for five days a week.

[18] In June 2017 Dr. Broeren summarized her conclusions and stated the Claimant's ability to work is limited by the fact that he cannot speak without his voice becoming hoarse; working data entry would cause eye strain; and any job would need to be tailored to his needs and limitations. She reported he has one to two naps each day and he feels he is not able to participate in a structured return to work¹⁵. She confirmed her opinion that he is totally disabled and she does not foresee any improvement¹⁶.

[19] Dr. Ken Mitton reviewed Dr. Broeren's opinion in July 2017¹⁷. He questioned her conclusions about the Claimant's disability since the Claimant was not tested for the functions Dr. Broeren addressed. He explained that describing his condition as moderate to severe is not

¹² GD4-15

¹³ GD4-23

¹⁴ GD4-40

¹⁵ GD4-5

¹⁶ GD4-37

¹⁷ GD4-38

relevant as functional abilities determine disability. He confirmed his opinion that there is no contraindication to return to work since any residual limitations such as speech problems can be accommodated.

[20] Dr. Mitton and Dr. Broeren did not provide information about any special expertise they may have to assess the Claimant's functional abilities. Both confirmed they reviewed the assessments conducted by other health professionals and reached different conclusions. Dr. Broeren had the benefit of her knowledge of the Claimant's health condition as his primary physician. She confirmed that she reviewed the reports and stated any work would have to be tailored to the Claimant's needs and limitations. She expressed concern about the Claimant's ability to perform certain job functions but did not explain why her conclusions were different from those of the assessors.

[21] Dr. Mitton also reviewed the assessments and, while his opinion is consistent with the findings and conclusions of the assessors, His letters did not sufficiently explain why he reached his conclusions although he offered some explanation for why he did not agree with Dr. Broeren's conclusions. I find the information about the doctors' training and expertise and the evaluation processes they each used is insufficient to lead to a conclusion that one opinion should be preferred over the other.

[22] The assessments, particularly those conducted in 2017 are persuasive. They were conducted by certified professionals who explained the assessment process, the testing methods and their conclusions. There is thorough, professional evidence and opinion about the Claimant's functional abilities and in particular his ability to return to work. On the question of whether the Claimant retains the capacity for work I rely on the evaluations and reports submitted by Ms. Billet, Ms. Oliver and Ms. Roy and find the Claimant retains some capacity for work provided there is suitable accommodation for his ongoing limitations.

[23] I must assess the severe part of the test in a real world context¹⁸. This means that when deciding whether the Claimant's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[24] The Claimant is 51 years old. He completed high school and a university degree in religious studies. His work experience includes work as a pastor, telephone sales and service. There is no evidence of any language or learning impediments. I find the Claimant's personal circumstances would not restrict his ability to find a realistic job in the competitive workforce given his limitations.

Did the Claimant show efforts to obtain or maintain employment?

[25] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition¹⁹.

[26] The Claimant participated in assessments and testing but did not pursue employment opportunities. He testified that he did everything that was asked of him and no one told him to apply for specific jobs or identified jobs he could do to earn a living. He considered his efforts to comply with the insurers vocational processes to be adequate.

[27] The Claimant believes that he will never work and even though testing showed he likely has the capacity for some work he made no efforts to explore possible options except to participate in assessments that were necessary to ensure he remained eligible for ongoing disability benefits. He said the assessments and testing he did for the insurer made it clear to him that he can no longer make a living. Given that I have found based on the evidence that he has the capacity for work the Claimant is required to pursue employment options and he did not show that he made any efforts that were unsuccessful because of his health conditions.

[28] I find the Claimant did not prove on a balance of probabilities that he is incapable regularly of pursuing any substantially gainful employment.

¹⁸ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁹ *Inclima v. Canada (A.G.)*, 2003 FCA 117

CONCLUSION

[29] The appeal is dismissed.

Anne S. Clark
Member, General Division - Income Security