



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. P. v Minister of Employment and Social Development*, 2018 SST 1419

Tribunal File Number: GP-17-691

BETWEEN:

**J. P.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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

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Decision by: David Somer

Claimant represented by: David Brannen

Videoconference hearing on: July 4, 2018

Date of decision: July 12, 2018

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant was 34 years old at the time of his application in June 2016. He has the equivalent of a grade 12 education. He worked as a heavy equipment operator from August 2008 until August 9, 2015 when he stopped work due to pain from a back injury. He then attempted working as a line cook for several months and then stopped in March 2016 for the same reason. The Minister received the Claimant's application for the disability pension on June 13, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] 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 to be December 31, 2016.

## **ISSUES**

[4] Did the Claimant's back pain result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2016?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2016?

## **ANALYSIS**

[6] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</sup>. 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

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **Severe disability**

#### ***The Claimant did not have a serious health condition that limited his capacity to do lighter work other than his previous occupation as a heavy equipment operator***

[7] 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 impairment.

[8] In a medical report dated May 31, 2016<sup>2</sup>, Dr. Veronique Robichaud, Family Physician, diagnosed the Claimant with chronic mechanical low back pain with depressive symptoms associated with loss of full function. Dr. Robichaud reported that the Claimant has limited forward flexion due to pain and is unable to tolerate prolonged sitting/standing for more than 2 hours. He is very deconditioned. He is prescribed Cymbalta and gabapentin. He has undergone physiotherapy which helped him improve somewhat but then plateaued. He has been re-referred to physiotherapy due to his deconditioning. Dr. Robichaud has been the Claimant's family physician since September 2014 and started treating him for his main medical condition at that time. Dr. Robichaud stated that the Claimant had a poor prognosis due to chronicity and limited response to treatment, but further stated that hopefully the pain clinic and physiotherapy would help him regain some function.

[9] The Claimant stated that he is always in pain which limits his mobility and prevents him from performing required tasks. He is unable to sit/stand for more than 1-2 hours before the pain becomes intolerable. He is able to walk for one half hour at a slow pace and lift 20 pounds which he can carry for short distances. Bending is very painful. He needs help dressing below the knees. He needs medications to sleep as it is hard to get comfortable. He drives for short trips only. He has not been seeing any specialists for the last 2 years. He is prescribed gabapentin, duloxetine and Symbicort for his asthma. He also uses medical marijuana. He attended physiotherapy 3 times per week for 3 months and his back plateaued at 70%. in 2016. He is waiting for an appointment with the pain clinic and uses a TENS machine, back brace and seat

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<sup>2</sup> GD2-52-56

cushion. The Claimant testified that opioid pain medication was effective in helping to control his pain but he did not like the way it made him feel and he stopped taking it on his own.

[10] In a letter dated November 16, 2016 requesting reconsideration, the Claimant wrote that he is unable to work due to injuries in his low back pertaining to his work. He is unable to keep employment as he has a hard time sitting or standing for prolonged periods of time and needs constant breaks. He is unable to do labour work, lift or band and therefore employers will not hire him. He has been a heavy equipment operator most of his life but the specialist says he cannot do that kind of work again he has tried intense physiotherapy and has back has plateaued at 70%. Of what it was before he stopped work. He is in constant pain every day with some days being worse than others. His pain level is a minimum of 5 on a pain level 1-10. He is no longer on narcotic painkillers so his pain level is highly elevated and has a serious effect on his quality of life. He currently is on antidepressants. He is awaiting an appointment at a pain clinic and is not seeing any specialists at the present time. I note that the Claimant has not yet attended a pain clinic and it is expected that his condition would improve following this course of treatment.

[11] On May 9 2014<sup>3</sup>, Dr. Andrei Manolescu, Orthopedic Surgeon, reported that the Claimant's neurological exam was unremarkable. His MRI showed mild to moderate DDD at L5-S1 and L4-5. There is a small L5-S1 posterior central annular tear and a small posterior disc extrusion. Dr. Manolescu explained to the Claimant that the natural history of this disease is to resolve on its own with recurrent episodes of pain. The chronicity of the pain is concerning but the doctor did not think that he followed up a consistent physiotherapy regimen. On June 6, 2014<sup>4</sup>, Dr. Manolescu reported that the Claimant completed the 6 weeks physiotherapy program and made a moderate improvement of his symptoms. The Claimant noticed that not doing his regular job as a heavy equipment operator helped him quite a bit. Since he gets some relief from physiotherapy, he is encouraged to continue for another 8 weeks. Dr. Manolescu advised the Claimant of the benefit of changing his occupation, considering that vibration is one of the biggest triggers of his pain. On July 29, 2014<sup>5</sup>, Dr. Manolescu reported that the Claimant is doing much better. He is doing physiotherapy religiously and has lost some weight and is much happier

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<sup>3</sup> GD2-68

<sup>4</sup> GD2-65

<sup>5</sup> GD2-64

at this point. He would like to continue with physiotherapy and do modified duties for the next 6-8 weeks.

[12] The Claimant underwent an Independent Orthopedic Examination on July 31, 2014 by Dr. Jim McMillan<sup>6</sup>. Dr. McMillan stated that the Claimant is unable to carry out work that he was doing previously which was driving heavy equipment. Dr. McMillan did not think that further physiotherapy would be of benefit but noted that epidural injections of facet injections could be helpful. It is unlikely that in spite of physiotherapy, activity and strengthening, that he will be able to return to persistent stress of heavy work with bouncing in a truck. He is not going to get better enough to manage working with heavy equipment at his previous occupation.

[13] Based on the reports of Dr. McMillan and Dr. Manolescu, I find that the Claimant retained the capacity for some type of work but not of course, his previous work as a heavy equipment operator. The Claimant testified that he returned to his previous occupation as a line cook from October 2015 until March 2016 but was unable to continue in that work. I also find that his work as a line cook was not appropriate for a person with his limitations of needing frequent breaks after prolonged sitting and no lifting of more than 40 pounds according to the physiotherapist report of June 4, 2014.<sup>7</sup> Also, he would be on his feet during his entire shift.

[14] In a report dated April 17, 2014<sup>8</sup>, Dr. Vincent Agyapong, Psychiatrist, diagnosed the Claimant with Adjustment Disorder with Depressed Mood secondary to significant medical and social stressors. Dr. Agyapong reported that the Claimant was cooperative with good eye contact and rapport. His speech was spontaneous and of normal rate and volume. His mood was low and his affect was reactive. He was not suicidal or psychotic. His cognition was average and he had good insight into his problems. Dr. Agyapong offered him psychoeducation, supportive psychotherapy and encouraged him to self- refer to a counseling team for supportive counseling. He prescribed amitriptyline and clonazepam and an offer to review him in 4 weeks' time and hope to discharge him back into the care of his family physician at that stage. On May 15 2014<sup>9</sup>, the Claimant was seen once again by Dr. Agyapong who reported that the Claimant informed him that he is feeling much better and his energy levels are improved but his concentration is

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<sup>6</sup> GD2-57-65

<sup>7</sup> GD2-66

<sup>8</sup> GD3- 61-62

<sup>9</sup> GD3-66

variable. His mood was subjectively good and objectively his mood was euthymic. He was not suicidal or psychotic. He should continue amitriptyline and discontinue clonazepam. He is being discharged into the care of his family physician. There is no indication that the Claimant has been seeing or referred to a psychologist or psychiatrist since May 2014. I agree with the Minister's submission that this does not support a severe psychiatric condition and treatment options are still available should his condition warrant it.

***The Claimant has residual work capacity when I consider his health condition in combination with his personal circumstances***

[15] I must assess the severe part of the test in a real world context<sup>10</sup>. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Claimant was 34 years of age at the time of his application. He has the equivalent of a high school education. His work history consisted almost entirely of heavy labour. Although the Claimant's education level and previous work experience may negatively impact on his ability to seek lighter work or retrain, the Claimant is still a very young man with many years to go before a standard retirement age. In addition, I have found that the Claimant retains the residual capacity for some type of light or sedentary work. I acknowledge his testimony regarding his functional limitations, however, his doctors do not preclude lighter, more sedentary work.

[16] 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 work<sup>11</sup>. I have concluded that the Claimant's physical and psychiatric conditions would not have prevented him from seeking and maintaining suitable gainful employment on or before December 31, 2016.

***The Claimant has not made efforts to find or maintain suitable work within his limitations***

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<sup>10</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>11</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[17] The Claimant testified that he was working as a heavy equipment operator for Suncor in Fort McMurray, Alberta. His job involved driving a heavy truck over rugged roads and despite cushioned seating, he experienced bumping and jostling while driving the truck. He suffered through 3 incidents of hurting his back. The first time, he was off work for 2-3 months and on short-term disability. The 2<sup>nd</sup> time he was off for 3 months while on short-term disability and after the 3<sup>rd</sup> time he did not go back to his previous work. He was then assigned a "no job" position in the office at Suncor where he did very little work with no shift work and regular business hours, 5 days per week. As such, he was unable to return home to Moncton very often which affected his mood. After he left Suncor, he returned to Moncton and eventually became a line cook for several months. As he had to be on his feet during his shifts and reach and carry items, he was unable to continue with this work due to the pain in his back. He also attempted catering as a favour to a friend for 2 hours every other Saturday for 6 to 8 months but did not make any money. He also does some computer repair work but it is mostly a hobby.

[18] 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 condition<sup>12</sup>. I have concluded that the Claimant's attempt at returning to work as a line cook was not a failed attempt at returning to work because that type of work was not suitable for him with his limitations. His other attempts at returning to work were no more than hobbies. He did not make a serious attempt to return to work or look for alternative employment when he stopped working in March 2016. Therefore, I cannot determine from the evidence before me that the Claimant was unsuccessful in obtaining or maintaining employment by reason of his health condition if he never attempted to look for alternative employment. In this case, I am satisfied that the Claimant had the capacity to seek alternative employment but failed to meet his obligation as set out in *Inclima*.

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<sup>12</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

**CONCLUSION**

[19] The appeal is dismissed.

David Somer  
Member, General Division - Income Security