Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. R. v Minister of Employment and Social Development*, 2018 SST 1216

Tribunal File Number: GP-17-1089

BETWEEN:

D. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Shannon Russell
Claimant represented by:	Ronald Cronkhite
In person hearing on:	September 13, 2018
Date of decision:	October 18, 2018

DECISION

[1] The Appellant is not entitled to *Canada Pension Plan* (CPP) disability benefits.

OVERVIEW

[2] The Appellant is a 59 year old man who last worked in the summer of 2014. He applied for CPP disability benefits in May 2016 and in his application he reported that he is unable to work because of arthritis in his neck and back, depression and anxiety, constant migraine-like headaches, and regular nosebleeds. The Respondent denied the application initially and on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for CPP disability benefits, 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. I find the Appellant's MQP is December 31, 2014.

ISSUE(S)

[4] Does the Appellant have a disability that was severe by December 31, 2014?

[5] If so, does the Appellant also have a disability that was prolonged by December 31, 2014?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged[1]. 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. An appellant must prove on a balance of probabilities that his disability meets both parts of the test, which means if an appellant meets only one part, the appellant does not qualify for disability benefits.

[1] Paragraph 42(2)(a) of the *Canada Pension Plan*

Severe Disability

The Appellant Retained Work Capacity at the Time of his MQP

[7] For most of his career, the Appellant worked as a sales representative for a food company. That job ended because the company went bankrupt. In 2012, the Appellant took a landscaping job and it was at that job that he injured his back. I accept that since 2012 the Appellant has been unable to return to heavy, physical labour. For example, the Appellant's family physician (Dr. Rytwinski) reported in February 2015 that the Appellant has spondylosis of the cervical, thoracic and lumbar spine and should avoid jobs that involve heavy labour or lifting[2].

[8] While the Appellant was unable to return to a job that involved heavy physical labour, he retained the capacity to work at a different type of job at the time of his MQP. I have arrived at this conclusion based upon four main grounds.

[9] First, the Appellant's family physician has repeatedly suggested that the Appellant could do work that respects his limitations. I say this because Dr. Rytwinski has only ever indicated that the Appellant cannot do physical work. For example, in May 2012 Dr. Rytwinski reported that the Appellant has a back injury with scapular tendonitis and is unable to do physical work[3]. In February 2015 (just two months after the MQP), Dr. Rytwinski reported that the Appellant has chronic, recurrent pain with overuse of his back and neck and, as such, he advised the Appellant to avoid jobs that involve heavy labour or lifting[4]. In April 2016, Dr. Rytwinski wrote that the Appellant had not been able to physically tolerate manual jobs such as landscaping. He added that the Appellant has some sales experience but has not been able to find a job in that field[5]. I acknowledge that in December 2014 (the month of the MQP), Dr. Rytwinski reported that the Appellant's restrictions include work that requires prolonged sitting[6]. However, other evidence on file (including evidence from Dr. Rytwinski) shows that the Appellant has not had difficulties with sitting. In his CPP Questionnaire of April 2016, the Appellant wrote that "sitting is no

[2] Pages GD2-66 to GD2-69
[3] Page GD2-49
[4] Page GD2-69
[5] Page GD5-29
[6] Page GD2-53

problem", though he has difficulties with prolonged standing[7]. In April 2016, Dr. Rytwinski reported that the Appellant's ability to sit for a sustained period is within normal limits[8]. During the hearing the Appellant was asked about his sitting tolerance in December 2014 and he testified that he did not have problems with sitting.

[10] Second, there is evidence indicating that, in the months after December 2014, the Appellant expressed uncertainty as to whether he was in fact disabled. For example, in the spring of 2015, the Appellant's caseworker (with Ontario Works) referred the Appellant to John Ostrander, Counsellor, and during those initial consultations Mr. Ostrander noted that the Appellant expressed ambivalence about whether he was willing or able to work and whether he should apply for disability benefits. In April 2015, the Appellant told Mr. Ostrander that he was struggling with whether he could actually support himself with his health conditions. He did not know whether it was just a matter of him not being able to find work or whether he realistically could not work anymore[9]. In May 2015, Mr. Ostrander reported that the Appellant was still "on the fence" about whether to apply for CPP and ODSP[10].

[11] Third, the Appellant worked in a X from about May 6, 2014 to July 6, 2014[11] (about six months before the end of his MQP) and he testified that his attendance was good and that he often picked up extra shifts from other employees. I acknowledge that there is *some* evidence indicating that the Appellant's job with X ended because of performance issues, but the evidence is simply too inconsistent to be reliable. For example, when the Appellant was initially asked by his representative why his job with X ended, the Appellant testified that his manager told him he was not able to "keep up with the pace". When it was pointed out to the Appellant that his CPP Questionnaire indicates he stopped work because the regular employee (who he was temporarily replacing) returned to work, the Appellant did not really explain the apparent inconsistency. Instead he said the employee he replaced had been let go before he started the job, but she got her job back after a court proceeding. I asked the Appellant whether he thinks he could have continued working at X had the regular employee not returned, and he said that he could have if

[7] Page GD2-77
[8] Page GD5-28
[9] Page GD4-24
[10] Page GD4-19
[11] These are the dates the Appellant reported in his CPP Questionnaire (page GD2-74), but at the hearing the Appellant testified that he worked for X for 12 weeks.

he increased his speed. He also said that if he did not increase his speed he probably would have been let go. This suggests to me that the Appellant was not let go for reasons related to performance issues. I also note that in March 2015 the Appellant told Mr. Ostrander that he stopped working at his last job because it was a temporary job and not because he had difficulty with the job[12].

[12] Fourth, at the time of his MQP and throughout the time that he was working at X, the Appellant was living with and caring for his mother. In April 2016 (more than one year after the MQP), the Appellant wrote that he committed to helping his mother five years ago and that he helps with basic household chores, vacuuming, dusting, washing floors, dishes, garbage, mail, paying bills and getting groceries. This shows that in 2014 the Appellant was able to manage his job at X while at the same time providing care for his mother.

[13] In finding that there is evidence that the Appellant had work capacity at the time of his MQP, I have been mindful that the Appellant has reported having more than just a pain condition. However, consideration of the other medical conditions does not alter my opinion on work capacity.

[14] I accept that the Appellant may have been dealing with depression and anxiety at the time of his MQP, but I am unable to find that these conditions would have prevented him from working by December 31, 2014. Dr. Rytwinski completed a CPP medical report on February 26, 2015 (just two months after the MQP) and he did not mention anxiety or depression, which suggests to me that these conditions were not significant contributors to the Appellant's disability at that time. Also, the Appellant testified that his mental health symptoms probably started about one year before he started seeing Mr. Ostrander. (As stated previously, the Appellant began seeing Mr. Ostrander in the spring of 2015). I note that the Appellant was able to work during the period he said his symptoms started and he described his attendance as good and said he regularly took on extra shifts. Finally, the Appellant did not start counselling until early 2015 which means that there were treatment options that had yet to be explored at the time of his MQP. Fortunately, it appears the counselling helped because when the Appellant was asked about his depression at the time of the hearing he said that "now it is alright".

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[12] Page GD4-28

[15] With respect to the migraine-like headaches, the Appellant acknowledged during the hearing that the headaches started after his MQP. He said they started about one month before the CT of his head that was done in March 2016[13].

[16] As for the nosebleeds, I do not have any medical evidence concerning this condition and I note that in April 2018 Dr. Rytwinski wrote that there is no mention of nosebleeds in the Appellant's chart[14].

[17] The Appellant mentioned several times during the hearing that he has difficulties with concentration. He said it was because of these difficulties that he did not apply for any jobs after leaving X in 2014 and he thinks that these difficulties will prevent him from working in the future. When I asked him if he has discussed his concentration difficulties with Dr. Rytwinski, he said that he has and that Dr. Rytwinski has told him he needs to get more sleep. In the absence of an effort to try working, despite having some concentration difficulties, it is hard for me to know how much of a limitation the Appellant has, particularly since there is no medical evidence that speaks to this condition. I also note that in April 2016 Dr. Rytwinski reported that the Appellant did not have impairments with respect to his ability to comprehend, express or communicate orally and that the Appellant exhibits normal limits of functioning with respect to intelligence, responds within normal limits to situations requiring memory and has an attention span that is sustainable and appropriate to task[15].

[18] Finally, there are several references in the evidence (particularly in Mr. Ostrander's notes) to the Appellant having challenges with alcohol. When the Appellant was asked whether he was able to control this condition while working in 2014, he said he was. While this condition may have worsened after the Appellant stopped work in July 2014, I note that the Appellant did not pursue Mr. Ostrander's repeated recommendations that he attend a treatment facility. In fact, on more than one occasion, Mr. Ostrander arranged for the Appellant to attend a treatment facility in X and while the Appellant initially agreed to go, he never followed through. The Appellant's decision to not attend the treatment facility is a relevant consideration because applicants for disability benefits are required to submit to programs and treatments that are

[13] Page GD8-3
[14] Page GD8-5
[15] Page GD5-28

recommended and if this is not done applicants must establish the reasonableness of the non-compliance[16]. When I asked the Appellant why he did not attend the programs, he said he could not go because he has a dog and his mother was unable to care for it. I do not accept this as a reasonable explanation and I note that in April 2016 the Appellant called Mr. Ostrander and said that his sister and brother-in-law had recently done a family intervention and, as a result, he was again looking to attend a residential treatment program[17]. There is no mention in Mr. Ostrander's notes of the Appellant being concerned about who would look after his dog, and I find it unlikely that the Appellant would have asked Mr. Ostrander to again arrange a referral if the Appellant knew that his dog would prevent him from attending.

[19] In assessing whether there is evidence of work capacity, I have also considered the Appellant's age, level of education, language proficiency, and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context[18].

[20] I am unable to find that the Appellant's personal characteristics adversely affected his employability at the time of his MQP. In December 2014, the Appellant was 55 years of age and thus had several working years ahead of him before the standard age of retirement. He also has a good education (grade 12 as well as 3-year college diploma in business), is proficient in at least one of Canada's two official languages, and has many years of work experience in sales.

The Appellant Has Not Pursued Alternate Employment

[21] Where there is evidence of work capacity, an appellant is required to show that efforts to obtain and maintain employment have been unsuccessful by reason of the health condition[19].

[22] The Appellant testified that he has not applied for any jobs since July 2014. In the absence of a failed attempt to try to work, I cannot find that the Appellant's disability was severe by December 31, 2014.

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[16] See, for example, *Ramirez* v. *MHRD* (January 27, 1999), CP 05222 (PAB) and *Lalonde* v. *Canada (MHRD)*, 2002 FCA 211
[17] Page GD4-14
[18] *Villani* v. *Canada (A.G.)*, 2001 FCA 248
[19] *Inclima* v. *Canada (A.G.)*, 2003 FCA 117

Prolonged Disability

[23] Given my finding that the Appellant's disability was not severe by December 31, 2014, it is not necessary for me to assess whether his disability was also prolonged.

CONCLUSION

[24] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security