



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. R. v Minister of Employment and Social Development*, 2018 SST 1232

Tribunal File Number: GP-18-106

BETWEEN:

J. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Kelly Temkin

Claimant represented by: Terry Kirby

Videoconference hearing on: October 31, 2018

Date of decision: November 6, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of January 2016.

OVERVIEW

[2] The Claimant was self-employed as a window washer from 2003 until June 2015. The Claimant described his main disabling conditions as anxiety, depression, asthma and back pain. He stated that he could no longer work as of June 2015. 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. 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, 2018. Since this is a future date, I must decide if it is more likely than not that the Claimant had a severe and prolonged disability on or before the date of hearing, October 31, 2018.

ISSUES

[4] Did the Claimant's anxiety, depression, asthma and back pain result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by October 31, 2018?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by October 31, 2018?

ANALYSIS

Test for Disability

[6] Disability is defined as a physical or mental disability that is severe and prolonged. ¹A 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.

Severe Disability

The Claimant's condition was serious by October 31, 2018

[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] I am satisfied that the medical evidence on file in combination with the Claimant's testimony demonstrates that based on his depression and anxiety he had a serious medical condition on or before October 31, 2018.

Depression

[9] The Claimant was last hospitalized for depression in May 2014 and had no interest or ambition to do anything including eating. In July 2017 the Claimant's family doctor gave him a poor prognosis because he was not compliant with the treatment plan. The doctor recommended that the Claimant take pills for his condition but he does not want to take medications. The family doctor recommended the Claimant follow up with a psychiatrist. ² The family doctor attached the August 2014 psychiatrist report which shows the Claimant was hospitalized. His mother brought him to the hospital because he was not eating and deteriorating. The psychiatrist writes that the Claimant had been treated by his family physician with probably CipraleX which he took for a day and stopped because he does not like taking medication. The psychiatrist diagnosed a major depression, seasonal disorder, generalized anxiety disorder, and panic disorder. ³

¹ paragraph 42(2)(a) of the CPP

² GD2-63

³ GD2-67

[10] The Minister submits the Claimant has not improved his medical condition as he has not followed the family doctor's treatment plan. No serious pathology from an orthopedic or psychological perspective was reported that would stop the Claimant from taking on other work within his ability. There are no specialist reports on file other than the 2014 psychiatric report and no evidence of a serious disease or impairment. There is no evidence of active treatments, therapies or medication which would be expected with a serious disease.

[11] The Claimant's testimony was straightforward, thoughtful and consistent with the medical evidence. I accept his testimony. His work history includes a variety of jobs but he could not hold on to them because he did not like taking instructions from others. This is why he started his own window cleaning business in 2003. Starting about three years ago he worked fewer hours until June 2015 when he stopped working because his anxiety and depression was so bad. He just walked away from his business. Today he works for himself, two days a month, window washing as his Ontario Works leaves him short financially.

[12] The Claimant said that he has suffered with depression from childhood. He took anti-depressant medication in 2014 and this made him feel sick and unable to eat for 12 days. He did not wish to take antidepressants because he did not believe in them. He took vitamin D which is a natural remedy and he felt that this was helping his psychological condition. He remembers hiding as a child and not eating. He has memory and concentration difficulties due to depression. His depression takes away his energy and he feels like he is falling into a deep hole. He said that his family doctor retired in December 2017 and although he has made more 20 phone calls he has not found a new doctor in his area. He goes to a walk in clinic if necessary. He has no ongoing psychological care. He thinks his previous family doctor may have suggested a psychiatrist or pills. He said that no doctor had talked to him about a psychological or psychiatric referral recently.

Low back pain

[13] In December 2016, the family doctor wrote that the Claimant had a history of low back pain and difficulty climbing ladder when cleaning windows as well as asthma. He was not taking any pain medications because does not want to take pills. The Minister submits that according to the July 2017 diagnostics of his lower back the Claimant was seen for low back

discomfort. He has a curve in his lumbar spine with many levels of degenerative disc disease. The Claimant testified he saw no specialist for this condition. I find there is not enough evidence to make a finding that this condition alone or in combination with his other medical conditions was serious by October 31, 2018.

Asthma

[14] The Minister submits that the Claimant's January 2016 chest X-ray of his lungs was normal and although he is treated for asthma it is controlled. The Claimant testified that he was awaiting a specialty referral for this condition. Presently he took no puffers because they did not work. I find there is not enough evidence to make a finding that this condition alone or in combination with his other medical conditions was serious by October 31, 2018.

The Claimant's condition was severe by October 31, 2018

[15] I find that the Claimant has established, on a balance of probabilities, a severe disability in accordance with the CPP requirements.

Substantially gainful occupation

[16] The Minister submits of the Claimant may consider changing his job for one less physically demanding. The Claimant does not have a severe medical condition which prohibits him from returning to the workforce in a suitable capacity.

[17] A "substantially gainful" occupation is one that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. 4 A substantially gainful occupation has been described as "having substance, actually existing not illusory, of real importance or value, practical" and gainful as "lucrative, remunerative paid employment." In determining whether work is substantially gainful, I must consider the circumstances of the Claimant.⁵ The Claimant's Record of Contributions shows contributions of \$6323 for 2016 and no contributions for 2017. ⁶ The Claimant testified he is currently on

⁴ Section 68.1 of the CPP *Regulations*

⁵ MSD v Nicholson (April 17, 2007), CP 24143 (PAB). This case is persuasive not binding

⁶ GD6-11

Ontario Works and earns \$400 working two days per month as a self-employed window washer. I find that the Claimant's employment efforts, while commendable, do not demonstrate a capacity to pursue substantially gainful employment. I have considered the medical evidence on file and his testimony to determine whether he is capable of pursuing any substantially gainful occupation in realistic terms.⁷ I find he is unable to do so given his limitations.

Refusal to follow treatment

[18] I must consider whether the Claimant's refusal to follow recommended treatment is unreasonable and if so, what impact the refusal might have on the Claimant's disability status.⁸ Each case must be considered on its own particular facts, and the test in each case is whether the Claimant has acted reasonably having regard to his own particular circumstances and capabilities.⁹ The issue to be determined is whether it was reasonable for the Claimant not to have followed the recommended medical advice. The Claimant's lack of compliance must be viewed in the context of his circumstances. The family doctor identifies the Claimant's lack of motivation and the Claimant testified his depression left him unmotivated and lacking energy. I acknowledge the obligation that Claimants have to seek treatment and help themselves. The fact that he has not had the benefit of a family doctor since December 2017 has impacted his well-being and further complicated his care. In this particular circumstance, the lack of compliance is intertwined with his psychological illness. I have concluded that in light of the lack of primary care combined with his longstanding refractory psychiatric condition his refusal to follow treatment recommendations is not unreasonable, rather it is a symptom of his illness.

[19] I must assess the severe part of the test in a real world context. 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.¹⁰ I acknowledge that the Claimant is 50, with no language barrier and varied work experience in labour. Although the Claimant's education, work history and transferable skills would work in his favour for pursuing employment, his medical condition precludes him from pursuing substantially gainful

⁷ Villani 2001 FCA 248

⁸ *Lalonde v Canada (MHRD)*, 2002 FCA 211

⁹ *Bulger v MHRD*, (May 18, 2000) CP 9164 (PAB). This case is persuasive, not binding.

¹⁰ Villani 2001 FCA 248

employment. Taking into account his personal circumstances I have decided his condition is severe.

Prolonged

[20] Having determined that the Claimant's disability is severe, it is also necessary to make a determination on the prolonged criteria.

[21] The Claimant's testimony, which was supported by the medical evidence, is that the Claimant has suffered from depression since his teenage years, which is longstanding. Based on the medical evidence his conditions are of indefinite duration, as they are continuous and there is no expectation of recovery noted. In fact, in July 2017 the family doctor gave the Claimant a poor prognosis. For these reasons I conclude that the Appellant's disability is "prolonged" in accordance with CPP criteria.

CONCLUSION

[22] The Claimant had a severe and prolonged disability in June 2015 when he could no longer work due to his psychological condition. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension.¹¹ The application was received in December 2016 so the deemed date of disability is September 2015. Payments start four months after the deemed date of disability, as of January 2016.¹²

[23] The appeal is allowed.

Kelly Temkin
Member, General Division - Income Security

¹¹ Paragraph 42(2)(b) *Canada Pension Plan*

¹² Section 69 *Canada Pension Plan*