



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. K. v Minister of Employment and Social Development*, 2018 SST 1345

Tribunal File Number: GP-17-2982

BETWEEN:

**R. K.**

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: Jackie Laidlaw

Claimant represented by: Leo Dillon

Videoconference hearing on: December 4, 2018

Date of decision: December 11, 2018

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant worked as a machine operator for many years. He has had previous injuries to his left shoulder in 2005 and right shoulder in 2014. He began receiving a CPP retirement benefit in January 2016. In January 2017 he was diagnosed with leukemia. He claims he has not worked since August 2014. The Minister received the Claimant's application for the disability pension on February 16, 2017. 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, 2015. However, as the Claimant began receiving a CPP retirement pension in January 2016, he must be found disabled on or before December 2015<sup>1</sup>, which coincidentally is the same date as his calculated MQP.

## **PRELIMINARY MATTERS**

### **The Claimant can cancel a CPP retirement pension in favour of a CPP disability benefit**

[4] The Claimant began receiving a CPP retirement pension in January 2016. He applied for a CPP disability benefit on February 16, 2017 within 15 months of receipt of the CPP retirement pension, and therefore he is eligible to cancel her retirement pension in favour of a disability benefit.<sup>2</sup>

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<sup>1</sup> Subsection 66.1(1.1) of the *CPP*

<sup>2</sup> Subsection 66.1(1.1) of the *CPP*, Paragraph 42(2)(b) of the *CPP*

## **ISSUE(S)**

[5] Did the Claimant's conditions of bilateral shoulder pain and leukemia result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 2015?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by December 2015?

## **ANALYSIS**

[7] Disability is defined as a physical or mental disability that is severe and prolonged<sup>3</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 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**

#### ***Bilateral shoulder injuries***

[8] The Claimant is relying upon the letter of February 2018 from chiropractor Mark Blau as substantial evidence of his shoulder injuries.

[9] There is some discrepancy as to when the first shoulder injury happened. The chiropractor, Mark Blau indicated in a letter of February 2018<sup>4</sup> that he suffered a rotator cuff tear of his right shoulder in 2005. The Claimant has testified that the injury occurred in 2009 and that he was off work for three months and received chiropractic treatment twice weekly.

[10] Dr. Blau noted that the right shoulder injury of 2005 caused permanent disability of his right arm. However, there is no indication the Claimant was on a permanent disability benefit from the Workplace Safety and Insurance Board (WSIB) from either 2005 or 2009. There is also

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<sup>3</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>4</sup> GD 4 3

no medical evidence provided from the right shoulder injury to determine a permanent disability. Given this, I do not put much weight on Dr. Blau's assertion his injury was a permanent disability. The Claimant returned to work after three months. He stated the work was lighter duties whereby he was required to X by machine rather than his previous job in the warehouse packing and sending orders. He continued to do this job, which would require the use of both arms until he stopped working at Cinram in August 2014.

[11] The record of earnings shows a dip in earnings in 2006. Therefore I accept that the first injury took place in 2005.

[12] If the right shoulder was injured in 2005, then the Claimant demonstrated he was capable of working full time for another nine years with his condition. In August 2014 he went on another WSIB claim for a partial tear to the tendon of his left shoulder. He stated it was due to overcompensating for his right shoulder.

[13] WSIB sent the Claimant to X College to attend school full time for three semesters, essentially one year, for a diploma in accounting/payroll which he completed. The course also included a mandatory course in English as a second language (ESL).

[14] The Claimant stated that his shoulder issues were not a barrier to his ability to go to school or apply for jobs after.

[15] There is little information on the Claimant's shoulder conditions. Besides the letter from Dr. Blau, there is also a letter in May 2018 from Dr. Jeyaranjan, cardiovascular and internal medicine, who was the Claimant's family physician from 1997 until February 2012. He does not address the state of the shoulders other than to say he had physiotherapy from 2014 until 2016 and is permanently disabled from an orthopaedic standpoint. Dr. Jeyaranjan is not an orthopaedic specialist, and there is no information from any orthopaedic specialist that the Claimant suffers a permanent disability of his shoulders. As well, I do not put weight on Dr. Jeyaranjan's opinion of the Claimant's shoulders as he was not treating the Claimant at the time of the second injury to his left shoulder and therefore not in a position to comment on his condition. He was treating the Claimant at the time of his first injury in 2005 and does not mention anything about the injury to his right shoulder in 2005. The only time he saw the

Claimant after 2012 was in 2017 for a second opinion on his blood work and not regarding his shoulders.

[16] The Claimant stated he is receiving weekly chiropractic treatments currently. However, the letter from Dr. Blau does not indicate he is currently receiving treatment from his clinic, or any other clinic. Dr. Blau noted he received weekly chiropractic treatments from 2015 into 2016. While there is no information from the current treating chiropractor, there is evidence that at the time of the MQP the Claimant was receiving chiropractic treatment for his shoulders and no other intervention. He has stated he is not taking any medication for his shoulders.

[17] I accept that the Claimant has some pain in both shoulders, and at the time of his MQP was treating his left shoulder. However, the pain and limitations of the shoulders did not prevent him from attending school for a full year in 2014 until 2015 nor did it prevent him from continuing to work in 2015 as a part time worker in an X and then after his MQP in 2015 X part time in 2016, both physical jobs which would require the use of his arms and shoulders.

### ***Leukemia***

[18] The Claimant stated his symptoms of feeling tired and out of breath began in 2015. He had his blood tested every six months since 2014 with his family physician, Dr. Liu and nothing was found unusual. It was not until 2017, when he asked his previous family physician Dr. Jeyaranjan to provide a second opinion on his blood work, that he was told by Dr. Jeyaranjan to go to the hospital emergency. At that point, oncologist Dr. Maze diagnosed acute myeloid leukemia and he was put on chemotherapy. Dr. Maze reported that the prognosis at that time was currently unknown, however the treatment was being administered with curative intent.<sup>5</sup>

[19] He received a bone marrow transplant six months later in June 2017. Since that time he has been told he should be fine but that the condition may return. He is still tired but in remission and there is no further indication he continues to suffer from the leukemia. There is no further information from Dr. Maze and it would appear the treatment was successful in its curative intent.

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<sup>5</sup> GD 2 120

[20] Dr. Jeyaranjan wrote in May 2018<sup>6</sup> that on January 16, 2017 the Claimant presented with extreme shortness of breath. Dr. Jeyaranjan noted that he most likely had abnormal blood tests for a few years prior to the diagnosis and these abnormalities were overlooked. Dr. Jeyaranjan did not specifically refer to any previous blood test he may have reviewed. His comment was hypothetical and not based on evidence. I accept that it is possible the Claimant may have had an abnormal blood test which was overlooked, however, he stated he received a blood test every six months since 2014. Therefore I find it highly unlikely that every blood test was incorrectly reviewed for two to three years.

[21] I do agree with Dr. Jeyaranjan's comment that, "the absence of a diagnosis does not rule out its existence".<sup>7</sup> I accept that the Claimant may have been suffering from symptoms of fatigue prior to his diagnosis. However, the Claimant has not presented any evidence to corroborate his testimony that he was incapable of working at the time of his MQP by reason of symptoms of the leukemia.

***The Claimant's conditions were manageable at the MQP***

[22] 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<sup>8</sup>.

[23] The Claimant's main condition, at the time of his application was leukemia, which was diagnosed, treated and in remission all in 2017. His left shoulder condition began in 2005 and the Claimant continued to work for many years after only three months of sick leave. His right shoulder began in 2014 and he received chiropractic treatment from 2015 into 2016. He is not taking any medications nor is there any surgery required nor specialist consultations, all of which suggests his condition is treatable with minimal intervention.

[24] I accept that at the time of the MQP the Claimant had some limitations with his right and to an extent left shoulder as he required treatment. I also accept that he was feeling tired due to the undiagnosed leukemia. However, the medical evidence and the testimony provided does not

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<sup>6</sup> GD 4 4

<sup>7</sup> GD 4 4

<sup>8</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

indicate that the leukemia was a consideration or required any intervention in 2015, and the shoulder only required conservative treatment for a limited time.

[25] Therefore, the Claimant's conditions were manageable at the time of the MQP.

***The Claimant had a capacity to work at the MQP***

[26] I must determine if the conditions prevented the Claimant from working by the MQP.

[27] The Claimant stopped working in August 2014 and went on a WSIB claim for his left shoulder. He stated that the WSIB sent him for retraining in a completely different field. He went to X College for one year, full time Monday to Friday. He received a diploma in accounting/payroll. The schooling required him to use a computer and study accounting theory through books.

[28] He stated his shoulder did not interfere with his ability to go to school.

[29] The capacity to work is indicated by the performance of part-time work, modified activities, sedentary occupations and school attendance<sup>9</sup>. The Claimant completed his course without incident and therefore has shown a capacity to work in 2015.

[30] The Claimant stated he was dizzy in 2015 while on a WSIB claim for his shoulder and also working for X in X. X is a job placement company who sent the Claimant to three different companies over the course of a year to work at X.

[31] His wife stated he worked two or three days a week. He stated he was let go from X in 2015 due to his inability to work faster because of his shoulder injury and his dizziness.

[32] There is no information on X and the record of earnings does not show any income after 2014. The Claimant's representative was not aware of this work. The Claimant was questioned numerous times as to the timing of his work at X. His application stated that he worked from August 2012 to August 2014 for X.<sup>10</sup> Both he and his wife testified that he did work for them

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<sup>9</sup> S.M.-R. v Canada (Attorney General) [2013] F.C.J. no. 689, 2013 FCA 158 (F.C.A.)

<sup>10</sup> GD 2 139

and received payments in cheque form. They both stated he worked after he had been sent to retraining by WSIB. This would bring the timing to fall of 2015 or 2016.

[33] After questioning both the Claimant and the Claimant's wife, in the absence of any information from X I accept that he worked part time, two to three days a week for almost a year at the personnel agency and was laid off in 2015 or 2016. I cannot accept that he was let go due to his health conditions without evidence from X. As well, there is limited evidence to indicate his health condition, specifically his leukemia, was interfering with his ability to work in 2015.

[34] Therefore, he has demonstrated an ability to work in a physical job despite the limitations of his shoulders and his fatigue in 2015.

[35] 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>11</sup>.

[36] There is evidence of work capacity through both his job at X and his ability to attend school on a regular basis. The Claimant did obtain employment at before his MQP at X and after his MQP as a X two days a week in 2016. Therefore, he has shown he could obtain and maintain employment despite his limitations.

[37] I must assess the severe part of the test in a real world context<sup>12</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.

[38] The Claimant stated that he attempted to get a job in accounting after the training as requested by the WSIB. He had 10 interviews and did not get the jobs, which he applied for online and had personal interviews. He first stated he could not get a job due to the language barrier. Upon further questioning he suggested it was due to his age. He was never told why he did not qualify for the jobs he applied for.

[39] While the Claimant had a translator present during the hearing, he demonstrated he was capable of understanding and answering questions in English. He took an ESL course as part of

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<sup>11</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

<sup>12</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248



the curriculum in the accounting diploma. It is not reasonable that he would be illiterate in the English language and capable of taking a sophisticated course provided in the English language. I also question if he were incapable of communicating in the English language why the WSIB would pay for a diploma course at a College which required a skilled level of understanding English. The Claimant testified he is able to understand English. As well, he was capable of working at the same X company, X, for over 15 years which would have required him to have some understanding of the English language.

[40] The Claimant had completed Grade 12 in Sri Lanka. When he was on Employment Insurance in 1990 in Canada he attended X College for accounting.

[41] In Sri Lanka the Claimant worked for the government as a clerk for four years. When he came to Canada in 1985 he worked as a machine operator for a few years, then eventually started work in 1992 at X. He also “moved up” to work in the warehouse processing orders. After his X training he worked in X. Eventually, in 2016, the Claimant worked part-time for a friend X twice a week for a few months.

[42] The Claimant was 59 at the time of his MQP. He had been retrained the year earlier and had found work before his MQP working in warehouses and then after his MQP X. His age did not appear to be a barrier in accomplishing either retraining or obtaining employment. He is proficient enough in English to obtain employment and retrain and would not have a barrier due to his English skills. He is very well educated in a specialized field of accounting. Given his training he has transferable skills.

[43] I find due to the Claimant’s ability to successfully attend school and his ability to work part-time for a year in a manual labour position at a warehouse he has established a capacity to work. His ability to work has not been impaired by his health conditions or by reason of his age, language skills, education or past work and life experiences as of his MQP.

***The Claimant’s conditions are not severe***

[44] The Claimant may have some limitations with his shoulders. And while it is fortunate he is in remission with leukemia he may well still experience fatigue. At the time of his MQP however, his conditions were manageable and he was able to work at the time of his MQP and after his MQP.

[45] I find the Claimant has failed to prove a severe disability that renders him incapable regularly of pursuing any substantially gainful occupation.

## **CONCLUSION**

[46] The appeal is dismissed

Jackie Laidlaw  
Member, General Division - Income Security