



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. O. v Minister of Employment and Social Development*, 2018 SST 1342

Tribunal File Number: GP-17-850

BETWEEN:

T. O.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Claimant represented by: Vanessa Leggio

Teleconference hearing on: December 19, 2018

Date of decision: December 20, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of April 2015.

OVERVIEW

[2] The Claimant last worked as a full-time journeyman scaffolder from 2005 until January 27, 2014. He stopped working at that time after injuring his right knee on the job. The Claimant indicated that he could no longer work as of that time due to a torn meniscus, depression, and left shoulder arthritis/muscle tears. The Minister received the Claimant's application for the disability pension on March 22, 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 Claimant has been in receipt of a CPP retirement pension which became in pay as of December 2015. To be able to cancel his retirement pension in favour of a disability pension, the Claimant must be deemed to be disabled before the month the retirement pension became payable¹. I find the Claimant's MQP to be November 30, 2015.

PRELIMINARY MATTERS

[4] The Claimant's representative on file did not attend the scheduled hearing. The Claimant submitted that she was not available and had not planned to attend. That there was confirmation the representative received a copy of the NOH and that she had made a telephone request to the Tribunal on December 12, 2018 that a Polish interpreter be present at the hearing for the Claimant. The Claimant submitted that he was prepared, and ready, to proceed.

ISSUES

¹ Subsection 66.1(1.1)CPP

[5] Did the Claimant's condition result in him having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by November 30, 2015?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by November 30, 2015?

[7] Can the Claimant cancel his CPP retirement pension in favour of a disability pension?

ANALYSIS

[8] Disability is defined as a physical or mental disability that is severe and prolonged². 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.

[9] I found the Claimant to be credible. He testified in a forthright fashion answering questions related to his work and health history, as well as the impact that his condition has had on his day to day life.

Severe disability

i. The Claimant suffers from a serious health condition.

[10] 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 impairment³.

[11] The Claimant submitted that he has suffered from right knee pain and left shoulder pain for many years, stemming from multiple workplace injuries over the years. He has also been suffering from depression and a back injury which rendered him unable to work for approximately 10 years until 1997.

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

³ *Bungay v. Canada (A.G.)*, 2011 FCA 47

[12] Though a left shoulder ultrasound was conducted shortly after the expiration of the MQP, it confirmed a complete tear of the supraspinatus tendon as well as partial full-thickness tears of the infraspinatus tendon along with fatty atrophy of the muscles. In August 2016, the Claimant's family physician, Dr. Marcu, also reported that the Claimant had been suffering from shoulder pain for 5 years that was getting worse. This supports a significant shoulder condition that predated the MQP. Following the workplace injury in January 2014, Dr. Greidanus, orthopedic surgeon, reported that an MRI of the right knee dated February 2014 showed tricompartmental osteoarthritis, a complex undisplaced medial meniscus tear, and an MCL sprain. Arthroscopic surgery was performed in April 2014 which involved a medial meniscectomy, partial lateral meniscectomy, debridement, and synovectomy. Since the time of that surgery various orthopedic specialists have recommended that the Claimant undergo total knee replacement surgery. The Claimant submitted that he continues to be on a waiting list to undergo the procedure, but he continues to have to rely on significant narcotic pain medication. His reliance on narcotics has also resulted in recommended surgical delays for undergoing a knee replacement.

[13] In addition to narcotic medication to manage his pain, since January 2014 the Claimant has undergone arthroscopic surgery and viscosupplement joint injections. Though he acknowledges that the joint injections did help reduce his pain to a limited degree, it was not lasting so he did not pursue additional injections. The Claimant has reportedly been advised by a shoulder specialist he is currently seeing that while surgery might help his pain at night, it would not be functionally restorative and the surgery itself would have only a 50/50 chance of success. The same probable outcome holds true for undergoing knee replacement surgery. The Claimant argued that while it may help to alleviate some of his pain, it will not restore his function to the point that he could return to the only line of physical work that he is qualified to do.

[14] I accept the Claimant's testimony and find that while some surgical procedures do remain outstanding, the goal of those surgeries would be to decrease his pain to a tolerable level and not to restore his function to a level that would enable him regularly to return to any substantially gainful work that he would be qualified to do based on his age, experience, and education.

ii. The Claimant's condition has only deteriorated since the time he stopped working which has precluded his ability to successfully return to work.

[15] 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 condition⁴.

[16] The Claimant was working as a full-time scaffolder until the time of his injury in January 2014. Despite suffering multiple injuries in the past to his knee, shoulders, and back, he had continued to persevere in a physically demanding role because it was the only type of work he had known. In May 2014, the Claimant attempted to return to modified sedentary duties in an office type of setting with his previous employer for half days only. The Claimant's significant pain and inability to use a computer, however, made it extremely difficult for him to learn or to be productive. As a result, he was not able to return to work after that single 4 hour shift. His contract of employment was then terminated.

[17] From August to September 2015 the Claimant submitted that WCB placed him in a rehabilitation program that focused on both physical rehabilitation and educational upgrading. He participated daily for 4 hours and was taught basic computer and typing skills. When the Claimant was not able to graduate to 8 hour days of training, he was released from the rehabilitation program. WCB has not requested that the Claimant participate in any additional upgrading or re-training.

[18] While there was indication in an independent medical report from Dr. Greidanus, dated July 2016, that the Claimant was interested in the possibility of working as a parking attendant, the Claimant submitted that Dr. Marcu advised him against returning to any work because of the sustained postures and walking that unskilled work even as a parking attendant would have required. The Claimant submitted that he is not qualified for any other type of work and his constant pain makes it difficult for him to focus to be able to learn any new skill or task. He participated in the WCB rehabilitation program because it was required of him and not because he felt that he could return to any type of work.

⁴ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[19] The Claimant has demonstrated numerous barriers to his successful participation in even sedentary work. He is physically limited in all sustained postures that is not likely to improve over time. I find that he has demonstrated compliance with treatment and has shown effort to mitigate his circumstances to be able to return to the workplace. I find, however, that his condition has simply not improved to the point that would allow him to realistically obtain or maintain any substantially gainful work since the time of his knee injury in 2014.

iii. The Claimant is not realistically employable.

[20] I must assess the severe part of the test in a real world context⁵. 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.

[21] The Claimant was 60 years of age at the time of his MQP. He completed a high school at a technical trade school in Poland and obtained certification as a journeyman scaffolder in Canada. The Claimant is not fluent in either written or spoken English. He possesses no transferable skills given the uniformity of his previous work experience as a scaffolder/carpenter and unskilled labourer, and he has no computer skills. I find that given his functional limitations, limited English competency, age, and lack of transferable skills, that he would not be a good candidate for successful re-training or for more sedentary accommodated work. In a competitive work environment, I find that the Claimant is not realistically employable.

[22] Based on my consideration for the totality of evidence presented, I have concluded that on a balance of probabilities the Claimant was suffering from a severe disability, as defined by the CPP, prior to November 30, 2015.

Prolonged disability

[23] I also find that the Claimant's disability was long continued and of indefinite duration by November 30, 2015. He has been suffering chiefly from chronic pain and degenerative joint/muscular changes at numerous sites. Despite participating in various treatments and consulting with multiple medical specialists, the Claimant's global health condition has little

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

improved. Given the chronicity of his symptoms, I find little prospect that he will improve to the point that would allow him regularly to resume any substantially gainful work.

CONCLUSION

[24] The Claimant had a severe and prolonged disability in January 2014, when he was injured and stopped working. 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 pension⁶. The application was received in March 2016 so the deemed date of disability is December 2014. Payments start four months after the deemed date of disability, as of April 2015⁷.

[25] The appeal is allowed. The Claimant can cancel his CPP retirement pension in favour of a disability pension.

Tyler Moore
Member, General Division - Income Security

⁶ Paragraph 42(2)(b) *Canada Pension Plan*

⁷ Section 69 *Canada Pension Plan*