



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. H. v Minister of Employment and Social Development*, 2018 SST 1349

Tribunal File Number: GP-17-2229

BETWEEN:

H. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Teleconference hearing on: December 4, 2018

Date of decision: December 14, 2018

DECISION

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

OVERVIEW

[2] The Claimant was born in 1959. He is a master electrician. He also has a power lineman certificate. The Claimant alleges that he cannot work because of heart problems, emphysema, depression, and angina. The Minister received the Claimant's application for the disability pension on May 27, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

ISSUES

[3] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the hearing date?

ANALYSIS

[4] 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, 2020. In this case, I must decide whether it is more likely than not that the Claimant had a severe and prolonged disability on or before the hearing date, given the future MQP date.

[5] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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.

¹ Paragraph 42(2)(a) *Canada Pension Plan*

The Claimant failed to prove that he had a severe disability by the hearing date

[6] I find that the Claimant is capable of performing sedentary work and that he is still engaged in a substantially gainful occupation, which means that I must dismiss his appeal. 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 the Claimant is unable to perform their regular job, but rather his inability to perform any substantially gainful work.²

The medical evidence did not support a finding of a severe disability under the CPP

[7] The case law is clear that medical evidence is required to support a finding that a disability is severe.³ The medical evidence shows that the Claimant is capable of performing sedentary work.

[8] The Claimant had a heart attack in March 2005.⁴ The Claimant underwent a double coronary artery bypass graft on April 19, 2005.⁵ He also underwent a lobectomy of the left lung.⁶ He had an episode of an irregular heartbeat in November 2005.⁷

[9] The Claimant previously applied for a CPP disability pension in 2006.⁸ Dr. B. Kiaii, Cardiologist prepared a medical report to the Minister in support of that application. Dr. Kiaii diagnosed the Claimant with coronary artery disease. Dr. Kiaii provided the Claimant with an excellent prognosis.⁹

[10] The Claimant’s previous family physician, Dr. I.J. MacLean drafted a report on September 21, 2005. He provided the Claimant with a guarded prognosis. He was of the opinion that the Claimant would be unable to do any type of heavy physical work.¹⁰ Dr. MacLean drafted

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

³ *Warren v. Canada (A.G.)*, 2008 FCA 377

⁴ GD2-204-205

⁵ GD2-140

⁶ GD2-149

⁷ GD2-149-150

⁸ That application was never adjudicated by the predecessor to this Tribunal. I therefore have jurisdiction to deal with this appeal.

⁹ GD2-157-160

¹⁰ GD2-197-198

a report to the Minister on January 19, 2006. Dr. MacLean again provided an opinion that the Claimant's heart condition would preclude him from anything but sedentary work.¹¹ These reports do not assist the Claimant's case because they confirm that he has capacity to perform sedentary work.

[11] There is an approximate 10-year gap in the medical records contained in the Tribunal file. The Claimant had difficulty obtaining a medical report from one of his family physicians, Dr. D. Hastings.¹² He file a complaint with the College of Physicians and Surgeons of Ontario about Dr. Hastings.¹³

[12] The Claimant's current internal medicine specialist, Dr. Tran did not respond to requests from the Minister for information.¹⁴

[13] The Claimant had an angiogram on May 12, 2016. Dr. P. Diamantouros, Cardiologist noted that the Claimant tolerated the procedure well. He did not change the Claimant's medications.¹⁵

[14] Dr. I. Atta drafted a medical report to the Minister in support of this disability application on November 16, 2018. He stated that he had been the Claimant's family physician since 2014. He provided the Claimant with an unknown prognosis and his condition may change in the future.

[15] The medical records in this case do not support a finding of a severe disability. Dr. MacLean indicated that the Claimant could perform sedentary work in 2006. I do not see a significant deterioration in the Claimant's medical condition since that time that would preclude him from performing sedentary work.

[16] The Minister properly submitted that the Claimant bears the onus of proving that he suffers from a severe disability. The Minister is not required to prove that he is capable of

¹¹ GD2-140-141

¹² GD2-8 and 35

¹³ GD5

¹⁴ GD3-7

¹⁵ GD4-5-7

working.¹⁶ I find it troubling that the Claimant's current internal medicine specialist did not respond to requests for information from the Minister. If the Claimant suffers from severe heart disease, emphysema and depression to the point that it precluded him from working one would think that his treating physicians would have provide such information to the Minister.

The documentary and hearing evidence does not support a finding of a severe disability under the CPP

[17] The Claimant in his Questionnaire for Disability Benefits stated that he worked from 1977 to 2005.¹⁷ He also referred to office work being too stressful on his heart. However, the Claimant advised the Minister in 2007 that he had returned to work when he withdrew his previous CPP disability application.¹⁸

[18] The Claimant's Record of Earnings (ROE) also shows that he has earned income in every year since he had his heart attack in 2005.¹⁹ His ROE shows that his unadjusted pensionable earnings have increased every year since 2005 from \$41,100 to \$54,737.

[19] The Claimant testified that he began his apprenticeship in 1977. He began operating his own business in 1988 or 1989. His business included performing industrial wiring and street lighting. He had 8 to 12 employees prior to his heart attack. He was the key person in the business. He would go from one job site to another to ensure that the work was done properly. His business generated sales of over \$1,000,000. However, his business went downhill after his 2005 heart attack. His children eventually took over the business in about 2007. He testified that his children could not operate the business without him because they need a master electrician on staff. He testified that he is still obtaining an income from the business. His children could not afford a lump sum benefit to buy him out. They pay him a weekly salary based on what he earned prior to his heart attack. He testified that he is no longer involved in the business. He does not sign cheques. He has not been involved in the business since 2007.

¹⁶ GD3-7

¹⁷ GD2-55

¹⁸ GD2-65

¹⁹ GD6-5-6

[20] The Claimant argued that he is not deriving income from employment and he is not engaged in substantially gainful employment.

[21] I disagree.

[22] In 2014, the *CPP Regulations* were amended to provide a definition of the term “substantially gainful”. Section 68.1 states for the purpose of subparagraph 42(2)(a)(i) of the Act, “substantially gainful”, in respect of an occupation, describes an occupation that provides a salary or wage equal to or greater than the maximum amount a person could receive as a disability pension.

[23] The Claimant had unadjusted pensionable earnings of \$52,500 in 2014, \$53,600 in 2015, \$54,711 in 2016, and \$54,737 in 2017. The *CPP Regulations* contain a formula that results in the maximum amount a person could receive as a disability person. The maximum amount a person could receive as a disability pension was \$14,386.20 in 2014, \$15,175.08 in 2015, \$15,489.72 in 2016, and \$15,763.92 in 2017.²⁰ The Claimant receives amounts in excess of the maximum of the disability pension and continued to do so as of the date of the hearing.

[24] The Claimant asserted that he does not work, but I find that he is an essential part of the business. His children cannot operate the business without his master’s electrician licence. He testified at the hearing that his children run the business, but he told the Minister in July 2018 that he owned the business. He continues to receive employment income and make CPP contributions. I find that he is still engaged in a substantially gainful occupation.

[25] The purpose of the CPP is to provide social insurance to Canadians who experience loss of earnings owing to retirement, disability, or the death of a wage earning spouse or parent.²¹ The Claimant’s ROE does not reveal that he has had a loss of earnings. By his own admission, the Claimant is still receiving a salary that was equivalent to what he earned prior to his heart attack.

[26] Even if an argument can be advanced that the Claimant is not engaged in a substantially gainful occupation, I still find that he is capable of pursuing sedentary employment based on Dr. MacLean’s report. The Claimant testified that he cannot work because he is severely fatigued

²⁰ Subsection 68.1(1) *Canada Pension Plan Regulations*

²¹ *Granovsky v. Canada (MEI)*, 2000 SCC 28

and suffers from severe impairments in the areas of memory and concentration. However, the medical evidence on file does not support his assertion that he is unemployable.

[27] The Claimant and his wife both gave evidence that he suffers from significant problems with memory. The Claimant testified that his memory problems began after his surgery in 2005. He testified that he suffered from “pump head” after his surgery and that he has significant impairments. He was so concerned about his memory that he visited the Alzheimer’s Society where he was told that he did not have Alzheimer’s. One would think that if the Claimant had significant memory impairments it would be reflected in the records of his treating physicians, but I do not see any medical evidence to support a finding that the Claimant has problems with his memory.

[28] The Claimant and his wife testified that he suffers from depression. He has taken anti-depressant medications. He also has problems with drinking. Dr. Atta is encouraging him to work through his issues with alcohol on his own. He has not had mental health counselling. I find that his depression and problems with alcohol do not prevent him from performing sedentary work, and they have not prevented him from earning income since 2005.

[29] The Claimant suffers from shortness of breath, which is consistent with his heart condition and having part of his left lung removed. The evidence is clear that his heart condition and shortness of breath make physical work an impossibility for the Claimant, but the same does not hold true for sedentary work.

[30] The Claimant testified that he has no upcoming procedures or consultations. He indicated that he suffers from night blindness and has macular degeneration, but I did not see any medical evidence to support this assertion.

[31] The Claimant and his wife also testified that his shortness of breath leads to difficulty putting on his socks and performing his housekeeping. I do not question that the Claimant suffers from heart problems, shortness of breath, and depression. He continues to take medications for all of his medical conditions. However, it is a claimant’s capacity to work and not the diagnosis of the disease that determines whether the disability is severe under the CPP.²² I agree with the

²² *Klabouch v. Canada (MSD)*, 2008 FCA 33

Minister that while the Claimant might have some limitations arising from his medical conditions, the evidence does not support a finding that these limitations prevent him from performing all types of work.

[32] In dismissing this appeal, I do not mean to minimize the Claimant's medical conditions. However, I am bound by the wording of the CPP legislation and the associated case law interpreting those provisions.

CONCLUSION

[33] The appeal is dismissed.

George Tsakalis
Member, General Division - Income Security