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

Citation: *TS v Minister of Employment and Social Development*, 2019 SST 1702

Tribunal File Number: GP-18-1569

BETWEEN:

T. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Raymond Raphael

Videoconference hearing on: January 16, 2019

Date of decision: January 23, 2019

Canada

DECISION

[1] The Claimant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment starting July 2013.

OVERVIEW

[2] The Claimant was 45 years old when he applied for a CPP disability pension in June 2014. He last worked as a window and door delivery driver, and stopped working in August 2012 because of stress and a mental breakdown. He hasn't worked since, and states that he is unable to work because of numerous mental health and physical conditions including severe depression; anxiety; obsessive compulsive disorder; post-traumatic stress disorder; constant pain in his hips, knees, and low back; left leg lymphedema (swelling) causing frequent infections; insomnia; headaches; blurred vision; loss of hearing in his right ear; dizziness; and insomnia. The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal.

[3] On September 13, 2017 the General Division dismissed the appeal. The General Division Member determined that although the Claimant was severely disabled from August 2012 until at least June 2015, his disability was not severe by the time of August 28, 2017 hearing.[1] The Claimant appealed, and on July 3, 2018 the Appeal Division allowed the appeal and referred this matter back to the General Division for reconsideration.

[4] In order to avoid unnecessary duplication, I treated the recording of the evidence at the initial General Division hearing as part of the evidence at this hearing. The Claimant gave additional evidence.

ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2014?
2. If so, is his disability long continued and of indefinite duration?

[1] General Division decision, paras 55 & 66

ANALYSIS

Test for a Disability Pension

[5] A qualifying disability must be severe and prolonged.[2] A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

[6] The Claimant must prove on a balance of probabilities that he became disabled on or before the end of his Minimum Qualifying Period (MQP), which is calculated based on his contributions to the CPP. His MQP ended on December 31, 2014.[3]

Severe Disability

[7] I must assess the Claimant's condition as a whole and consider all of his impairments that affect employability, not just his biggest impairment or his main impairment.[4] Although each of his medical problems taken separately might not result in a severe disability, their collective may render him severely disabled.[5]

[8] The Claimant stopped working in July 2012 because of a mental breakdown. He stated, "I couldn't even get out of bed...everything came out at once." He has not tried to return to work because of his nervousness, anxiety, feelings of hopelessness, and the side effects of his medications. He stated, "It is hard for me to do anything... I couldn't be fair to an employer because of my struggles. ...there is no way I could maintain a job with my fluctuating moods and sleep patterns, poor memory, and inability to focus."

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[2] Subsection 42(2) of the CPP
[3] Record of Contributions: GD2-37
[4] *Bungay* 2011 FCA 47
[5] *Barata v MHRD* (January 17, 2001) CP 15058 (PAB)

The Claimant's conditions were significantly disabling as of December 31, 2014 and continuously thereafter

[9] Dr. Stewart has been the Claimant's family doctor since 1994. In his September 2014 CPP medical report Dr. Stewart diagnosed chronic depression, recurring leg cellulitis, and chronic knee and back pain secondary to accidents. He stated that the Claimant was unlikely to return to gainful employment because of his chronic longstanding medical and psychiatric problems.[6]

Accidents and traumatic events

[10] The Claimant testified that he has suffered permanent physical and psychological damage as a result of numerous accidents and traumatic events:

- He was hit by a school bus when he was 3 ½ years old. He suffered cerebral injuries and a concussion, and was hospitalized in intensive care for three months. His memory was "wiped out" and he had to learn things all over again. He believes that this contributed to his doing poorly in school. Although he completed high-school it took him 14 years as opposed to 12 because he failed two years. He had "a hard time" learning and "barely" passed. He was put in the trade school stream and majored in automotive repair. He has suffered from anxiety and depression since this accident.

- In 1998 he was injured in a motorcycle accident. His left leg was smashed between the motor cycle and a guard rail, and he suffered a crush injury to his leg and hip. He underwent four surgeries and was off work for five years. He has suffered constant left leg and hip pain since this accident.

- In February 2011 he fractured the top of his spine in a motor vehicle accident. His car rolled over several times and the top of his head hit the roof. He suffered another concussion, went for physiotherapy, and was off work for three months. He returned to his work delivering doors and windows, and "soldiered" through his pain.

- In August 2011 he tore his left bicep when he was lifting a heavy door. He was off work for another three months. When he returned to work, he was on light duties for a couple of months and then resumed his usual delivery work.

- In February 2012 he cut his left hand when he dropped a piece of glass on it. He was off work for a couple of weeks until the stitches were taken out.

[6] GD2-52 to 55

- In 2012 he was involved in a traumatic break-up of a 12-year relationship with the mother of his two children. He was barred from seeing his children for a period of time.

- By July 2012 he was severely depressed and suicidal and checked himself into the hospital emergency department. He stopped working because of a "mental breakdown." Although he had been treated for depression and anxiety since the 1990's, by this time his depression and anxiety were severe and he "couldn't even get out of bed."

- In May 2013 he was physically assaulted by his former girl-friend and her boyfriend.

Mental health conditions and treatment

[11] The Claimant had numerous long-standing mental health conditions as of December 2014. He had been treated for depression and anxiety since the 1990's but these conditions became worse after his mental breakdown in 2012. He also had suicidal thoughts "many times over the years." He no longer has suicidal thoughts but he always has "butterflies" in his stomach, experiences no joy, avoids crowds, and doesn't go out socially. He has difficulty with his personal care and goes for lengthy periods of time without taking a bath or shower. He goes for days without eating and then binge eats. He has problems with memory and focusing. His mind is "all over the place." He repeatedly does things such as checking whether a door is locked and washing his hands. He has night-mares about the assault and his numerous accidents.

[12] He also suffers from insomnia. At the initial hearing he testified that he would cycle between being awake for 3-4 days, and then sleeping for several days. This is still a problem but it is not as bad since his medications are helping him get a decent sleep. He was also experiencing dizziness which he believed was caused by his medications. Now he only experiences dizziness if he stands up too quickly.

[13] In July 2012 the Claimant went to a hospital emergency department because he was depressed and suicidal, was having prolonged periods of highs and lows, had disturbed sleep, and was hearing voices. Dr. Anthony, a hospital psychiatrist, diagnosed major depressive disorder (recurrent, moderate to severe episodes); rule out type II bipolar disorder; and cluster C

(anxious, fearful, obsessive compulsive) personality. Dr. Anthony assessed a Global Assessment of Functioning (GAF) of 55.[7]

[14] Until recently, when the Claimant was transferred to a new psychiatrist, Dr. Anthony treated the Claimant for depression, anxiety, obsessive compulsive disorder, post-traumatic stress disorder, and social anxiety. He monitored his medications and provided counselling. The most significant excerpts from Dr. Anthony's progress notes are set out below:

- May 2013: not able to return to work because of severe depression and anxiety, former girl-friend and her boy-friend had come to his home the previous weekend and assaulted him, medications Zopiclone, 7.5 mg (not taking regularly), Clonazepam,.25 mg three times a day, Pristiq, 100 mg daily, and Seroquel, 50 mg daily.[8]

- July 2013: recommended reduce Pristiq to 50 mg daily.[9]

- August 2013: recommended increase dosage of Seroquel to 100 mg, daily[10]

- October 2013: still struggling with depression and obsessive compulsive disorder, anxiety symptoms substantially decreased.[11]

- January 2014: still struggling with depression and anxiety, unable to do chores at home, moved into his mother's house.[12]

- March 2014: 60 to 70% better with prescriptions.[13]

- May 2014: anxiety decreased by 50%, mood improved by 20%, not confident about returning to work.[14]

- July 2014: still off work, living with his brother, recommended continue on his medications which were Seroquel, Prestiq, and Clonazepam.[15]

- November 2014: mood and anxiety symptoms still disabling.[16]

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[7] GD2-56 to 57
[8] GD2- 73 to 75
[9] GD2-72
[10] GD2-71
[11] GD2-70
[12] GD2-69
[13] GD2-68
[14] GD2-67
[15] GD2-66
[16] GD6-4

- June 2015: depressed, affect flat, attended eight session of the Take Charge of Mood program.[17]
- July 2016: doing much better clinically, sleep and appetite normal, mood stable on Effexor, Seroquel, and Clonazepam.[18]
- January 2017: sleep normal, continuing same medications.[19]
- April 2017: periods of increased and decreased sleep but for the most part was doing well, mood stable, affect appropriate.[20]

Physical conditions and treatment

[15] The Claimant also had numerous physical conditions including constant pain in his hips, both knees, and low back; left leg swelling and cellulitis that required numerous emergency hospital visits because of flare-ups of infection; headaches which came on in the evening and lasted for a few hours; blurred vision which has now been dealt with by his using reading glasses; a complete loss of hearing in his right ear which has been present since his childhood school bus accident; and left shoulder pain as a result of which he was unable to lift his left arm over his shoulder.

[16] After his 1998 motorcycle accident the Claimant underwent an ACL (anterior cruciate ligament) reconstruction and two scopes. In July 2001 Dr. Daigle, orthopaedic surgeon, performed a scope and debridement. Dr. Daigle's post-operative diagnosis was a PCL (posterior cruciate ligament) tear and fraying around the anterior horn of the meniscus.[21] In spite of his surgeries the Claimant continued to have problems with his knee. In January 2003 he told Dr. Clark, orthopaedic surgeon, that his chief complaint was instability and unpredictable hyperextension of his left knee.[22]

[17] On March 21, 2011 JoAnn Thompson Franklin, physiotherapist, confirmed that the Claimant was attending physiotherapy for his compression neck and back sprain injuries

[17] GD6-5
[18] GD6-6
[19] GD6-7
[20] GD7-10
[21] GD2-109
[22] GD2-106 to 107

sustained in a motor vehicle accident on March 21, 2011.[23] On April 4, 2011 Dr. Harper, neurologist, diagnosed bilateral carpal tunnel syndrome.[24] On October 6, 2011 Sharron Steeves, physiotherapist, saw the Claimant to initiate treatment of a partial left bicep tear sustained in an August 17, 2011 workplace injury.[25] On February 27, 2012 Dr. Brent, plastic and cosmetic surgeon, saw the Claimant for a deep laceration over the dorsal aspect of his left hand caused by a sharp glass.[26]

[18] The Claimant has a lengthy history of left leg cellulitis.[27] In December 2003 he spent four days in a hospital with a left leg infection after out-patient treatment failed. In the December 12, 2003 discharge statement Dr. Stewart stated that the Claimant's left leg was chronically edematous secondary to the trauma of his 1998 motorcycle accident. The Claimant attended at the hospital on seven occasions between April 2013 and November 2014 because of flare-ups of cellulitis in his left leg.[28]

[19] The Minister acknowledges that the Claimant has conditions that cause limitations, but states they are not severe and continuous. The Minister says the Claimant's mental health conditions are stable and there is no evidence of severe symptoms that prevent him from returning to the work force. The Minister relies on Dr. Anthony's progress notes from July 2016 to April 2017 discussed in paragraph 14, above. With respect to concussions, the Minister says that there is no evidence of a referral to a neurologist or other specialists. With respect to his chronic knee and back pain, the Minister says that the Claimant has been able to work for many years despite these conditions.

My Findings

[20] There may have been some improvement in the Claimant's ability to manage his mental health conditions with medications, but he still receives ongoing psychiatric care. In addition, he

[23] GD2-113
[24] GD2-153 to 156
[25] GD2-129
[26] GD2-34
[27] GD2-91, Nov 1, 2014 , emergency department record
[28] GD2-103, 101, 94, 92, 91, 89 & 84

continues to suffer from multiple longstanding physical conditions as detailed above. All of these were present as of December 31, 2014 and have continued to the date of the hearing.

[21] He continues to experience multiple disabling mental health symptoms including severe depression, constant anxiety, poor memory, inability to focus, obsessive compulsive symptoms, and night-mares. He also suffers from constant pain in his hips, knees, and low back which limits his sitting, standing, and walking. In addition he has left leg cellulitis, frequent headaches, and a complete loss of hearing in his right ear.

[22] Having regard to the cumulative effect of the Claimant's multiple conditions, I find that his conditions were significantly disabling as of December 31, 2014 and continuously thereafter.

The Claimant has established a severe disability

[23] A disability should be considered severe if it renders a Claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I should assesses the severity requirement in a "real world context" and consider such factors as the Claimant's age, education level, language proficiency, and past work and life experiences when determining his "employability".[29]

[24] I recognize that the Claimant was only 46 years old on December 31, 2014 and that he is able to communicate fluently in English. However, his education is limited. He had a "hard time learning and barely passed" grade 12, failed two years, and was placed in the trades school stream. He has a narrow employment history consisting primarily of work requiring heavy physical labour. His only non-physically demanding employment was in a call centre, and he wasn't able to continue at that work because of pain from prolonged sitting.

[25] I have already determined that he suffers from multiple significantly disabling mental health and physical conditions. He has significant physical limitations in sitting, standing, walking, lifting, and reaching. He has trouble remembering and concentrating. He has mood swings, obsessive compulsive symptoms, and social anxiety symptoms. I cannot envision how he could be a regular and reliable employee.

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[29] *Villani* 2001 FCA 248

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

Prolonged Disability

[27] The Claimant suffers from multiple long-standing physical and mental health conditions. He has exhausted treatment of his physical conditions through multiple surgeries and physiotherapy, and is allergic to pain medications. Although his mental health conditions have been treated by multiple medications for many years, there has been no improvement that would enable him to regularly return to substantially gainful employment.

[28] The Claimant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[29] I find that the Claimant had a severe and prolonged disability in August 2012, when he last worked. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Minister received his application for a disability pension.[30] The application was received in June 2014; therefore, the Clamant is deemed disabled in March 2013. Payments start four months after the deemed date of disability[31], as of July 2013.

[30] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

[30] Paragraph 42(2)(b) of the CPP
[31] Section 69 of the CPP