



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. W. v Minister of Employment and Social Development*, 2019 SST 185

Tribunal File Number: GP-18-94

BETWEEN:

D. W.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Teleconference hearing on: February 18, 2019

Date of decision: February 21, 2019

DECISION

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

OVERVIEW

[2] The Claimant is 55 years old, and has had a long and varied work history. He most recently worked as a general labourer and “X”. However, he had degenerative disc disease and also had suffered some workplace injuries. He suffered from chronic pain and was no longer able to handle the physical demands of his job. He attempted some lighter duties, but has not worked since October 13, 2015. The Minister received his application for the CPP disability pension on November 30, 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 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, 2018.

ISSUES

[4] Did the Claimant’s conditions result in the Claimant having a severe disability by his MQP date? In other words, was he incapable regularly of pursuing any substantially gainful occupation by December 31, 2018?

[5] If so, was the Claimant’s disability also prolonged?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged.¹ A person is considered to have a severe disability if he is 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

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

probabilities that his disability meets both parts of the test. If the Claimant meets only one part, he does not qualify for disability benefits.

Did the Claimant have a severe disability by December 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.² I must also assess the severe part of the test in a real-world context.³ 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.

[8] The Claimant was 55 years old at his MQP date. He speaks English fluently. At the hearing, he confirmed that he wrote his final exams in Grade 11, but they did not count because he had been suspended from school. Dr. Chandrarajan (Family Physician) has suggested that the Claimant's education level understates his actual capacity.⁴ The Claimant has also held "A" and "D" driving licences in the past, but now only has a "G" licence. He also completed periodic training through his work, such as First Aid and WHMIS ("Workplace Hazardous Materials Information System"). He has had a broad range of jobs: he did machine maintenance at a X, made X deliveries, worked at a X store, worked in construction, did maintenance on apartment buildings, painted offices and warehouses, and cleared snow. His most recent job, which he held for more than 13 years, was acting as a general labourer and X at X. This involved sports field landscaping, driving lawnmowers, cutting trees and bushes, flower gardening, shovelling, watering, weed picking, driving dump trucks, filling sandboxes, and a variety of odd jobs.

[9] Without considering his medical conditions, the Claimant's personal characteristics provide him with a relatively broad range of potential non-sedentary jobs. Although his age and low level of "documented" education would likely preclude formal academic upgrading, lengthy training programs, or work in a specialized profession, he may have some capacity for brief and job-specific retraining. The sheer variety of his work experience shows an ability to learn and

² *Bungay v. Canada (A.G.)*, 2011 FCA 47

³ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁴ GD4-40

perform job-specific tasks. With this in mind, I will consider whether he has a serious health condition that affects his work capacity.

The Claimant has a serious health condition that affects his work capacity

[10] I have no doubt that the Claimant's degenerative disc disease and associated pain leave him unable to return to his former job as a general labourer and X. Dr. Chandrarajan affirmed this on various occasions from 2015 to 2018. The Claimant's chronic back pain clearly precluded work of such a physical nature: mild to moderate activities were problematic and his pain was even interfering with his activities of daily living.⁵

[11] At the hearing, the Claimant said that he was "definitely disabled from his original job". He also described significant limitations on his capacity to do work of a physical nature. I found the Claimant to be a candid witness. I did not sense that he was withholding information from me. As a result, I am willing to accept his evidence (along with Dr. Chandrarajan's evidence) that his work capacity has been affected by his health condition since 2015.

[12] However, 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 is not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work.⁶ I must therefore determine whether the Claimant has any residual work capacity.

The Claimant now has some residual work capacity

[13] The most recent medical evidence is from August 2018.⁷ However, at the hearing, the Claimant described some recent improvements in his condition. He said his tolerances for sitting, standing, and driving had slightly increased. While he still has pain, he feels he has been getting better. He is trying to do more housework, and is capable of doing more than he did before. He described a focus on pain management, rather than on finding a cure, and said he was better at

⁵ See, for example, GD4-22 (February 2018), GD4-61 (October 2016), and GD4-103 (October 2015)

⁶ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁷ GD4-10

choosing activities within his capabilities. This is important because if he feels good on one day and overdoes things, he may end up in bed for the next day.

[14] The Claimant is trying to remain positive about his situation. He is hopeful that he will be able to go back to work and do some kind of job, even though he will not have a total recovery. He said Dr. Chandrarajan shares this view. The Claimant went on to say that he's "really close" to a possible return, although he could not do his old job because it was very physical.

[15] In October 2016, Dr. Chandrarajan suggested that the Claimant could do sedentary (computer-based) work at his own pace.⁸ When asked about his capacity to do such work now, the Claimant thought he could do it for a short period of time, but not for four hours straight. He still has difficulty sitting for extended periods, and would have to keep getting up.

[16] The Claimant was asked whether there was any work he could see himself doing. He said he could see himself doing a lighter job that did not involve demanding tasks such as shovelling or getting bumped around in a tractor. With his current employer, he thought such work might be found in the kitchen, in loss prevention, in occupational health and safety, or in shipping and receiving. These positions appear to involve relatively frequent position changes and do not appear to involve prolonged sitting. When asked whether he would be able to try one of these jobs if they became available, he thought he could. However, he is not sure what type of work would be offered to him.

[17] The Claimant expressed a strong preference for working with his current employer, as he feared that he might need to go home once in a while. He thought that a civilian employer would be less understanding of this. He also noted that continuing to work for X would be more favourable from a retirement pension perspective. He said he really wanted to work: he has been off for too long and does not want to be at home all the time.

[18] While the Claimant said he could not remain seated throughout the hearing, I accept his clear evidence that there has been a recent improvement. I also find that there is persuasive evidence of some work capacity, given his apparent readiness to attempt work that is consistent with his current limitations. This finding is extremely important because, where there is evidence

⁸ GD4-61

of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition.⁹

Have the Claimant's efforts at obtaining and maintaining employment been unsuccessful because of his health condition?

[19] The Claimant said he had not applied for any jobs since he stopped working in 2015. However, his union told him that there might be another job opportunity that has lighter physical demands. He said the union was going to help him with finding another position if his appeal for CPP disability benefits were unsuccessful. He said the union had a "sit back and wait" attitude, and were reluctant to take any steps before his CPP appeal was resolved.

[20] The Claimant said he had not really thought about a particular job field outside of whatever might be available at his current employer. He does not think he would last long in an office. He would hate to take another job and have to quit after a week or two. He admitted that he might have to think about other jobs and perhaps make a list of jobs that might be suitable for him.

[21] Although he currently has some work capacity, I must conclude that the Claimant has made little or no effort to obtain or maintain suitable employment. Indeed, it seems that such efforts are on hold pending the outcome of this appeal. While this appears to be the result of reliance on the union, rather than any personal unwillingness to look for suitable employment, it still means that his efforts at obtaining and maintaining employment have not been unsuccessful because of his health condition. As a result, I am bound by the Federal Court of Appeal to find that he cannot be considered severely disabled at this time.¹⁰ His appeal cannot succeed.

The Claimant's receipt of disability benefits from a private insurer

[22] While the above analysis is sufficient to resolve the appeal, I would like to comment briefly on the Claimant's receipt of long-term disability benefits from a private insurer. This Tribunal is frequently asked to assess disability under the CPP when a private insurer has already determined that the applicant met the insurer's definition of disability. However, there is non-

⁹ *Inclima v. Canada (A.G.)*, 2003 FCA 117

¹⁰ *Inclima v. Canada (A.G.)*, 2003 FCA 117

binding authority confirming that receipt of disability benefits under a private insurance plan is not relevant for CPP disability purposes. The provisions of other public and private plans for disability benefits are not the same as those under the CPP. The threshold for a CPP disability pension is a high and stringent one, perhaps the highest of any such legislation in North America.¹¹ While it appears that the Claimant was denied an Ontario disability benefit, this is also not relevant for CPP disability purposes.¹²

Does the Claimant have a prolonged disability?

[23] As I found that the Claimant's disability was not severe, it is not necessary for me to answer this question.

CONCLUSION

[24] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security

¹¹ See, for example, *Heller-Pereira v. MHRD*, (2004) CP 18522.

¹² GD4-10