



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *GM v Minister of Employment and Social Development*, 2019 SST 1721

Tribunal File Number: GP-18-2009

BETWEEN:

G. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Videoconference hearing on: February 27, 2019

Date of decision: March 4, 2019

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of January 2016.

OVERVIEW

[2] The Claimant last worked as a full-time heavy equipment operator from April 2015 until September 2015. He indicated that he could no longer work as of that time due to worsening chronic back and knee pain. The Minister received the Claimant's application for the disability pension on December 14, 2015. 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, 2018.

[4] I previously issued a Summary Dismissal decision related to the Claimant's appeal for a CPP disability pension on November 23, 2017. That decision was issued following a series of unsuccessful attempts to contact the Claimant and unsuccessful attempts to deliver a NOH. The Claimant subsequently applied for leave to appeal to the SST – Appeal Division citing that not all avenues of contact had been attempted before his appeal was Summarily Dismissed. On August 22, 2018 the SST – Appeal Division allowed the Claimant leave to appeal, and the matter was referred back to the SST – General Division for reconsideration.

ISSUES

[5] Did the Claimant's conditions result in him a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2018?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2018?

ANALYSIS

[7] 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.

[8] 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 that impacts all aspects of his day to day life.**

[9] 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 a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work². I must also assess the Claimant's condition

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

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

in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment³.

[10] The Claimant's family physician, Dr. Motyer, reported in July 2014 that the Claimant had required long-term codeine for his chronic left knee. By August 2014, Dr. Motyer indicated that the Claimant was complaining of a lot of lower back pain, despite the pain medication he was already taking. The Claimant continued to work despite his back and knee pain. In November 2014 an MRI of the lumbar spine revealed disc bulging with annular tears and a disc protrusion abutting the L5 nerve root at L4-L5. A follow-up MRI in 2016 revealed a new annular tear at L5-S1 and ongoing displacement of the right L5 nerve root. In early 2015 the Claimant underwent nerve blocks at a pain clinic, and according to Dr. Bharat, he had good results. I find that these objective findings are significant and correlate with the Claimant's reported symptoms.

[11] In September 2015, Claimant's pain medication was listed as Amitriptyline, Lyrica, Flexeril, Tylenol #4, and Codeine Contin. Dr. Ahmed, the Claimant's treating pain specialist noted in 2016 that the Claimant had already seen multiple orthopedic surgeons in the past. According to the Claimant, he has been advised he is too young for knee replacement surgery and he is not a candidate for any other surgical procedure.

[12] The Claimant continues to travel to see Dr. Ahmed in Oshawa every few months for pain injections. He either takes a bus or has a friend drive him. Though Dr. Ahmed noted in his last report that he was awaiting the results of a recent MRI before considering epidural injections, the Claimant submitted that he has already received those injections in the past, the most recent was a year ago. Those injections met with limited success and the Claimant is not optimistic that more epidural injections would be of benefit. Treatment at this point has been supportive. Despite several avenues of ongoing treatment, the Claimant continues to subjectively rate his daily pain level as 8/10.

[13] The Claimant acknowledges that physiotherapy and aquatherapy have been recommended to him. He does not participate in those activities because of the out of pocket expense. He does try to be as active as he can be by stretching at home and getting outside to

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

walk. The Claimant submitted that he is only able to walk for about a block before having to stop, and can only sit for 30 to 60 minutes. He does his best to cook simple meals and he only cleans when absolutely necessary.

[14] The Claimant spends the majority of his time moving around constantly changing postures in an attempt to get comfortable. He also spends time laying on the sofa with a heating pad on while watching television or reading. Coughing and bending the wrong way set his back off and can cause excruciating pain. The Claimant has neighbours who help him with groceries and his landlord does all the outside maintenance. He submitted that has only very basic computer skills and does not own a computer.

[15] I accept that the Claimant's chronic pain dictates his day to day activity. He has been compliant with recommended treatment but has obtained minimal gains, especially with regards to his back. Even with significant narcotic medication and regular back injections at a pain clinic, the Claimant's daily pain continues to be constant. I find that his pain and functional limitations preclude him regularly from any substantially gainful work.

ii. The Claimant's health condition has not improved to the point that would allow him to return to the workplace.

[16] 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.

[17] The Claimant stopped working in September 2015 after catching himself while falling out of the excavator he was driving. He was reportedly offered light duties, but those duties would have still involved heavy labour and so the Claimant had to decline.

[18] The Claimant submitted that at the time he stopped working he had already been suffering from chronic pain for 20 years. Over time, his pain had worsened mostly because of the constant jarring while driving heavy machinery. The September 2015 incident at work significantly aggravated his knee and back condition. That aggravation continues to date. As a result, the Claimant has not looked for any other work. He had already persevered in the

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

workplace for many years while heavily medicated with narcotics. By 2015, those medications did nothing to alleviate his back pain. The Claimant has also only known work as a physical labourer and heavy machine operator.

[19] I accept that the Claimant would return to work if he could. Unfortunately, his condition has not improved to the point that would allow him to do so. I find that he has been precluded him from both obtaining and maintaining any employment for which he would be qualified to do based on his age, education, and experience.

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 is 55 years of age. He has completed a high school education and is fluent in English. He possesses no transferable skills given his employment history only in industrial landscape and as a heavy machine operator. The Claimant has no real computer skills. Given Claimant's age, lack of transferable skills, and numerous functional limitations, I find that he would not be a good candidate for any re-training or for sedentary work within his limitations.

[22] In 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 in the CPP, as of December 31, 2018.

Prolonged disability

[23] I find that the Claimant's disability was also long continued and of indefinite duration by December 31, 2018. He has been suffering from chronic pain related to his knee and back since well before September 2015. Despite his compliance with treatment, regular pain injections, and his reliance of significant narcotic pain medication, the Claimant's condition is little improved overall. Given the chronicity of his symptoms, lack of restorative treatment options presented to him, and lack of improvement to date, I find little prospect that his condition will improve to the

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

point that he could regularly return to any substantially gainful work. While knee replacement surgery at some point in the future may improve the Claimant's knee mobility and pain to a degree, his chief complaint is related to his lower back for which there has been no novel treatment options presented.

CONCLUSION

[24] The Claimant had a severe and prolonged disability in September 2015, when he stopped working completely. Payments start four months after the date of disability, as of January 2016.

[25] The appeal is allowed.

Tyler Moore
Member, General Division - Income Security