



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. A. v Minister of Employment and Social Development*, 2019 SST 424

Tribunal File Number: GP-18-650

BETWEEN:

**L. A.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Virginia Saunders

Claimant represented by: Sant Sharma

In person hearing on: March 26, 2019

Date of decision: April 19, 2019

## **DECISION**

[1] The Claimant, L. A., applied for a *Canada Pension Plan* (CPP) disability pension in January 2017. The Minister denied the application and the Claimant appealed to this Tribunal. I have decided the Claimant is not eligible for the pension, so I am dismissing his appeal. These are my reasons.

## **OVERVIEW**

[2] The Claimant is 54 years old. He is originally from Fiji, where he left school after Grade 6 so that he could work and help support his family. He immigrated to Canada in 1985, and began working as an auto body repairman. Eventually he started his own business. He did this type of work until 2011, when he had to stop because he had respiratory issues. In August 2012 he was in a car accident, and since then he has had back and leg pain. He says he has been unable to work since August 2012 because of breathing problems, progressive left leg and hand weakness, liver disease, and arthritis in his fingers and toes.<sup>1</sup>

## **THE ISSUE IN THIS APPEAL**

[3] The Claimant is entitled to a CPP disability pension if he meets these conditions:

- he must have contributed to the CPP within a time frame called the “minimum qualifying period” or MQP;
- he must have a disability that is “severe and prolonged”; and
- he must have become disabled on or before the end of his MQP.<sup>2</sup>

[4] The Claimant’s MQP ended on December 31, 2013.<sup>3</sup> I have to decide if he has a severe and prolonged disability, and if he was disabled by that date. It is the Claimant’s responsibility to prove this.<sup>4</sup>

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<sup>1</sup> The Claimant’s application and CPP disability questionnaire are at pages GD2-80-83 and GD2-371-377.

<sup>2</sup> Paragraph 44(1)(b), and subsections 44(2) and 52(3) of the *Canada Pension Plan*

<sup>3</sup> The Claimant’s CPP contributions are at page GD4-19.

<sup>4</sup> The legal test is that the Claimant must prove he is disabled on a balance of probabilities; in other words, he must show it is more likely than not that he is disabled.

[5] The Claimant's disability is severe if he is incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.<sup>5</sup>

### **IS THE CLAIMANT'S DISABILITY SEVERE?**

[6] A person's disability is severe not because he has impairments or a particular diagnosis, but because the disability prevents him from earning a living at any type of job.<sup>6</sup> I have to look at the Claimant's overall medical condition and consider every health issue that might affect his employability.<sup>7</sup>

[7] The Claimant's subjective assessment of how his condition affects his ability to work is important. However, there must be some objective medical evidence to support his claim.<sup>8</sup> That means I have to look at what doctors and other professionals have said about his condition, and consider that as well. I believe things have not been easy for the Claimant since he stopped working, but the objective evidence shows his condition was not severe at December 31, 2013.

[8] There is no evidence the Claimant was affected by most of the conditions he claimed in his application on or before December 31, 2013. He did not mention left leg and hand weakness, liver disease, or arthritis in his fingers and toes to his family doctor, nor was he sent for investigation or examination by specialists. While I understand these conditions contribute to his present health condition, they did not do so when his minimum qualifying period ended. The potentially debilitating conditions the Claimant had at December 31, 2013, were asthma and back and leg pain. However, I cannot find these left him incapable regularly of pursuing any substantially gainful occupation on or before that date.

### **The Claimant's breathing problems were not severe at December 31, 2013**

[9] The Claimant had respiratory problems for many years. They worsened around 2009, when he began to have increasing shortness of breath and difficulty getting a full breath in.<sup>9</sup> He

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<sup>5</sup> Paragraph 42(2)(a) *Canada Pension Plan*.

<sup>6</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

<sup>7</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

<sup>8</sup> *Warren v Canada (Attorney General)*, 2008 FCA 377

<sup>9</sup> GD2-55, GD2-173-178

made several trips to emergency, and was treated with prednisone and inhalers.<sup>10</sup> In 2011 he stopped doing body repair work, because he thought his symptoms were caused by the dust and welding fumes in his shop. For the next year he worked part-time in the body shop's office. He filed a claim with Work Safe BC.

[10] In April 2012 Dr. Youakim of Work Safe BC concluded the Claimant had work-related asthma and probably allergic occupational asthma. He advised the Claimant not to enter the body shop area, and to only try working in the office if the ventilation was made independent of the workshop and adequate cleanliness was maintained.<sup>11</sup> Soon after this, the Claimant sold the business, but he continued to go to the office for a few hours each day to train the new owner.<sup>12</sup>

[11] The Claimant saw a respiratory medicine specialist, Dr. Ahmed, in early 2011. He went back to see Dr. Ahmed in May 2012. Dr. Ahmed prescribed new medications and recommended that the Claimant quit smoking.<sup>13</sup> Notes of subsequent visits to Dr. Ahmed and to immunologist Dr. Luciuk for the next 18 months show the Claimant continued to smoke and continued to feel unwell. Besides having asthma, he was diagnosed with chronic sinusitis and "at least" moderate obstructive sleep apnea. He tested positive for allergies. He was given a CPAP and then a BiPAP machine, and new medication. He could not afford the recommended treatment of immunotherapy and Xolair injections.<sup>14</sup>

[12] In December 2013 the Claimant's family doctor, Dr. Frey, said his asthma was stable.<sup>15</sup> Dr. Ahmed confirmed this in March 2014, when he said the Claimant had been reasonably stable over the last four months, with mild shortness of breath when he had a cold.<sup>16</sup> In the summer of 2014 he had difficulty with breathing, which Dr. Ahmed thought was probably caused by acid reflux. He recommended the Claimant start using CPAP therapy again, and by February 2015 the

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<sup>10</sup> GD2-175

<sup>11</sup> GD2-167-172

<sup>12</sup> GD2-53

<sup>13</sup> GD2-53

<sup>14</sup> GD2-28, 32, 39, 40, 43, 44, 47, 51, 52, 109

<sup>15</sup> GD2-34-35

<sup>16</sup> GD2-10

Claimant was reported as “apparently doing reasonably well” for the past six months without any flare-ups.<sup>17</sup>

[13] I accept that the Claimant honestly feels his breathing problems have been continuous since 2011. However, his doctors’ reports tell me otherwise: they show that his symptoms improved and stabilized by December 2013, and that they stayed that way for more than a year, except for a two month period when he had stopped using his CPAP machine. Although the Claimant could not work in auto body shops or other dusty areas, and his breathing problems affected his stamina,<sup>18</sup> the objective evidence shows he was not otherwise limited by asthma or other respiratory issues when his MQP ended and for some time after that.

### **The Claimant had work capacity despite his back and leg issues**

[14] The Claimant was injured in August 2012 when his car was rear-ended. At first, he felt fine, but over the next few days he developed back pain that radiated into his right leg, foot and toes.<sup>19</sup> An x-ray of the lumbar spine showed moderate narrowing of disc space and mild osteophyte formation.<sup>20</sup> By October 2012 his back was improving, but he continued to report pain to Dr. Frey into the next year.<sup>21</sup>

[15] A CT scan of the Claimant’s lumbar spine in January 2013 showed the Claimant had a herniated disc.<sup>22</sup> He went to an orthopedic surgeon, Dr. Kwon, in April 2013. He told Dr. Kwon his pain was worse when he sat for long periods. It limited his ability to lift and to sit. He told Dr. Kwon that physiotherapy and chiropractic treatment had not helped him. Dr. Kwon recommended a nerve root block, weight loss, and more physiotherapy. He said the Claimant should consider surgery if he continued to have pain.<sup>23</sup>

[16] The Claimant had a nerve root block in July 2013, but it did not help. Dr. Kwon felt the Claimant’s symptoms were caused by the herniated disc. He noted the Claimant was not

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<sup>17</sup> GD2-20, GD2-275

<sup>18</sup> GD2-240-253

<sup>19</sup> GD2-16

<sup>20</sup> GD2-45

<sup>21</sup> GD2-14-16

<sup>22</sup> GD2-41-42

<sup>23</sup> GD2-12-13

interested in having surgery, and that Naprosyn (naproxen) seemed to help. He thought the Claimant's symptoms would improve over time.<sup>24</sup>

[17] The Claimant continued to report back symptoms to Dr. Frey on some of his visits for the rest of 2013.<sup>25</sup> At the hearing he told me he still has pain from the herniated disc, and that he cannot sit, stand, or walk. He now gets cortisone injections that have not helped much, as they give temporary relief only. He does not want to have surgery because Dr. Frey told him there was only a 20% chance he would get better, while there was a 30% chance he would get worse.

[18] I did not consider whether it was reasonable for the Claimant to refuse to have surgery, because I find that even with the limitations he had at December 31, 2013, he had some work capacity. My conclusion is based on the following evidence:

[19] First, although the Claimant reported back and leg pain fairly regularly after August 2012, it does not appear to have been as significant as he now remembers. In August 2013 Dr. Kwon thought it would improve on its own, and he offered to see the Claimant again in six months if he did not feel better or he was still unhappy with his symptoms.<sup>26</sup> Dr. Frey's clinic notes from 2014<sup>27</sup> do not show the Claimant was referred back to Dr. Kwon or to any other orthopedic specialist, and there is no other evidence that he was. The Claimant did not remember if or when he went back to see Dr. Kwon.

[20] Second, the Claimant received vocational rehabilitation services from Work Safe BC after it found his asthma was caused by workplace exposure.<sup>28</sup> He had an interview in November 2012 and a psycho-vocational assessment by a registered psychologist, Dr. Kwong, in April 2013. In neither case were his back and leg pain mentioned, either as physical challenges or as barriers to returning to the workforce.<sup>29</sup> The Claimant told Dr. Kwong he did not have chronic pain, but that he got migraine headaches about twice per month and had to rest for the remainder of the day. He described a typical day of watching television, shopping for groceries, running

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<sup>24</sup> GD2-26

<sup>25</sup> GD2-14, GD2-266

<sup>26</sup> GD2-26

<sup>27</sup> GD2-267

<sup>28</sup> GD2-122-125

<sup>29</sup> GD2-254-257, GD2-240-253

errands, doing household chores and cooking. He told Dr. Kwong he hoped to learn computer skills and find part-time work.<sup>30</sup>

[21] Although Work Safe BC only accepted the Claimant's respiratory symptoms as eligible for compensation, it had to consider his overall condition in deciding on a rehabilitation plan. It is obvious, especially from the psycho-vocational assessment, that all the Claimant's relevant physical limitations were carefully considered. The fact that no one, including the Claimant, mentioned his back and leg pain tells me that it was not as debilitating then as the Claimant now remembers.

[22] Third, Dr. Frey saw the Claimant frequently in 2013,<sup>31</sup> so was well-placed to comment on his limitations. After he examined the Claimant in December 2013 he completed a medical report for ICBC (Insurance Corporation of British Columbia) concerning the Claimant's injuries from the August 2012 car accident – that is, his back and leg pain. He noted the Claimant had a disc herniation with impingement that caused back pain radiating down the right leg, pain with walking and standing, and decreased range of motion and tenderness in his neck and upper back. Despite this, Dr. Frey said the Claimant was capable of performing “relatively sedentary work”. He said the Claimant's pain was 80% controlled with Naprosyn, and that he was capable of carrying out non-work activities.<sup>32</sup>

### **The Claimant had work capacity despite some negative personal factors**

[23] The Claimant's background is important when deciding if his disability is severe. I have to look at things like his age, level of education, language proficiency, and past work and life experience, so that I have a realistic picture of his work capacity.<sup>33</sup>

[24] The Claimant was 49 years old at his MQP. English is his second language, but he has adequate English functional skills.<sup>34</sup> I do not think either of these factors had a negative impact

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<sup>30</sup> GD2-245-246

<sup>31</sup> GD2-14, GD2-265-266

<sup>32</sup> GD2-34-35. Dr. Frey also indicated the Claimant could not perform duties associated with going to school, although he did not say why. Considering that the Claimant was going to school at that time, it is more likely Dr. Frey meant he was unable to perform work duties because he was going to school.

<sup>33</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>34</sup> GD2-233

on his employability. However, the Claimant's work capacity is limited because his work experience is almost entirely in auto body repair, and because he has very little formal education. Most significantly, in the psycho-vocational assessment the Claimant scored in the impaired range for general intellectual functioning, and in the borderline range for nonverbal intelligence with grade equivalencies of Grade 2 to 3.<sup>35</sup>

[25] Dr. Kwong thought the Claimant's intellectual and academic functioning precluded jobs and training programs requiring anything above a very basic capacity to learn. She thought he would require routine, hands-on learning; work environments in which he could learn a specific task thoroughly before learning additional tasks; and vigilant supervision to ensure he was following instructions correctly. She noted he had limited work stamina because of the effort required to function at his cognitive level, and she thought he would benefit from being able to work at his own pace in a supportive learning environment. She said the Claimant should be directed towards light strength employment in dust-free environments that did not require heavy lifting.<sup>36</sup>

[26] I considered whether these limitations effectively meant the Claimant was not competitively employable. I was more persuaded by other evidence of his intellectual and cognitive functioning that shows he was more capable than Dr. Kwong found.

[27] Dr. Kwong herself noted the Claimant had been able to manage in daily living and had managed his own business for many years. She speculated it was possible his cognitive decline was more recent, but there is no evidence to suggest that was the case. In fact, in December 2013 Dr. Frey stated there were no psychosocial or other factors that would impede the Claimant's recovery from the injuries he had in the motor vehicle accident. It is reasonable to conclude Dr. Frey did not feel such factors would affect the Claimant's employment either, because he also stated the Claimant was able to perform relatively sedentary work.<sup>37</sup>

[28] Further evidence of the Claimant's abilities is that he took computer training from October 15, 2013, to February 7, 2014. The course was for 20 hours each week, and the Claimant

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<sup>35</sup> GD2-246-249

<sup>36</sup> GD2-240-253

<sup>37</sup> GD2-34-35



learned keyboarding, internet and email, and Microsoft Windows, Word and Outlook. His attendance was excellent, and he passed the course with a 90% average.<sup>38</sup> At the hearing the Claimant's representative told me the course was supposed to be only two months long but the Claimant took four months. I find he is mistaken in that. The documentation shows the course was 280 hours at 20 hours per week (which means it was 14 weeks long), and that when the Claimant started in October 2013 he was expected to complete the course by February 2014, which he did.

[29] In 2014 the Claimant trained to become a security guard. He failed the licensing exam twice, but passed in August that year, on his third try.<sup>39</sup> He was given a job search allowance by Work Safe BC and was supposed to look for a job full-time.<sup>40</sup> The Claimant and his representative told me he applied for security jobs because Work Safe BC forced him to, but he was not well enough to work, and he was not hired. The Claimant's allowance was extended in October 2014, which means any job search took place at least ten months after the end of his MQP and is not evidence of his condition then.

[30] The Claimant's medical records show his condition deteriorated after December 31, 2013, and he developed new health problems. In the November 2016 medical report for this application, Dr. Frey said the Claimant's main medical condition was progressive leg weakness for the past three months, severe left ulnar neuropathy, and alcoholic liver disease.<sup>41</sup> None of these conditions was evident on or before December 31, 2013.

[31] In January 2017 Dr. Frey said the Claimant's asthma became worse in 2013. The medical records from 2013 do not support that statement. Dr. Frey also said he became aware of the Claimant's significant alcohol problems in 2014 and that progressive peripheral neuropathy was evident in 2015, as well as bilateral ulnar neuropathies, and nerve palsy in the Claimant's leg.<sup>42</sup> However, there is no evidence that any of these conditions affected the Claimant's work capacity on or before December 31, 2013.

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<sup>38</sup> GD2-225-227; GD2-229-230

<sup>39</sup> GD2-192

<sup>40</sup> GD2-194

<sup>41</sup> GD2-309

<sup>42</sup> GD2-264

[32] I recognize the Claimant is not suited to some types of retraining, and his job prospects were limited by his physical issues, his work experience, and his level of intelligence and cognitive functioning. However, on balance the evidence tells me he was able to perform sedentary or light work at December 31, 2013. He was not incapable regularly of pursuing any substantially gainful occupation, so he did not have a severe disability.

**CONCLUSION**

[33] Because I decided the Claimant's disability was not severe at December 31, 2013, I did not have to consider whether it was prolonged.

[34] The appeal is dismissed.

Virginia Saunders  
Member, General Division - Income Security