



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. K. v Minister of Employment and Social Development*, 2019 SST 1610

Tribunal File Number: GP-18-30

BETWEEN:

C. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Kelly Temkin

Claimant represented by: C. L.

Teleconference hearing on: April 16, 2019

Date of decision: May 14, 2019

DECISION

[1] The Claimant applied for a Canada Pension Plan (CPP) disability pension. The Minister refused his application and he appealed to this Tribunal. I have decided the Claimant is not eligible for the pension so I am dismissing his appeal. Here are the reasons why.

OVERVIEW

[2] The Claimant worked as an aircraft maintenance engineer from September 1975 to January 2005 when he stopped working due to early retirement as a result of his medical condition. He described his main disabling condition as disc problems at C5, C6 and C7 noting an anterior spinal fusion surgery in 2014. He felt he could no longer work as of January 2005. The Minister denied the Claimant's disability application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

THERE IS ONE ISSUE IN THIS APPEAL

[3] A person who applies for a disability pension has to meet the requirements that are set out in the law that deals with CPP disability benefits. First, you have to meet the contribution requirements. The legal term for this is the "minimum qualifying period"¹. The Claimant's minimum qualifying period date is December 31, 2008.

[4] Second, you have to have a disability that is "severe" and "prolonged"². You have to have that disability on or before the minimum qualifying period date.

[5] The issue I have to decide is whether the Claimant's disability was severe and prolonged by December 31, 2008. It is up to the Claimant to prove³ this.

IS THE CLAIMANT'S DISABILITY SEVERE AND PROLONGED?

¹ It is found at s.44(1)(b) of the *Canada Pension Plan* (CPP).

² This requirement is found at s.42(2)(a) of the CPP.

³ The legal test for proof in this case is that the Claimant has to show it is **more likely than not** her disability is severe and prolonged.

[6] If the Claimant is incapable regularly of pursuing any substantially gainful occupation because of his disability, that is a severe⁴ disability. If the Claimant's disability is likely to be long continued and of indefinite duration, that is a prolonged⁵ disability. The Claimant's disability must be both severe and prolonged for the Claimant to receive a disability pension.

There is insufficient medical evidence on which to base a finding that the Claimant's medical condition limited his capacity to work on or before his December 31, 2008 MQP

[7] To decide if the Claimant's disability is severe, I have to look at all of the Claimant's medical conditions together to see what effect they have on his capacity to work.⁶

[8] I have to consider how the Claimant feels about the impact these conditions have on his capacity to work. This is what we call subjective evidence. I also have to consider what doctors and other medical professionals say about his condition, including such things as the results of medical tests. This is objective evidence. The Claimant must provide some objective medical evidence to support his claim.⁷

[9] The Claimant wrote that he had severe medical condition in 2004 which became permanent. He felt the medical system failed him. All the information is in his medical charts. He felt he should qualify for disability benefits because the condition was present when he was forced to take early retirement.⁸

[10] In February 2017, the Claimant wrote that he had permanent nerve damage. He could not stand as both legs were affected. He retired early due to leg issues but his problem was not diagnosed until 2013. He had a spinal fusion to avoid needing a wheelchair permanently, but unfortunately the damage was already done. He has difficulty with walking, sitting, standing and needs assistance to shower.⁹

⁴ The legal definition of "severe" is found at s.42(2)(a)(i) of the CPP.

⁵ The legal definition of "prolonged" is found at s.42(2)(a)(ii) of the CPP.

⁶ The Federal Court of Appeal explains this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

⁷ The Federal Court of Appeal explains this in a case called *Warren v Canada (Attorney General)*, 2008 FCA 377.

⁸ GD2-17

⁹ GD2-92

[11] In March 2017, the Claimant's family doctor wrote that he has known the claimant for more than 10 years.¹⁰ He has treated the main medical condition since 2004. He has chronic cervical disc disease, anterior cervical decompression and a fusion at C5-C7. He has weakness in the upper leg and lower leg and uses walking aids for movement. He gave the Claimant an uncertain prognosis. The doctor included reports from the neurosurgeon who said postoperatively (November 2014) following a C5 - C7 decompression surgery the Claimant was doing quite well.¹¹ The Claimant's gait had improved and a year later he only required a cane if he was walking long distances. There were no restrictions placed on his activity.

[12] There are several reports all of which post-date the Claimant's MQP. In January 2013, an internal medicine report notes that since a stent placement he has been feeling well, walking regularly and is asymptomatic. There is an emergency room visit on January 9, 2012 with a diagnosis of gout. There is an emergency room visit for foot pain in March 2013.

[13] Additional medical records submitted after the hearing¹² showed the Claimant suffered a right rib injury in January 2004. X-rays¹³ showed no fractures of the right ribs, and fractures of the 8th and 9th left ribs. In August 2018, the Claimant injured his right heel. An August 2005 x-ray¹⁴ shows early changes of spondylosis with the disc spaces well maintained. The Minister submits that all of these injuries occurred four years prior to the expiration of the Claimant's minimum qualifying period of December 31, 2008 and do not indicate a severe medical condition that would have precluded the Claimant from all types of work activity. Also, the 2005 x-ray does not show serious pathology that would require further consultation or preclude all types of work. No further reports are on file regarding disc disease until July 2014, well past the MQP of December 2008.

[14] The Minister submits there is a significant lack of objective medical information at the MQP of December 2008. I agree. The Minister indicated a request was made for a narrative report from the family doctor regarding the Claimant's medical conditions in 2008 and if these

¹⁰ GD2-74
¹¹ GD 2-76
¹² GD8
¹³ GD8
¹⁴ GD8-4

conditions prevented him from working at the time.¹⁵ The family doctor did not provide a report. The Claimant wrote¹⁶ that when he made inquiries at the health clinic for his records following the hearing, he was told a flood in 2010 had damaged the earlier records and his chart was presumed destroyed.¹⁷ The Claimant's testimony was straightforward and credible. But while I accept the Claimant's testimony that he was mismanaged medically and that his symptoms were present prior to December 2008,¹⁸ there is insufficient medical evidence on which to base a finding that his disc problems, or a combination of his medical conditions, limited his capacity to work on or before his MQP.

[15] Two witnesses testified in support of the Claimant. Their testimony was straightforward and credible. The Claimant's former girlfriend testified she and the Claimant started dating in 2004. He needed help bathing, showering and dressing and found it difficult to get out of bed. He could not work. The Claimant's former colleague testified that the Claimant's problems began in 2004. Although they did not work in the same department, he observed him having difficulty walking and falling. While I acknowledge the testimony of the witnesses, there is no suggestion in the medical evidence that his medical condition in December 2008 was serious enough to restrict the Claimant from working.

[16] I have to look at the Claimant's background (including age, level of education, language and past work and life experience) so I can get a realistic or "real world" picture of whether his disability is severe.¹⁹ The Claimant was 53 years old at his MQP, proficient in English and with certifications and experience in aircraft maintenance. Taking into account his proficiency in English, his level of education and his work experience, if the Claimant thought he could not do his usual work, I find the Claimant retained capacity for alternate work or retraining at the time of his MQP.

[17] In addition to showing a serious health problem, where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been

¹⁵ GD2-67

¹⁶ GD8

¹⁷ GD8

¹⁸ GD1-1

¹⁹ The Federal Court of Appeal explains how to understand the concept of a "severe" disability in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

unsuccessful because of the person's health condition.²⁰ I acknowledge the Claimant's decision to take early retirement from his job due to his medical condition. As the Claimant has made no efforts to look for work, I am unable to determine that he could not engage in substantially gainful employment at the time of his MQP, by reason of his medical condition.

[18] The Claimant submits that the fact he was approved for the Disability Tax Credit from 2004 to 2021 shows he was disabled at the time of his MQP. I acknowledge that the Claimant was found to be eligible for a disability tax credit by the Canada Revenue Agency beginning in 2004. However, the criteria used for establishing eligibility for the disability tax credit and for a CPP disability benefit are different, and therefore eligibility for one does not guarantee eligibility for the other.

[19] I find that the Claimant has failed to establish, on a balance of probabilities, a severe disability in accordance with the CPP requirements.

[20] There is no need for me to consider whether the disability is prolonged, because I have decided the disability is not severe.

PRELIMINARY MATTERS

[21] At the hearing, I provided the Claimant an opportunity to obtain supporting medical documentation. The Tribunal received the additional medical evidence (GD8) which was sent to the Minister and a reply was received (GD9). I have proceeded to write my decision based on the post hearing documents, the original documents on file and the Claimant's oral testimony at the hearing.

CONCLUSION

[22] The Claimant does not have a severe and prolonged disability. The result is that his appeal is dismissed.

Kelly Temkin
Member, General Division - Income Security

²⁰ *Inclima.v.Canada (A.G)* 2003 FCA 117