



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. R. v Minister of Employment and Social Development*, 2019 SST 1627

Tribunal File Number: GP-18-2517

BETWEEN:

D. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Gerry McCarthy

Teleconference hearing on: May 22, 2019

Date of decision: May 27, 2019

DECISION

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

OVERVIEW

[2] The Claimant was working as a self-employed driver for X and was in a Motor Vehicle Accident (MVA) on May 12, 2015. The Claimant submitted that he cannot return to work and his disabling conditions were his shoulder, neck, elbow, and left eye. The Minister recognized the Claimant had some limitations in his work capacity because of pain, but submitted these limitations would not have precluded him from performing all types of work as of December 31, 2016.

[3] The Claimant previously applied for CPP disability benefits on March 1, 2017. The Claimant's application was denied at the initial level on May 2, 2017. There was no request for a reconsideration of the decision. The Minister received the Claimant's current application for the disability pension on December 18, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] 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, 2016.

[5] The Claimant was in receipt of a CPP Retirement benefit with an effective date of June 2017. In accordance with section 70(3) and section 66.1 of the CPP, a person cannot receive a retirement pension and a disability pension at the same time. After 1997, the legislation also stipulated that a person cannot withdraw a retirement pension application in favour of a disability pension unless the earliest date of onset of the disability pension is prior to the effective date of the retirement pension. In addition, given the 15-month limit on retroactivity to be eligible for a disability benefit a retirement pensioner must have applied for a disability benefit within 15-months of the effective date of their retirement pension to qualify for a CPP disability benefit. In

this case, the Claimant's latest date of onset for disability would have to be prior to June 2017 to meet the above requirement.

ISSUES

[6] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2016?

[7] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2016?

ANALYSIS

[8] 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.

Severe disability

[9] I must assess the severe part of the test in a real world context². 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.

[10] 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 work³.

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

² *Villani v. Canada (A.G.)*, 2001 FCA 248

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[11] 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 impairment⁴.

[12] 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 condition⁵.

Did the Claimant have a severe disability within the meaning of the CPP by December 31, 2016?

[13] I find the Claimant did not have a severe disability within the meaning of the CPP by December 31, 2016, for the following reasons. First: There have been no severe clinical examination findings or severe functional limitations related to the Claimant's right shoulder, right knee, and elbow that would preclude him for all work as of his MQP date. For example, Dr. Townley reported on the Claimant's knee and explained there was minimal tenderness topalpatation around the joint line. Dr. Townley also reported the Claimant's range of motion was relatively well-preserved in spite of the effusion and there was no evidence of ligamentous instability (GD1-36) Also: Dr. Chiu reported there was no significant bony or joint abnormality noted of the right elbow and shoulder (GD2-77). Finally: The Claimant's family physician (Dr. Walters) provided a prognosis of degenerative arthritis, but did not indicate the Claimant was disabled or precluded from work.

[14] Second: The Claimant has demonstrated capacity for gainful employment in light of his daily activities. For example, the Claimant testified he could drive a vehicle and carry a few bags when shopping. Furthermore, the Claimant explained he could use a computer. Also, the Claimant testified he travelled to Jamaica for one-week in April 2019. I realize the Claimant submitted that he tried to work at his friend's coffee shop for a few days, but could not load the expresso machine due to his physical limitations. However, I find that driving a vehicle and travelling to Jamaica would demonstrate the Claimant could manage his physical limitations and had some capacity for work. On this matter, I wish to emphasize the legal test for a severe

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁵ *Inclima v. Canada (A.G.)*, 2003 FCA 117

disability was not a question of whether a person was unable to perform their regular job but rather the person's inability to perform any substantially gainful work.

[15] Third: The Claimant has not continued active therapy for his shoulder, elbow, and knee. I do realize the Claimant explained that his insurance ran out and he could not keep going to therapy. Still, the Claimant could find alternate ways to continue his therapy although perhaps not at the "New Age Recovery Rehabilitation Services" which the Claimant explained he had attended three times a week for two-years. The importance of active therapy for the Claimant was particularly emphasized by Dr. Kerr who reported that "active therapy" was the "focus" for the Claimant (GD1-124).

[16] Fourth: There was no evidence the Claimant's depression and anxiety were disabling conditions for him. I realize Dr. Hewchuk's report referenced the Claimant's depression and anxiety (GD1-145). I also recognize the Claimant testified that the stress of not working had affected him badly. However, Dr. Hewchuk recommended cognitive behaviour therapy to assist the Claimant in managing his symptoms and made no mention of the depression and anxiety disabling the Claimant from work.

[17] I do recognize the Claimant submitted that bending over and getting up were problematic for him. I further realize the Claimant would have some limitations for physical demanding work. Still, I cannot conclude the Claimant was incapable regularly of pursuing any substantially gainful occupation as of December 31, 2016. As cited above, there were no severe clinical examination findings or severe functional limitations related to the Claimant's right shoulder, right knee, and elbow. Furthermore, the Appellant confirmed he could drive a vehicle and was recently able to travel to Jamaica.

[18] I realize the Claimant did suffer some left field loss as a result of a previous accident in 2005 (GD1-9). I also recognize the Claimant explained that he had to turn his body to see left. Nevertheless, the Claimant continued to work after 2005 until his MVA in May 2015. Furthermore, the Claimant has continued to drive a vehicle.

[19] I further recognize the Claimant submitted a report recently (dated March 26, 2019) which indicated he presented to a hospital emergency department due to right knee pain and received an

injection of Toradol (analgesic) for his discomfort and an x-ray was ordered. The Claimant was referred to the Fracture and Plastics clinic for follow-up. Nevertheless, the report on the Claimant was dated over two-years after his MQP of December 31, 2016. Furthermore, the Claimant testified that he was still able to travel to Jamaica in April 2019, which would demonstrate mobility despite some previous right knee pain.

Prolonged disability

[20] Since I have determined the Claimant did not have a severe disability, I am not required to make a finding on the prolonged criterion.

Post-Retirement Disability Benefit

[21] The Minister has submitted the Claimant did not have an MQP in 2019 or later and therefore did not meet the contributory requirements to qualify for a Post-Retirement Disability Benefits. I have reviewed all the evidence and agree with the Minister on this matter. In short, I find the Claimant did not qualify for a Post-Retirement Disability Pension.

The Claimant's Financial Situation

[22] The Claimant submitted documentation to support his difficult financial situation (GD5-1 to GD5-7). I recognize the Claimant was facing some personal financial challenges. Nevertheless, I must apply the legal test for a severe and prolonged disability to the evidence. In other words: I cannot ignore, re-write, or circumvent the CPP legislation even in the interest of compassion.

CONCLUSION

[23] The appeal is dismissed.

Gerry McCarthy

Member, General Division- Income Security