



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *F. P. v Minister of Employment and Social Development*, 2019 SST 1659

Tribunal File Number: GP-18-935

BETWEEN:

F. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: George Dietrich

Teleconference hearing on: June 6, 2019

Date of decision: June 24, 2019

DECISION

[1] F. P. is the Claimant in this case. He applied for a Canada Pension Plan (CPP) disability pension in June 2017. The Minister of Employment and Social Development (the Minister) declined his application. He appealed to the Social Security Tribunal (the Tribunal). I am dismissing his appeal. These reasons explain why.

OVERVIEW

[2] The Claimant was born in 1963. He has a Grade 11 education. He had a real estate and mortgage license. He took safety courses in relation to his employment. He previously worked in the mortgage industry. He ran a trucking company, but stopped doing this after having a heart attack in 2011. He last worked as a drywall finisher/taper. The Claimant stopped working after sustaining injuries in a February 2015 motor vehicle accident. He alleges that he cannot work in any capacity because of heart disease and herniated discs in his back.

[3] The Claimant completed a Questionnaire for Disability Benefits in support of his disability application. He reported in his Questionnaire that he had restrictions with sitting, standing, walking, lifting, reaching, bending, memory, and concentration. He experienced interrupted sleep and was slow with performing his personal needs. He also stated that he could drive for only 20 to 30 minutes.¹

[4] His current family physician, Dr. B. Takhar completed a Medical Report for the Minister in support of the Claimant's disability application. Dr. Takhar noted that the Claimant had a heart attack in 2011. The Claimant suffered from right hand numbness and right arm weakness after his February 2015 car accident. The Claimant had reduced range of motion in his right arm. The Claimant had low back pain that led to reduced capacity to lift, push, pull, and carry. The Claimant had reduced stamina. His response to treatment was poor. Dr. Takhar provided the Claimant with a poor prognosis.²

¹ GD2-119-122

² GD2-111-114

[5] The Claimant's legal representative submitted that the Claimants impairments in their totality led to a severe disability under the CPP.³

[6] The Minister submitted that the Claimant did not have a severe disability under the CPP because he was capable of performing some type of work.⁴

[7] After reviewing all of the evidence, I agree with the Minister that the Claimant did not have a severe disability under the CPP.

ISSUE

[8] 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, 2017?

ANALYSIS

[9] 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, 2017.

[10] Disability is defined as a physical or mental disability that is severe and prolonged⁵. 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.

The Claimant failed to establish a severe disability under the CPP

[11] The Claimant testified that he took many job specific training courses over the years. He has not had a valid real estate licence for 25 years. He obtained a real estate licence when he was

³ GD6-25

⁴ GD10-3

⁵ Paragraph 42(2)(a) *Canada Pension Plan*

18 years old, but he never made enough money to work full-time. He let his real estate licence lapse. He has not had a valid mortgage licence for about 10 years. He gave evidence about running his own trucking company. The stress of running this business led to a heart attack in 2011. He applied for a CPP disability pension in 2012, but he cancelled this application because he eventually felt capable of working.⁶

[12] The Claimant wanted to find suitable work within his limitations after his heart attack. He chose to work as a drywall finisher/taper. He described this as a fast-paced job. His cardiologist was happy with his job choice and told him to continue working in this position. The Claimant's job had physical requirements that included carrying 20 to 22 kilogram boxes of mud up the stairs of homes.

[13] The Claimant did well at this job until February 25, 2015, when he sustained injuries in a motor vehicle accident. His back started to hurt. He had a MRI that showed herniated discs in his back with a tear. He had sore right wrist and thumb. His right knee hit the dashboard in the accident. He sustained a whiplash injury in his upper back. He developed bad headaches. He could not perform his job. This affected his emotional state because he liked his drywall job. He was in a union and he made good money. He often made \$1,500-\$2,000 per week. This job improved his cardiovascular health and he enjoyed his lifestyle.

[14] The Claimant tried physiotherapy, psychotherapy, and pain management treatment after the accident. But he did not get back to work, despite receiving treatment. He tried different pain medications, including Dilaudid, Baclofen, Naproxen, Tylenol 3, and Percocet. He tried to avoid pain medications because of their addictive affect. He tried medical marijuana, but he could not drive or function when took it. He took Valium to help him sleep. He could take this medication every day, but choose to take it once a week because it is addictive. He quite smoking six months before his hearing. He took a pain management course. He gained 65 pounds after the car accident, but he went on a diet and lost 25 pounds. A doctor suggested pain injections, but he researched this issue and decided against it. The Claimant was diagnosed with prostate cancer six or seven months before the hearing (which is after his MQP). The Claimant opted for radiation therapy, which gave him side effects. He relies on his partner to do most of the housework. He

⁶ The Tribunal did not decide the Claimant's previous disability application. I therefore have jurisdiction to deal with this appeal.

can vacuum for about five to 10 minutes at a time. It takes him a long time to complete household tasks.

[15] The Claimant testified that his medical condition has not really improved since the car accident. He tried to go back to work as a drywall finisher/taper. He only lasted one or two hours. He testified that he thought of trying to find another job, but he does not believe that he could perform any job. Going back to the transportation industry was not a realistic option for him because he had been out of that industry for too long. He did not think that he could work in the mortgage and real estate industry because it would involve too much driving and sitting in front of a computer. The Claimant thought of starting a company in the drywall sector, but he did not believe that he could manage such a job because of the multiple demands involved, including hiring employees. He was asked about possible alternative jobs that were identified in a psychovocational report contained in the Tribunal file. He did not believe that he could work as dispatcher because of sitting restrictions and an inability to handle stress. He did not believe that he could work as a truck and trailer sales representative because of the hours that he would have to keep. He believes he could work for short periods on a computer if he were allowed to work from home. He thinks he could manage working on a computer for perhaps two or three hours a day.

[16] The Claimant's former co-worker, M. L., testified at the hearing. M. L. testified that the Claimant trained him as an apprentice. The Claimant made one return to work effort, but only lasted for 30 minutes to one hour. The Claimant spent most of his time sitting down and checking his work. M. L. stated that the Claimant changed both physically and mentally. He described the Claimant as a good worker before the accident, but the Claimant cannot handle the physical aspects of his job and he also lacks motivation because of his mental state.

[17] The Claimant's partner, J. S. gave evidence. She is a registered practical nurse. She met the Claimant in August 2015. She maintains a separate residence, but spends a lot of time with the Claimant. She testified that the Claimant declines social invitations because he cannot sit or stand for long. She helps him with housekeeping tasks and grocery shopping. She described the Claimant's back pain as debilitating. She stated that he is clinically depressed. The Claimant sleeps a lot. The Claimant attempted to help his friends on two or three occasions with various

trades and ended up on the couch after only working for a few hours. She stated that the Claimant would work if he could, but he would be an unreliable employee.

The medical evidence shows that the Claimant cannot return to performing physical work, but it does not show that the Claimant was unable to perform any type of substantially gainful work at the time of his MQP.

[18] 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 work⁷.

[19] I agree that the Claimant could not return to work as a drywall finisher/taper or perform any type of sedentary work at the time of his MQP. However, I agree with the Minister that the Claimant was capable of performing alternative sedentary work. He therefore does not have a severe disability under the CPP.

[20] The medical evidence confirms that the Claimant had a heart attack in July 2011.⁸ He underwent a coronary angiography.⁹ He stopped working as a parts clerk at a retail store after his heart attack.¹⁰

[21] The Claimant’s then family physician, Dr. K. Gamble completed a Medical Report for the Minister in support of his previous disability application on January 18, 2012. Dr. Gamble noted that the Claimant almost died after his heart attack and was still weak.¹¹

[22] The Claimant’s Record of Earnings shows that he returned to work after his heart attack and earned income from 2012 to 2015.¹²

[23] The medical records show that the Claimant had physiotherapy after his February 2015 motor vehicle accident.¹³ He tried acupuncture.¹⁴ He suffered from right knee, left wrist, neck,

⁷ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁸ GD2-164

⁹ GD2-178

¹⁰ GD2-182

¹¹ GD2-152-155

¹² GD2-4

¹³ GD2-46

¹⁴ GD6-13

and back pain. He suffered from leg numbness. He had limited range of motion. He could not bend. His gait was affected. He had weakness in all muscles and pain with fast movements. He was prescribed Dilaudid.¹⁵ He took Baclofen.¹⁶ A lumbar spine MRI taken on July 9, 2015 showed a left lateral disc bulge at the L4-L5 level associated with an annular tear that abutted the left L4 nerve root and may have been irritating this root on dynamic movement.¹⁷

[24] Dr. K. Giles, Neurologist noted that EMG testing was normal in a report dated March 8, 2016. She believed that the Claimant's lower back pain was myofascial. There was no evidence of lumbar radiculopathy. The Claimant experienced numbness in his left thigh because of entrapment of the left lateral femoral cutaneous nerve of the thigh. The Claimant did not require surgery, but surgery could have been an option if the Claimant's pain worsened.¹⁸

[25] Dr. F.M. Muniz, Psychiatrist in a report dated November 13, 2016 provided an opinion that the Claimant sustained an impairment that resulted in a substantial inability to perform the housekeeping that he normally performed prior to the car accident.¹⁹

[26] Dr. R. Dost, Neurologist diagnosed the Claimant with a right ulnar entrapment at the elbow in a report dated May 18, 2017. This resulted in cramping and some loss of fine motor dexterity in his right hand and tingling in the left hand.²⁰

[27] A March 6, 2018 MRI of the cervical spine showed small disc herniations, but no spinal cord or nerve root compression was identified.

[28] Dr. K. Del Rosario, Psychologist in a report dated July 30, 2018 stated that the Claimant felt useless because of not being able to return to work. The Claimant continued to endorse above average depressive symptoms because of his pain. Dr. Del Rosario stated that the Claimant's major depressive disorder had resolved to a certain degree. She recommended further treatment.²¹

¹⁵ GD2-70

¹⁶ GD2-46-48

¹⁷ GD2-49-50

¹⁸ GD2-75

¹⁹ GD6-212-221

²⁰ GD6-336

²¹ GD3-2-4

[29] Dr. S. Jett, Psychologist in a report dated November 30, 2018 stated that the Claimant's heart was stronger prior to the accident, but he became less active. The Claimant had an episode of an increased heart rate that led to an emergency room visit. The Claimant continued to be followed by a cardiologist. Dr. Jett noted that the Claimant went to a pain management program. The Claimant continued to experience constant pain that was exacerbated by prolonged sitting, standing or walking for about 20 minutes. The Claimant had to frequently change positions. Dr. Jett was of the opinion that the Claimant continued to meet the criteria of a somatic symptom disorder with predominant pain and he recommended more treatment.²²

The majority of the medical reports that commented on the Claimant's work capacity did not support a finding that the Claimant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2017.

[30] Dr. J. Heitzner, Physiatrist in a report dated September 23, 2015, provided an opinion that the Claimant sustained a contusion to his right elbow and a thoracolumbar strain with referred pain down his left leg with no neurological impairments. Dr. Heitzner was of the opinion that the Claimant suffered a substantial inability to perform the essential tasks of his job as a drywall taper.²³ This report does not assist the Claimant's case because it does not reference an inability to perform all types of work.

[31] Dr. Heitzner in an addendum report dated October 29, 2015, stated that the July 9, 2015 MRI could explain the Claimant's lower back and left leg symptoms. Dr. Heitzner referenced a functional abilities evaluation that stated that the Claimant was capable of working at a sedentary level.²⁴ This report does not support the Claimant's argument that he had work capacity because it suggests that the Claimant has work capacity.

[32] Dr. Del Rosario outlined the Claimant's work history in her report dated October 1, 2015. The Claimant managed a transportation company for 14 to 16 years. He then focussed on managing investments, but he began working as a drywall taper when the economy took a turn for the worse. Dr. Del Rosario noted that the Claimant could not return to his drywall taping job.

²² GD5-2. The cervical spine MRI and the medical reports of Dr. Del Rosario and Dr. Jett arose after the MQP, but I am satisfied that these records dealt with medical conditions that arose from the February 2015 motor vehicle accident.

²³ GD6-67

²⁴ GD6-85-88

He occasionally dropped things and lost his grip unpredictably. The Claimant owned a transportation company and planned to start his own company in the future. The Claimant worried about a return to work. She diagnosed the Claimant with a persistent moderate somatic symptom disorder with predominant pain, an adjustment disorder with mixed anxiety and depressed mood, and vehicular anxiety. She recommended further psychological treatment.²⁵

[33] Dr. T. Ballard, Physiatrist assessed the Claimant on August 11, 2016. She found that the Claimant continued to experience lower back pain with radicular symptoms. The Claimant had difficulty with stooping and lifting. She was of the opinion that the Claimant suffered a substantial inability to perform the essential tasks of his pre-accident employment. She provided him with a guarded prognosis.²⁶ This report does not assist the Claimant because it only provides an opinion on his ability to perform his pre-accident job.

[34] Dr. D. Jones, Psychologist in a report dated September 8, 2016 stated that the Claimant suffered from an adjustment disorder with mixed anxiety and depressed mood. The Claimant had a somatic symptom disorder and a driving phobia. Dr. Jones did not believe that the Claimant's psychological impairments were the primary reason for his inability to perform his employment tasks. He provided the Claimant with a good prognosis.²⁷

[35] Dr. R. Koch, Chiropractor completed a functional capacity evaluation report on October 11, 2016. She found that the Claimant could not return to working as a drywall finisher/taper because of restriction with walking, standing, climbing, bending, twisting, carrying, lifting, crouching, crawling, kneeling, and squatting.²⁸ This report does not assist the Claimant's case because it only provides an opinion about his inability to work as a drywall finisher/taper.

[36] Dr. A. Shujah drafted a psycho-vocational report on October 24, 2016. He diagnosed the Claimant with a major depressive disorder. The Claimant's emotional problems diminished his resources for coping with life in general and may interfere with his ability to function effectively in a work or school environment. Dr. Shujah was of the opinion that the Claimant's psychological status would impede the Claimant's performance in the type of occupations for

²⁵ GD2-58-68

²⁶ GD6-146-155

²⁷ GD6-158-169

²⁸ GD6-170-180

which he was most suited in view of his education, training, and experience. Testing showed that the Claimant's intellectual abilities ranged from superior to average. Dr. Shujah stated that the Claimant's pain management issues and emotional difficulties would have to be addressed before any vocational retraining could be considered.²⁹

[37] The Tribunal referenced two reports drafted by Dr. Heitzner on April 7 and May 11, 2017. Dr. Heitzner did not believe that the Claimant's physical injuries attributable to the car accident led to a disability. It appeared to Dr. Heitzner that the Claimant's psychological condition played a major role in his inability to work. Dr. Heitzner did not believe that the Claimant suffered from a complete inability to engage in any employment for which he was reasonably suited by means of education, training or experience.³⁰

[38] Dr. Muniz provided a report to the Claimant's legal representative on January 29, 2019. She stated that while she agreed that the Claimant may not have major impairments that prevented him from considering or exploring non-physical jobs, he certainly had impairments that prevented him from pursuing and maintaining in his physical job prior to the accident. She provided an opinion that the Claimant had a complete inability to engage in any occupation for which he was suited based on his education, training and experience as a result of the injuries he sustained in the car accident.³¹

The Claimant had work capacity at the time of his MQP

[39] The Claimant's legal representative submitted that the Claimant had been unable to return to any form of competitive employment because of chronic pain in his neck and back, which resulted in restricted range of motion. The Claimant's depression, anxiety, and non-restorative sleep led to fatigue, exhaustion and cognitive impairments that rendered him unemployable. The legal representative also submitted that the Claimant is not a suitable candidate for returning to any kind of employment, including sedentary occupations.³²

[40] I disagree.

²⁹ GD6-181-209

³⁰ GD6-312

³¹ GD9-2-8

³² GD6-3

[41] After reviewing all the medical evidence, I am satisfied that the medical evidence shows that the Claimant had the ability to perform sedentary work at the time of his MQP. Like many cases involving the Ontario automobile insurance regime, numerous medical experts from different medical disciplines have assessed the Claimant. These experts have conflicting opinions. For example, Dr. Jones thought that the Claimant's psychological issues were not the primary reason for the Claimant's inability to go back to his pre-accident job. Dr. Heitzner held an opposite view. He felt that the Claimant's psychological issues were the primary barrier to a return to work.

[42] I have no doubt that the Claimant cannot return to his former occupation as a drywall finisher/taper. However, I am satisfied that the medical evidence shows that the Claimant was capable of performing sedentary work at the time of his MQP.

[43] Several physicians who assessed the Claimant made findings that supported a finding of work capacity prior to the Claimant's MQP. Dr. Heitzner's October 29, 2015 referenced a functional abilities evaluation that stated that the Claimant could work at a sedentary level. Christopher Agaton in his functional abilities evaluation report of August 10, 2016 found that the Claimant could sit at a competitive level. Dr. Muniz in her January 29, 2019 report stated that she agreed that the Claimant might not have major impairments that prevented him from considering or exploring non-physical jobs.³³

[44] The Claimant's legal representative placed emphasis on a May 2, 2017 psychovocational report drafted by Dr. J. Karp in support of the Claimant's position that the Claimant had a severe disability. I do not believe that Dr. Karp's supports a finding that the Claimant had a severe disability under the CPP.

[45] Dr. Karp's report states that the Claimant had driving related fears. He diagnosed the Claimant with an adjustment disorder with mixed anxiety and depressed mood. The assessment required two sessions because the Claimant was fatigued, had difficulty concentrating, and suffered from lower back pain. Dr. Karp stated that the Claimant would likely benefit from vocational rehabilitation counselling. Dr. Karp identified possible jobs for the Claimant after

³³ Although this report falls after the Claimant's MQP, I am satisfied that it is relevant. Dr. Muniz referred to medical conditions that started before the Claimant's MQP expired.

considering the Claimant's residual functional capacity, transferable skills, abilities, education, and work experience. These jobs included working as a dispatcher, transportation scheduler, quality control inspector, truck and trailer sales representative, truck rental clerk, and interpreter. Dr. Karp was of the opinion that the Claimant suffered a complete inability to engage in any occupation for which he was suited based on his education, training, and experience. He believed that the Claimant's psychological condition had plateaued. The assessment concluded that the prospective jobs identified during the assessment only offset the Claimant's pre-accident earnings by at most 37%.³⁴

[46] Dr. Karp's report dealt with the test for continuing to receive income replacement benefits under Ontario's automobile insurance regime. In order to continue to receive income replacement benefits after the first 104 weeks of disability, a claimant must show that they suffer a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.³⁵ This test differs from the severe disability test under the CPP, which requires that a Claimant be incapable regularly of pursuing any substantially gainful occupation.

[47] Dr. Karp's report also mentioned that the jobs that were identified would only offset 37% of the Claimant's pre-accident earnings. The Claimant earned \$1,500 to \$1,800 per week prior to his car accident, 37% of that figure would amount to \$555 to \$666 per week or \$28,860 to \$34,632 per year. The CPP Regulations contain a definition of a substantially gainful occupation that corresponds to the maximum amount that a claimant could receive as a disability pension.³⁶ The amounts that the Claimant could have earned in the occupations outlined in Dr. Karp's report exceeded the maximum amount that the Claimant could have received as a disability pension.

[48] Dr. Karp also stated that the Claimant's vocational prognosis was fair and that he would benefit from vocational rehabilitation counselling. I find that Dr. Karp's report provides evidence of work capacity in a sedentary occupation at the time of the Claimant's MQP.

³⁴ GD6-313-335

³⁵ Paragraph 6(2)(b), *Statutory Accident Benefits Schedule*, Ontario Regulation 34/10.

³⁶ Section 68.1 *Canada Pension Plan Regulations*

[49] Dr. Shujah's psycho-vocational report of October 24, 2016 did not provide much help to the Claimant because he also was evaluating the test for income replacement benefits under Ontario's automobile insurance regime, as opposed to the severe disability test under the CPP.

[50] I find that the Claimant had capacity to perform sedentary work at the time of his MQP. If a person has some capacity to work, the law requires that they have to show efforts to find work.³⁷ The Claimant failed to pursue sedentary work despite having the capacity to do so. I am dismissing his appeal in light of his finding.

[51] In making my finding that the Claimant does not have a severe disability, I am not just considering the medical evidence, but also, the hearing evidence. I found the Claimant to be an intelligent person. He denied that he could perform any of the jobs in Dr. Karp's report for various reasons, including an inability to sit. The medical records show that the Claimant complained about problems sitting, but no sitting problem was noted when he underwent functional tests with Christopher Agaton.

[52] I must assess the severe part of the test in a real world context³⁸. 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. The Claimant was 54 years old at the time of his MQP. He does not possess a post-secondary diploma or degree, but he obtained a real estate and mortgage licence. Psychovocational testing showed that the Claimant's intellectual abilities ranged from superior to average. He has a good understanding of the English language. He ran his own trucking company. He testified that he had experience with computers. I believe that sedentary employment is a realistic employment option for the Claimant.

[53] The Claimant gave evidence that he thought about working in the transportation industry, but he been out of that industry for too long for his resume to be considered. The Claimant was 54 years old at the time of his MQP. It might be difficult for him to find work because of his age and labour market conditions. However, socio-economic conditions such as labour market conditions are irrelevant in a determination of whether an individual is disabled.³⁹

³⁷ *Inclima v. Canada (A.G.)*, 2003 FCA 117

³⁸ *Villani v. Canada (A.G.)*, 2001 FCA 248

³⁹ *Canada (MHRD) v. Rice*, 2002 FCA 47

[54] M. L.'s evidence did not assist the Claimant because he reiterated that the Claimant could not return to his former occupation as a drywall finisher/taper.

[55] J. S. gave evidence that the Claimant would be unreliable employee. However, the medical evidence, including Dr. Muniz's report, showed that the Claimant had the capacity to perform sedentary work. J. S. was a pleasant witness, but she is not a medical expert. I prefer the evidence of the medical assessors to her lay evidence.

[56] In making my decision, I do not mean to minimize the Claimant's pain and discomfort. He was a pleasant witness. I am satisfied that he had both physical and psychological impairments at the time of his MQP. However, it is the Claimant's capacity to work and not the diagnosis of his disease that determines whether the disability is severe under the CPP.⁴⁰ I am satisfied that the Claimant suffered from back pain, heart disease, and depression at the time of his MQP, but he retained capacity to work in a sedentary occupation.

CONCLUSION

[57] The appeal is dismissed.

George Tsakalis
Member, General Division - Income Security

⁴⁰ *Klabouch v. Canada (A.G.)*, 2008 FCA 33