



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *CP v Minister of Employment and Social Development*, 2019 SST 1690

Tribunal File Number: GP-18-2425

BETWEEN:

C. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: John Eberhard

Claimant represented by: Steven Yormak

Teleconference hearing on: June 4, 2019

Date of decision: June 26, 2019

DECISION

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

OVERVIEW

[2] The Claimant is 46 years of age. He last worked as a forklift operator from 1998 to 2017. He claimed that he could no longer work for Format Industries as of September 21, 2017 because of psychological trauma. In his application, he states that neck and back problems have been aggravated because of anxiety. He has both organic and inorganic issues. The Representative acknowledged that alone, the pain associated with his neck and shoulder, are not severe.

[3] He worked as a material handler for 20 years. He was a forklift operator. He reported an issue to a supervisor at work and ever since he was repeatedly targeted, accused, threatened, and lastly, manhandled by company employees. He explained that he tried to continue with his work and work with everyone while the harassment and threats were ongoing. However, this incident made him feel extremely insecure, traumatized and dysfunctional due to the high level of anxiety. He was advised to take some time off. Psychologist Dr. Peter Corbin diagnosed him with a Post Traumatic Syndrome Disorder-like (PTSD) condition in 2017.

[4] It is the Minister's position that the medical evidence does not support that he is incapable of all work. The pathology identified in his cervical and lumbar spine has not precluded him from working in the past and there is no evidence of worsening by way of a specialist assessment, investigations or clinical examination findings. There has been some improvement of his psychological symptoms with treatment.

[5] The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[6] I conclude that the Claimant does not has a severe and prolonged disability.

ISSUES

- Did the Claimant's neck and shoulder pain, psychological trauma, pain and anxiety result in a severe disability, meaning being incapable

regularly of pursuing any substantially gainful occupation by the date of the hearing?

- If so, is his disability also long continued and of indefinite duration?

ANALYSIS

The Claimant's health condition and functional limitations affect his capacity for employment at his workplace

[7] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. The Claimant must be found disabled, as defined, by his minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. The Claimant's MQP is December 31, 2020. I must find him to have a severe and prolonged disability as of the time of the hearing.

[8] 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 is 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 work¹. The evidence clearly indicate that his physical impairments do not make him incapable of returning to his work at Format Industries or comparable work elsewhere. The more difficult questions is whether or not his mental health condition alone or together with is organic conditions make him regularly incapable of seeking gainful employment.

[9] The Minister called the Claimant on July 31, 2018 and determined that he worked without modified duties until the date he stopped work, September 21, 2018.² The Minister argues that his prognosis for his mental health issues is good once he appreciates his ability to start a job in a different company environment (or another career). The Minister argues that the evidence does not support the presence of any severely disabling physical condition. I agree with this finding.

Severe Disability

¹ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

² GD2-49

History of his Medical Issues

[10] Dr. Usha Kumar is his family doctor. He filed the CPP medical³ in February 2018. His patient is diagnosed with acute anxiety related to workplace harassment (physically and mentally abused); and a history of pain affecting the left shoulder and shoulder pain radiating down his left arm to fingers (diagnosed with myofascial pain in 2014⁴). The physician noted that if the Claimant worked in a different environment he may continue to work. He stated that his patient does not want to go back to his usual work. However, he provided a series of hand written notes excusing the Claimant from work. These are most recently dated between 2016 and 2018.⁵ Several of the notes refer to his workplace environment. He was treated for anxiety related to workplace harassment and abuse as well as chronic neck and shoulder pain. In a note dated January 3, 2018, the doctor reported that his patient did not want to return to work until after his claims were settled.⁶

His Physical Health Problems

[11] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments⁷. Several physical impairments contribute to his disability. They are not directly related to his main impediment to function, being his mental health issues.

[12] The family doctor provided a medical history from 2013 to 2015. The main issues include a painful left shoulder. This gave rise to a Workplace Safety and Insurance Board (WSIB) claim resulting in modified hours and work. WSIB allowed initial entitlement for his left shoulder injury. In August 2014, Dr. Mendonca diagnosed left C-7 nerve root irritation. Symptoms were improving. It was surmised that more likely than not that the disc protrusion and left C-7 nerve root impingement occurred because of his work duties.⁸ By October 2014, sensations and reflexes were normal. The Claimant testified that from 2013 he worked through the pain and did his normal work following a 3 month modified duty stint. He was upset with the

³ GD2-57

⁴ This diagnosis was made by physiatrist Dr. M. Lacerte in December 2014

⁵ These hand-written notes are difficult to read but clearly excuse the Claimant from work for mostly his organic issues. They are found between pages GD2-235 to 238

⁶ GD2-235

⁷ *Bungay v. Canada* (A. .), 2011 FCA 47

⁸ GD2-120

company because it often would require him to work outside of his restrictions. These assignments included lifting too much weight (although he could not remember specifically what his weight restriction was).

[13] There are additional up-dates from clinical notes were provide by Dr. Kumar's for the period between January 2018 and January 2019.⁹ Dr. Kumar observed that he had no cervical tenderness and his reflexes and strength were both normal in his upper and lower extremities and his straight leg raising (SLR) was negative. She recommended he try physiotherapy and prescribed Tramacet (narcotic analgesic) for his discomfort.¹⁰ Dr. W. Romano provided the report¹¹ in which he states that the vertical body height and disc spacing and alignment are well maintained throughout with no evidence of developmental, degenerative or traumatic change. Facet joint and intervertebral foramina ate within normal limits. The impression was that his was a “normal cervical spine”

[14] The Claimant testified that his pain was managed by medications when he was working. He could physically manage. The representative of the Claimant acknowledged that the severity of the physical impediments do not, by themselves, support a severe pathology of impairment. I do not regard his physical impediments, by themselves, as robbing him of employment capacity.

His Mental Health Problems

[15] The Claimant has been assessed for depression and anxiety for a number of years. According to the psychologist's note dated February 21, 2108, he presents as psychologically sound with good coping skills. He reported the workplace bullying that he endured over many years has caused significant stress and has negatively affected his self-esteem and relationships. This has led to a post-traumatic stress-like reaction. He further noted he is not psychologically capable of returning to his previous work. While the workplace limitation is acknowledged, it does not support a severe medical condition that would prevent him from returning to all types of suitable work.

⁹ Dr. Kumar's notes, January 25, 2018 to January 7, 2019

¹⁰ Dr. Kumar prescribed Effexor and Cipralex (antidepressants) to manage his anxiety/depression and Trazadone for sleep.

¹¹ The report from London X-Ray Associates is found at page GD2-155

[16] Dr. Usha Kumar (family physician) responded to legal letter.¹² The doctor explained that according to her patient, he attended an appointment on August 22, 2017 claiming he was manhandled, mentally abused, and his car was vandalized at work. He felt anxious regarding a return to work after the harassment. The patient received a note for four weeks off from work. He started on the anti-depressant Cipralex. A few months later, he was coping well with Cipralex 5mg.

[17] Dr. Kumar advised the Workplace Safety and Insurance Board (WSIB) in November 2017 that his patient is not able to attend work unless changes are made. Psychotherapist Sedi Asrar and Psychologist Sean Shahrokhnia provided an opinion for funding support for treatment of his psychological trauma.¹³ The therapist noted that the PTSD suffered by the Claimant resulted in him being unemployable for the indeterminate future. She noted that his motivation for treatment and seeking help for treatment of trauma and emotional injuries are indicator for positive treatment outcome.¹⁴ These two reports are inconsistent and I prefer the evidence provided by the treating physician.

[18] Dr. Cobrin is a registered psychologist who saw the Claimant for four sessions in early 2018.¹⁵ The workplace bullying the patient has endured for many years has caused significant feelings of stress. He noted he was psychologically sound with good coping skills. He stated that if not for workplace bullying he would not require psychological intervention but he not psychologically fit to return to previous workplace as doing so would impair his functioning. He did not go back to his workplace. This report suggests no contraindication psychologically for the Claimant to work at the same or other job at another workplace.

[19] In December 2018, "Psychology Health Solutions" prepared an assessment and treatment recommendation. It noted he continued to experience moderate to severe symptoms related to PTSD. Testing revealed only a mild level of anxiety and a minimal level of depression. The assessors were of the opinion C. P. required psychological intervention to stabilize his emotional reactions and to gradually adjust. I take it from the report that seeking employment in a different

¹² GD2-76

¹³ This request was made in an assessment related to workplace harassment and bullying of September 22, 2017

¹⁴ GD9-6

¹⁵ GD2-265

environment would provide some stabilization. There is evidence that he has engaged in further treatment or taken steps to avoid the unhealthy work environment.

Treatments and results

[20] Dr. Kumar had medicated her patient with Ciprex, Eltroxin, and Trazadone. His response to treatment has been fair.¹⁶ The Claimant has been treated by Jennifer Sutcliffe (registered physiotherapist) on the direction of the WSIB. He was experiencing ongoing pain and numbness from a neck/shoulder injury with symptomatic onset in February 2013. She noted that he can begin working under modified duties starting 2018-02-06. He has full functional abilities aside from being unable to bend, lift, twist, push or pull. He did not go to work in 2018.

[21] While there have been assessments by mental health specialists, there has been no treating therapist, psychologist, psychiatrist or counsellor. Of course, we do not know the outcome of any proposed treatment program. I certainly agree with the Claimant who testified that he felt stress in the workplace where the harassment was taking place. Dr. Peter Cobrin states that his patient presents as psychologically sound with good coping skills and if not for the workplace bullying, he would not require psychological intervention. Dr. Cobrin conducted four sessions with the Claimant suggesting he had “PTSD – like” symptoms. I do prefer this report to that of the assessors in the Psychology Health Solutions report of about the same time (December 2018).¹⁷ The primary reason for this is that the latter seemingly adopted the label of PTSD and jumped to behavioural conclusion based on a single assessment primarily based on the self-reporting of the Claimant.

[22] Treatment recommendations and situational stressor removal have been recommended but there is no evidence that either has been acted upon. If a Claimant refuses or does not act on recommended treatment, I must consider whether the Claimant’s refusal was unreasonable. If so, what impact that refusal may have had on his disability.¹⁸ If I find the Claimant’s refusal was unreasonable and there may have been an impact on his disability because of that refusal, then

¹⁶ GD2-59

¹⁷ GD9-2

¹⁸ This can be found in a Federal Court case called *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

the Claimant's disability is not severe.¹⁹ I do not find it reasonable that the Claimant has not responded to the idea of further and more intensive mental health therapies and interaction. Of more importance to the potential of rehabilitation is that he has taken no action to find a different workplace where the stressors would not be present.

Personal Factors considered

[23] I must assess the severe part of the test in a real world context. 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 experience²⁰. The Claimant's resume includes extensive certificated technical, trade and on-the-job training. His licences are current as of his application date. One of his certificates is for forklift operations. The claimant is relatively young. He has a transferable work specialties and proven ability to retrain or work at the same job in another location as suggested by Dr. Cobrin. Indeed, he requested to do so in a job grievance.²¹ His detailed letter suggests competence and rational and articulate use of the language, memory and logic. It represents intellectual capacity and a clear thought process. It is clear that he continues to want to work. He also wants to avoid the stressors at his job site. There is no reason why he cannot do this. I find that his life experiences and ability to persevere through his non-incapacitating organic injuries do not rob him of work capacity.

[24] He is also involved in a WSIB claim related to his workplace. I observe that the Canada Pension Plan Disability and WSIB insurance have differing legislative criteria. CPP considers capacity for all types of work-full-time, part-time, casual or seasonal and not just the usual type of work a person performs. This is a much higher threshold than one that looks at his specific work and last work environments. While he might receive WSIB benefits, the CPP test is much stricter. Given his restrictions, which he has overcome for many years, I find that he has physical capacity for some type of work. I conclude from the manner in which he gave his evidence that he has the mental competence to seek work.

¹⁹ The Federal Court of Appeal talks about this in a case called *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ *Villani v. Canada (A.G.)*, 2001 FCA 248

²¹ The Claimant wrote a letter dated September 28, 2017 one week after he stopped work in which he asked for a transfer to another plant where the environment would be less stressful. This is found at page GD281

[25] If there is evidence that a person has some capacity to work, then the law requires that they show some efforts to work.²² About one week after he said he could no longer work, the Claimant wrote a detail letter of grievance to the company. His doctor had already stated that he was on medical leave for in September 2017 and would request a change of job assignment within another X. He wrote that he did not believe the X's Charter or his rights as a worker in Ontario will be or have been respected at X.²³ There is no evidence as to the response to this request but clearly as of that time; the Claimant believed he had the work capacity sufficient to be similarly engaged in a different X doing similar work.

The evidence

[26] It is the Minister's submission that the summery of clinical notes provided by the family doctor does not support a severe physical or psychological condition that would preclude the Claimant from suitable work. It is acknowledged that the Claimant would have difficulties returning to his previous job at X.

[27] The Claimant testified. He spoke in an articulate manner. He spoke intelligently about the workplace harassment. His memory was good on details when prompted. He competently reiterated much of the content of his letter dated September 28, 2017 that outlined the actions taken by co-workers and officials at the company.²⁴ It is clear that he is a student of workplace policies and the employee's handbook. He struck me as a person who can intelligently absorb information and interpret complex instructions and fact situations.

[28] In his application questionnaire, the Claimant stated²⁵ Psychological trauma, anxiety, and neck and back problems aggravated from anxiety make him unable to perform necessary daily routines. He has difficulties with memory, concentration and sleeping. The physiotherapist's report dated February 6, 2018 stated he retains full functional abilities with limitations in

²² The Federal Court of Appeal explains this in the case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²³ This letter was written on September 28, 2017 and found at page GD2-81 in the file material

²⁴ The letter is found in the file at page GD2-79

²⁵ GD2-276

bending, lifting, pushing, and pulling. She further noted he could work under modified duties. The Claimant did not indicate why he did not seek work or pursue the transfer.

[29] His evidence that trouble me. The Claimant explained to his psychotherapist that his vehicle was vandalized on September 22, 2017. At the hearing, the Claimant insisted that this incident happened in February 2017. There is no explanation for this discrepancy. He could not specifically recall the restrictions under which he was placed (i.e. weight for lifting or use of heavy equipment such as a sander). It is difficult to believe, given his other cognitive skills, that one would not remember these details. He said, “His neck was still shot” even though he went back on full shift duties driving his forklift truck with no apparent difficulties. There is no explanation for him stating that he has been living now for several years without pay or support but at the same time noted by his doctor that he is soon running out of benefits. There is no explanation for these contradictions.

[30] Regrettably, there was very little evidence concerning his activities of daily living. He did not testify as to what his daily routine is other than to say he is now a property owner taking care of four tenants in his house. In his application questionnaire,²⁶ he states no difficulties with the restrictions imposed by the physiotherapist. He mentions no functional difficulties with any of these restrictions.²⁷ He apparently has no problem with attending to personal needs. Although he notes bouts of depression as limiting daily routines, he did not testify as to what this means. I am unable to connect this evidence with work capacity or lack of it.

[31] I agree that the Minister is not required to prove that the Claimant is capable of working. I am not satisfied that the Claimant has not demonstrated debilitating limitations nor met the test, on a balance of probabilities that he is incapable regularly of seeking gainful employment. The evidence does not supports a disabling condition that precludes all types of suitable work. I find that he does not have a severe disability.

Prolonged Disability

²⁶ GD2-279

²⁷ Walking, lifting, carrying, reaching, bending

[32] Since I find that, the Appellant did not suffer a disability within the meaning of the CPP as of the day of the hearing. I do not need to address the issue of whether his disability was prolonged.

CONCLUSION

[33] The appeal is dismissed.

John Eberhard
Member, General Division - Income Security