



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. W. v Minister of Employment and Social Development*, 2019 SST 1604

Tribunal File Number: GP-18-2107

BETWEEN:

D. W.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Lianne Byrne

Teleconference hearing on: May 22, 2019

Date of decision: July 8, 2019

DECISION

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

OVERVIEW

[2] The Claimant suffered numerous injuries in a motor vehicle accident in November 2006, including liver and kidney lacerations, multiple bone fractures on the left side and brain swelling. He eventually returned to work as a network administrator, but stopped this work in January 2016. In The Minister received the Claimant's application for the disability pension on October 11, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] 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, 2008.

ISSUE(S)

[4] 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, 2008?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2008?

ANALYSIS

[6] 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

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

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

The Claimant did not have a severe disability as of December 31, 2008.

[7] 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 work².

[8] The Claimant was injured in a very serious motor vehicle accident on November 23, 2006. He suffered numerous injuries, including liver and kidney lacerations, multiple bone fractures on the left side and brain swelling. His left femur was missing three inches of bone. He was in a coma for 10 days. He had multiple surgeries. He was released from the hospital at Christmas-time. However, he returned by ambulance one week later due to infection in his left leg. He had multiple additional surgeries on his left leg due to the infection.

[9] He was discharged from the hospital in February 2007. He was then confined to a hospital bed at home for one year. He relied on nurses and his wife for personal care. He had to use bed pans and a commode.

[10] Since then, he has had a slight improvement in his pain. He finds that medications help very little. He has limited range of motion in his left knee and it gives way when walking, especially with stair climbing. He uses a cane or walker. His liver seems to have healed. With respect to his kidneys, he goes to the bathroom more frequently than a normal person. He gets headaches 2-3 times per week lasting a couple of hours. He has very poor short term memory.

[11] In addition to his physical problems, he has had mental health problems since approximately 2008. He tried Paxil in early 2008, which helped a little bit but made him

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

“completely lazy”. He has been taking medications for mood issues, anxiety and anger since approximately 2015.

[12] Dr. Heather Mills, family physician, completed the CPP Medical Report on September 5, 2017. He has chronic pain related to multiple injuries and many surgeries due to motor vehicle accident in 2006, including injuries to his back, legs, and shoulders. His injuries included concussion, open left femur with severed femoral artery, left quadriceps tendon rupture, and renal laceration. He has had multiple surgeries and bone grafts (approximately 30 surgeries). He has major depression secondary to his injuries. She wrote that, despite many accommodations and vocational rehabilitation, he has been unable to return to gainful employment. On February 21, 2018, she also stated that his level of function due to his orthopaedic injuries and secondary depression do not permit him to work. She felt that his disability is severe.

[13] There are multiple medical reports on file from Dr. Allan Liew, orthopaedic surgeon. His reports indicate that the Claimant has had difficulty with non-union at the left distal femur. On April 30, 2012, which is after the MQP, he was noted to have some pain in the distal femur as well as new pain in the knee itself. He was noted to have some giving way episodes. His pain was noted to be increasing and is currently a 4-5/10.

[14] The Claimant’s health appears to have worsened following several surgeries in 2015. Dr. Liew reported that he had surgery to remove a nail in the left femur, apply an external fixator lengthening device, osteotomy and insert intramedullary nail. On July 3, 2015, the Claimant was noted to have a problem with range of motion in his knee and significant shortening. He is otherwise healthy and not on any medications. He had a revision external fixation left femur on July 24, 2015. He was noted on August 4, 2015 to have had lengthening in his femur and his pain is better controlled. On August 26, 2015, he was noted to have been doing quite well, but developed a pin site infection. On November 10, 2015, Dr. Liew noted that he has had extensive surgical history of his left femur after trauma, including lengthening, which has all gone well. On February 2, 2016, he was noted to have residual pain in his upper thigh. He is not suitable to return to any physical type of job and is retraining for a sedentary-type job.

[15] There is a report dated many years after the MQP from a clinical psychologist, Dr. Ken Reesor. Dr. Reesor stated on September 26, 2015 that he has been deemed catastrophically

impaired and, in his opinion, this determination exceeds the CPP disability definition of severe. Dr. Reesor's opinion is that he is not capable of maintaining or sustaining any type of viable work activity. However, this report is dated many years after the MQP following a deterioration in the Claimant's health. I noted that Dr. Reesor only began following the Claimant three years prior to the date of the report.

[16] Similarly, Dr. Linda Ann Robinson, anesthesiologist, reported on March 20, 2018 that he is severely disabled and unable to work at any kind of job due to his disability, chronic pain and need for analgesic, which interferes with his memory and concentration. She felt that his disability is severe. However, this report is dated many years after the MQP and following a worsening in his condition.

There is evidence of work capacity.

[17] There are very few medical reports dated at or around the time of the MQP. The medical reports dated after the MQP indicate that the Claimant had improved significantly. Although he still had some pain and limitations, he was noted to be taking very few medications. Many years after the MQP, his health seems to have deteriorated. I therefore find that there is evidence of work capacity.

[18] 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 condition³. In this case, the Claimant returned to College from October 2013 to October 2014 to attend a part-time (Monday-Friday for four hours per day) network administrator course. He was successful in completing the course, although he missed some days for medical appointments and took frequent breaks. After completing the course, in November 2014, he started working full-time (10:00 p.m. to 7:00 a.m.) at X as a network analyst. His duties included monitoring networks for other companies from his computer. He was able to perform his duties, although he took frequent breaks.

[19] C. G., an accountant at X, completed a CPP Employer's Questionnaire. He noted that the Claimant worked full-time (40 hours per week) as an analyst. His attendance was good and his

³ *Inclima v. Canada (A.G.)*, 2003 FCA 117

work was satisfactory. He did not require any special services, equipment or arrangements. He also did not require help from his coworkers. He had the ability to handle the demands of the job.

[20] The Claimant took a sick leave in June 2015 in order to undergo a lengthening procedure on his left leg. The surgery resulted in reduced range of motion in his knee and increased pain. He tried to return to work on a full-time basis from November 2015 to January 2016. However, he found it difficult due to pain and difficulty concentrating. He missed time at work due to headaches and pain. He stopped working altogether due to lack of motivation, difficulty concentrating, constant pain, and mood issues. He has not looked for another job since then.

[21] The Claimant was able to successfully complete a one year college program on a part-time basis. He was also able to work full-time from November 2014 to June 2015. I therefore find that has not shown that his efforts at obtaining and maintaining employment were successful because of his health condition. It was many years after the MQP in July 2015, following his left leg surgery, that his condition worsened.

[22] I must assess the severe part of the test in a real world context⁴. 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. In this case, in finding that his disability is not severe, I considered that he was 33 years old as of the MQP. He has a college level education. He has worked in construction, at a gas station, and, most recently, as an analyst.

[23] The Claimant is very young and well-educated. He has worked in both physically-demanding and sedentary jobs. In considering his personal characteristics, I do not find that he is unemployable in a real world context. While I accept that he is no longer able to perform physically-demanding jobs, he was able to return to sedentary work on a full-time basis until his condition worsened following surgery.

[24] In addition, given his post-MQP work, I considered section 68.1 of the *Canada Pension Plan Regulations* (CPP Regulations), which came into force on May 29, 2014. The provision

⁴ *Villani v. Canada (A.G.)*, 2001 FCA 248

was in effect when the Appellant applied for a disability pension on October 11, 2017. Section 68.1 of the *CPP Regulations* states that “substantially gainful”, in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

[25] In the present appeal, his record of earnings shows that he earned \$18,484 in 2015, which is above the maximum annual disability pension amount of \$15,175.08 established for the year 2015. He confirmed that those earnings relate to income earned from his full-time job at X. The CPP Employer Questionnaire confirms that he was able to perform his duties and did not require assistance. I therefore find that his post-MQP earnings in 2015 are substantially gainful.

[26] 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 impairment⁵. Having considered the totality of the evidence and the cumulative effect of the Claimant’s medical conditions, I am not satisfied on the balance of probabilities that he suffers from a severe disability.

CONCLUSION

[27] The appeal is dismissed.

Lianne Byrne
Member, General Division - Income Security

⁵ *Bungay v. Canada* (A. .), 2011 FCA 47