Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. A. v Minister of Employment and Social Development*, 2019 SST 712

Tribunal File Number: GP-17-2903

BETWEEN:

L. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Shannon Russell
Claimant represented by:	Les Mitchell
Videoconference hearing on:	June 19, 2019
Date of decision:	July 25, 2019

DECISION

[1] The Claimant is entitled to Canada Pension Plan (CPP) disability benefits to be paid as of July 2017.

OVERVIEW

[2] The Claimant is a 51-year-old X, who was injured at work in 2014. He applied for CPP disability benefits in November 2016, and in his application he reported that he is unable to work because of back and knee pain. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for CPP disability benefits, 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. The Claimant's MQP is December 31, 2018.

PRELIMINARY MATTERS

[4] During the hearing, the Claimant spoke of his consultations with Dr. Paul Woolfrey, Physiatrist. I did not have any reports from Dr. Woolfrey, and when I asked about this, the Claimant's representative said he had assumed they were in the file. I asked the Claimant and his representative if they wanted an opportunity to provide reports from Dr. Woolfrey, and they said they did. Given the clear relevance of the reports, I allowed the Claimant a period of 30 days after the hearing to submit reports from Dr. Woolfrey.

[5] On June 27, 2019, the Claimant's representative submitted reports from Dr. Woolfrey and an MRI of the spine dated March 2019[1].

[1] Pages GD9-1 to GD9-9 and pages GD10-1 to GD10-10

[6] I shared the Claimant's post-hearing documents with the Respondent, and I gave the Respondent an opportunity to comment on them. The Respondent did not submit any comments on the post-hearing documents.

ISSUE(S)

[7] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2018.

ANALYSIS

[8] Disability is defined as a physical or mental disability that is severe and prolonged[2]. A disability is severe if it renders a person 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

The Claimant Has a Serious Health Condition

[9] On November 30, 2014, the Claimant suffered a significant injury at work. He was standing by the driver's door of a pick-up truck talking to the people who were inside the truck, when a one-ton welding truck backed up, hit him and pushed him face-first against the pick-up. When the driver of the welding truck realized what had happened, he moved his truck forward and the Claimant collapsed to the ground in pain and shortness of breath.

[10] The Claimant was taken by ambulance to a hospital in Goose Bay where he reported pain, particularly in his lower back. X-rays did not show any fractures[3]. The attending physician diagnosed soft tissue injuries, and discharged the Claimant with medication and instructions to return to the hospital if his condition worsened[4]. The Claimant returned to the hospital the next

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[2] Paragraph 42(2)(a) of the *Canada Pension Plan*
[3] Page GD9-2
[4] Page GD2-420

day (December 1, 2014), complaining of low back pain, knee pain and blood in his urine[5]. He had a CT of the abdomen and pelvis, and the results were unremarkable (aside from bilateral adrenal adenomas)[6].

[11] A few days later, the Claimant flew home (he lives in X, but had been working near X) and spent the next several months resting and attending physiotherapy.

[12] The Claimant returned to work on modified duties in late February 2015 and likely continued to work until November 2015. I use the word "likely" because the evidence is not entirely consistent as to when he stopped work. The Claimant testified that, after he returned to work in February 2015, he was only there for about four months or so. The Claimant's testimony is generally consistent with what he told Dr. Lewis on May 22, 2015 in that he said he last worked on May 14, 2015[7]. However, the Claimant's testimony is not consistent with other evidence on file, including a work schedule dated November 9, 2015 showing the Claimant was then working a schedule of 20 days on and 10 days off[8], a physician's report showing he suffered a strain injury at work on October 30, 2015 and would be off work until November 10, 2015[9], the Claimant's CPP Questionnaire showing he last worked on November 2, 2015[10], and Dr. Woolfrey's report of September 2017 indicating that the Claimant worked until November 2015[11]. The preponderance of the evidence supports a stopped work date of November 2015. I asked the Claimant if he made more than one attempt to return to work after 2014 and he said he did not.

[13] The Claimant testified that he stopped work in 2015 because he was in too much pain and was struggling from muscle spasms, though he did not know what they were at the time. This is consistent with Dr. Woolfrey's report of September 2017, which states that the Claimant stopped

[5] Page GD2-421
[6] Page GD2-424
[7] Page GD2-126
[8] Page GD2-302
[9] Page GD2-141
[10] Page GD2-600
[11] Page GD9-2

work in November 2015 because he could no longer cope with his pain, despite the fact that he was doing very light and sedentary duties[12].

The Claimant's Pain is Significant and Functionally Limiting

[14] The evidence shows that, since before the end of his MQP, the Claimant has been experiencing significant pain and corresponding limitations.

[15] The Claimant testified that his pain and limitations are the same now as they were at the time of his MQP, and so I will write in the present tense. The Claimant explained that the condition that he struggles with the most is the muscle spasms. He said the muscle spasms started about 3-4 weeks after the injury of November 2014 and have continued since then. The spasms are debilitating and often make him cry. They can last anywhere from 15 to 45 minutes and typically occur in his upper torso (front, back and sides). He talked to his doctors repeatedly about the spasms, but he felt that they did not believe him, and so he had someone record a video of him in the midst of a spasm and then showed the video to his doctors, including Dr. Woolfrey.

[16] The Claimant showed me the video during the hearing and the spasm was notably visible. It was obvious the Claimant was in significant pain throughout the video. Dr. Woolfrey has also commented on the video. He said he saw the video on January 16, 2019 and it shows muscle spasms in the back and abdomen which are "obviously quite significant". He also said the spasms occur daily when the Claimant twists or turns and that, after the spasms are over, the Claimant takes Tylenol No. 4 for pain. The Claimant testified that he last saw Dr. Woolfrey in May 2019 (I do not have a copy of that report) and at that time, Dr. Woolfrey prescribed a new medication for the spasms. The Claimant said that he has been taking the medication (he could not recall the name of it) but it is not helping. He said that, at Dr. Woolfrey's suggestion, he has been keeping track of how many spasms he gets and since May 2, 2019 he has had 63 spasms. I accept that the spasms occur often and are debilitating when they occur. I also accept that the spasms leave the Claimant in pain and feeling drained.

[12] Page GD9-2

[17] In addition to the spasms, the Claimant also has back and left knee pain. He describes his back pain as "really, really bad". He is unable to reach behind him so as to clean himself after bowel movements and so he needs to clean himself by showering. Because of his pain, he has had to give up hobbies that he previously enjoyed (such as skidooing). His father sold the family cabin last year, because the Claimant told him that he would never be able to use it again.

[18] The Claimant testified that he spends much of his time lying down because that is the most comfortable position for him. He can only sit for short periods of time (probably not even half an hour) and he cannot do too much walking.

[19] In September 2017, Dr. Woolfrey wrote that the Claimant was reporting moderate to severe pain, with his average pain being a 5-6 out of 10 but increasing to 7-8 out of 10 with any increase in activities. Dr. Woolfrey diagnosed mechanical low back pain and associated moderate to severe myofascial pain, patellofemoral knee pain with underlying degenerative arthritis and meniscal pathology. Dr. Woolfrey described the Claimant's pain as "significant" and he explained that it interferes with the Claimant's function, in that he has difficulties with prolonged sitting, standing, bending, lifting, pushing or pulling[13]. Dr. Woolfrey's subsequent reports of January 2018, September 2018 and January 16, 2019 do not indicate that the Claimant's functionality improved in any significant way after the initial consult of September 2017.

The Claimant Has Pursued Recommended Treatment Modalities

[20] The Claimant has made strong efforts to reduce his symptoms and improve his functioning. His efforts include extensive physiotherapy; chiropractic therapy; surgeries (left knee surgery in March 2016[14] and a hernia repair in June 2016[15]); clinic-based occupational rehabilitation - CBOR (November 2016 to February 2017); trigger point injections, botox injections, and several different types of medications.

[13] Page GD9-5
[14] Pages GD2-167 to GD2-168
[15] Pages GD2-195 to GD2-196

[21] Any relief the Claimant was able to achieve through his treatment efforts was either not sustained or was not enough to reduce his symptoms and/or improve his functionality in any meaningful way.

[22] For example, the CBOR reports show that the Claimant improved throughout the program and, at discharge, the Occupational Therapist concluded that the Claimant was meeting most of his pre-injury tolerances and that he had an estimated workday tolerance of 8 hours at a strenuousness level of heavy[16]. The Claimant acknowledged the progress in January 2017 when he spoke with one of the Respondent's adjudicators and said that the CBOR was going very well and that he was hopeful of being able to return to work in the future[17]. However, despite the progress throughout the program and despite the encouraging findings at discharge, the Claimant's improvement was not long-lasting. On March 27, 2017, the Claimant's family physician (Dr. Dennis) wrote that the Claimant's back and knee problems had become worse and that the Claimant was in a great deal of pain and incapable of doing any work[18]. Shortly thereafter (in May 2017), Dr. Dennis re-referred the Claimant to Dr. Lewis (the Claimant's knee surgeon) for assessment of his left knee[19], and referred the Claimant to Dr. Woolfrey for assessment of the Claimant's back and knee injuries and muscle spasms[20].

[23] As another example, the Claimant first saw Dr. Woolfrey on September 20, 2017 and during that consultation Dr. Woolfrey gave the Claimant a trial of trigger point injections, following which the Claimant had good painless range of motion of the left knee and significant improvement in his low back symptoms[21]. At the follow up visit of January 2018, however, Dr. Woolfrey noted that the Claimant was in obvious discomfort. He said the Claimant acknowledged having had some relief from the injections but he said he was still having mid back pain and muscle spasms[22]. Dr. Woolfrey performed more injections, and while they significantly improved the Claimant's comfort level at the time of the January 2018 visit, the Claimant explained at his next visit (in September 2018) that the relief was of short duration[23].

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[16] Page GD2-269
[17] Page GD2-310
[18] Page GD2-277
[19] Page GD2-287
[20] Page GD2-289
[21] Page GD9-5
[22] Page GD9-7
[23] Page GD9-9

Dr. Woolfrey then did a trial of botox injections but when he saw the Claimant again (in January 2019), the Claimant explained that the botox did not help and that his muscle spasm was worse[24].

The Claimant's Disability is Severe

[24] Given the Claimant's pain, significantly reduced functionality, and limited benefit from treatment modalities, it is more likely than not that his disability rendered him incapable regularly of pursuing any substantially gainful occupation by December 31, 2018.

[25] This finding is supported by Dr. Dennis' report of March 27, 2017 wherein he reported that the Claimant's back and knee conditions had worsened, that the Claimant was in a great deal of pain, and that the Claimant was incapable of doing any work[25]. Dr. Dennis' opinion is deserving of weight as he has been the Claimant's family physician since 1990 and he saw the Claimant regularly after his injury in 2014. Moreover, Dr. Dennis was aware of the CBOR discharge report because he referred to it in his letter to the WHSCC in March 2017 and while he said he could not read or understand most of it, he was aware that the Claimant had been told he could work[26]. This is a noteworthy point because the CBOR discharge report of February 7, 2017 (indicating work capacity) and Dr. Dennis' report of March 27, 2017 (indicating no work capacity) are relatively close in time and yet Dr. Dennis did not in any way suggest that the Claimant's condition could not have changed so significantly in the span of about two months.

[26] The finding of a severe disability is also supported by the reports of Dr. Woolfrey who has seen the Claimant on several occasions since late 2017. In September 2017, Dr. Woolfrey stated that the Claimant could not return to his regular job and he implied that the Claimant could not do any other type of work because he said the overall goal is to get the Claimant back to his pre-injury employment or at least get him to the point where he can look at alternate employment

[24] Page GD10-3
[25] Page GD2-277
[26] Page GD2-266 and GD2-270

or retraining[27]. Significantly, Dr. Woolfrey's opinion on work capacity did not change over the course of his follow up visits with the Claimant. This is consistent with the Claimant's testimony that, despite the treatments provided by Dr. Woolfrey, he has not realized much in the way of improved pain and/or functionality.

[27] Finally, the Claimant impressed me as a person who would much rather be working than not. He was quite emotional during his testimony when he spoke of his inability to provide for his family and it was evident that he has struggled to accept his limitations. He spoke of being highly motivated to return to work and I note that his comments in this regard are consistent with observations made by several health care practitioners he has seen[28].

[28] In assessing the Claimant's capacity to work, I have considered his age, education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context[29].

[29] At the time of the Claimant's MQP, he was only 51 years of age and thus had several years ahead of him before the standard age of retirement. The Claimant also has a good education. He returned to school at age 34 and obtained his grade 12 and he has also completed trade school programs as a X, X, and X. The Claimant is also proficient in at least one of Canada's two official languages. With respect to work history, the Claimant testified that he has only ever done heavy, physical labour. Had the medical evidence indicated a capacity to work at a lighter, sedentary job, I would have canvassed whether it would have been reasonable for the Claimant to retrain. However, the evidence does not show that the Claimant had the capacity for any type of work by December 31, 2018.

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[27] Page GD9-5
[28] See, for example, page GD2-98
[29] *Villani* v. *Canada (A.G.)*, 2001 FCA 248

Prolonged disability

[30] The preponderance of the evidence shows that the Claimant's disability was likely long continued and of indefinite duration by December 31, 2018.

[31] The Claimant has not worked since November 2015 and he has been unable to sustain any lasting relief from the treatment modalities he has tried.

[32] With respect to the Claimant's left knee condition, I do not have a copy of Dr. Lewis' most recent report (i.e. the report from the re-referral of May 2017). However, Dr. Woolfrey had a copy of Dr. Lewis' report of July 6, 2017 and his summary of that report does not leave the impression of an optimistic prognosis. Dr. Woolfrey said, for example, that Dr. Lewis noted that the Claimant continued to remain in a chronic pain situation and he did not think that further investigations were warranted (though he did support continued physiotherapy)[30]. The Claimant testified that he is waiting to see another knee surgeon about the possibility of a knee replacement, but he has not yet received an appointment date. He added that he is not sure if he will be considered a candidate for a knee replacement because of his relatively young age.

[33] I have no way of knowing what will happen with the Claimant's surgical consultation. However, even if he has the knee replacement, he will still be left with his significant back pain and debilitating muscle spasms.

[34] I know that Dr. Woolfrey offered hope of recovery in September 2017, at least to the extent that would allow the Claimant to try a different type of job or to retrain. However, he did not go so far as to say that such recovery is *anticipated* or *expected* within a reasonable and foreseeable time. Instead he simply acknowledged the *possibility* of improvement if future treatment is successful. In the absence of anticipated or expected improvement, I am satisfied that the Claimant's disability is prolonged and has been so since before his MQP.

CONCLUSION

[35] The Claimant has a disability that was severe and prolonged by December 31, 2018. In terms of the date of onset of disability, I cannot find that the disability became both severe and

[30] Page GD9-3

prolonged in November 2014 (the date of the injury) because the Claimant was able to work for a significant period after that and because the Claimant showed promising improvement as recent as February 2017 when he was discharged from the CBOR program.

[36] The evidence supports a date of onset finding of March 2017. This is when it became clear that any improvement the Claimant realized during the CBOR program was not sustained, as evidenced by Dr. Dennis' letter of March 27, 2017 and his subsequent referrals to Dr. Lewis and Dr. Woolfrey.

[37] Payments start four months after the date of disability. Four months after March 2017 is July 2017.

[38] The appeal is allowed.

Shannon Russell
Member, General Division - Income Security