



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *LW v Minister of Employment and Social Development*, 2019 SST 1757

Tribunal File Number: GP-19-374

BETWEEN:

L. W.

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: Daniel Griffith

Teleconference hearing on: July 17, 2019

Date of decision: August 9, 2019

DECISION

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

OVERVIEW

[2] The Claimant is a 56-year-old man who worked for many years as a locomotive engineer for X. He stopped working in December 2012 because he injured his back. He applied for CPP disability benefits in November 2015, and in his application he reported that he is unable to work because of back and hip pain. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant's appeal was heard by a Tribunal Member in March 2018. That Tribunal Member determined that the Claimant was not eligible for disability benefits. The Claimant appealed the Tribunal Member's decision and, in a decision dated February 2019, the Appeal Division allowed the appeal and referred the matter back to the General Division for reconsideration by a different Tribunal Member.

ISSUE(S)

[4] 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. I find the Claimant's MQP is December 31, 2016.

[5] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2016.

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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 Nature of the Medical Condition

[7] On December 13, 2012, the Claimant was bent forward near the back of his truck when the tailgate fell and hit him in the T12-L1 region. It was initially thought that the Claimant had suffered a compression fracture, but no surgery was needed². At the time of the injury, the Claimant had a history of low back pain with sciatica and had (at times) required time off work³.

[8] In the years after the injury, the Claimant attended a number of medical consultations and pursued treatment modalities. For example, the Claimant saw Dr. Kahled Rodwan (Orthopedic Surgeon) in November 2013 and at that visit the Claimant said that he was still experiencing severe back pain, despite physiotherapy and NSAIDs. An MRI showed degenerative disc disease at L5-S1. Dr. Rodwan referred the Claimant to Dr. Lang for a trial of epidural steroid injection⁴. Dr. Lang diagnosed degenerative disc disease with right L5 radiculopathy⁵, and he gave the Claimant an epidural injection on December 19, 2013. The Claimant reported that the injection worsened his lumbar and radicular pain⁶.

[9] In March 2014, the Claimant was assessed by Richard Bourassa (a physiotherapist) and at that time the Claimant reported that his back pain was in the 5-9 range (on a scale of 1-10). Mr.

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

² Page GD7-27

³ Page GD2-47

⁴ Page GD7-21

⁵ Page GD7-22

⁶ Page GD7-23

Bourassa diagnosed central sensitization⁷. Mr. Bourassa recommended a six-week rehabilitation program⁸. The Claimant participated in an interdisciplinary treatment program from October 2 to November 6, 2014 but further treatment was delayed because the Claimant moved from Saskatchewan to British Columbia in December 2014.

[10] In July 2015, imaging of the Claimant's right hip showed moderate osteoarthritis⁹.

[11] In August 2015, the Claimant was assessed by Orion Health (a rehabilitation and assessment centre in British Columbia) and during that assessment the Claimant reported constant pain across the lower lumbar region with radiation into the buttock, groin and medial aspect of the right thigh. He described an aching / burning pain that ranged in intensity from 5-8 out of 10. He also reported intermittent sharp pain in the sacrococcygeal area and noted that his right hip sometimes locks up. He was considered to be an appropriate candidate for an occupational rehabilitation program¹⁰.

[12] The Claimant completed four weeks of the occupational rehabilitation program and then was discharged on September 4, 2015 (two weeks early). The assessors agreed that an early discharge was warranted because of a lack of progress and because the Claimant's right hip and groin pain were worsening. Upon discharge, the assessors concluded that the Claimant was currently functioning at a Limited (NOC) level, which they noted was the same work demand description as his previous job except that the Claimant had said that there were times in his previous job when he needed to lift up to a Heavy (NOC) category. The Claimant also explained to the assessors that his previous job required a high level of concentration and attention to detail (to ensure safety) and he was concerned that his pain levels would compromise those abilities.

[13] The Claimant testified that up until the time he was discharged from the Orion program, he had held out hope of returning to work. However, following his discharge, his employer did not have anything for him that suited his limitations. The Claimant said he did not look for

⁷ A change in nervous system susceptibility to incoming sensations, leading to a sensitivity to things that should be painful but also to sensations that should not be painful.

⁸ Pages GD7-22 to GD7-26

⁹ Page GD2-44

¹⁰ Pages GD2-46 to GD2-53

another type of job because he did not think there was a job he could do. He retired from X (for medical reasons) in 2016.

[14] The Claimant explained that at the time of his MQP he would have been unable to pursue a different type of job because of pain and chronic fatigue. He had (and has) chronic pain in his lower lumbar area and hip area and also had (and has) acute pain attacks in the hip and back. The triggers for the acute pain attacks are inconsistent and these attacks seem to happen at random. The pain attacks rob him of quite a bit of energy and leave him feeling fatigued. When this happens, he needs to lie down and rest because movement is difficult. The pain also interrupts his sleep and leaves him feeling as though he is not rested. At the time of his MQP, he was averaging four hours of sleep at night and he was probably napping 2-3 times during the day.

[15] The Claimant explained that his days start at a pain level of about 3-4 out of 10 and then, depending on what he does, his pain can rise to a 5-6 out of 10. By the end of the day, his pain is about an 8 out of 10. His pain affects his ability to concentrate and focus.

[16] He has seen three surgeons for his hip (Dr. Chan, Dr. Taylor and Dr. Vandermere) and while he knows that he will need a hip replacement at some point, he has not yet had that done because the doctors have told him that it is best to wait until he is at least age 60 and because he is concerned about experiencing complications from the operation (such as infection).

There is Evidence of the Claimant Having Work Capacity Before the MQP

[17] The Minister submits that, although the Claimant may not be able to return to his former job, there is evidence that he had work capacity at the time of his MQP. I agree.

[18] In August 2016, Dr. Alex Chan, Orthopedic Surgeon, wrote that “there is no reason why modified duties or some type of more sedentary duty would not be possible for him to perform”¹¹. Clearly, Dr. Chan was quite firm in his view that in August 2016 (just 5 months before the MQP) the Claimant had the capacity to work.

[19] The Claimant and his representative suggested that Dr. Chan’s opinion should be given little weight because Dr. Chan only saw the Claimant twice (once in May 2016 and once in

¹¹ Page GD8-8

August 2016). I do not find this argument compelling. The evidence shows that it was the Claimant who approached Dr. Chan for the purpose of asking him to complete a CPP Medical Report. This was well after the Claimant had already submitted another CPP Medical Report by Dr. Stuckey (his former family physician) in November 2015. It seems to me that the Claimant would not have asked Dr. Chan to complete a CPP Medical Report unless the Claimant thought that Dr. Chan was well-positioned to comment on the Claimant's disability.

[20] The Claimant and his representative also suggested that Dr. Chan's opinion should be given little weight because Dr. Chan may not have been aware of all of the Claimant's limitations as set out in the Orion Discharge Report. The Claimant added that he does not think the Orion Discharge Report was "out yet" when Dr. Chan rendered his opinion of August 2016. Again, I do not find this argument compelling.

[21] First, the Orion Discharge Report was prepared on September 10, 2015, which is almost one year before the Claimant asked Dr. Chan to complete the CPP Medical Report. It is possible then that the Claimant may have had the Discharge Report with him when he met with Dr. Chan on August 2, 2016. This report appears to have been in the Claimant's possession in and around that time because the Claimant included a copy of the report with his Notice of Appeal that he signed on August 15, 2016¹². Even if the Claimant did not have the Discharge Report with him when he met with Dr. Chan in August 2016, he was aware of his limitations and he appears to have had the opportunity to discuss his limitations with Dr. Chan before Dr. Chan completed the report. I say this because Dr. Chan's note of August 2, 2016 indicates that he spoke with the Claimant before he completed the CPP Medical Report and that he made it clear that he would complete the report with the proviso that he believes the Claimant can do some type of work. Also, the Claimant testified that he explained his limitations to Dr. Chan, but Dr. Chan was nonetheless of the opinion that there was a "job out there".

[22] Second, although Dr. Chan did not mention the Claimant's back condition in his note of August 2016, he was nonetheless aware of this condition. In May 2016, he wrote that he saw the Claimant because of lower back pain and right hip pain¹³. Also, as previously indicated, the

¹² Pages GD1-2 and GD1-3

¹³ Page GD8-9

Claimant had the opportunity to discuss his limitations with Dr. Chan before Dr. Chan completed the CPP Medical Report.

[23] The final reason why I am not prepared to discount Dr. Chan's opinion is because there is another physician who also suggested in and around the same time (August 2016) that the Claimant can work. On August 15, 2016, the Claimant's new family physician (Dr. Floris Morkel) wrote that the Claimant has moderate osteoarthritis of the right hip and this, together with some degeneration of his lower back, would constitute a barrier to "physical and or labour intensive work"¹⁴. It is reasonable for me to infer from Dr. Morkel's report that because he only precluded physical and/or labour intensive work, he was of the view that the Claimant was capable of more sedentary work.

[24] I acknowledge that the Claimant's former family physician (Dr. Stuckey) reported on February 2016 that the Claimant suffers from severe and prolonged lumbar and right hip pain and that his condition (chronic pain and osteoarthritis) prevents him from doing any meaningful work or retraining¹⁵. However, I am unable to prefer Dr. Stuckey's opinion over the opinions of Dr. Chan and Dr. Morkel. First, the latter includes the opinion of a specialist. Second, the opinions of Dr. Chan and Dr. Morkel are closer in time to the MQP. Third, the evidence shows that Dr. Stuckey and Dr. Morkel began treating the Claimant *around* the same time. According to the file, Dr. Stuckey began treating the Claimant in May 2015¹⁶ and Dr. Morkel began seeing the Claimant in July 2015¹⁷. Fourth, there is some suggestion that the Claimant's back pain may have improved (though it clearly did not resolve) after Dr. Stuckey completed his letter of February 2016. For example, on May 31, 2016, Dr. Chan wrote that the Claimant's low back pain had been managed well with his improvement in core strengthening exercises¹⁸. The Claimant acknowledged during his testimony that since being discharged for Orion Health, his back is a "little" stronger, he has lost 20 pounds, and he has increased his core strength. Fifth, Dr. Stuckey prepared a report in December 2016 (after Dr. Chan and Dr. Morkel rendered their opinions on work capacity) and although Dr. Stuckey mentioned that the Claimant had "very

¹⁴ Page GD1-4

¹⁵ Page GD2-10

¹⁶ Page GD2-36

¹⁷ Page GD2-67

¹⁸ Page GD8-9

painful movements, reduced range of motion, very tender internal rotation” when last seen in July 2016¹⁹, he did not explain whether these findings were specific to the Claimant’s hip condition or whether they also pertained to the back condition (or both). Moreover, Dr. Stuckey did not make any comments about the Claimant’s ability to work, leaving me to wonder whether his opinion on work capacity changed after February 2016 (and perhaps upon reading the reports of Dr. Chan).

[25] The Claimant believes that his inability to complete the program at Orion is indicative of his inability to work and highlights his inability to be a reliable employee. He explained that he attended the program for 3 hours a day (9:00 to 12:00) and towards the end of the week his pain would catch up to him and he would basically spend his weekends in bed trying to recover.

[26] I acknowledge the difficulties the Claimant had at Orion, but I am also mindful that he was relatively active during his time in the program. The Discharge Report states, for example, that the Claimant completed four weeks of the program and the program consisted of physical and functional exercises, cardiovascular conditioning, pool therapy and work simulation activities²⁰. (I know the program also included education sessions on pain management and counselling). The program activities are a relevant consideration because the Claimant testified that his symptoms worsen with activity. I do not know that the Claimant would have the same difficulty attending a job that involved less activity levels than what he experienced at the Orion program.

[27] In assessing work capacity, I have considered the Claimant’s 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 context²¹. I am unable to find that these factors would have made employment unrealistic for the Claimant in December 2016. At the time of his MQP he was 53 years of age and thus had several years ahead of him before the standard age of retirement. He is proficient in at least one of Canada’s two official languages, he has a good level of education (grade 12 plus extensive on-the-job training programs for positions such as brakeman, conductor, engineer) and years of experience working in different positions at X. I

¹⁹ Page GD8-5

²⁰ Page GD2-54

²¹ *Villani v. Canada (A.G.)*, 2001 FCA 248

know the Claimant testified that he has limited proficiency with computers (only being able to check email and basic surfing of the internet and only typing with one finger), but not all sedentary or light jobs require a sophisticated knowledge of computers or the ability to type.

The Claimant Has Not Attempted Alternate Employment

[28] Where there is evidence of work capacity, a claimant is required to show that efforts to obtain and maintain employment have been unsuccessful by reason of the health condition²².

[29] The Claimant has not attempted to work since December 2012. His Record of Earnings shows earnings of \$9,437 in the year 2016²³, but the Claimant was clear in his testimony that those earnings were from a payout from his employer and are not from any work activity on his part.

[30] In the absence of efforts to obtain and maintain employment, I cannot find that the Claimant's disability was severe by December 31, 2016.

Prolonged disability

[31] Given my finding that the Claimant's disability was not severe by December 31, 2016, it is not necessary for me to assess whether it was prolonged.

CONCLUSION

[32] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security

²² *Inclima v. Canada (A.G.)*, 2003 FCA 117

²³ Page GD10-5