



Citation: *K. P. v Minister of Employment and Social Development*, 2019 SST 1243

Tribunal File Number: GP-19-849

BETWEEN:

**K. P.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Raymond Raphael

Claimant self-represented: Assisted by L. P., his wife

Minister represented by: Line Losier

Teleconference hearing on: September 25, 2019

Date of decision: September 28, 2019

## **DECISION**

[1] The Claimant is not eligible for a *Canada Pension Plan* (CPP) disability pension.

## **OVERVIEW**

[2] The Claimant was 52 years old when he applied for the CPP disability pension in June 2016. He last worked as a X. He stated that he had been unable to work since December 2012 because of “total knee damage.” He was unable to walk, lift, climb stairs, squat, or run. The Minister denied the application initially and on reconsideration, and the Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] This is the Claimant’s fourth application for CPP disability. The Minister received the previous applications in December 2013, February 2015, and October 2015. The Minister denied all of those applications. The Claimant requested a reconsideration only with respect to the first application. The Minister denied that request for reconsideration, and the Claimant did not appeal the reconsideration decision.

[4] The Minister acknowledges that the Claimant cannot return to his previous physically demanding work. However, it takes the position that he has the capacity to pursue alternative sedentary work and that he has failed to take reasonable steps to do so. It submitted that limitations of one knee do not preclude all work.

[5] A disability is a physical or mental impairment that is severe and prolonged.<sup>1</sup>The Claimant’s disability is severe if it causes him to be incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration.

[6] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled on or before the end of his Minimum Qualifying Period (MQP), which is calculated based on his contributions to the CPP. His MQP ended on December 31, 2015.<sup>2</sup>

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>2</sup> Record of Contributions: GD2-83

## ISSUES

1. Did the Claimant's severe left knee osteoarthritis result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2015?
2. If so, is his disability long continued and of indefinite duration?

## ANALYSIS

### *Severe Disability*

#### **The Claimant's medical conditions interfered with his ability to work by December 31, 2015**

[7] The Claimant suffers from long-standing left knee problems resulting from a sports injury in the 1980s. He underwent major ligament reconstruction surgery, but continued to suffer from left knee pain and swelling. Despite this, he was able to work as a X until December 2012. His work was physically demanding. He moved furniture, shovelled snow, cut the grass, and did other "physical labour" activities. He wore a knee brace while working.

[8] By December 2012, he couldn't continue working. He couldn't climb stairs, bend, or carry heavy items. He stopped working because he was experiencing too much pain and swelling in his left knee. He had discussions with his doctors about a total knee replacement. They have advised him to hold off because of his age. He now goes for massage therapy once a month, takes Percocet for pain, and takes Trazadone to help him sleep. He sees his family doctor on a regular basis, and last saw an orthopaedic surgeon about 1 ½ years ago.

[9] The medical evidence supports the Claimant's account.

[10] In February 2013, Steve Hutchinson, physiotherapist, stated that the Claimant had received only short-term benefit from physiotherapy for his "severely degenerated left knee."

His knee was getting worse, and his flexion had decreased. Mr. Hutchinson did not think the Claimant would benefit from further physiotherapy.<sup>3</sup>

[11] In December 2013, Dr. Wignall, family doctor, completed the initial attending physician's statement for the Claimant's long-term disability insurer. Dr. Wignall diagnosed severe left knee osteoarthritis. The Claimant was in constant pain and his symptoms had increased since May 2012.<sup>4</sup>

[12] In February 2015, Dr. Wignall stated that the Claimant suffered from increasing severe pain throughout his left knee. He had been unable to return to work in manual labour.<sup>5</sup>

[13] In November 2015 (one month before the MQP), Dr. Wignall stated that the Claimant had severe right [sic] knee osteoarthritis.<sup>6</sup> His functional limitations were worse than when he was tested in 2013. The Claimant's condition was deteriorating and he would eventually require a total knee replacement.<sup>7</sup>

[14] I find that because of his severe left knee osteoarthritis the Claimant could not return to his previous physically demanding employment as a X, or to any other physically demanding work.

**The Claimant has failed to establish that he lacks the regular capacity to pursue alternative substantially gainful employment**

[15] Since the Claimant is unable to return to his physically demanding previous employment, the primary issue that I must decide is whether he is regularly able to pursue alternative work.

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<sup>3</sup> GD2-204

<sup>4</sup> GD2-201

<sup>5</sup> GD2-194

<sup>6</sup> Dr. Wignall mistakenly referred to the right knee but it is clear that he is discussing the left knee since he refers to the injury to and surgery on the knee in the 1980's.

<sup>7</sup> GD2-154 to 157

[16] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.<sup>8</sup> The Claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.<sup>9</sup>

[17] The Claimant acknowledges that he has made no efforts to pursue alternative employment since he stopped working. He did not attempt to retrain because of his age and his initial belief that he would not be off work for long. His employer refused to offer him light duties. There are few jobs where he lives, and he did not look for work with another employer because they would only pay minimum wage.

[18] The case law is clear that medical evidence is required to support a claim that a disability is severe.<sup>10</sup> The preponderance of the medical evidence, as well as the Claimant's statements to his treating doctors, support that he had the capacity to pursue alternative non-physically demanding employment.

[19] The most significant excerpts from the medical evidence are set out below:

- February 25, 2013, Dr. Ahmed, orthopaedic surgeon: pain control quite good with Celebrex, planning to take early retirement from physical labour job, suitable candidate for activity potential assessment for alternative placement.<sup>11</sup>
- October 7 & 8, 2013, Functional Capacity Evaluation: told assessor starting to think may need to get surgery and go back to modified work.<sup>12</sup>
- October 13, 2013, Dr. Ahmed: doing well with Celebrex, would like to continue with Celebrex and get into less physically demanding job like security, just walking around, or desk work.<sup>13</sup>

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<sup>8</sup> *Ferreira v. Attorney General of Canada*, 2013 FCA 81

<sup>9</sup> *Klabouch*, 2008 FCA 140

<sup>10</sup> *Villani v. Canada (A.G.)* 2001 FCA 248; *Warren v. Canada (A.G.)*, 2008 FCA 377

<sup>11</sup> GD2-205

<sup>12</sup> GD2-214

<sup>13</sup> GD2-316

- September 2, 2014, Dr. Ahmed: not working because job quite physical, willing to proceed with some less physical job, good candidate for activity potential assessment and appropriate job placement.<sup>14</sup>
- November 18, 2014, Functional Capacity Evaluation: told assessor could probably do sedentary office work, if employer had it.<sup>15</sup>

[20] I recognize that the Claimant suffers from chronic pain and now feels he is unable to work. However, it is not sufficient for chronic pain to exist; the pain must be such as to prevent him from regularly pursuing a substantially gainful occupation.<sup>16</sup> Where a Claimant has some capacity to work, he is obligated to show that he has made efforts to obtain and maintain employment that were unsuccessful because of his medical condition.<sup>17</sup>

[21] It is understandable that the Claimant may have been reluctant to pursue alternative employment because any job he might find in the area where he lives would only pay a minimum wage. However, socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP.<sup>18</sup>

[22] The Claimant's refusal to apply for certain types of work based on perceived low wages does not assist his claim that he was unable to perform substantially gainful employment. The foundation of a person's claim to CPP disability is employability in any substantially gainful occupation, not employability in an occupation with wages similar to those he previously earned.<sup>19</sup>

[23] I am satisfied that the Claimant had some capacity to work at December 2015, and that he failed to make reasonable efforts to do so.

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<sup>14</sup> GD2-246

<sup>15</sup> GD2-256

<sup>16</sup> *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB). This decision is not binding but I find it persuasive.

<sup>17</sup> *Yantzi v Attorney General Canada* 2014 FCA 193, para 5; *J.W. v Minister of Human Resources and Skills Development* 2014 SSTAD 12, para 41. This decision is not binding but I find it persuasive.

<sup>18</sup> *Canada (MHRD) v. Rice*, 2002 FCA 47

<sup>19</sup> *Fancy v. Canada (Social Development)*, 2008 FC 1414 (CanLII), at para. 13

[24] I must assesses the severity requirement in a “real world context” and consider such factors as the Claimant’s age, education level, language proficiency, and past work and life experiences when determining his employability.<sup>20</sup>

[25] The Claimant was 51 years old at the December 2015 MQP. He was only 48 years old when he last worked in December 2012. He has no language barriers. I recognize that he has a fairly limited education and that his employment has mostly involved physical work. Before his job as a X started in 1999, he was an X for three years, a X for 9 to 10 years, and a X for three months. Although this work history may have limited his employability, I am not satisfied that he was not employable at light non-physically demanding work.

[26] Because he has not looked for alternate work, he has not demonstrated that he was unable to obtain or maintain employment because of his health condition. The onus is on the Claimant to show that it is more likely than not that he lacked the regular capacity to pursue substantially gainful employment. I find that he has failed to discharge this onus.

[27] The Claimant has failed to establish that it is more likely than not that he suffers from a severe disability in accordance with the CPP requirements.

[28] Since he has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

## **CONCLUSION**

[29] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>20</sup> *Villani* 2001 FCA 248