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

Citation: *R. S. v Minister of Employment and Social Development*, 2019 SST 1359

Tribunal File Number: GP-19-489

BETWEEN:

R. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Raymond Raphael
Claimant represented by:	Mark S. Grossman
Minister represented by:	Christian Demars (participating by Teleconference)
Videoconference hearing on:	September 23, 2019
Date of decision:	October 11, 2019

Canada

DECISION

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

OVERVIEW

[2] The Claimant was 36 years old when he applied for the CPP disability pension in March 2013. In January 2012, he injured his back while working as a X for an X. He continued to work on modified duties until March 2012. He has not returned to work for that employer. He worked on a part-time basis in a X from December 2015 until he suffered further injuries in a motor vehicle accident in August 2017. He has not worked since that accident.

[3] In his disability questionnaire, the Claimant stated that he had been unable to work since March 2012 because of two slipped discs in his lower back, depression, and insomnia. The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal.

[4] This is third hearing before the General Division. On March 14, 2016, the General Division dismissed the appeal. The Claimant appealed and on August 30, 2017, the Appeal Division allowed the appeal and referred this matter back to the General Division for a new determination by a different Tribunal member. On July 11, 2018, the General Division again dismissed the appeal. The Claimant appealed and on March 13, 2019 the Appeal Division allowed the second appeal and again referred this matter back to the General Division for a new determination by a different Tribunal member.

[5] A qualifying disability must be severe and prolonged.[1] 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.

[1] Subsection 42(2) of the CPP

[6] The Claimant 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, 2014.[2]

ISSUES

1. Did the Claimant's chronic back pain and depression result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2014?
2. If so, is his disability long continued and of indefinite duration?

PRELIMINARY ISSUE

[7] In order to avoid unnecessary duplication, I used the recording of the evidence from the General Division hearings on March 14, 2016 and May 29, 2018 as part of the evidence at this hearing. The Claimant provided further oral evidence at the hearing before me.

ANALYSIS

Severe Disability

[8] The Claimant had a serious back condition as of the MQP, but did not follow recommendations for treatment that would likely have improved his back condition and resultant depression. A failure to follow reasonable treatment recommendations may result in a finding that a claimant is not entitled to a CPP disability pension.

[9] Although he worked part-time with accommodations in a somewhat physically demanding job from December 2015 to August 2017, he has not looked for sedentary work. The evidence shows that taking into account his personal characteristics, he had the capacity to perform light sedentary work.

The Claimant's medical conditions limited his ability to perform physically demanding work by December 31, 2014

[2] Record of Contributions: ISR7-4

[10] I must initially focus on the Claimant's condition as of December 31, 2014. When doing so I must assess his condition as a whole and consider all of the impairments that affect his employability, not just his biggest impairments or his main impairment.[3]

[11] The Claimant stated that he was unable to work as of December 2014 because of the combination of his chronic pain and depression. He was always in pain. He couldn't focus and was forgetful. He couldn't sit or stand for more than 15 minutes. He couldn't do any household work or childcare. His medications made him drowsy and caused memory problems. In his March 2016 testimony, he stated that he was taking 16 to 17 tablets a day. These included several medications for pain, depression, anxiety, sleep difficulties, and allergies. He went for physiotherapy and massage therapy, but this wasn't helpful.

[12] In July 2012, a MRI of the Claimant's lumbar spine revealed mild degenerative fact joint disease and disc protrusion at L5-S1 impinging the left exiting nerve root.[4]

[13] In November 2012, Dr. Richardson, a sports medicine and work injuries specialist, stated that as result of repetitive bending and twisting at work, the Claimant herniated his L5-S1 disc causing left sciatica. The Claimant could not bend or lift. He could not pick up his two-year-old child. He displayed pain behaviour and at times was tearful. The range of motion of his lumbar spine was severely restricted, and he was unable to touch his knees. The Claimant had developed chronic low back pain syndrome. Dr. Richardson referred him to Dr. Moammer for a surgical consultation.[5]

[14] In May 2013, Dr. Moammer, an orthopaedic surgeon, started the Claimant on Celebrex and Lyrica, and suggested that he continue with non-operative treatment.[6] In July 2013, the Claimant declined surgery offered by Dr. Moammer.[7]

[15] In the May 28, 2013 CPP medical report, Dr. Rao, a general surgeon who acted as the Claimant's family doctor, diagnosed severe back pain with left leg sciatica. Dr. Rao did not

---

[3] *Bungay* 2011 FCA 47
[4] GD15-77
[5] IS5-6
[6] GD6-18
[7] GD2-73

mention depression or anxiety.[8] Dr. Rao saw the Claimant again on July 30, 2013. The Claimant continued to have severe leg pain. Nothing had changed since his last visit.[9]

[16] In November 2013, Dr. Surapaneni, a psychiatrist, diagnosed affective disorder depression, chronic pain syndrome, and anxiety disorder. The Claimant needed treatment for anxiety and depression.[10]

[17] The Claimant saw Dr. Surapaneni on a regular basis (usually every one or two months). In February 2016, Dr. Surapaneni referred the Claimant to another psychiatrist for his opinion and treatment suggestions. The Claimant was still "very much depressed and in pain, and no treatment was helping him."[11] At the hearing before me, the Claimant could not remember whether he saw another psychiatrist.

[18] I am satisfied that the Claimant's medical conditions limited his ability to work by December 31, 2014. He could not return to his previous employment, or other physically demanding work, because of his chronic back condition. He also suffered from depression and anxiety.

The Claimant has failed to take a proactive approach to his health care

[19] A Claimant is required to take a proactive approach to his health care, and demonstrate that any treatment refusal is reasonable.[12] The Claimant unreasonably failed to follow treatment recommendations for his back condition.

[20] In November 2012, Dr. Richardson mentioned epidural injections for pain control. The Claimant refused to consider this because he had been "advised by a physician friend not to undergo injections."[13]

[21] In July 2013, Dr. Moammer offered to do a lumbar spine decompression discectomy for the L5-S1 disc bulge. The Claimant told Dr. Moammer that he had sent his MRI to his uncle in

---

[8] GD15-83 to 86
[9] GD7-23
[10] IS6-32 to 34
[11] IS6-30
[12] *Warren v. Canada (A.G.)*, 2008 FCA 377; *Lalonde v. Canada (MHRD)*, 2002 FCA 211; *K.C. V. MESD*, 2019 SST 656
[13] IS5-6

India and was waiting for his recommendations.[14] In November 2015, the Claimant told Dr. Pysklywec, an occupational health specialist, that he hesitated about proceeding with surgery because he was concerned about "operative outcome." Dr. Pysklywec told the Claimant that he should discuss the surgery again with the surgeon. He also told him to consider surgery if there was a focal nerve root injury.[15]

[22] Dr. D'Souza's[16] April 2014 office note indicates that Dr. Moammer had suggested surgery in the past. The Claimant declined surgery because he was afraid. Dr. D'Souza was going to refer the Claimant to a doctor in Hamilton after he obtained the MRI.[17] On April 16, 2014, Dr. D'Souza stated that the Claimant needed reassessment by orthopedics.[18] Dr. D'Souza's March 29, 2018 office note indicates that he was awaiting an orthopaedic consult.[19] In a medical questionnaire completed for Service Canada in May 2018, the Claimant stated that he last saw Dr. Moammer in 2015.[20]

[23] At the hearing before me, the Claimant stated that he had seen Dr. Moammer again about two years before the hearing. Dr. Moammer again offered surgery and stated there was a 50-50 chance of success. The Claimant spoke to his aunt and uncle in India, who again recommended against the surgery. His uncle is a heart specialist in India. His aunt and uncle said they would send a letter to the Claimant's doctor saying they didn't think the surgery would help.

[24] I have attached little weight to this oral evidence. There is no further report from Dr. Moammer in the hearing file and there is no record of a follow up visit with him, or any other orthopaedic surgeon, after July 2013.[21] Given the large volume of medical evidence in the hearing file, it is reasonable to expect that any further orthopaedic report would be included in the file.

---

[14] GD7-23
[15] GD23- 4 & 6
[16] Dr. D'Souza became the Claimant's family doctor in March 2014 when Dr. Rao retired: ADN2-11
[17] ADN2-10
[18] GD1-6
[19] ADN2-5
[20] IS9-4
[21] *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB). Although this decision is not binding, I find it persuasive.

[25] Mr. Grossman submitted that the obligation to follow treatment recommendations only applies to non-invasive treatments such as physiotherapy. It does not apply to procedures such as injections or surgery, which have significant risks. He also submitted that the proposed epidural injections would have provided only temporary relief and the benefits of the surgery are uncertain.

[26] It is for the trier of fact to determine whether it is reasonable to refuse surgery.

[27] Case law supports a finding that it may be unreasonable for a claimant to decline surgery. For example, the *Pensions Appeal Board* (PAB) stated that the refusal by a claimant to undergo back surgery with a 75% chance of success was unreasonable. She was therefore not entitled to a CPP disability pension.[22] In another decision, the PAB stated if a claimant's decision to refuse surgery is based on reasonable grounds, it should not disqualify her from entitlement to a CPP disability pension. If not based on reasonable ground, the refusal should be considered as a negative factor in determining entitlement to a CPP disability pension.[23]

[28] It is understandable that the Claimant was concerned about the risks of surgery and discussed this with relatives, who are physicians. However, when his relatives raised concerns, he should have followed up by discussing them with his treating physicians. His obligation is to follow recommendations by his treating physicians, not to decline treatment based on discussions with relatives who were not treating him. In addition, despite Dr. D'Souza's repeated suggestions that he follow up with an orthopaedic surgeon, there is no credible evidence in the hearing file that he did so.

[29] I must also consider what effect the Claimant's failure to follow treatment recommendations had on his disability status.[24]

[30] The surgery would likely involve only the exiting nerve root at the L5-S1 disc. The Claimant was young and had no underlying degenerative conditions.[25] Two doctors

---

[22] *MSD v. Gregory* (September 2005), CP 22759 (PAB)
[23] *Wescome v MHRD* (December 1996), CP 3752 (PAB). The PAB decisions are not binding, but I find them persuasive.
[24] *Lalonde v. Canada (Minister of Human Resources Development),* 2002 FCA 211
[25] GD2-24

recommended surgery. They would not have done so unless they believed that there was a significant chance of success. The surgery might reasonably have been expected to improve the Claimant's nerve impingement and the resulting back pain. With an improvement in his back pain, it is reasonable to expect a significant improvement in his depression and anxiety.

[31] I find that the Claimant has failed to take a proactive approach to his health care. He has failed to demonstrate that his refusal to pursue surgery was reasonable. The surgery might reasonably be expected to have improved his disability status.

The Claimant has failed to make reasonable efforts to pursue alternative light employment

[32] In addition to showing a serious health problem, where there is evidence of work capacity, the Claimant must establish he has made efforts to find and keep employment that were unsuccessful because of her health.[26]

[33] 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.[27]

[34] After his January 2012 injury, the Claimant continued to work for approximately six weeks on modified duties. He stated that these were not "light duties" because he had to repetitively push, bend, and twist. In addition, his left wrist pain became worse.[28] He stopped working because his leg and back pain were becoming worse. He couldn't stand long enough to do the work and his medications made him drowsy.

Physical Limitations

[35] The preponderance of the evidence supports that, in the absence of mental health issues, the Claimant had the capacity to perform alternative light work.

---

[26] *Inclima* 2003 FCA 117
[27] *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.
[28] The Claimant's left wrist pain subsequently resolved.

[36] On February 27, 2012, a physiotherapy assessment report noted the Claimant could remain at work on modified duties.[29]

[37] On April 30, 2012, a physiotherapy assessment report noted physical restrictions in only bending and lifting.[30] In a July 30, 2012 attending physician's update report, Dr. Rao noted only limitations in lifting, carrying, and bending.[31] Although these restrictions excluded the Claimant from his previous physically demanding employment, they did not exclude him from alternative light work.

[38] In the May 2013 CPP medical report, Dr. Rao stated the Claimant might need training for a desk job.[32] Dr. Rao would not have suggested training for a desk job if he did not believe this was something the Claimant could do.

[39] In a January 2018, the Workers Safety & Insurance Board (WSIB) determined that the Claimant was totally impaired from March 6, 2012 to May 2013. As of May 2013, he was only partially impaired and able to perform modified duties offered by his employer. That work was light in nature and the Claimant could sit or stand, and change position as required.[33] Mr. Grossman stated that this decision is under appeal.

[40] A September 2019 Back and Neck Specialty Program, Worker Summary report prepared for the WSIB, stated that the Claimant was able to work at the sedentary physical demands level.[34]

Mental Health Limitations

[41] I must consider whether the Claimant's mental health conditions, when considered either in isolation, or together with his physical limitations, excluded him from performing alternative light work.

---

[29] GD2-48
[30] GD3-4
[31] GD1-58
[32] GD15-86
[33] IS4
[34] ISR6-5

[42] For the reasons that follow, I have determined that they did not.

[43] In his July 30, 2012, attending physician's update report for Manulife, Dr. Rao noted that the Claimant had no cognitive or mental impairments in concentration, analytical reasoning, learning new material, comprehension, or social interaction.[35]

[44] When the Claimant first saw Dr. Surapaneni, in November 2013, his cognitive functions were normal and there was no evidence of hallucinations or delusions.[36]

[45] In August 2016, Dr. Surapaneni cleared the Claimant for a two-month visit to India.[37]

[46] In October 2017, Dr. Surapaneni stated that the Claimant was "quite stable" and that he was taking his medications from Dr. D'Souza. Dr. Surapaneni discharged the Claimant back to Dr. D'Souza for future follow up and medications.[38]

[47] Dr. Surapaneni did not identify any psychiatric symptoms that limited the Claimant's capacity for suitable work. He treated the Claimant only with medications. The Claimant was able to work in the X from December 2015 to August 2017 despite his depression and anxiety. There is no evidence that his depression and anxiety significantly limited his ability to work by December 2014.

[48] It would appear that the Claimant did not attend for psychological treatment such as cognitive-behavioural therapy until the fall of 2018. He has been attending for this through the WSIB on a weekly basis. A February 2018 WSIB Community Health progress form stated the Claimant was expected to make progress with continued treatment and that his prognosis was guardedly optimistic. The progress form also noted that the Claimant was not yet ready to return to work activities because of his depression and anxiety symptoms. There was no mention of cognitive challenges.[39]

---

[35] GD15-58
[36] IS6-34
[37] IS6-28
[38] IS6-25
[39] ISR1-2 to 7

[49] There was no mention of cognitive challenges in an August 12, 2019 report from Dr. Surapaneni to Dr. D'Souza.[40]

[50] The first indication of cognitive challenges is a September 2019 WSIB Community Health progress form, which Mr. Grossman filed after the hearing. The Claimant reported cognitive challenges in performing his every day tasks and stated that he easily and quickly loses his train of thought. This progress form reiterates that the Claimant's prognosis was guardedly optimistic and that he was not yet ready to return to work activities.[41]

[51] Mr. Grossman submitted that the Community Health Progress reports establish that the Claimant will not be ready to return to work for the foreseeable future.[42] This may be true. However, those reports do not speak to his condition at December 31, 2014.

[52] At December 2014, the Claimant was being treated for depression and anxiety only with psychotropic medications. There was no medical evidence of any significant cognitive limitations or psychiatric symptoms. He was later able to work in a X for almost two years.

[53] I am satisfied that the Claimant's mental health conditions did not prevent him from performing alternative lighter work as of December 2014, even if they are considered together with his physical limitations.

Claimant's return to work efforts

[54] In December 2015 (one year after the MQP), the Claimant started to work on a part-time basis in a X. He worked only 10-15 hours a week, was allowed to sit, and was allowed to take breaks. He was paid minimum wages. His total earnings were about $500 per month. He stated that he wasn't able to work more than he did.

[55] After the August 2017 accident, the Claimant had increased pain in his neck and back. He stopped work, stating he was no longer able to work at all. He has not looked for other work and has not considered going back to school to upgrade his education and work skills

[40] ISR9-1
[41] ISR9-3 to 11
[42] ISR11

[56] At the May 2018 hearing, he stated that the X work was a “favor.” He didn’t look for it. The owner was a friend of his pharmacist, and provided several accommodations. He stated, “no one else would hire me…I could sit whenever I had pain…I only had to work for 2-3 hours a day.” The Claimant’s ability to work at this physical job, even though it was for a benevolent employer, suggests he had some capacity for light sedentary work. He has acknowledged that he has made no efforts to find this type of employment.

[57] The X has not officially terminated the Claimant. At the hearing before me, the Claimant stated that it recently offered him an office job that involved processing emails and making appointments. The Claimant stated that he didn’t accept this job because of the effects of his medications and his inability to focus because of pain.

[58] The Claimant was obligated to make at least some good faith efforts to find alternative non-physically demanding work. The Claimant’s ability to work at a physical X job shows that he had some capacity for light sedentary work. He never sought this type of work, and recently refused even to try an offer of this type of work from his employer.

[59] At the May 2018 hearing, the Claimant stated he didn’t look for other work. He didn’t consider going back to school or upgrading his work skills. He didn’t apply for a desk job because he assumed no one would hire him for only 2-3 hours a day. This is not a satisfactory reason for not making at least some effort to pursue this type of work.

[60] I am satisfied that the Claimant had the capacity to work at alternative sedentary employment at December 2014, and that he failed to make reasonable efforts to do so.

The Claimant has failed to establish a severe disability

[61] I must assesses the severity of the Claimant’s disability in a “real world context” and consider such factors as his age, education level, language proficiency, and past work and life experiences when determining his "employability".[43]

[43] *Villani* 2001 FCA 248

[62] Mr. Grossman submitted that the Claimant has always done physically demanding work and that he has no aptitude for lighter sedentary work. He stated that the Claimant cannot reasonably be expected to retrain for alternative work.

[63] The Claimant was only 37 years old at December 2014. He was only 35 years old when he injured his back in January 2012. He had a grade 12 education in India. He was able to complete three credits of a X course while working for the X. He is able to speak, understand, read, and write in English.

[64] Although his work history may have limited his employability, I am not satisfied that he was unable to perform light work.

[65] I have already determined that he failed to take a pro-active approach to his health care and that he failed to take reasonable steps to pursue alternative work.

[66] The Claimant has failed to establish that it is more likely than not that he suffered from a severe disability in accordance with the CPP requirements at December 31, 2014.

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

CONCLUSION

[68] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security