



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. K. v Minister of Employment and Social Development*, 2019 SST 1584

Tribunal File Number: GP-19-664

BETWEEN:

R. K.

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: Shyla Oates-Pennell

Teleconference hearing on: November 7, 2019

Date of decision: November 30, 2019

DECISION

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

OVERVIEW

[2] The Claimant is a 62-year-old man who last worked in May 2009. At that time, he had been working as a digital tape operator for X. He applied for CPP disability benefits in December 2015 and in his application he reported that he is unable to work because of depression, seasonal affective disorder, anxiety, panic attacks, cluster headaches, difficulties with sleep, and chronic pain in his legs.

[3] The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST).

[4] A Tribunal Member dismissed the Claimant's appeal in November 2018. The Claimant appealed that member's decision to the SST Appeal Division. The Appeal Division allowed the Claimant's appeal and referred the appeal back to the General Division.

ISSUE(S)

[5] 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, 2011.

[6] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2011.

ANALYSIS

[7] 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

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

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

Why the Claimant stopped work

[8] The Claimant stopped working for X in 2009 because he was laid off. The Claimant testified that before he was laid off, his work environment was stressful. He felt physically and emotionally burned out, and he was experiencing an increased number of headaches. He explained that a lot of his work-related stress resulted from his employer transitioning from analog technology to digital technology without providing him with an adequate amount of training. On top of that, his employer was often adding to his duties and/or changing his duties frequently, which made it difficult for the Claimant to cope. With everything going on, his illness-related absences increased near the end of his employment.

The nature of the Claimant's disability

[9] The Claimant explained that the lay-off caused additional stress for him, and that by December 2011 he was unable to work by reason of depression, seasonal affective disorder, panic disorder, and headaches.

[10] The Claimant testified that in December 2011 his depression caused him to be antisocial and to basically be a "veggie". He also said he was "boozing big time" as he could not see a way out of his situation and was turning to alcohol as a solution. He tried to find ways to get out of the depression. For example, he would force himself to leave his apartment so as to walk for physical activity. He would also go to a coffee shop just to be amongst people, albeit strangers. His efforts helped, but his depression "hit again" whenever he returned home.

[11] With respect to the panic attacks, the Claimant said that they were happening almost every day in December 2011 and that sometimes they could last all day. The panic attacks

caused him to shake and experience a racing heart. To help alleviate his symptoms, he needed to lie down, close his eyes and relax.

[12] The Claimant said that his headaches include cluster headaches and migraines. However, he spoke primarily of the cluster headaches. He said that in December 2011, the cluster headaches were occurring frequently. He usually experienced at least two a month but sometimes he had as many as 3 to 4 a month. Sometimes the cluster headaches lasted 48 hours. The headaches caused (and still cause) extreme pain and were sometimes associated with increased body temperatures. To help with the pain, he took Advil Extra Strength.

The Claimant's disability was not severe by December 31, 2011

[13] I accept that the Claimant experienced a difficult time after he was laid off. He was understandably worried about his future and how he was going to pay his bills². He was also coping with mental and physical health conditions. However, I am unable to find that the Claimant's disability was severe by December 31, 2011. I say this for three main reasons that I have considered in combination. First, the Claimant did not follow his doctor's recommendation to see a mental health specialist in 2011. Second, there is some evidence that the Claimant's conditions improved before December 31, 2011 and remained improved throughout 2012. Third, the Claimant completed an intensive program of study after the MQP. I will now explain each of these reasons in detail.

I – The Claimant did not follow his doctor's recommendation to see a mental health specialist in 2011

[14] To be successful in obtaining disability benefits, a claimant must not only provide evidence concerning the nature of his disability, but must also provide evidence of his efforts to manage his medical condition³. Such efforts are generally known as a "duty to mitigate". The Federal Court of Appeal has made it clear that claimants are not entitled to CPP disability benefits unless the duty to mitigate has been satisfied⁴. When claimants refuse to undergo a

² The Claimant said that he is receiving ODSP but that those benefits started in 2016

³ *Klabouch v. MSD*, 2008 FCA 33

⁴ *Sharma v. Canada (Attorney General)*, 2018 FCA 48

recommended treatment that is likely to affect their disability status, claimants must then establish that their refusal was reasonable⁵.

[15] In July 2011, the Claimant's family physician (Dr. Wilk) referred the Claimant to a psychiatrist (Dr. Majeed)⁶.

[16] During the hearing, the Claimant told me that he did not see Dr. Majeed (or any other mental health practitioner) in 2011. He said he does not remember what happened with the referral that his family physician made. He also said that he eventually went to see Dr. Majeed but it was in 2013 or 2014. He thinks he saw Dr. Majeed for at least 6 months (but possibly a year) and he thinks his visits were scheduled every 2 or 3 months. He stopped seeing Dr. Majeed because Dr. Majeed "quit on him" at a time when the Claimant felt he needed Dr. Majeed the most.

[17] Because the Claimant did not see Dr. Majeed (or another mental health practitioner) in 2011 (or even 2012), I cannot find that he was compliant with Dr. Wilk's treatment recommendation.

[18] I have considered whether there is a reasonable explanation for the Claimant's non-compliance, but I have not been provided with any explanation, let alone a reasonable one. The Claimant's testimony did not help me understand why he appears not to have followed Dr. Wilk's treatment recommendation of July 2011. To further complicate matters, I do not have any reports from Dr. Majeed and so I have no information from him as to why the Claimant did not see him in 2011 (or 2012 for that matter).

[19] As for the impact of the recommended treatment on the Claimant's disability status, I can only conclude that treatment would likely have helped the Claimant. The Claimant's mental health conditions were (and are) a main component of his disability claim. It is reasonable for me to infer from the medical evidence that Dr. Wilk would not have made the referral unless he thought it would help the Claimant's mental health conditions.

⁵ *Lalonde v. Minister of Human Resources Development*, 2002 FCA 211

⁶ Page IS7-62

[20] I am aware that the Claimant saw psychiatrists after his MQP (Dr. Majeed in 2013 and/or 2014 and Dr. Betlen starting in 2015) and I am aware that, at least with respect to the Claimant's consultations with Dr. Betlen, the Claimant's conditions appear not to have improved in any significant way as a result of that treatment⁷. However, I cannot infer from this that the Claimant would have had similar results had he seen a mental health practitioner in 2011 and/or 2012 because his condition appears to have worsened after that and I have little information (from a medical perspective) about the scope of that deterioration. Again, I do not have any reports from Dr. Majeed.

II – There is some evidence that the Claimant's conditions improved before December 2011

[21] Although the Claimant went through a stressful time in and around 2009, there is some evidence that his conditions improved before December 2011. The Claimant testified, for example, that one "bright light" at the end of the tunnel was that in 2011 he started getting help from a case worker at an employment centre and she helped him get government funding so that he could go to school.

[22] In September 2011 (just a few months before his MQP) he started a web design course at Durham College. This tells me that the Claimant was making efforts to improve his skills so as to re-enter the workforce.

[23] I acknowledge that the Claimant did not complete the web design course. He testified that he stopped the course after about three months because he could not cope. However, he did not suggest that his medical conditions were the main reason for his inability to cope. Instead, he explained that he withdrew from the course because it was a difficult program and his English was not "good enough".

[24] The Claimant appears to have been able to maintain an improved level of function and retain plans to re-enter the workforce because he began an upgrading program at Durham College in April 2012 (just a short while after withdrawing from the web design program). The

⁷ Pages GD2-46 and GD6-2

upgrading program initially involved math and English studies, but the Claimant told me that he dropped the math and focused solely on the English.

[25] The Claimant's evidence that he did not start seeing Dr. Majeed until 2013 or 2014 is a further indication that the Claimant was likely maintaining an improved level of function throughout 2012 and possibly 2013. Indeed, in 2016 the Claimant wrote that it was 2013 (well after his MQP) that his mental health caused him to "give up and not be able to find and keep suitable employment"⁸.

[26] I know that in October 2015, the Claimant's current psychiatrist (Dr. Betlen) wrote that the Claimant has a longstanding history of low mood, sadness, fatigue, poor motivation, difficulties with concentration and making decisions, recurrent migraines, anxiety attacks and avoidant behaviors⁹. Despite Dr. Betlen's reference to these conditions being longstanding, I cannot find that they resulted in a severe disability by December 31, 2011. In an earlier report of May 2015, Dr. Betlen reported that the Claimant's depression started in 1993 when his wife asked him to move out and at that time the Claimant was admitted to hospital for 3 weeks for what the Claimant believed was a nervous breakdown¹⁰. It seems then that this was the context for Dr. Betlen's later description of the Claimant having a "longstanding history". The Claimant obviously improved after 1993 because he worked from 1998 to 2009.

III – The Claimant completed an intensive program of study after the MQP

[27] The evidence shows that the Claimant completed an intensive program of study after his MQP. The Claimant explained that he studied English from April 2012 to September 2012. He then stopped his English studies, not because of disability, but because he had been accepted into a Digital Video Production Program (DVP program). The DVP program was full-time, and ran from September 5, 2012 to April 18, 2014¹¹.

[28] I acknowledge that participation in an upgrading or retraining program is not determinative of whether a person has work capacity. However, on these facts, I find that the

⁸ Page GD2-12

⁹ Page GD2-43

¹⁰ Pages GD2-47 to GD2-48

¹¹ Page IS6-2

Claimant's participation in the DVP program is indicative of work capacity. I say this for three reasons.

[29] First, the program was full time and involved a significant commitment of time. The Claimant testified that the program was intensive and, as a result, he put in about 10 hours a day, 5 days a week (in-class time and homework). On top of that he also did some school work on weekends if, for example, he had an assignment due.

[30] Second, the Claimant completed the program in good academic standing¹².

[31] Third, the Claimant spoke of having some accommodations during his studies, but I do not consider his accommodations so extensive as to be inconsistent with an ability to work. The Claimant testified that his accommodations were made possible because he was registered with the student disability office. He said that because of his disability he was often (not always) given extensions on his assignment deadlines, but only if the assignment was an individual assignment. The Claimant said that he did not receive extensions for group assignments. The only other accommodation the Claimant spoke of was that his professors sometimes stayed a little bit longer after class to explain things to him, one-on-one. Again, I do not consider these accommodations to be inconsistent with an ability to work, particularly in an environment that was not as challenging and demanding as the Claimant's program of study.

[32] I realize that most of the Claimant's post lay-off studies occurred after his MQP. However, they are still nonetheless a significant consideration. This is because the Claimant (as a late applicant) is required to show that his disability was severe by December 31, 2011 and that his disability remained severe *continuously* through to his date of application for disability benefits.

[33] In assessing the Claimant's capacity to work, I have considered his age, level of education, language proficiency and past work and life experience. These factors are important because they help me to understand how realistic it is for the Claimant to work¹³.

¹² Page IS6-3

¹³ *Villani v. Canada (A.G.)*, 2001 FCA 248

[34] At the time of his MQP, the Claimant was 54 years of age and thus had several years ahead of him before the standard age of retirement. He had a reasonable level of education (having completed post-secondary education in Poland in the field of film and television). I acknowledge that the Claimant's first language is Polish and I acknowledge that the Claimant felt it necessary to improve his English after his MQP. However, the Claimant did not tell me he was unable to communicate in English before his MQP. He worked for X from 1998 to 2009 and so it is reasonable for me to infer that he had a functional level of English proficiency before his MQP. In terms of life and work experience, the Claimant has years of work experience within the television industry and he appears to have thought he could continue to work in a related field after his MQP because he pursued and completed the DVP program.

[35] I acknowledge that Dr. Betlen and Dr. Wilk are both supportive of the Claimant's application for benefits. However, Dr. Betlen did not begin seeing the Claimant until 2015 (after the Claimant's MQP). Dr. Wilk wrote in August 2018 that the Claimant is permanently disabled and unable to work, but he did not write (or otherwise suggest) that the Claimant was similarly disabled in December 2011. In fact, he wrote "At this stage", the Claimant is permanently disabled for the purpose of employment seeking¹⁴.

[36] Finally, with respect to the chronic leg pain that the Claimant mentioned in his application, I do not have medical evidence indicating that it was affecting his functionality in any significant way, at the time of his MQP. Dr. Wilk's office notes indicate that the Claimant asked for a referral (to Dr. Kekosz) for assessment of his leg cramps but this was in October 2016 (well after the MQP)¹⁵. This suggests to me that the Claimant was able to manage his physical pain in and around the time of his MQP.

Prolonged disability

[37] Given my finding that the Claimant's disability was not severe by December 31, 2011, it is not necessary for me to assess whether his disability was prolonged.

¹⁴ Page GD6-4

¹⁵ Page IS7-11

CONCLUSION

[38] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security