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

Citation: *P. G. v Minister of Employment and Social Development*, 2019 SST 1652

Tribunal File Number: GP-18-1957

BETWEEN:

P. G.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Brian Rodenhurst
Claimant represented by:	Bozena Kordasiewicz
In person hearing on:	November 12, 2019
Date of decision:	December 13, 2019

Canada

DECISION

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

OVERVIEW

[2] The Claimant arrived in Canada able to speak English. He worked in a variety of jobs usually of a physical nature. In May 2013 while working as a machine operator, he hurt his finger and right hand. His finger was swollen and turning black in colour. He received an injection in his hand and took a few days off work. He started feeling sicker with lower back pain and left leg numbness, with tingling in his neck. He had a car accident and returned to work. He felt dizziness and body pain. He underwent surgery due to a heart condition. His medical history indicates a number of medical issues over the years. He has not worked since May 2013.

[3] The Minister received the Claimant's application for the disability pension on September 1, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] To qualify for a CPP disability pension, 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 to be December 31, 2015.

ISSUE(S)

[5] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2015?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2015?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged[1]. A person is considered to have a severe disability if 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

Oral Evidence

[8] The Claimant stated he does not sleep well. He gets up three or four times during the night. The bloating in his stomach causes him to wake up and he then struggles to get back to sleep. He also experiences pain his left foot. He does not take medication to help him sleep. The Claimant produced a list of medications. He has stopped taking Pregabalin (common side effect is dizziness) and Daloxetine due to problems tolerating side effects. He continues take ASA for heart, Rosuvastatin for cholesterol, and Rabeprazole Sodium for acid reflux. The Claimant testified that in 2015 he was taking ASA for heart and Tylenol 3 for pain.

[9] The Claimant maintains he is presently unable to work because of his physical problem he has with standing, sitting, walking, and lifting. He noted he experiences physical problems daily.[2] In 2015, he was feeling weak and tired. He has not seen any improvement in his medical condition since 2015. The Claimant testified that in December 2015 he was incapable of any occupation due to bloating and numbness in his left foot.

[10] He testified he could not do any physical job because if he went back to his old job he could not keep making the required number of parts every day. His Representative asked him if his employer was able to accommodate him would he be able to go back to work every day and do something lighter. He stated he did not have any office experience or skills. After clarification, he answered that if they had a lighter job for him to do he would do it[3]. He was asked that if other than his former employer offered a lighter job could he do it. He answered he

[1] Paragraph 42(2)(a) *Canada Pension Plan*
[2] Recording 2 – 15:00
[3] Recording 2 – 17:39

was willing to try. It was discussed there was no guarantee he could do it, but he was willing to try. He also testified he could not do any type of occupation because he did not have the body strength. The onus is on the Claimant to prove it is more likely than not[4] he is incapable[5] of working. The test is not that it is a certainty or guaranteed he could work.

[11] The Representative submitted that the Claimant is minimizing his condition. She submitted his evidence understates the severity of his impairments on his ability to work. His evidence indicates he is willing to try lighter jobs. He testified concerning his restrictions. He stated he could stand one to one and half hours, sit for two hours and lift to 15 pounds. He was of the opinion he could not return to his old job and keep up the required pace but was willing to try a lighter job. I have no basis upon which to conclude he minimized this evidence. I have no basis to determine the Claimant who is familiar with his symptoms and limitations has made anything but a realistic appraisal of whether he could try lighter employment. The Claimant appeared sincere in his opinion.

Totality of Impairments

[12] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment[6]. The Claimant was asked to state all the medical conditions, symptoms, impairments and restrictions that interfered with his ability to work. The Claimant testified that in December 2015 he was incapable of any occupation due to bloating and numbness in his left foot. Bloating interferes with his ability to work as it feels like it is pressing down on his stomach and he has to sit down[7]. He can only sleep for a couple of hours. He testified he does not presently take medication to help him sleep. Physical problems included trouble lifting, standing, walking, and sitting[8]. His medical issues affect his physical relationship with his wife.

[13] He experiences depression. He does not remember when the first time depression was diagnosed. He stated his depression is not as significant as before as his faith/religion has a

[4] Balance of probabilities
[5] Incapable regularly of pursuing any substantially gainful occupation
[6] *Bungay v. Canada (A.G.)*, 2011 FCA 47
[7] Recording 1 – 24:58
[8] Recording 2 – 25:50

positive effect on his mental health. He believes his depression started in 2016 or 2017.[9] Dr. Khosla noted on August 14, 2017, that the Claimant's prognosis was complicated by his "recent" diagnosis of depression. I note the Claimant does not mention depression in his Questionnaire dated August 28, 2017. Dr. Khosla does not note depression in his July 29, 2016, Medical Report. Dr. Khosla on August 14, 2017 noted a recent diagnosis of depression. The Representative submitted that depression could affect the Claimant's ability to work prior to the MQP. She noted depression often exists prior to a formal diagnosis. She noted depression does not start at the time of the diagnosis. The problem is there is not any evidence to establish when it started. I cannot make a finding of depression at the time of the MQP without evidence. I am not able to project the Claimant experienced depression prior to the MQP without some foundation to make such a finding. Depression does often exists prior to a diagnosis. There is no evidence to indicate it existed[10] in the particular case of the Claimant, and I will not make an assumption.

[14] The Representative submitted the Claimant experienced anxiety as well as depression. There is no diagnosis of anxiety in any of the medical documents. The Claimant did not indicate he experienced anxiety in his oral testimony.

[15] The Claimant testified he has physical limitations resulting from his medical conditions. Limitations include pain if he walks more than 15 minutes. He has been using a cane since 2017. Standing is limited one – 1.5 hours, and sitting for two hours. He has to lie down after two hours. Lifting is limited to 15 pounds. The Claimant testified that he takes ASA for his heart condition. The Claimant underwent valve replacement in 2013. Dr. Hobson in May 2016 reported his heart sounds are normal. His opinion was the Claimant had mild peripheral vascular disease. He did not recommend restrictions and noted the Claimant did not require any intervention at that time.

[16] The Claimant testified he does exercises as recommended, however he still feels tired and numbness. He purchased an exercise bike to try to build leg strength. He feels dizzy and has bloating in his stomach. Doctors have not been able to tell him what is causing the bloating, and

[9] Recording 1 – 22:10
[10] On or before the MQP

numbness in his left foot despite undergoing ultrasounds. He has followed recommended diets but the bloating continues.

Functional Impairments

[17] The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work[11]. In considering the totality of impairments and functional effect it is necessary to consider the objective medical evidence on file as well as the oral evidence. Instructive in the assessment of the functional effect are the clinical notes filed with the Tribunal. On September 28, 2016, it was noted the pain in his muscles were gone, can walk a block but despite the improvement the Claimant felt he could not stand for a prolonged period of time. The Claimant felt a sitting job would not work either because his foot falls asleep and he may fall[12]. The clinical notes indicate progress in his symptoms and ability to work. Noted on May 4, 2017[13] the Claimant was not capable of standing for 8 hours as a machine operator. However, noted that modifying the job so he could sit with intermittent breaks to change position was agreeable. The Doctor could not see any other barriers. On May 30, 2017, Doctor Khosla noted the Claimant asked for a letter stating he was unable to work. The Doctor declined writing a letter[14] as the Claimant was able to work. The Doctor was of the opinion the problem was his workplace cannot modify the job. The Claimant disclosed he could not find another job as he was 57 years of age, and does not want to start a new job, as he would be a new employee with no benefits initially. The Doctor was of the opinion the Claimant could do modified duties. This observation by Dr. Khosla supports the belief of the Claimant that he could try a lighter job.

[18] The Representative submitted the Claimant had and continued to suffer from numerous severe medical problems including complications resulting from endocarditis due to life-threatening infection and brain hemorrhage, gastroesophageal reflux disease, gallstones, peripheral vascular disease, irritable bowel syndrome, Diabetes Mellitus, chronic renal failure, sensorineural hearing loss bilaterally, diabetic neuropathy, as well as depression and non-

[11] *Ferreira v. AGC* 2013 FCA 81
[12] GD5-42
[13] Notes of SK – Dr. Sapna Khosla, GD5 - 48
[14] GD5-48

restorative sleep; resulting in fatigue, exhaustion and cognitive impairments.[15] The Claimant did not testify that Diabetes Mellitus affected his ability to work. The objective medical evidence on file noted he had borderline diabetes mellitus[16]. The medical opinions do not substantiate diabetes affects his ability to work. Dr. Khosla authored two Medical Reports and did not note diabetes mellitus. Clinical notes indicated his diabetes was well controlled,[17] but with diabetic neuropathy.

[19] The Claimant stated a reason he is unable to work is numbness in his left foot. Dr. Khosla noted in March 2017 the Claimant experienced burning under both feet. The Claimant was able to walk further (2.5 blocks), sitting longer 2-3 hours, and felt better since taking Lyrica. On November 1, 2017 Dr. Khosla noted peripheral neuropathy – numbness there but pain is gone, mood normal. The Claimant was not returning to work due to a numb foot. Dr. Steckley authored a Consultation Report on September 10, 2015. The Doctor noted burning pain in the feet, with no leg weakness. His balance was fairly good but occasionally staggers. No weakness in hands and upper extremities. Numbness and burning pain improved by soaking both feet in hot water, and Tylenol. He has mild immune thrombocytopenia. EMG was normal with no evidence for a distal sensory or motor peripheral neuropathy. The Doctor was of the opinion the Claimant may be developing a mild distal sensory predominant peripheral neuropathy. He recommended treatment with medication. An EMG November 13, 2017, noted normal nerve conductions studies of the lower extremities.

[20] The Claimant stated he feels dizzy when bending. St. Joseph's Health Centre reported[18] the Claimant had some low blood pressure but did not feel dizzy when he gets up. The Family Doctor noted[19] the Claimant felt dizzy when he bends forward. There is no objective medical opinion recommending restrictions or limitations due to dizziness. The indication is the dizziness occurs when he bends. A situation that is controllable.

[21] Mentioned in the clinical notes of Dr. Khosla is Irritable Bowel Syndrome (IBS). The Doctor noted bloating and a feeling something was pressing down on his stomach. The Clinical

[15] GD5-28
[16] GD5-146
[17] GD5-40 – April 2016
[18] July 2013
[19] June 29, 2017

Notes indicated the Claimant passes gas, and this helps with the symptoms and discussed a diet[20]. On March 23, 2017, clinical notes indicated a lot less bloating in his stomach and he was sleeping through the night. Also noted he was able to walk further, sit 2-3 hours and was active exercising. On January 18, 2018, the Family Doctor noted a stomach issue. He was booked for feet but discussed his stomach instead. The Claimant indicated he has a lump in his stomach that hurts when he touches it but if he does not touch it, he does not notice it, fine when he does not touch it. On October 28, 2016, it was noted the Doctor had not seen him really regarding stomach pain, only January 2016. There is a history of stomach distended with fluid and gas. The medical evidence does not indicate this condition results in an impairment that would restrict any substantially gainful occupation.

[22] The Claimant did not mention sensorineural hearing loss in his oral testimony. He filled in two Questionnaires. He noted under seeing/hearing - "no impairment", and "good". The Family Doctor does not mention a hearing loss in the clinical notes and the Standard Medical Reports. There were no issues concerning the Claimant's hearing while he gave evidence and answered questions. Dr. Sloka noted in a consultation report[21] that the Claimant's vision and hearing seemed fine. I note Dr. Singh[22] did not note an issue with hearing in a list of impairments. A review of the oral evidence and file does not indicate a hearing impairment that would interfere with his ability to work.

[23] The Claimant underwent successful surgery involving mitral valve replacement with stented bio-prosthesis. The result of the surgery was excellent.[23] He had some discomfort in his left leg and numbness in his feet but could walk for 20-30 minutes and on his bike for 30 minutes free of any cardiorespiratory symptoms. Dr. Fowlis was of the opinion he needed only to be on a small dose of Aspirin. It was recommended he increase his activities incrementally. Dr. Novick post-surgery the Claimant looked amazingly well and he was astonished at the pace of this recovery, and recommended ASA for the long term. On May 25, 2016 Dr. Hobson noted the Claimant had mild peripheral vascular disease. He did not feel it necessary to see the Claimant

[20] GD5-44
[21] GD5-83
[22] March 19, 2019
[23] GD5-113

for a year and intervention was not required. There were not any functional limitations and restrictions recommended due to mild peripheral vascular disease.

[24] The Representative submitted the Claimant experiences lower back pain. A lumbar spine MRI indicated mild degenerative changes consistent with mild bulging of disc margins with a normal EMG. There is not objective medical evidence of a severe back condition that would stop the Claimant from being able to work. Dr. Hobson noted on July 28, 2017, the Claimant denied back pain.

[25] The Claimant's medical history indicates he has struggled with a number of significant medical conditions. Treatment has included surgery and long recovery periods. The Representative submitted he has been unable to return to any form of competitive employment due to severe and prolonged medical conditions since he left his last place of employment in May of 2013. I disagree. He has recovered from heart surgery taking ASA as a precaution. There are not restrictions recommended by doctors due to his heart condition that would render him incapable of any type of occupation. He punctured his right ring finger and after diagnosed with cellulitis infection he spent a prolonged time in hospital. The documents on file do not indicate he has restrictions using his right ring finger and right hand.

[26] The Claimant recovered to the point he exercised daily, could sit for 2-3 hours, was active exercising and slept through the night. He has not experienced a continuous disability. I place significant weight on the opinion of the Family Doctor who is the person in the best position to assess the limitations of the Claimant. Dr. Khosla refused to sign a document that the Claimant was incapable of modified/light employment. August 14, 2017, the Doctor noted a plateau due to a recent diagnosis of depression. He was treated conservatively with Cymbalta. On August 28, 2017 it was noted his mood was much improved and changed a lot. By November 1, 2017, the Claimant noted his mood was "back to normal", and was not returning to work due to a numb foot. Dr. Stevens noted in July 2018, the Claimant has modest thrombocytopenia. The Claimant looked well and reported feeling relatively well. Dr. Stevens noted the Claimant alert oriented and in no distress. The Claimant has experienced a number of medical issues. I find that upon assessing the totality of his medical conditions, symptoms, and impairments they do not result in an incapacity regularly of pursuing any substantially gainful occupation. He has

followed treatment and recovered to the point he was employable[24].

Real World Analysis[25]

[27] The Claimant came to Canada in 1992 from Guyana. He knew English when he arrived in Canada. His working career in Canada started in 1993. He had a variety of jobs including in a car parts plant, footwear company, and a shelving company. His last place of employment was with X as a machine operator. His work experience gives him some transferable skills.

[28] He testified[26] he has not returned to work because he does not have computer skills and office experience. He completed Grade 12 in Guyana. The information on file indicates he is capable of upgrading his education/retraining. He has not pursued training, except having his children show him how to do things on a computer. He completed two Questionnaires indicating under the title Remembering - no problem[27] and good[28]; Concentrating - no problem and good. The Representative submitted he has significant cognitive impairments including problems with concentration and memory[29]. The evidence of the Claimant and documents on file does not support the submission. Possible cognitive deficit was noted during 2013 rehabilitation. The Nurse Practitioner noted he showed carryover from one therapy session to the next. He had some problems with high-level cognitive functions, further treatment was recommended. Dr. Kennedy noted his Montreal Cognitive score was 17/30 but noted now he seems to have improved significantly.

[29] The file does not indicate this cognitive difficulty has continued, as there is no mention of cognitive limitations or treatments since. Problems remembering when his children shows him computer skills does not equate to an inability to retrain or upgrade his education under the guidance of third party professionals. The test is whether the Claimant is incapable regularly of pursuing "any" occupation. This definition is not restricted to occupations that require computer

[24] Employable – capable regularly of pursuing any substantially gainful occupation.
[25] Villani factors
[26] Recording 1 – 15:30
[27] December 12, 2013
[28] August 28, 2017
[29] GD 5-3

skills. The evidence on file does not indicate he has severe cognitive difficulties that would preclude retraining and engaging in “any” substantially gainful occupation.

[30] The Claimant was 56 years of age at the time of the MQP. The medical evidence indicates he was capable of physical activity within his restrictions and had the ability to learn new skills within limitations. He is not of such an advanced age as to preclude employment within his physical and mental abilities. There is insufficient medical evidence and evidence of employment efforts. I find the Claimant failed to prove on a balance of probabilities he experienced a severe disability as defined in the CPP when assessed in a real world context.

[31] The Claimant has struggled with a number of medical conditions. He has undergone surgery and emergency treatments for serious and severe conditions. Recovery and treatment has involved significant time and effort. He is not able to return to his regular physical employment. During his recovery and rehabilitation, the Family Doctor was supportive of him being off work. He recovered to the point his Family Doctor, the medical provider in the best position to assess his limitations, was of the opinion the Claimant was capable of employment within his limitations. I agree.

CONCLUSION

[32] The appeal is dismissed.

Brian Rodenhurst
Member, General Division - Income Security