



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *TS v Minister of Employment and Social Development*, 2020 SST 1207

Tribunal File Number: GP-18-2144

BETWEEN:

T. 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: Roger Foisy

In person hearing on: December 18, 2019

Date of decision: January 14, 2020

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of July 2016.

OVERVIEW

[2] The Claimant was 56 years old when he applied for a CPP disability pension in September 2017. He last worked as a stagehand rigger. In August 2013, he was injured when a large truck struck the vehicle he was driving. He stated that he had been unable to work since because of several conditions including a traumatic brain injury (TMI); headaches; dizziness; difficulties with balance and concentration; a torn rotator cuff; neck, shoulder and back pain; depression; posttraumatic stress disorder (PTSD); fatigue; and insomnia.¹

[3] The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal.

[4] The Minister recognizes that the Claimant cannot return to his previous physically demanding work as a stagehand rigger. Its position is that the medical evidence does not support any severe pathology or impairment that prevents him from pursuing alternative suitable employment within his limitations.

[5] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² 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, 2016.³

¹ GD2-128

² Paragraph 42(2)(a) *Canada Pension Plan*

³ Record of Contributions: GD4-13

ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2016?
2. If so, is his disability long continued and of indefinite duration?

ANALYSIS

The Claimant's medical conditions interfered with his ability to work at December 2016

[7] I must assess the Claimant's condition as a whole and consider all the impairments that affect his employability, not just his biggest impairments.⁴

Oral Evidence

[8] The Claimant stated that his most significant symptoms arise from his head injury. He has been diagnosed with post-concussive syndrome. He suffers from chronic fatigue, insomnia, headaches (3-4 times a day), dizziness, ringing in his left ear, nausea, loss of balance, as well as difficulty understanding and focusing. His physical symptoms include chronic left shoulder pain and weakness, loss of sensitivity in his left hand, and chronic neck and lower back pain. His psychological symptoms include depression, PTSD, anxiety, and driving phobia.

[9] He isn't able to follow a routine. He is often unable to sleep – sometimes he won't sleep for 48 hours. He lives in the basement apartment at his daughter and son-in-law's house. He no longer has the energy to cook. He can't keep up with his daily chores – his daughter will often clean and do his laundry for him. He doesn't drive. At least once a week he is bedridden for at least a day - his head spins if he tries to get up so he has to lie down in bed. Sometimes he won't get out of bed for 2-3 days. He isn't able to predict when he will bedridden.

[10] He sees Dr. Minassian, a neurologist, once a month. He sees Dr. Singh, his family doctor, every sixty days. He goes to massage therapy as often as insurance will cover the cost. He takes

⁴ *Bungay* 2011 FCA 47

2-3 Percocet a day for pain as well as Seroquel and Lorazepam for anxiety and depression. He also takes a sleep medication. The medications makes him groggy.

The medical evidence supports the Claimant's account

[11] In November 2013 Dr. Guerra, orthopaedic surgeon, stated that the Claimant had suffered a left shoulder injury and a concussion in the August 2013 accident.⁵ In May 2014, he stated that the Claimant continued to have left shoulder pain.⁶ In July 2014, he performed left shoulder sub acromial decompression surgery. The post-operative diagnosis was left shoulder impingement.⁷

[12] In December 2013, Dr. Walker, psychologist, diagnosed major depressive disorder and driver/passenger phobia. The Claimant's symptoms included depressed mood, anxiety, stress, and agitation. He was also experiencing chronic pain that interfered with his ability to work and sleep cycle. Dr. Walker recommended immediate referral for psychotherapy as well as chronic pain management.⁸ In April 2014, despite 10 sessions of psychotherapy, Dr. Walker stated that the Claimant continued to have severe symptoms of pain, depression, and anxiety.⁹

[13] In a December 2013 Functional Abilities Evaluation, Ashok Jain, occupational therapist, stated that the Claimant's physical capacity was severely limited. He concluded that the Claimant could not manage his current job on a consistent basis because of his limitations in standing, reaching, turning/twisting, bending, and carrying.¹⁰ In a February 2014 job analysis, Mr. Jain classified the Claimant's job as very heavy physical demand. No light or modified duties were available.¹¹

[14] In March 2014, Dr. Minassian, neurologist, stated that the Claimant's post concussive symptomology may never return to normal.¹²

⁵ GD2-685

⁶ GD2-687

⁷ GD2-689

⁸ GD2-281 to 282

⁹ GD2-308 to 309

¹⁰ GD2-242

¹¹ GD2-285

¹² GD2-678

[15] In November 2014, Dr. MacDonald, neuropsychologist, diagnosed cognitive disorder (likely secondary to concussion and mild traumatic brain injury), PTSD, major depressive disorder, and mild neurocognitive disorder. She stated that the Claimant was not able to return to work because of his depression, emotional fragility, reduced stress tolerance, and cognitive dysfunction. His cognitive dysfunction included reduced speed of information processing and executive cognitive weakness for adjusting under timed conditions.¹³ In October 2015, Dr. MacDonald stated that she had been treating the Claimant with cognitive behavioural therapy and psychological pain management. She reiterated the diagnoses in her November 2014 report.¹⁴ In February 2015, she stated that the Claimant was not yet able to return to work because of depression, emotional fragility, reduced stress tolerance, and cognitive dysfunction.¹⁵

[16] In his September 2016 orthopaedic assessment, Dr. Karabatsos, orthopaedic surgeon, stated that the Claimant had sustained soft tissue injuries to his neck and upper back, as well as a left shoulder rotator tear.¹⁶

[17] In his November and December 2016, neurocognitive behavioural assessment, Dr. Zakzanis, neuropsychologist, stated that the Claimant's cognitive functioning had been compromised since the accident. The Claimant had disturbed supervisory attention abilities coupled with slowed information processing.¹⁷

[18] In his April 2017 psychiatric assessment, Dr. Waisman, psychiatrist, stated that the Claimant had post-traumatic stress symptoms, sleep difficulties, generalized anxiety, depressive symptoms, and cognitive symptoms. The Claimant reported that he had not been able to return to his previous work because of his physical problems. He could no longer climb, he had no sense of balance, he was exhausted by chronic pain, and he had no energy. Dr. Waisman diagnosed somatic chronic pain symptom disorder and major depressive disorder.¹⁸

¹³ GD2-408 to 409

¹⁴ GD2-115 to 124

¹⁵ GD2-442

¹⁶ GD2-561

¹⁷ GD2-583 to 584

¹⁸ GD2-594 to 611

[19] In her February 2017 occupational impairment assessment. Ranya Ghatas, occupational therapist, stated that the Claimant reported ongoing pain levels, decreased activity tolerances, and compromised emotional and cognitive status. This negatively impacted his ability to function and cope.¹⁹

[20] In his May 2017 CPP medical report, Dr. Singh, the Claimant's family doctor, diagnosed post-concussive syndrome; chronic back, neck, and shoulder pain; depression and anxiety; and chronic vertigo. The Claimant's functional limitations included not being able to lift or carry objects for prolonged periods, fatiguing easily, poor balance, difficulty focusing and completing tasks, and tenderness throughout his body. Dr. Singh stated that the Claimant could not return to work as a rigger.²⁰

My Findings

[21] As of December 2016, the Claimant suffered from multiple disabling conditions and limitations including post-concussive syndrome, chronic back, neck, and shoulder pain, depression, chronic headaches, and insomnia. He had physical limitations in standing, reaching, turning/twisting, bending, and carrying. He also suffered from chronic fatigue, post-traumatic stress symptoms, generalized anxiety, depressive symptoms, and cognitive symptoms.

[22] I find that the Claimant's multiple conditions interfered with his ability to work at December 2016.

The Claimant has established a severe disability

[23] The key question in CPP disability cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.²¹ The Claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.²²

¹⁹ GD2-530

²⁰ GD2-109 to 112

²¹ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²² *Klabouch*, 2008 FCA 140

[24] Since the Minister acknowledges that 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.

[25] A disability is severe if it renders a Claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess 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".²³

[26] The Claimant was 55 years old in December 2016. This is 10 years before the usual retirement age. He is well educated. He completed a post-secondary business diploma and one year of a Masters of Theology program. He discontinued this program because of work and childcare responsibilities. Prior to his last employment as a stagehand rigger, he had a lengthy and varied work history. This including working as a delivery driver; working for the city as a truck driver, labourer, and heavy equipment operator; and working as the owner/operator of a magazine publishing company.²⁴ If it were not for the Claimant's disabling medical conditions, neither his age nor past work and life experiences, would pose a significant barrier to undertaking alternative employment.

[27] The Claimant must not only show a serious health problem, but where there is evidence of work capacity, he must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health.²⁵

[28] The Claimant made two unsuccessful efforts to return to work at less physical demanding employment: first, in 2016 as a projectionist; and second, in 2019 as a Grip (assistant for video shoots). Despite significant accommodations, both of these attempts were unsuccessful.²⁶

[29] In April 2017, S. R., who attempted to retrain the Claimant, stated the Claimant was unable to train to be a projectionist. This was because of his poor memory, constant fatigue, and

²³ *Villani* 2001 FCA 248

²⁴ GD9-28 to 30

²⁵ *Inclima v Canada (A.G.)* 2003 FCA 117

²⁶ June 2019 Occupational Therapy Worksite Assessment, GD5; GD9 -39 & 43

inability to concentrate.²⁷ In April 2017, Dr. Waisman stated that the Claimant had recently attempted to undergo vocational retraining as a projectionist, but he was unable to focus and concentrate long enough to do this.²⁸

[30] In his June 2017 occupational worksite assessment, Matt Geregthy, occupational therapist, stated that the Claimant was unable to tolerate the physical and cognitive demands of the Grip position. Further, the Claimant was unable to tolerate the physical and cognitive demands of retraining to be a projectionist, which is a sedentary position.²⁹

[31] In a November 2019 psychovocational assessment report, Dr. Karp, psychologist, stated that the Claimant's vocational potential was poor. He was not fit to return to his pre-accident employment and would not be able to successfully pursue alternative work. This was because he would have difficulties sustaining a successful job search, network, perform well in an interview, be punctual, maintain regular attendance, focus on task, and work consecutively productive shifts. He concluded that the Claimant was suffering a complete inability to engage in any employment for which he is reasonably suited by education, training, or experience. Dr. Karp conducted an occupational analysis and could not identify any suitable occupations.³⁰

[32] The Claimant's unsuccessful attempts to return to work as a projectionist and a Grip were commendable efforts to pursue alternative less physically demanding employment that unfortunately were unsuccessful because of his health.³¹

[33] Due to his multiple disabling` medical conditions and limitations, the Claimant lacks regular work capacity. He could not be a predictable and reliable employee.

[34] I find that the Claimant has established that it is more likely than not that he suffers from a severe disability in accordance with the CPP requirements.

Prolonged Disability

²⁷ GD5-6

²⁸ GD2-601

²⁹ GD5-12

³⁰ GD9-44

³¹ *Inclima* 2003 FCA 117

[35] Having found that that the Claimant's disability is severe, I must also determine the prolonged criteria.

[36] The Claimant's disabling conditions have persisted since the accident. Despite extensive treatment, there has been little improvement. In June 2017 Dr. Hanna, emergency room physician, stated that the Claimant had reached maximum medical recovery.³²

[37] The Claimant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[38] I find that the Claimant had a severe and prolonged disability in August 2013, when he was injured in the motor vehicle accident. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Minister received the application for a disability pension.³³ The Claimant's application is considered to have been received in June 2017, when the Minister received the CPP medical report³⁴; therefore, the Claimant is deemed disabled in March 2016. Payments start four months after the deemed date of disability.³⁵ Payments will start as of July 2016.

[39] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

³² GD2-512

³³ Paragraph 42(2)(b) of the CPP

³⁴ GD2-109

³⁵ Section 69 of the CPP