



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. O. v Minister of Employment and Social Development*, 2020 SST 145

Tribunal File Number: GP-19-939

BETWEEN:

A. O.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Heather Hamilton

Teleconference hearing on: January 15, 2020

Date of decision: January 30, 2020

DECISION

[1] The Claimant cannot cancel his Canada Pension Plan (CPP) retirement pension in favour of a CPP disability pension. He is not entitled to a Post-Retirement Disability Benefit (PRDB). The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal. I am dismissing the appeal. These are my written reasons why.

OVERVIEW

[2] The Claimant started receiving a CPP Retirement pension in March 2018. Therefore, he must be disabled, for the purposes of entitlement, on or before February 28, 2018, the month prior to receiving his CPP retirement pension, under CPP legislation. The Minister received the Claimant's application for the disability pension in April 2018.¹ He can request a withdrawal of a retirement pension in favour of a disability pension if he is considered disabled before the month the retirement pension became payable.

[3] At the date of his application the Claimant was 63 years old with a grade 10 education, computer technical support specialist certificate, and a medical degree as a neurologist obtained in Russia. He worked as a computer technical support worker until December 2017. He also worked as a security guard until November 2017. He continued to work part-time as a security guard in 2018. He stated he was no longer able to work due to his medical condition as of February 14, 2018.² He described his main disabling condition as multiple symptoms since he received a pacemaker. The Claimant worked part-time in 2019 as a security guard. He was guaranteed two days per week and could have one or two extra days if needed.

[4] The Minister submitted the Claimant did not have a severe and prolonged disability by his MQP of February 28, 2018. The Minister found the Claimant was not eligible to receive a Post-Retirement Disability Benefit (PRDB) because he did not have a severe and prolonged disability on or before his MQP for PRDB of December 31, 2019.

¹ Application for CPP Disability pension GD2-92-96

² Claimant's questionnaire GD2-177-184

Minimum qualifying period explained

[5] A person who applies for a CPP disability pension has to meet the requirements set out in law. First, a person has to pay contributions into the Canada Pension Plan that meet minimum requirements. The legal term for this is the “minimum qualifying period.”³ The Claimant’s minimum qualifying period or MQP ended on February 28, 2018. Second, the disability must be both “severe” and “prolonged” by the end of the minimum qualifying period.⁴ The law defines what “severe” and “prolonged mean.”

PRELIMINARY MATTERS

[6] At the hearing the Claimant talked about his medical conditions and his work history in 2019 and this information was not in the file. I asked the Claimant to provide the evidence that he was referring to and he did. I submitted copies of the reports to the Minister as they had not seen them before. I entered the documents as evidence. I provided an opportunity for the Claimant to respond to the Ministers submissions.

Issues in this appeal

[7] The Minister refused the application because the Claimant reported limitations from his condition; however, the evidence does not support that this medical condition would preclude him from performing all work.

[8] The Claimant has argued that the disability was both severe and prolonged by February 28, 2018. I have to decide if that is more likely than not.⁵ It is up to the Claimant to prove this.

[9] I must decide if Claimant’s conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by February 28, 2018 when she is already receiving a retirement pension.

[10] I must decide if the Claimant’s disability is long continued and of indefinite duration.

³ Found in 44(1)(b) of the *Canada Pension Plan*

⁴ This requirement is in s 42(2)(a) of the *Canada Pension Plan*

⁵ This is paraphrase of the legal requirement to decide “on a balance of probabilities.”

[11] I must decide whether the Claimant is eligible for the PRDB.

Was the claimant's disability both severe and prolonged?

[12] First I have to decide if the Claimant's disability was severe. Canada Pension says "severe" means that a claimant cannot regularly work in any "substantially gainful" job because of the disability.⁶

[13] If the Claimant is able to regularly do some kind of work that is substantially gainful, then he is not entitled to a disability pension.⁷

[14] To decide on this, I have to look at the effect of the Claimant's medical conditions on his capacity to work.⁸ I also have to look at the Claimant's background. This includes factors such as age, level of education, language proficiency, and past work and life experience. This is so I can get a "real world" picture of whether the disability is severe.⁹

[15] I have to think about two things: How the Claimant believes his health problems affect his capacity to work. This is the Claimant's personal evidence. What doctors and other medical professionals say about the Claimant's conditions. This includes evidence such as what a doctor has to say about the results of the medical tests.

Was the Claimant's disability severe?

[16] I have to look at whether the Claimant's disability prevents her from earning a living. The question is not whether the Claimant is unable to perform his regular job. I need to decide whether or not the Claimant can do any substantially gainful work.¹⁰ This is called the Claimant's "capacity to work." I cannot just look at the diagnosis.¹¹ The key is how the Claimant's health affects daily functioning and capacity to work.¹²

⁶ The legal definition of "severe"

⁷ This is explained in a Federal Court of Appeal(FCA) decision called *Klabouch*.

⁸ This is explained in FCA *Bungay v Canada (A.G.)*, 2011 FCA 47.

⁹ The concept of a "severe" disability is explained in *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁰ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹¹ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹² Explained in *Ferreira v. Canada (A.G.)*, 2013 FCA 81

[17] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition¹³.

Did the Claimant have a severe disability by February 28, 2018?

[18] I find his minimum qualifying period (MQP) is February 28, 2018. However, one of the requirements for a CPP disability pension is that the applicant must not be receiving a CPP retirement pension.¹⁴ A person may apply to cancel a retirement pension so that he can receive a disability pension if he does so within six months of payment beginning;¹⁵ however, that cannot be done if he is deemed to have become disabled "in or after" the month the retirement pension became payable.¹⁶ Another way of saying this is that he must be deemed to have become disabled *before* the month when payment of the retirement pension began.

[19] I find on the balance of probabilities the Claimant did not have a severe disability by February 28, 2018 for the following reasons:

[20] First: The Claimant has shown a capacity to work after his MQP of February 28, 2018. According to the Direct Deposit Advice statement dated December 20, 2019 the Claimant's 2019 year to date earnings were \$15,441.¹⁷ His earnings have substantially increased compared to his previous earnings in 2017 and 2018. The Claimant told me he was working 12 hour night shifts at least twice per week and sometimes three or four shifts per week if he was asked to fill in for people. Although he may not be working full time he continued to work part-time employment. He told me he had two shifts on the weekends. The Claimant worked part-time for almost a year and this is not a failed attempt at working, as he made \$15,441 working part-time.

[21] Second: I find the Claimant is not severe. For example Dr. Omelchenko wrote a note that the Claimant would benefit from being off work for the next five weeks due to medical reasons.¹⁸ However, I find Dr. Omelchenko is not advising the Claimant stop his employment and he did not tell me that the Claimant was permanently unable to work in any employment. I took into account that the Claimant had right plantar fascia injection on January 20, 2020 and he

¹³ *Inclima v. Canada (A.G.)*, 2003 FCA 117

¹⁴ CPP paragraph 44(1)(b), subsection 70(3)

¹⁵ CPP section 66.1; CPP *Regulations* section 46.2

¹⁶ CPP subsection 66.1(1.1)

¹⁷ GD7-2

¹⁸ Medical note Dr. Omelchenko GD7-4

is returning in a few weeks for the left.¹⁹ I acknowledge that Dr. Omelchenko wrote another note that that the Claimant is currently unable to work, and the Claimant's return to work is dependent on his condition in the future as he will be assessed periodically.²⁰ This tells me that he is currently unable to work but is expecting the Claimant to return to work; however, Dr. Omelchenko is not telling me that the Claimant is unable to work permanently.

[22] Third: The medical evidence does not support a severe medical condition. Cardiologist Dr. J. Bonet, at the Pacemaker clinic in February 2018 reported the Claimant felt worse after the insertion of his pacemaker and was opposed to having undergone the procedure. Dr. Bonet noted that the Claimant could safely switch to Diltiazem, used to treat hypertension, angina, and arrhythmias.

[23] Fourth: The Claimant told me he was not so sick in 2018. He got worse in 2019. However, I find that the Claimant showed a residual capacity to work in 2019 which is after his MQP of February 2018. He worked more in 2019 which showed his medical condition improved.

[24] Fifth: The Claimant was 63 years old at the date of his application with a grade 10 education, with a computer technical support specialist certificate, and a medical degree obtained in Russia. He worked as a computer technical support worker until December 2017. He also worked as a security guard until November 2017 when he stopped work. The Claimant told me he worked in 2019 as a security guard and worked at least two twelve hour shifts per week and sometimes more. He speaks English, is educated and although he is older at 63 he has secured employment as a security guard part-time. His ability to find part-time employment and demonstrate a residual capacity to work outweighs the disadvantage of his age.

[25] I find on the balance of probabilities that the Claimant was not severe on or before February 28, 2018.

Prolonged disability

¹⁹ Document from Dr. Burrill GD10-2

²⁰ Medical note from Dr. Omelchenko GD10-3

[26] Because I did not find the Claimant severe, I do not need to make a decision on prolonged.

Is the Claimant eligible for Post-Retirement Disability Benefits

[27] New legislation, effective January 1, 2019, provides disability protection for CPP retirement pensioners who are disabled on or after their retirement pension start date but who have not reached 65. He must have a MQP of January 2019 or later to be considered for PRDB. I find the Claimant's MQP is December 31, 2019 which is after January 1, 2019.

[28] The Claimant testified that he worked two days a week and sometimes it could be three or four days per week. He worked twelve hour shifts per day. He submitted earnings of \$15,441 in 2019,²¹ that demonstrated a residual capacity to work within his limitations and medical conditions. This was not a failed attempt to work as he showed a capacity to work within his medical conditions and limitations. I find he was not severe and prolonged by December 31, 2019. Although he told me he stopped working in December 2019 and was not planning to work anymore as a security guard he has not returned his uniform to his employer and he has not received a Record of Employment from his employer. I am not convinced that the Claimant is not returning to work. Holding onto your work tools such as his uniform allows you to continue to work. Especially with the medical note from Dr. Omelchenko that the Claimant is to be off work for five weeks. I find Dr. Omelchenko is not advising the Claimant stop his employment. I put more weight on the medical note from Dr. Omelchenko that he would benefit from having five weeks off work and he will be assessed periodically for a return to work.

[29] The Claimant told me he was not so sick in 2018 but that he got worse in 2019 and maybe he would qualify for PRDB. I find that the Claimant showed a capacity to work in 2019 and this was not a failed work attempt as he worked throughout 2019 and demonstrated a residual capacity to work in part-time employment and some weeks he worked more than two twelve hour shifts.

[30] The medical evidence does not support a severe medical condition. Dr. Tyler Mori, Otolgoy and Neuro-Otolgoy reported on September 4, 2019 that the Claimant had concerns of

²¹ GD7-2

light headedness for the last year. He associates the symptoms to his pacemaker placement. He can precipitate the symptoms with exertion, but there are no precipitants that he is aware of. There are no associated aural symptoms. He has no previous history of vertigo, dizziness or aural concerns. He has right caloric reduction; however, treatment options remain open to the Claimant to improve his condition. Family Physician Dr. Omelchenko on November 21, 2019 wrote the Claimant would benefit from a night splint for plantar fasciitis.

[31] I understand the Claimant feels that he is totally disabled. It is clear from the doctor's reports that he cannot return to work as a computer technical support worker. However, the medical evidence does not support a conclusion that he is unable to do any kind of work. I find he is capable of part-time employment.

[32] I find on the balance of probabilities he did prove he was incapable regularly of pursuing substantially gainful occupation by December 2019. He continues to work within his medical conditions and limitations part-time. I find the Claimant is not eligible to a PRDB under the CPP legislation because he did not have a severe and prolonged disability by December 2019.

CONCLUSION

[33] The appeal is dismissed on both issues.

Heather Hamilton
Member, General Division - Income Security