



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. P. v Minister of Employment and Social Development*, 2020 SST 768

Tribunal File Number: GP-18-1143

BETWEEN:

**D. P.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

---

**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

---

Decision by: Lianne Byrne

Claimant represented by: S. P.

Teleconference hearing on: July 24, 2019

Date of decision: February 26, 2020

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant indicated in his CPP disability application that he worked as a painter until December 2014. He stopped working due to a back injury and uncontrollable pain. The Minister received the Claimant's application for the disability pension on May 23, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] 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, 2009.

## **PRELIMINARY MATTERS**

[4] At the hearing, I discussed the lack of medical reports dated prior to the MQP with the Claimant and his representative, S. P. The Claimant's representative indicated that she thought she could obtain medical reports from 2004 to 2011 from the Claimant's former family doctor's office. She was given until August 26, 2019 to provide additional documents. The Claimant requested an extension of time. I agreed to extend the deadline to October 8, 2019.

[5] The Claimant produced a number of additional documents after the hearing, all of which were accepted despite the fact that they are dated many years after the MQP. These include letters from the Claimant dated August 18, 2019 (GD14-2), August 22, 2019 (GD15-1) and October 5, 2019 (GD18-2), pharmacy records (GD15-9), a letter from Dr. Michael Chin Fu Lee dated November 21, 2017 (GD15-60), and letters from Dr. Muhammad Khawar dated August 6, 2019 (GD15-61) and August 21, 2019 (GD16-62). I also accepted additional submissions from the Minister (GD-16, GD-19 and GD-22).

[6] The Claimant requested another extension of time to produce documents following upcoming medical appointments. This request is denied on the basis that these medical reports are dated many years after the MQP and would be of very limited probative value.

### **ISSUE(S)**

[7] 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, 2009?

[8] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2009?

### **ANALYSIS**

[9] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</sup>. 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**

*The Claimant did not have a severe disability as of December 31, 2009.*

[10] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It is not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work<sup>2</sup>.

[11] S. P., the Claimant's wife, testified at the hearing that the Claimant was physically healthy and doing great until February 2000. He was working in a warehouse when he injured his back. He had a huge bulging disc, L5 herniation and a lot of pain. He took approximately

---

<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>2</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

six months off from work, then returned to lighter work in the janitorial department (sweeping). He continued to work until the factory closed in 2007.

[12] He took some time off to figure out what type of work he could do. In 2009, he started a painting business. She stated that he did not work many hours and was helped by family members. He was not making any money from this business.

[13] She was asked about the gap in medical reports from 2004 to 2011. She suggested that there is medical evidence from this time period that she could obtain. As of the date of this decision, however, no such medical evidence has been provided.

[14] The Claimant testified that he worked full-time on the packing line at Robin Hood. He injured his back in a slip and fall. He continued to work for the next few days. However, he had to stop working for six months due to severe lower back pain. He returned to light duty work consisting of pushing a mop in a warehouse. His hours gradually increased over time to eight hours per day. He could rest when needed.

[15] The factory closed in 2007. After that, he did small painting jobs. He relied on helpers to do the heavier tasks, such as painting baseboards and ladder work. He would roll the walls. He was not making very much money because he had to pay his helpers.

[16] As of December 31, 2009, he was working approximately six hours per day with some days off. He stopped working as a painter as of December 2014 due to pain in his back and legs. He tried to go back to school, but stopped after one week.

[17] As of December 31, 2009, he was seeing his family doctor, Dr. Lee every couple of weeks. He also saw a back specialist, but he is not sure when.

[18] The Claimant's neighbour, L. N. also testified at the hearing. She has known the Claimant and his wife for four years. She spoke about the Claimant's difficulties and limitations in the time she has known him. However, since her testimony is limited to his health in the years after the MQP, I will not summarize her testimony.

[19] As previously stated, there is a lack of medical evidence dated prior to or around the time of the MQP. The Claimant and S. P. were asked to provide additional medical documents from

that time. However, as of the date of this decision, the only documents provided were dated after the MQP. Nonetheless, all documents were considered.

[20] The CPP Medical Report was completed on September 1, 2016 by Dr. Michael Chin Fu Lee, family physician, who has known the Claimant since approximately 2004. Dr. Lee began treating his main medical condition after the MQP in March 2010. He has degenerative disc disease at L5-S1, right knee meniscal tear, hypertension, asthma and GERD. He was noted to have chronic back pain and knee pain. Dr. Lee did not provide any evidence regarding when these health problems began and how they progressed over time.

[21] In a report dated May 3, 2013, Dr. Lee reported that he missed time at work in 2012 due to his chronic back condition related to a 2001 workplace injury. This is many years after the MQP. The Claimant was noted to have recurrent right elbow and arm pain from tendinitis. Dr. Lee does not indicate when this condition began.

[22] Similarly, on March 3, 2016, Dr. Lee wrote that the Claimant was unable to work in 2015 due to his medical conditions. This is many years after the MQP.

[23] On November 21, 2017, Dr. Lee wrote that the Claimant's condition is the result of a workplace accident on February 11, 2000. His medical condition is severely disabling preventing him from performing any type of employment since February 11, 2000. While this opinion is noted, there are no physical findings from that time to explain how he reached this conclusion. It is also inconsistent with the Claimant's evidence that he continued to work for many years after his accident, albeit in a modified capacity. Therefore, I placed very little weight on this opinion.

[24] Dr. Thorsteinn Gunnarsson, orthopedic surgeon, reported in July 2013 that the Claimant was seen three months ago for lower back pain. His previous injury was noted. However, Dr. Gunnarsson was not treating the Claimant as of or prior to the MQP.

[25] Similarly, Dr. J. Ostrowski, orthopaedic surgeon, reported on July 23, 2015 that he has been complaining of bilateral knee pain for the past two years. This is well-passed the MQP. The Claimant was noted to be working as a painter and to be having a hard time on his knees.

He was noted to have had left knee arthroscopy a number of years ago and did well in that regard.

[26] Dr. Richard W. McMillan, physical medicine and rehabilitation, reported on November 23, 2018 that his symptoms date back to 2001. His pain symptoms have worsened with time. Although he was noted not to appear employable, this opinion was given many years after the MQP and after a worsening in his health problems.

[27] Dr. Sanaz Zarinehbab reported on May 15, 2019 that he saw the Claimant for chronic pain. His pain began in 2001 following a work injury. He has myofascial pain, mechanical low back pain, piriformis irritation syndrome, and chronic pain syndrome. There is no indication from this report that the Claimant had a severe disability as of the MQP.

[28] Although I accept that the Claimant's health problems began after his workplace injury in 2000, he was able to continue working for many years after his injury and even after the MQP. He has not shown on the balance of probabilities that he had a severe disability as of the MQP.

[29] Given the lack of medical reports on file and his post-MQP work, I find that there is evidence of work capacity. 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 condition<sup>3</sup>.

[30] In this case, the Claimant was working as a self-employed painter at the time of the MQP and for years thereafter. He wrote in his application that worked from October 11, 2010 to December 30, 2014 doing exterior and interior painting. He wrote that he worked 8-12 hours per day, seven days per week. He also did lawn services, snow removal and disposal of garbage.

[31] The information noted in his application differs from the testimony at the hearing. For example, the Claimant testified that, as of the MQP, he worked six hours per day as a painter with some days off.

[32] S. P.'s testimony is that, as of the MQP, he was not working many hours and was not capable of working a whole shift. I do not accept her testimony on these points as they differ

---

<sup>3</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

from the Claimant`s testimony as well as the CPP application. With respect to the discrepancy between the Claimant`s testimony and the CPP application, both indicate a capacity to perform, at a minimum, light, part-time work.

[33] I must assess the severe part of the test in a real world context<sup>4</sup>. This means that when deciding whether a person`s disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, in finding that the Claimant`s disability was not severe as of the MQP, I considered that he was 44 years old as of the MQP. He has a grade 12 education with some post-secondary education. He is fluent in the English language. He has worked in warehouses, as a forklift driver and as a painter.

[34] Despite his work experience in mainly physically-demanding jobs, he was relatively young, relatively well-educated and fluent in the English language. He has operated his own business for many years. In considering his personal characteristics, I do not find that he is unemployable in a real world context. While I acknowledge that he has had symptoms since 2000, he was not precluded from lighter work within his limitations or retraining for lighter work. He was working at least on a part-time basis as a painter as of the MQP and for many years after the MQP. Therefore, he has not shown that his effort at obtaining and maintaining employment have been unsuccessful because of his health condition.

[35] 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<sup>5</sup>. Having considered the totality of the evidence and the cumulative effect of the Claimant`s medical conditions, I am not satisfied on the balance of probabilities that he suffered from a severe disability as of the MQP.

---

<sup>4</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>5</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

**CONCLUSION**

[36] The appeal is dismissed.

Lianne Byrne  
Member, General Division - Income Security