



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MM v Minister of Employment and Social Development*, 2020 SST 887

Tribunal File Number: GP-18-1679

BETWEEN:

M. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Suzanne Kennedy

Claimant represented by: Allison Schmidt

Teleconference hearing on: February 19, 2020

Date of decision: March 11, 2020

DECISION

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

OVERVIEW

[2] The Claimant is a 58-year old man who worked as a transportation operator (commercial driver) for about 21 years. In January 2011, he took a leave of absence from his job as a Paratransit driver due to excessive fatigue from sleep apnea. In June 2011, his commercial driver licence was revoked. The Claimant has not worked since January 2011.

[3] The Minister received the Claimant's application for disability pension on April 20, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] A person who applies for a disability pension has to meet the requirements that are set out in the law that deals with CPP disability benefits. First, you have to meet the contribution requirements. The legal term for this is the "minimum qualifying period"¹. That is not a problem in this appeal. The Claimant's minimum qualifying period is December 31, 2013.

ISSUES

[5] Disability is defined under the CPP as a physical or mental disability that is severe and prolonged². 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. This means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

[6] Did the Claimant have a severe disability on or before December 31, 2013?

[7] If so was the Claimant's disability prolonged by December 31, 2013?

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

Did the Claimant have a severe disability on or before December 31, 2013?

[8] No. While the Claimant has some limitations due to his medical conditions, he has failed, without giving a reasonable explanation, to comply with treatment recommendations and/or consider alternative options. In addition, the Claimant did not attempt to return to work or retrain.

Medical Conditions

[9] I must assess the Claimant's total condition, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment.³ The conditions that impair the Claimant's ability to work are severe obstructive sleep apnea and physical injuries.

[10] The Claimant has had issues with snoring, inability to get a proper sleep and excessive daytime sleepiness since about 1997. At that time, he was driving a highway coach bus long distances and noticed that he felt like he was falling asleep during the day. Because he was concerned about safety, he quit that job. Over the next few years, he worked driving a school and city tour bus. With both jobs, he was able to take frequent breaks and rest / nap during downtime.

[11] In Oct. 2000, the Claimant was hired to drive a para-transport bus within the city. With this job, he picked up and dropped off persons with disabilities. Many passengers were in wheelchairs, on scooters or otherwise required some physical assistance. The Claimant would have to push wheelchairs up and down ramps, transfer passengers from their scooter to a seat, and provide support for walking.

[12] The Claimant stated that sleepiness would creep up over him as the day went on. He would use his breaks to close his eyes, maybe get a power nap and decompress. Over the years, his condition got steadily worse in that he was getting less sleep at night and he would also often get headaches. In 2004, when he had enough seniority, the Claimant was able to book split shifts – he could go home to nap and then return later for the second half of his shift.

³ *Bungay v. Canada (A.G.)*, 2011 FCA 47

[13] Despite his attempts to nap during the day, the Claimant was frequently absent from work. He stated that he was often late arriving (sleeping through his alarm) or not showing up at all because of extreme fatigue, grogginess and/or headaches. The Claimant provided copies of numerous absenteeism forms he had submitted over the years. However, many of those indicated reasons for absences that did not relate to fatigue such as car trouble, power off in building, illness etc.

[14] Despite the sleep issues continuing and impacting his ability to work safely, by 2010, the Claimant had not seen a doctor about his excessive daytime grogginess and fatigue.

[15] Between 2008 and 2010, in addition to his sleep issues, the Claimant also sustained physical injuries while at work. He injured his back, right knee and left shoulder in three different incidents. During a 15 - month timeframe, he was off work for about 4.5 months due to these injuries. According to short term disability reports completed by Dr. Wray, the Claimant had issues with:

- mechanical low back pain with varying degrees of left nerve root irritation and acute lumbar spasm leading to limited ability to assist passengers in and out of bus and up ramps
- bursitis of his right knee causing pain when walking or taking stairs
- plantar fasciitis
- left shoulder bursitis / tendonitis

[16] The Claimant took medications for the pain and swelling and attended physiotherapy. He returned to work when given the okay by physiotherapists. In August 2010, Dr. Wray wrote in one of his reports that the Claimant's symptoms made it difficult for him to lift, move wheelchairs and assist passengers with walkers. In his opinion, the Claimant should consider another line of work that did not involve lifting.

[17] In October 2010, the Claimant's employer sent him for an independent medical examination. The main physical problems identified by the examiner (Dr. El-Sawy) were lower back pain, left hand pain, shoulder pain and foot pain. The Claimant's knees were not bothering

him at that time. Dr. El-Sawy indicated that the back pain was “mechanical”. He recommended an MRI for the shoulder issues. Dr. El-Sawy also expressed concern about the Claimant’s significant sleep disturbance and energy loss. In his report dated October 2010, Dr. El-Sawy recommended a sleep study at a sleep laboratory.

[18] The Claimant had the sleep study in December 2010. Dr. Dales diagnosed him with severe obstructive sleep apnea with severe hypoxemia (low level of oxygen in the blood). People with sleep apnea generally have problems keeping their airway passages open while sleeping. This leads to low levels of oxygen in the blood. Having low levels of oxygen can lead to daytime sleepiness, fatigue and loss of concentration.

[19] In his report dated January 11, 2011, Dr. Dales indicates that the best treatment for the Claimant was a CPAP (continuous positive airway pressure) machine and that other alternatives would not be sufficient to control his condition. During the sleep study, a trial of CPAP was attempted but not tolerated. Dr. Dales also wrote that he would have to notify the Ministry of Transportation.

[20] The Claimant tried using the CPAP but states that he is claustrophobic (has a fear of confined spaces). CPAP machines consists of a mask that fits completely over a person’s mouth and nose. The mask is connected to a tube that leads to a box that takes room air, pressures it and brings the air to the person. The positive pressure from the air keeps the breathing passages open while the person is sleeping. The Claimant says when he wears the mask he is scared – he feels like he is suffocating. He described it as if someone tries to put a bag over his head.

[21] In January 2011, while helping a passenger, the Claimant states he almost collapsed due to fatigue. The Claimant asked his employer to accommodate him with an office job. His employer refused his request because of his excessive absenteeism. The Claimant went off work on medical leave. In June 2011, the Minister of Transportation revoked his F licence commercial and general licence. The Claimant resigned from his job in mid-June 2011.

[22] Between January and July 2011, the Claimant had a number of sleep lab appointments to try and address his difficulties with wearing the CPAP. The CPAP pressures were titrated and different masks were tried. The Claimant also tried other types of sleep apnea devices: auto

CPAP, bi-pap and nasal prongs. The Claimants states that the bi-pap also uses a mask that he can't tolerate for very long because of claustrophobia and he can't use the nasal prongs because he is a mouth breather.

[23] The Claimant saw Dr. Dales for a sleep lab and cardio sleep consult on February 16, 2011. In his report, Dr. Dales wrote that the Claimant was wearing the CPAP 3 hours a night for 4 nights a week. He also wrote that he counselled the Claimant on the risks of untreated sleep apnea and explained that the choice for treatment was between an auto- CPAP and a tracheostomy.

[24] In April 2011, the Claimant had another sleep consultation after trying CPAP and auto-CPAP. He had worn the CPAP 16 nights out of a possible 36 nights for about 2 hours per night.

[25] In Dr. Dales' April 2011 report, he indicated that he explained to the Claimant that he would have a higher risk of strokes, heart attacks and hypertension if his sleep apnea was not treated. Dr. Dales repeated that the only effective option apart from CPAP would be a tracheostomy. Again, the Claimant declined.

[26] In July 2011, the Claimant had another sleep study consult. He was given a prescription to try auto-CPAP or auto bi-level.

[27] In a report to Dr. Wray dated March 14, 2012, Dr. Dales wrote that the Claimant wore the CPAP on average for 2 hours and 23 minutes for 34 out of 37 days. He indicated that the CPAP provided good control but the Claimant was unable to wear it for a sufficient amount of time. Dr. Dales stated that the Claimant could not tolerate the mask or the chin-strap because he is claustrophobic.

[28] In Dr. Dales' June 18, 2012 report, he wrote that the Claimant had severely elevated apnea and hypopnea and was not tolerating CPAP. He noted that the Claimant had tried a sophisticated auto-bilevel and wore it for 52 nights out of 76 for about 2 hours per night.

[29] Dr. Dales also wrote that the Claimant asked about alternative treatment and he again explained that major facial reconstruction or a tracheostomy may help sleep apnea. Dr. Dales wrote that the Claimant “was not keen” on either. The Claimant requested to see an ENT specialist for which Dr. Dales provided a referral. Dr. Dales also prescribed a couple of medications: Trazodone to see if it would help him sleep and use the CPAP better and Modafinil which treats excessive sleepiness. This is the last report prior to the MQP of December 31, 2013.

[30] The next reports about the Claimant’s sleep apnea are from 2018 and 2019. They indicate that the Claimant was “not comfortable” with CPAP. Sleep study tests still indicate severe obstructive sleep apnea.

Impact of Sleep Apnea

[31] When asked how his sleep apnea affected him between 2011 and December 2013 (MQP date), the Claimant stated that he always felt fatigued throughout the day but then it would ‘hit him like a ton of bricks’ and he had to lie down and sleep. He would nap once in the morning and once in the afternoon. He would set an alarm to wake up in an hour and half. Many times when he awoke, he would have a headache.

[32] The Claimant said that he is unable to focus for very long: if he was reading he would quickly get disinterested and his eyes would start to close. After watching TV for an hour, he could no longer concentrate. He needed reminders about clothes being left in the dryer, or water boiling on the stove. He said that the feeling is similar to how you feel if you are up all night / did not get any sleep.

[33] In his submission, the Claimant states that sleep apnea has had a significant impact on his abilities. In addition to his extreme daily fatigue, he has difficulty concentrating, is forgetful and unable to complete tasks.

Impact of Physical Injuries

[34] The Claimant had sustained a number of physical injuries prior to his MQP date of December 31, 2013. However, he had returned to work after each injury following rest, physiotherapy and medication therapy. The only restriction noted by a physician was in August 2010 when Dr. Wray wrote that the Claimant should consider another line of work that did not involve lifting. In addition, the IME completed in October 2010 indicated that his lower back pain was mechanical. The only other evidence of physical injury or pain prior to the MQP is a note in Dr. Wray's chart records for a sore knee on December 10, 2013.

[35] Based on the evidence, while the Claimant may have had some pain or restriction in movement prior to the MQP, he was capable of light or sedentary work. During his testimony the Claimant himself said at the time he finished work he was more concerned with not being safe driving and had hoped his employer would accommodate him.

Did the Claimant follow recommended treatment for sleep apnea?

i. Evidence of Refusal

[36] I must assess a severe disability in a "real world" context which means that I must consider whether the Claimant's refusal to undergo recommended treatment is unreasonable and what impact that refusal might have on the Claimant's disability status should the refusal be considered unreasonable⁴.

[37] A Claimant must follow reasonable treatment recommendations or plausibly explain their failure to do so.⁵

[38] The Claimant has not been compliant with using CPAP as recommended. Reports throughout the years indicate that he seldom wore the CPAP for more than a few hours at a time and did not wear it every night. Even 7 years after being diagnosed, the Claimant does not wear the CPAP every night. In a Compliance Report that tracked the Claimant's use between June 19 and August 17, 2018, the Claimant only used it 41 out of 60 days and for 38 days his usage was below 4 hours.

⁴ *Lalonde v. Canada (AG)*, 2002 FCA 211

⁵ *Sharma v. Canada (AG)*, 2018 FCA 48

[39] The Claimant also has not been compliant with taking prescribed medications that could help him sleep and/or counteract the effects of daytime sleepiness.

ii. Explanation for Refusal and Reasonableness of Explanation

[40] It is acknowledged that claustrophobia would impact on the Claimant's ability to wear a mask and use the CPAP machine. It is also noted that the Claimant has attempted to work with the CPAP over the years. However, he has refused to consider the only other options to treat his sleep apnea and he has not considered seeking treatment for claustrophobia.

[41] As noted above, the Claimant was informed by Dr. Dales on a number of occasions about the possible effects of untreated sleep apnea. Dr. Dales also informed him that the only other alternatives to CPAP were facial constructive surgery and tracheostomy. According to Dr. Dales reports and the Claimant's testimony, he declined both options.

[42] The onus is on the Claimant to explain his refusal to consider the options. The Claimant has not provided a rationale for not considering either option and did not provide evidence about any potential risks. While refusing surgery or a tracheostomy could be considered a reasonable decision in the early days of a diagnosis, not considering that options after repeated unsuccessful attempts to use CPAP is not reasonable. In addition, when asked at the hearing if he considered treatment for his claustrophobia, he said did not because his doctor had not mentioned it.

[43] The Claimant has also been prescribed medications to help him get to sleep (Trazodone) and also to combat daytime sleepiness (Modafinil). The Claimant stated that he doesn't like to take Trazodone as it makes him groggy. However, a note in DR. Abdulkarim's records indicate that Trazodone was effective at full dose. In addition, the Claimant only takes Modafinil occasionally – when he will not have time for a day-time nap. The Claimant did not provide evidence of discussing side effects with his doctor and/or seeking alternatives. As a result, I find his explanation for refusing to take the medications is not reasonable.

iii. Impact of Refusal on Disability Status

[44] The Claimant's refusal to consider other treatment options or take the medications on a regular basis (without a reasonable explanation) means that the Claimant has not done all he could do to reduce the impact caused by sleep apnea or improve his functionality. As a result, I find that the Claimant has residual work capacity.

Real World Context

[45] I must assess the severe part of the test in a real world context⁶. 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.

[46] The Claimant was 52 years old at the date of the MQP and 50 years old when he quit working. He completed Grade 12 in 1979 and received a diploma in Electronic Technology from Ryerson Technical College in 1984. From 1985 to 1988, the Claimant worked in the electronic technology industry – most of the time in aviation flight instruments. The Claimant stated he quit working in this industry in 1988 as he felt he was 'not good at it'.

[47] For the next 5 years, the Claimant worked part time with the Ottawa Citizen newspaper as a supervisor of paper carriers. He mainly dealt with customer complaints and taught the paper carriers how to recruit new customers. He was not responsible for any financial matters.

[48] In 1995, the Claimant got his ABZ licence (to drive trucks, buses and vehicles with air brakes). From that time until 2011, he drove school buses, highway coaches, city double decker buses and paratransit buses. As noted above, the Claimant's commercial and general driving licences were revoked in 2011 because of his sleep apnea.

[49] 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's 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.⁷

⁶ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁷ *Klabouch v Canada (A.G.)*, 2008 FCA 33

[50] The majority of the Claimant's employment skills stem from his work as a commercial driver and it is evident that the Claimant cannot return to any type of driving work as his licence has been revoked. However, the Claimant does have transferrable skills from his work experiences at the Ottawa Citizen supervising paper carriers and dealing with customer complaints. He also has training and experience in Electronic Technology that may be useful in other areas or could be upgraded.

[51] The Claimant testified at the hearing that he could not return to work as he would be too tired to give a good interview and he could not keep up with the pace. He said that between 2011 and 2013 he was debating what other work or retraining he could possibly do.

[52] At the hearing, I asked the Claimant what type of job he thought he could do when he asked for an accommodation at work back in 2011. The Claimant replied that he did not know what he could do but knew he was not safe driving a vehicle and he needed something less physical.

[53] Based on the Claimant's testimony and the medical evidence, at the time of the MQP, I find he had residual capacity to retrain or work in light or sedentary occupation.

[54] The failure of the Claimant to try to re-train or find alternate work along with his failure to mitigate by following treatment recommendations means that he does not meet the definition of "severe" disability.

Does the Claimant have prolonged disability?

[55] As I have found that the disability is not severe, there is no need to consider the prolonged aspect.

CONCLUSION

[56] The appeal is dismissed.

Suzanne Kennedy
Member, General Division - Income Security