



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v Minister of Employment and Social Development*, 2020 SST 590

Tribunal File Number: GP-19-1689

BETWEEN:

J. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Connie Dyck

In person hearing on: March 5, 2020

Date of decision: March 10, 2020

DECISION

[1] J. M. is the Claimant. I have decided that he is not entitled to a Canada Pension Plan (CPP) disability pension. I know this decision will be disappointing to the Claimant, but below are the reasons why I made this decision.

OVERVIEW

[2] The Claimant was 49 years old when he stopped working as an auto detailer in October 2018. He was laid off from this employment. The Claimant says he has been unable to find suitable work since that time. His fatigue associated with Becker Muscular Dystrophy limits his capacity to work. The Claimant applied for a CPP disability benefit in June 2018. The Minister denied his application. He appealed to the Social Security Tribunal. I am the Tribunal member who heard his appeal. His mother also attended the hearing.

ISSUE IN THIS APPEAL

[3] A person who applies for a disability pension has to meet the requirements. These 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, 2018.

[4] Second, you have to have a disability that is “severe and prolonged”². You have to have that disability on or before the date of the minimum qualifying period.

[5] For most people “severe” means something that is “really bad” or “really significant”. Similarly, most people think of prolonged as something that takes a long

¹ It is found at Section 44(1)(b) of the *Canada Pension Plan* (CPP).

² This requirement is found at Section 42(2)(a) of the CPP.

time. But, the words “severe” and “prolonged” have special meanings in this area of law.

What Does Severe Mean?

[6] The law says that if a person is unable regularly to pursue any substantially gainful occupation because of their disability then they are severely³ disabled.

[7] Severely disabled is not about the nature of a disability. Severely disabled is about whether the disability impacts a person’s capacity to work. If a disability is so severe that it prevents a person regularly from working at a job, then they are severely disabled. It is important to note that this does not mean a former job or a job with a comparable wage. This means any job that is substantially gainful, even if the pay is lower than previous jobs.

What Does Prolonged Mean?

[8] Prolonged means that a disability is “long continued” and is “of indefinite duration” or “is likely to result in death”⁴. For a disability to be “prolonged” the disability must be almost permanent in nature. So if a person has a reasonable chance to regain the ability to work at some time in the near future then their disability is not prolonged.

[9] The Minister acknowledges the Claimant’s symptoms. The Minister believes the evidence does not show these conditions are severe. This means that the Claimant would have capacity to work. That is why his application was refused.

[10] To decide if his disability is severe, I have to consider how the Claimant feels about the impact his conditions have on his capacity to work. I also have to consider what his doctors and other medical professionals say about his condition, including such

³ The legal definition of “severe” is found at s 42(2)(a)(i) of the *Canada Pension Plan*

⁴ The legal definition of “prolonged” is found at s 42(2)(a)(ii) of the *Canada Pension Plan*.

things as the results of medical tests. If the Claimant is able to regularly do some kind of work that is substantially gainful⁵, then he is not entitled to a disability pension.

The medical evidence does not support that the Claimant is disabled

[11] The Claimant said he got very ill in December 1996. He had the flu and was fine afterwards. A few weeks later, he woke up very congested and needed to go to hospital. His lips were turning blue and he was not getting any air. He was admitted to ICU and was in hospital for about 3-4 months. The diagnosis was not very clear. He needed dialysis and lost several right foot digits and bilateral toes due to ischemia. He recovered slowly afterwards. However, he has had elevated liver and muscle enzymes since then. In 2007, the Claimant was called by his doctor at that time for an urgent assessment due to elevated CK. Since 2014/2015, he finds that he gets easily fatigued with activities.⁶

[12] The Claimant first saw Dr. Iain McGregor (family physician) in May 2018 because of fatigue when doing physical work. He told his doctor that his employers were not accepting of him having to rest frequently.⁷ In June 2018, the Claimant's family doctor said the Claimant had chronic fatigue and myalgia (not yet diagnosed). Dr. McGregor said that since 1997, the Claimant has been intolerant of heavy work with easy fatigue. This has progressively worsened since 2016.⁸ He said that the Claimant needed to stop work after an hour to rest for 15-30 minutes. Dr. McGregor felt the prognosis would be good for recovery if the cause could be determined. The Claimant was referred to neurology for a diagnosis and treatment.

[13] In November 2018, the Claimant was seen by Dr. Al-Kaabi (neurology) for symptoms of fatigue and assessment of myalgia and elevated CK. EMG/NCS studies in the left upper extremity and the right lower extremity showed normal motor and

⁵ This is explained in a Federal Court of Appeal decision called *Klabouch v Canada (MSD)*, 2008 FCA 33

⁶ This functional abilities were told to Dr. Al-Kaabi in November 2018 at GD 2-52

⁷ The clinic notes are at GD 2-48

⁸ Dr. McGregor's report is at GD 2-78

sensory nerve conduction studies. Dr. Al-Kaabi concluded that the Claimant had elevated CK and fatigue. EMB/NCS studies showed possible mild myopathic changes in the left deltoid. The CK was previously stable for 10 years at least and likely to be a hereditary etiology given stability overtime. Dr. Al-Kaabi referred the Claimant to the Genetics & Metabolism Clinic for an assessment.

[14] In May 2019, the Claimant saw Nicole Yang (Genetic Counsellor) at the Genetics & Metabolism Clinic.⁹ She reported that the Claimant's symptoms and prior investigations were suspicious for an underlying myopathy. The Claimant agreed to pursue genetic testing. By September 2019, a diagnosis of Becker Muscular Dystrophy (BMD) was made.¹⁰ Ms. Yang explained that the Claimant had proximal muscle weakness, exercise intolerance, myalgia that worsened with exertion and activity and fatigue. All of his symptoms were in keeping with his diagnosis of BMD.

[15] However, it is not the diagnosis of a condition that determines is someone is disabled. The effect of the condition on the person must be considered. Further, 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.¹¹ The evidence supports that the Claimant would be unable to work in a physically demanding occupation because of his fatigue. But, I find that the evidence shows that the Claimant still has capacity for work.

The Claimant retains capacity for work

[16] In June 2018, the Claimant said he had capacity to sit and stand for a maximum of 2 hours. He also rode a bike for 1-2 kms or about 30 minutes. He had no difficulty reaching, seeing, speaking, remembering, concentrating or sleeping. He was able to

⁹ Dr. Al-Kaabi's report is at GD 2-59

¹⁰ Ms. Yang's letter is at GD 1-3

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

perform his activities of daily living and personal needs. He was also able to drive a car within the city of Winnipeg, but no more than 2 hours of highway driving.¹² At the hearing, the Claimant told me that he enjoys reading and had thought about returning to school. However, after sitting for about 30 minutes, he would need to stand up and/or walk around for a little bit. He said that he helps his mom around the house. His mom said that she keeps him busy doing repairs and housework.

[17] The Claimant told me that he was laid off from his job doing auto detailing in October 2016. He explained that at that time 14 other people were also laid off. The reason given was because of company restructuring. The Claimant said that when he pressed his employer for more details, they told him that his fatigue was an issue. The Claimant contacted the Human Rights Commission with the hope of getting his job back. However, he has not returned to work since October 2016.

[18] He received regular Employment Insurance benefits from October 2016 to July 2017. The Claimant said that during this time, he was “willing and able” to work. He told me that since he was laid off in October 2016 until the present, he has continued to look for and apply for jobs. Some of these jobs, including custodial work at a cinema were too physical and he would be unable to do them because of fatigue. The medical evidence seems to support this as well. However, based on the functional abilities of the Claimant in June 2018 and the description of his abilities today, I find that he would have capacity for less physical work. The Claimant agrees with this. He said that he would likely be able to do a sedentary job if he could get up and move around periodically. He also told me that he applied for a work as a shuttle driver at a car dealership. He said he could do shuttle driving work. Unfortunately, he was not hired because he was not yet old enough. The Claimant explained to me that the car dealership employers prefer to have someone at least 55 years old. He told me at the

¹² The Claimant’s questionnaire is at GD 2-85

hearing, that he recently was again looking for shuttle driving jobs because this is work for which he would have capacity. It is clear from the doctors' reports that he cannot do heavy manual labour. Still, the Claimant does have some capacity to work.

[19] 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.

[20] Socio-economic factors such as labour market conditions are irrelevant in a determination of whether an individual is disabled. The focus is on any substantially gainful occupation having regard to the Claimant's personal circumstances and not on whether real jobs are available in the labour market.¹⁴

The Claimant's personal circumstances would not limit his capacity to work

[21] I must assess the severe part of the test in a real world context¹⁵. This means that I consider the Claimant's personal circumstances such as age, level of education, language proficiency, and past work and life experience in combination with the health condition and resulting limitations.¹⁶

[22] The Claimant was 51 years old at his MQP (December 2018). He has a grade 12 education. Although he has limited transferable work related skills, his age, education and language proficiency would not negatively impact his capacity to work. Further, the Claimant has no cognitive limitations that would prevent him from retraining.

¹³ This is explained by the Federal Court of Appeal in the decision *Inclima v. Canada (A.G.)*, 2003 FCA 117

¹⁴ The Federal Court of Appeal explains this is the decision called *Canada (MHRD) v. Rice*, 2002 FCA 47

¹⁵ The decision, *Villani v Canada (AG)*, 2001 FCA 248 discusses the 'real world' concept

¹⁶ *Bungay v Canada (AG)*, 2011 FCA 47

Financial hardship is not relevant to the determination of eligibility for a disability pension

[23] The Claimant stated that he has not had a steady employment income since October 2016. A CPP disability benefit would relieve financial stress for him. While I am sympathetic to the Claimant's situation, financial hardship is not relevant to the determination of eligibility for a disability pension. This means it is not a basis on which disability benefits are paid. The Tribunal is created by legislation and, as such, I only have the powers granted to it by its governing statute. I am required to interpret and apply the provisions as set out in the CPP, and I am bound by decisions of the Federal Court. I cannot use the principles of fairness or equity or consider extenuating circumstances to disregard the provisions of the CPP, or Federal Court decisions.

[24] As I mention above, a person needs to have a disability that is severe and prolonged to get benefits. I conclude that the Claimant's disability is not severe. This is because he has some work capacity.

[25] There is no need for me to consider whether the disability is prolonged, because I have decided that the disability is not severe.

CONCLUSION

[26] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security