Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *KD v Minister of Employment and Social Development*, 2020 SST 964

Tribunal File Number: GP-19-624

BETWEEN:

K. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by:	Jackie Laidlaw
Claimant represented by:	Ryan Alkenbrack
Teleconference hearing on:	April 1, 2020
Date of decision:	April 9, 2020

Canada

DECISION

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

OVERVIEW

[2] This hearing took place in a challenging time. Because of COVID-19 restrictions, many Canadians, including Tribunal staff, are working from home. This has put a great strain on telephone networks, and on the Tribunal's ability to send and receive documents by mail or courier. The Claimant verified that he had not sent in any further documents and I was satisfied we had all the evidence he had provided.

[3] I decided to proceed with the hearing despite the fact that no one was there to represent the Minister. I did this for two reasons. First, I was satisfied the Minister received notice of the hearing. Second, the Minister usually tells the Tribunal in advance if they are going to take part, and they had not done so here. I thought it was unlikely that a Minister's representative had tried to connect to the teleconference. In case I was wrong, I waited a week before issuing my decision.

[4] The Claimant was a 41 year-old man at the time of his MQP of December 31, 2016. He was a truck driver in January 2015 when he was in a car accident that dislocated his left shoulder, hurt his tailbone, bumped his head, scratched his chest and stomach and hurt the top of his right foot. He has been unable to work since then mainly due to his shoulder. His tailbone and back got better by 2016 but his shoulder pain worsened. He will require a shoulder replacement in 20 years. The Minister received the Claimant's application for the disability pension on July 9, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[5] 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, 2016.

ISSUE(S)

[6] Did the Claimant's left shoulder condition result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2016?

[7] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2016?

ANALYSIS

[8] Disability is defined as a physical or mental disability that is severe and prolonged[1]. 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

There are treatments still available to manage the shoulder

[9] There is no dispute that the Claimant was in a bad automobile accident in his "semi" truck in January 10, 2015 where he suffered a tear and a dislocation of his left shoulder. His treatments to date and the available treatments yet tried will be detailed in this decision.

[10] He stated that he also hurt his tailbone and back which took most of 2015 to recover. The bulging disc in his back has flared only three times, in 2015, 2016 and again in 2018 and has not happened since. It took three days to recover mobility and a month for the tenderness to subside. He took Tylenol, used a heating pad and let the pain run its course. His physiotherapist, Mr. Austin Gaber, gave him some exercises that he does daily at home to prevent bulging. The evidence does not indicate that he has a condition of his back or tailbone that requires any

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

consistent intervention other than very sporadic conservative treatment. There is no evidence to prove he is unable to work due to his back or tailbone.

[11] His shoulder is the condition, which he states, prevents him from working.

[12] The Claimant did not have a family doctor. Orthopaedic surgeon Dr. Pickle and physiotherapist Austin Gaber treated his shoulder. As such, I will put weight on the opinions of Dr. Pickle and Mr. Gaber.

[13] After the accident, he was assessed by Dr. Pickle who recommended he stay in a sling for six weeks and attend physiotherapy. Dr. Pickle noted his frozen shoulder was resolving by March 2015. In August 2015, an MRI showed a tear in the shoulder and Dr. Pickle offered a biceps tenotomy procedure, which the Claimant declined. A CT scan of August 26, 2016 showed that the fracture healed. I accept that the pain has continued as noted by both Dr. Pickle and Austin Gaber prior to the MQP. In February 2016, one year post-accident, Dr. Pickle noted that overall he had healed well but has residual stiffness and weakness. He continued to improve with physiotherapy but had discomfort after treatment. I accept this as rational.

[14] In August 2016, prior to the MQP he had a trivial injury at home, which worsened his shoulder. Because of that by December 2016, he tried cortisone twice, which did not help the pain. Dr. Pickle diagnosed him with chronic pain the last time he treated the Claimant in March 2017,

[15] A note dated May 4, 2018 from Dr. Pickle showed that he would be left with a permanent disability to the shoulder and treatments would have to be over-the-counter medications rather than injections. The Claimant is allergic to anti-inflammatories (Advil) and is only able to take Tylenol.

[16] The Claimant had constant physiotherapy with Mr. Gaber for a year, resulting in modest improvement with range of motion and function. He continues to receive physiotherapy with Mr. Gaber. Mr. Gaber noted in 2018 that pain is his new normal, and that he will most likely require ongoing physiotherapy for life. He also noted that his range of motion is better but the pain is worse. He was diagnosed with post-traumatic arthritis of the shoulder in 2018, which Dr.

Pickle noted, in the medical report of July 9, 2018, would likely progress. By July 2019 Mr. Gaber noted that his range of motion was better, the pain worse, and his pinky finger numb.

[17] Therefore, by the time of the MQP, his fracture had healed and he was treating his pain with very conservative measure of physiotherapy and Tylenol. He was not receiving any chronic pain management. The Claimant had already declined biceps tenotomy. The tenotomy is a procedure which is known for eliminating pain and functioning. The Claimant did not accept that procedure before the MQP, and his condition persisted turning into arthritis by 2018.

[18] At the request of his lawyer, he had an orthopaedic assessment with orthopaedic surgeon Dr. John Townley in September 2018.[2] Dr. Townley, who indicated that he is not a chronic pain practitioner, noted he may be a candidate for a tenodesis, (tenotony) which is the same type recommendation made by Dr. Pickle in 2015. Dr. Townley also recommended a shoulder arthroscopy and debridement for relief. He also noted that a more definitive procedure would be a total shoulder arthroplasty, but he should wait as long as possible to have the latter surgery. He recommended a second opinion on surgery from an orthopaedic surgeon.

[19] Dr. Pickle referred him to Dr. Ryan Bicknell in November 2018 and he was assessed on May 16, 2019[3]. Dr. Bicknell diagnosed significant arthritis. He noted the usual non-operative treatment of anti-inflammatories, injections and physiotherapy, all of which the Claimant has attempted. Both Dr. Pickle and Mr. Gaber had noted a few years earlier that the Claimant had plateaued. Therefore, these non-conservative treatments were no longer of benefit. Dr. Bickell stated further treatment beyond the above mentioned conservative treatments would be a simple arthroscopy and debridement to help now with pain and functioning and "buy time" before getting a shoulder replacement. As the Claimant is only 45 years-old now, the shoulder replacement will not be done for 20 years. Dr. Bickell offered the arthroscopy and debridement, which the Claimant has refused.

[2] GD 5 45 Orthopaedic assessment as an independent medical evaluation to address diagnosis, causation, prognosis, impact on activities of daily living and possible treatment. Dated October 2, 2018.
[3] GD 5 4

[20] While it is the decision of the Claimant whether to accept recommended treatment or not, it is important to realize that refusing treatment may have some impact on his disability status.[4]

[21] There was a treatment offered before the MQP, and treatments offered recently which may be of benefit to the Claimant. By refusing the treatments the Claimant may be prolonging his pain and level of functioning.

[22] Nonetheless, his refusal to accept these treatments has not directly impacted his disability status. I am more persuaded by the evidence of a capacity to work even with his prolonged pain and functional limitations.

There is evidence of a work capacity

[23] As previously noted, I am putting weight on the opinions of Dr. Pickle and Mr. Gaber, as they were the consistent medical specialists in charge of his shoulder recovery at the time of the MQP.

[24] Both Dr. Pickle and Mr. Gaber have made opinions that he is unable to work as a truck driver, but he would be capable of working in a sedentary position.

[25] Mr. Gaber noted at the time of his MQP that he may be able to return to work if he were driving only. In July 2017, six months post-MQP Mr. Gaber indicated he would not be able to return to his usual work but if he did returns to an occupation it would have to be sedentary.[5] The Claimant's representative argued this opinion is speculative and not evidence of his ability to return to work. I disagree. Mr. Gaber had been treating the Claimant since 2015. As such, he was providing an educated opinion based on his first-hand knowledge of the Claimant's ability and treatment.

---

[4] This is according to case law, *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211 which outlines that the [Tribunal] must consider whether the claimant's refusal to undergo treatment is unreasonable and what impact that refusal might have on the claimant's disability status should the refusal be considered unreasonable.

[26] Dr. Pickle also felt in February 2016 that it would be unlikely he would return to truck driving. In 2018, Dr. Pickle again noted that he would not recommend he return to work in any heavy manual capacity. Dr. Pickle has never stated he is unable to work at any occupation.

[27] After the MQP, in 2018 Dr. Townley, who is not a treating physician, indicated that it is not reasonable for him to work full time and at best, he is expected to perform light work on modified hours. A month later Dr. Townley altered his opinion to state at the Claimant's present state he would struggle to hold down even a sedentary job. I am not putting much weight on this opinion it is two years post-MQP. At the time of the MQP the Claimant did not have osteoarthritis which was prevalent when Dr. Townley made his assessment. As well, Dr. Townley had not been involved with the Claimant's care at the time of the MQP, or at all, other than for the medical legal orthopaedic assessment in 2018, three years after the Claimant had last worked.

[28] In November 2019, the Claimant had a medical legal vocational situational assessment[6] performed by Maria Ross, Occupational Therapist and Cheryl Tiessen, Kinesiologist at the behest of the Claimant's lawyer to determine if he is totally disabled from performing his previous job under the long-term disability (LTD) policy. The assessors were also instructed to evaluate his work capacity for CPP.

[29] As part of this evaluation a number of reports were assessed. I was not provided with the actual reports but accept the summary of each in the Ross Rehab report. These report were:

a) a functional capacity evaluation from Mr. L. Grimaldi dated May 31, 2017 showing that he had a light level capacity with medium pushing/pulling limitations;

b) a vocational assessment by evaluator Ms. Smith on May 31, 2017 which noted suitable occupational options such as a dispatcher, supervisor and vocational instructor;

c) a functional capacity evaluation (FCE) from Ms. Palmer, Occupational therapist and Ms. Grouse, physiotherapist on October 27, 2017 that he was functional at a sedentary level and recommended that further rehabilitation (which he has received) could result in

[6] GD 4 Ross Rehab medical legal vocational situational assessment of November 4, 2019.

eligibility for sedentary employment such as customer service, administration or other roles where he could perform while seated; and,

d) a transferable skills analysis from rehab consultant Ms. Joyal dated December 28, 2017 that he was capable of sedentary demands and identified suitable occupations.

[30] Despite the opinion from Ross Rehab in 2019 that he was unable to perform substantially gainful employment in 2019, it is quite clear that he was capable of sedentary work with a number of positions identified one-year post-MQP. I find it is reasonable the 2017 opinions would apply to his condition at the time of his MQP as they echoed the opinion of Mr. Gaber in 2016.

[31] 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[7].

[32] There is ample evidence of a capacity to work. The Claimant stated he never tried to work at a suitable occupation or retrain due to his pain affecting his concentration and his lack of range of motion and strength.

[33] He stated that after his MQP, in mid-2018 he did try to "work" for a friend of his fixing radio-controlled cars. This was not a job. He was not paid. He did it one or two hours a few times a week sporadically. He had only done it a few times. He answered the phones if his friend was busy. He stated the establishment is a hobby shop and he tried it because he thought he had a handle on his pain. The Claimant stated that he could not do the job well as he was not there mentally to work due to the pain.

[34] There is no corroborating evidence regarding his attempt at fixing radio-controlled cars. He was clear this was not a job. It was a hobby shop and radio-controlled cars were a hobby for the Claimant. I therefore do not view this as a valid attempt to work at anything. Nor do I consider his friend a benevolent employer as it was not a job and he was not paid. As well, this required a degree of physical input would presumably require him to use his arms and therefore

[7] *Inclima v. Canada (A.G.)*, 2003 FCA 117

his shoulder. It was established at the MQP and a few months post-MQP that he should not pursue physical labour. It was not an attempt at a suitable position for his limitations.

[35] Therefore, there is evidence of a capacity to work, both before and well after his MQP and the Claimant has failed to show an attempt at obtaining or maintaining employment, and that he was unsuccessful because of his shoulder pain.

[36] I must assess the severe part of the test in a real world context[8]. 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.

[37] The Claimant is a young man, age 41 at the time of his MQP. The Claimant's representative submitted in response to the Ministers submissions that his age should not be a factor used against him. It is, according to case law, a factor that must be considered when viewing the Claimant's ability to work in a real world context.

[38] He would not be prevented from working, or retraining because of his age, his language skills (he is fluent in the English language) or his education (high school graduate). He has a varied history of mainly manual labour driving truck for 10 years, window installing, factory work and construction work. He was also a professional hockey player for a few years. While he has a history mainly in manual labour, and I accept he is unable to work in manual labour any longer, he would be capable of retraining into a sedentary job. There were a number of sedentary jobs identified that the Claimant was capable of performing by both the FCE, the vocational assessment and the transferable skills analysis. These assessments generally take his age, education and skills into account when determining any suitable occupations.

[39] In a real world sense, the Claimant would not be prevented from working at a suitable occupation or training for a suitable occupation because of his age, education, language skills or past work and life experiences even with his shoulder pain and limitations.

[40] The Claimant stated that he really enjoyed being a truck driver and would have done this until retirement. I understand the frustration the Claimant must have being prevented from doing

[8] *Villani v. Canada (A.G.)*, 2001 FCA 248

the job he likes. However, he is unable to do this job any longer and he has not attempted to do anything else that is suitable for his limitations. The evidence shows he was capable of working at a sedentary job around the time of his MQP, and post-MQP. He has failed to show he cannot do a sedentary job because of his shoulder condition. As such, he does not have a severe disability.

[41] I find the Claimant has failed to prove a severe disability that renders him incapable regularly of pursuing any substantially gainful occupation.

CONCLUSION

[42] The appeal is dismissed.

Jackie Laidlaw
Member, General Division - Income Security