



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DD v Minister of Employment and Social Development*, 2020 SST 920

Tribunal File Number: GP-20-121

BETWEEN:

D. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Claimant represented by: Bozena Kordasiewicz

Teleconference hearing on: April 8, 2020

Date of decision: April 30, 2020

DECISION

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

OVERVIEW

[2] The Claimant is a 58-year-old man who has been involved in two significant accidents. In June 2000, the Claimant was working as a truck driver when another vehicle drove under his truck and a passenger in that vehicle died. Then, in November 2001 the Claimant suffered multiple physical injuries after he fell out of a tree while he was hunting.

[3] The Claimant applied for disability benefits in February 2014, and in his application he reported that he is unable to work because of PTSD, constant depression, and body pain from physical injuries. The Respondent denied the application at both the initial and reconsideration levels of adjudication. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] A Tribunal member heard the Claimant's appeal in June 2016. That member decided that the Claimant was not entitled to disability benefits because his disability was not severe at the time of the Minimum Qualifying Period (MQP) and continuously since. The Claimant appealed that decision to the SST Appeal Division. In March 2018, the Appeal Division allowed the appeal, finding that the General Division had erred in law by failing to consider the totality of the Claimant's medical conditions. The Appeal Division referred the matter back to the General Division for reconsideration.

[5] In June 2019, the same member of the General Division who had heard the appeal in June 2016, rendered a decision on the record (i.e. without an oral hearing). He considered the totality of the Claimant's impairments, and concluded that the Claimant was not eligible for disability benefits. The Claimant appealed the decision to the Appeal Division. In January 2020, the Appeal Division allowed the appeal, finding that the General Division had denied the Claimant his right to a full hearing. The Appeal Division referred the matter back to the General Division for another hearing and directed the General Division to conduct an oral hearing.

PRELIMINARY MATTERS

[6] This hearing took place during a challenging time. Because of COVID-19 and its related 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.

[7] I opened the teleconference about 10 minutes before the scheduled hearing time. The Claimant attended the hearing with his representative, but the Respondent did not. This is despite the fact that the Respondent had indicated in written submissions of March 3, 2020 that a representative would attend the hearing¹.

[8] Because the Respondent had indicated an intention to participate in the hearing, and because of recent connectivity issues with the teleconferencing system, I waited about 30 minutes before starting the hearing. During this time, I asked a Registry Officer to reach out to the Respondent's office to find out if a representative was attempting to connect to the teleconference. The Registry Officer told me she was unable to reach the person who had prepared the Respondent's most recent submissions. The Registry Officer also told me that she was able to confirm that no urgent documents (such as a request for an adjournment) had been received for this file.

[9] After waiting 30 minutes, I asked the Claimant and his representative whether they wanted to proceed with the hearing. They said they did, and so the hearing proceeded as scheduled. The Claimant's representative confirmed that she had not sent in any documents recently, and so I was confident that I had all of her evidence. I asked the Claimant if he wanted his decision sent to him by email, and he said it was not necessary to send him the decision electronically. He said it was enough for the decision to be emailed to his representative.

[10] The day after the hearing, I received word from the Tribunal Operations that they had contacted the Respondent's office and learned that the Respondent had decided not to send a representative to the hearing.

¹ Page IS7-8

ISSUE(S)

[11] To qualify for CPP disability benefits, 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 is December 31, 2002.

[12] Disability is defined as a physical or mental disability that is severe and prolonged². A disability is severe if it renders a person 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.

[13] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2002.

ANALYSIS

Why the Claimant stopped work

[14] The Claimant testified that after the MVA of June 2000, he took a few days off from his truck driving job and then he returned to work. He continued working until September 14, 2001 when his employer told him to take some time off. That was because the Claimant was having difficulties with PTSD in that he was short-tempered and he was getting involved in physical altercations with his co-workers.

[15] The Claimant never returned to his job. He was focusing on improving his mental health when he was involved in the hunting injury of November 2001. He fell 30 feet from a tree and

² Paragraph 42(2)(a) of the *Canada Pension Plan*

sustained multiple fractures including fractures of the left hip, left femur, left heel, right ankle, sternum and L2³.

[16] The Claimant testified that he was in the hospital until just before Christmas 2001 and then he went to live at his parents' home so that his mother could care for him. He said he was in a wheelchair for six months and then progressed to using two crutches and then two canes. Eventually, he improved to the point where he used just one cane. He continues to use the cane today every now and then.

The Claimant had significant functional limitations and impairments before his MQP

[17] The evidence shows that the Claimant's medical conditions resulted in significant functional limitations before the MQP.

[18] On June 15, 2002, Dr. Wendling (the Claimant's former family physician) reported the Claimant's physical impairments as no lifting, no bending, no carrying, sitting as tolerated, and limited standing / walking tolerances (less than 5 minute intervals)⁴.

[19] On November 27, 2002 (just one month before the MQP), the Claimant saw Dr. Pramila Tahlan, Psychiatrist. Dr. Tahlan diagnosed PTSD (moderate), major affective disorder (moderate), and generalized anxiety disorder (moderate), and she noted the Claimant's symptoms included feelings of sadness, depression, helplessness, worthlessness, guilt, agitation and irritability, lack of interest in things, low energy, fear of doing something uncontrollable, insomnia, constant worry and repetitive, senseless thoughts⁵.

The Claimant's physical limitations improved after the MQP

[20] The evidence shows that the Claimant's physical limitations improved after his MQP. This is important for two reasons. First, the Claimant did not meet the contributory requirements at the time of his application, and so, as a late applicant, he must show that his disability was

³ Page GD2-269

⁴ Page GD2-282

⁵ Pages GD4-96 to GD4-98

severe and prolonged by December 31, 2002 and that his disability remained severe and prolonged *continuously* through to his application. Second, improvement in functionality after the MQP may be an indication that the disability was not prolonged at the time of the MQP.

[21] On May 26, 2003, Dr. Ann Thomas (psychiatrist) reported that the Claimant had no difficulty with sitting, walking or ambulating. She said he also had no difficulty with his arms, legs, neck or trunk⁶.

[22] In December 2004, the Claimant was assessed by Dr. Pain (psychiatrist) and Ms. Jack-Bleach (occupational therapist), and during that assessment the Claimant reportedly told the assessors that after his accident of November 2001 he was not expected to walk again, but by the summer of 2002 he was fully mobile and felt well again. He said he had no remaining physical difficulties from that accident⁷.

[23] I asked the Claimant about the comments made in these two reports, and the Claimant said the reports are wrong. He told me that he would never have said such things. He also pointed out that the reports were prepared by practitioners who are affiliated with the WSIB and he suggested (though he did not come right out and say it) that the practitioners may not have been impartial.

[24] I cannot accept that just because the practitioners have affiliations with the WSIB they would have misrepresented what the Claimant told them. Moreover, there are also hints in the file that the Claimant may have had more functional abilities than he acknowledged to other practitioners. For example, a February 2007 letter from the WSIB states that in October 2006 the Claimant plead guilty to an offence under the WSIB Act in that he failed to inform the WSIB within 10 days of a material change in circumstances relating to his benefit entitlement. The letter goes on to state that the WSIB had evidence that the Claimant was functioning at a greater level than he was reporting to the WSIB⁸.

[25] I know that in the years after the MQP the Claimant's former family physician (Dr. Wendling) was reporting that the Claimant was in constant pain and that he was taking

⁶ Page GD4-112

⁷ Page GD4-114

⁸ Page GD2-216

significant amounts of pain medication. For example, in August 2005, Dr. Wendling wrote that the Claimant had minimal improvement in pain control and functional ability and that he was taking oxycontin 80 mg three times a day and oxycocet every 4 hours as needed for the pain⁹. However, the evidence includes a letter that Dr. Wendling wrote to the Claimant in November 2009 and in that letter she told the Claimant that she would not be providing further medical services to him because she had learned that he had committed fraud with regards to the prescriptions she gave him¹⁰.

[26] I asked the Claimant about Dr. Wendling's letter, and he told me he has no memory of what that letter was about. I find it hard to believe that the Claimant does not remember why Dr. Wendling stopped being his doctor. Something was clearly going on with the Claimant's pain medications and because I do not know the full story, I am left to wonder if the Claimant was misrepresenting his pain levels to his doctor so as to obtain pain medications.

The Claimant's mental health conditions appear not to have improved after the MQP

[27] I acknowledge that the Claimant's mental health conditions appear not to have improved, in any significant way, after his MQP. For example, in December 2004 (two years after the MQP), Dr. Pain and Ms. Jack-Bleach reported that the Claimant continued to have significant PTSD symptoms of avoidance as well as other symptoms such as anger, difficulties with interpersonal relationships, and difficulties with sleep¹¹.

[28] Despite the lack of improvement, I do not find the evidence supportive of a severe disability. I say this for two reasons. First, the evidence suggests that the Claimant has not always been compliant with treatment recommendations and may have provided inaccurate information to his practitioners about his compliance. Second, there is medical evidence indicating that the Claimant had the capacity to work, despite his mental health conditions. I will now explain each of these reasons in detail.

⁹ Page GD2-224

¹⁰ Page GD2-115

¹¹ Pages GD4-114 to GD4-119

(i) Compliance with Treatment

[29] The issue of compliance with treatment recommendations is important. To be successful in obtaining disability benefits, claimants must not only provide evidence concerning the nature of their disability, but must also provide evidence of their efforts to manage their medical condition¹². Such efforts are generally known as a "duty to "mitigate". Claimants are not entitled to CPP disability benefits unless they satisfy the duty to mitigate¹³. When claimants refuse to comply with a recommended treatment that is likely to affect their disability status, they must then establish that their refusal was reasonable¹⁴.

[30] The Respondent submits that, in and around the time of the MQP, the Claimant was not taking his prescribed Effexor regularly. The Respondent points out that a Patient Medical History Report shows that a prescription for Effexor (60 tablets) was filled on March 5, 2002 but that it was not filled again until September 4, 2003 (about 18 months later)¹⁵.

[31] I am not sure that the Claimant actually filled his prescription in March 2002 because a note beside the entry for March 11, 2002 shows the prescription was unfilled. It seems as though the Claimant filled the prescription on January 9, 2002 but did not fill it again in March 2002. In any event, it looks like there was a large gap because the prescription (60 tablets) appears not to have been filled again until November 6, 2002 and then September 2003¹⁶.

[32] I asked the Claimant to comment on the Respondent's argument, and he said he did not take the Effexor for very long because it did not agree with him and he had a bad reaction to it. I asked the Claimant if he discussed this with his family physician, and he said "not really", though he also said that he would have talked to her before stopping a medication.

[33] I do not know that the Claimant was in fact having a bad reaction to the Effexor (at least during the period in and around the time of his MQP). I say this because the Claimant told Dr.

¹² *Klabouch v. Minister of Social Development*, 2008 FCA 33

¹³ *Sharma v. Canada (Attorney General)*, 2018 FCA 48

¹⁴ *Lalonde v. Minister of Human Resources Development*, 2002 FCA 211

¹⁵ Page IS1-3

¹⁶ Pages GD4-152 to GD4-153

Tahlan in December 2002 that he had been on Effexor for the last 7-8 months and that he had found it helpful. There is no mention of any adverse side effects, though there is mention of the Claimant previously having difficulty with Paxil¹⁷. Similarly, in May 2003, the Claimant told Dr. Thomas that he was on Effexor 75 mg and again there is no mention of any adverse side effects¹⁸. I am not suggesting that the Claimant was purposely misleading me when he said he had a bad reaction to Effexor. He could simply have been thinking of his experience with Paxil. My point though is that the evidence does not show the Claimant was taking the Effexor regularly even though it appears to have been helping. The other concern this raises is that the Claimant appears to have been leaving his practitioners with the impression that he was taking the medication regularly, and I do not know how this would have affected their advice (including recommendations) had they known otherwise. Dr. Thomas commented on the fact that Effexor is an effective medication for PTSD, and so presumably this medication was thought to have an impact on the Claimant's disability status.

(ii) Capacity to Work

[34] Turning now to work capacity, there is evidence indicating that the Claimant had some ability to work, despite his mental health conditions. For example, in November 2002 Dr. Tahlan reported that the Claimant's PTSD would prevent him from driving a truck. She did not go so far as to say that the PTSD (or other mental health conditions) would prevent the Claimant from doing a different type of job. In fact, she said she talked to the Claimant about re-entering the workforce and she told him it was in his best interest to look at what he could be retrained for¹⁹. As another example, in December 2004, the Claimant reportedly told Dr. Pain and Ms. Jack-Bleach that he thought he might be able to run a fish shop or something similar, so long as he only had employees and did not have to report to others²⁰. Those practitioners went on to note that the Claimant has great difficulty with interpersonal relationships and anger, but they said he could probably do some part-time work on his own²¹.

¹⁷ Page GD4-97

¹⁸ Page GD4-113

¹⁹ Pages GD4-96 to GD4-98

²⁰ Page GD4-115

²¹ Page GD4-118

The totality of the Claimant's conditions

[35] A Claimant's conditions must be assessed in their totality²², provided of course the onset of the conditions occurred before the MQP. When I consider the Claimant's mental health conditions, pain condition, and sleep difficulties in totality, I am of the view that evidence of work capacity exists. Again, I have reason to believe the Claimant's pain condition improved after his MQP, and the evidence shows that even with the mental health conditions and sleep difficulties, the Claimant retained work capacity. The most telling piece of evidence is perhaps the Claimant's own statement to Dr. Pain and Ms. Jack-Bleach that he thought he might be able to run a fish shop or something similar. I find this telling, because the Claimant would have presumably been speaking of his overall capacity to work. Also, although the Claimant appears not to have mentioned this to Dr. Pain and Ms. Jack-Bleach he was in fact the owner of a business in or around the time of that assessment. The Claimant testified that he was the sole owner of a pet retail business from about July 2004 to about December 2004 or February 2005. He thus would have been well aware of what kind of work such a job entailed.

[36] In assessing work capacity, I have considered the Claimant's age, level of education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context²³.

[37] The Claimant's personal characteristics are such that he would have been realistically employable at the time of his MQP. In December 2002, the Claimant was only 40 years of age and thus had several years ahead of him before the standard age of retirement. The Claimant is proficient in at least one of Canada's two official languages. Although he has only a grade 10 or grade 11 education (the evidence is inconsistent), his file notes that he has been tested and found to have an equivalency much higher than grade 11. He reportedly scored 96% on the learning capabilities assessment²⁴. A psycho-vocational assessment of May 2003 states that the

²² *Bungay v. Canada (Attorney General)*, 2011 FCA 47

²³ *Villani v. Canada (A.G.)*, 2001 FCA 248

²⁴ Page GD2-256

Claimant's intellect is better than 70% of the general population. He reads at the grade 12 level, though his spelling and arithmetic operations are at the grade 8 level. The assessor concluded he has the potential to do training at the post-secondary level²⁵. The Claimant also has varied work experience including farming, house-framing, restaurant management, forklift operation, and owner of a small business.

The Claimant has not shown that his efforts at obtaining and maintaining employment were unsuccessful by reason of his health condition

[38] My finding of work capacity is important because the law states that if 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 condition²⁶.

[39] The Claimant has not shown that his efforts at obtaining and maintaining employment were unsuccessful by reason of his health condition.

[40] The Claimant testified that he attended a retraining program (a computer course) through the WSIB for about four months, from either late 2003 or early 2004 to May 2004. He said he had to stop the course before he could finish it because he could not physically tolerate the sitting and because his concentration was such that he could not understand the course material.

[41] The documentary evidence suggests that the Claimant participated in the program for longer than he remembers. It looks like the course began in either August or September 2003²⁷, and so the Claimant would have participated in the program for about 8 or 9 months. This is a significant period of time, particularly since the Claimant also testified that he never missed a day of classes.

[42] I do not consider that the Claimant's attempt at retraining satisfies his obligation to show that efforts at employment were unsuccessful by reason of his health condition. This is partly due to the length of time the Claimant was able to participate in the program and partly due to the fact that his decision to stop the program largely coincides with the time he purchased the fish

²⁵ Page GD4-99 to GD4-108

²⁶ *Inclima v. Canada (A.G.)*, 2003 FCA 117

²⁷ Page GD2-221

business, leaving me to wonder whether the Claimant truly stopped the course for the reasons he stated. The Claimant testified that when he stopped the computer course he did not have plans to purchase the business. I do not believe this to be true.

[43] First, the Claimant is a poor historian. There were several occasions throughout the hearing when the evidence he gave was very inconsistent with documentary evidence. For example, the Claimant testified that he started seeing Dr. Tahlan in either September 2001 or October 2001 and that he continued to see her regularly for counselling until she passed away a couple of years ago. The documentary evidence, however, shows that the Claimant first saw Dr. Tahlan in December 2002 and then not again until 2009. Moreover, the Claimant's representative said that she thinks Dr. Tahlan passed away several years ago (rather than two years ago).

[44] Second, the February 2007 letter from the WSIB suggests that the Claimant began operating the pet store at the time he stopped the computer program. For example, the letter states that at the time the Claimant stopped participating in the Labour Market Re-Entry program, he became self-employed operating a retail pet and supply store²⁸.

[45] As for the retail pet store, the Claimant testified that he did not work there. He said he was simply an investor and only attended the store to socialize. I do not have corroborating evidence of this, and without more I am reluctant to accept the Claimant's description of his limited involvement in the business. I also do not consider this employment endeavor to be indicative of a failed effort at employment. My understanding is that the business closed for reasons relating to bankruptcy.

CONCLUSION

[46] The appeal is dismissed. The Claimant did not have a disability that was severe and prolonged by his MQP and that remained severe and prolonged continuously through to the date of his application.

Shannon Russell

²⁸ Page GD2-216

Member, General Division - Income Security