



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AK v Minister of Employment and Social Development*, 2020 SST 1134

Tribunal File Number: GP-19-1914

BETWEEN:

A. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Michael Farago

Minister represented by: John Gebera

Teleconference hearing on: May 21, 2020

Date of decision: May 25, 2020

DECISION

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

OVERVIEW

[2] The Claimant was 46 years old when he applied for a CPP disability pension in May 2016. He last worked as a drywall installer. He stated that he had been unable to work since March 2015 because back, neck, and knee pain as well as depression.¹

[3] The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal. In January 2019, the General Division dismissed the appeal on the basis that the Claimant's pain and functional limitations did not preclude him from pursuing all types of work when he last qualified for CPP disability in December 2016.

[4] The Claimant appealed to the Appeal Division. In November 2019, the Appeal Division allowed the appeal on the basis that the General Division had not provided a fair process because it did not inquire whether the Claimant's representative wished to file additional medical documents that she had brought to the hearing. The Appeal Division returned this matter to the General Division for reconsideration.

[5] In order to avoid unnecessary duplication, I treated the recording of the evidence at the initial General Division hearing as part of the evidence at this hearing. The Claimant gave additional evidence

[6] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² The Claimant's disability is severe if it causes him to be incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration.

[7] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled by the end of his Minimum Qualifying Period (MQP).³ His MQP – the date by which he

¹ Disability questionnaire: GD2-76

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

³ Paragraph 44(1)(b) CPP

has to prove he was disabled – is December 31, 2016. This date is the last date when he had valid contributions to the CPP in four out the last six years.⁴

ISSUES

1. Did the Claimant’s medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2016?
2. If so, is his disability long continued and of indefinite duration?

ANALYSIS

Severe Disability

[8] I must focus on the Claimant’s condition as of December 31, 2016.

[9] The CPP is a social insurance regime based on contributions.⁵ Under the CPP, the Claimant is only covered for conditions that became severe on or before his MQP. He is not covered for conditions that became severe afterwards.

[10] In cases of chronic pain, a claimant is required to establish that the pain prevented him from pursuing regularly any substantially gainful occupation as of the MQP.⁶

[11] The Claimant testified that his pain started in 2004 - but he “pushed himself” to keep working in spite of his low back, neck, shoulder, and occasional knee pain. He took painkillers and anti-inflammatory medications, used a back brace, went for physiotherapy and acupuncture, and had injections, but the pain persisted. He missed days from work and some times had to leave work early. At times, he was laid up in bed for three days and had to use chairs for support to go to the washroom. He stopped working in March 2015, because he was in too much pain. His pain unpredictably flares-up after the slightest movement, and he will be “laid up” for days.

[12] At both the initial hearing and the hearing before me, the Claimant stated he did not have any mental health issues. In addition, there is no evidence of any medical treatment for

⁴ Record of Contributions: IS5-5. The Honourable Gordon Killeen, Q.C., and Andrew James, *2019 Annotated Canada Pension Plan and Old Age Security Act*, 18th edition, (Toronto, 2019), at page 296

⁵ *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, para 9

⁶ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

depression in the hearing file. In view of this, I did not consider depression to be a contributing medical condition.

[13] Mr. Farrago, the Claimant's representative, submits that the Claimant is not regularly capable of pursuing substantially gainful employment because of his pain. He suffers from unpredictable flare-ups and treatments only provides short-term relief.⁷

[14] Mr. Gebera, the Minister's representative, acknowledges that the Claimant cannot return to his previous physically demanding work as a dry wall installer. However, the Minister's position is that the Claimant has the regular capacity to pursue alternative less physical demanding work, and that he has failed to take steps to do so.

[15] Since the Claimant is unable to return to his physically demanding previous employment, the primary issue that I must decide is whether he has established that it is more likely than not that he is regularly unable to pursue alternative work.

The medical evidence does not establish that the Claimant could not pursue alternative work as of the end of December 2016

[16] In a recent decision, the Federal Court stated that, in order to succeed, a claimant must provide objective medical evidence of their disability at the time of their MQP.⁸ Although the medical evidence establishes that the Claimant was unable to return to his previous employment, it fails to show that he was regularly unable to pursue alternative employment.

- In February 2015, Dr. Amani, a physiatrist, diagnosed multilevel disc bulges and protrusions, which were worse at the L5-S1 level. He told the Claimant that he could no longer do a construction job that included heavy lifting and bending. He advised him to change his job to a supervisory role. This suggests that Dr. Amani believed the Claimant was capable of pursuing alternative supervisory employment.⁹
- In May 2015, the Claimant told Dr. Amani that he had not been working for the past three months because of his pain. Dr. Amani told the Claimant to avoid

⁷ The Claimant testified that he was going for weekly nerve block injections to his neck and back, but they only provided short-term relief.

⁸ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and CPP Regulations

⁹ IS1-60

heavy lifting and repeated bending and lifting permanently because of his L5-S1 disc protrusion. He advised the Claimant that he needed permanent light work.¹⁰

- In August 2015, Dr. MacDonald, neurosurgeon, recommended non-operative pain management with exercise and a return to work.¹¹
- In September 2015, Dr. Amani advised the Claimant that he could return to light work.¹²

[17] Mr. Farrago relies on the July 2019 letter from Dr. McNeil, pain management specialist. Dr. McNeil stated that the Claimant received only temporary pain relief from treatments and that he was unable to work as a labourer because of his pain. However, this report was 2 ½ years after the MQP, and Dr. McNeil does not state that the Claimant was unable to do alternative less physically demanding work.

[18] The Claimant has failed to provide medical evidence to establish that he was unable to pursue alternative work by the end of December 2016.

The Claimant has failed to establish that he lacks the regular capacity to pursue alternative substantially gainful employment

[19] Employability is the key measure of a severe disability under the CPP.¹³

[20] I recognize that the Claimant suffers from chronic pain and feels he is unable to work. However, it is not sufficient for chronic pain to exist; the pain must be such as to prevent him from regularly pursuing a substantially gainful occupation.¹⁴

[21] Where a Claimant has some capacity to work, he must show that he has made efforts to obtain and maintain employment that were unsuccessful because of his medical condition.¹⁵

¹⁰ IS1-62

¹¹ IS1-138

¹² IS1-65

¹³ *Dean*, para 8, above

¹⁴ *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB). This decision is not binding but I find it persuasive.

¹⁵ *Yantzi v Attorney General Canada* 2014 FCA 193, para 5; *J.W. v Minister of Human Resources and Skills Development* 2014 SSTAD 12, para 41. This decision is not binding but I find it persuasive.

[22] The medical evidence establishes that the Claimant was able to pursue light work as of December 2016.¹⁶ He acknowledged that despite recommendations from the specialists that he return to lighter work, he has made no efforts to do so.

[23] Because he has not looked for alternate work, the Claimant has not demonstrated that he was unable to obtain or maintain employment because of his health condition. The onus is on the Claimant to show that it is more likely than not that he lacked the regular capacity to pursue substantially gainful employment. I find that he has failed to discharge this onus.

The Claimant has failed to establish a severe disability

[24] A disability is severe if it renders a Claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement in a “real world context” and consider such factors as the Claimant’s age, education level, language proficiency, and past work and life experiences when determining his “employability”.¹⁷

[25] The Claimant was only 47 years old at the MQP. He had close to 18 years left until the usual retirement age. He had a grade 12 education in Iraq and worked there in a factory, as the owner of a small store selling vegetables, and in construction. After coming to Canada in 1996, he attended English language courses and is now able to communicate in English. He is able to read English, although he sometimes requires assistance from an app on his iPhone for translation. He is able to write English, do his banking, and pay bills. In Canada, he has worked as a gas station attendant and in construction. There is no suggestion that he suffers from any learning disability. Although English is his second language and his work history has involved primarily physical labour, his personal characteristics, education, and work history do not create substantial barriers to his “employability.”

[26] I have already determined that the Claimant has failed to provide medical evidence to establish that he was unable to pursue light work at the MQP. I have also determined that he had some capacity to work at that time and that he failed to make efforts to do so.

¹⁶ Para 15, above

¹⁷ *Villani v. The Attorney General of Canada*, 2001 FCA 248

[27] The Claimant has failed to establish that it is more likely than not that he suffers from a severe disability in accordance with the CPP requirements.

[28] Since he has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

CONCLUSION

[29] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security