



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SF v Minister of Employment and Social Development*, 2020 SST 1167

Tribunal File Number: GP-19-464

BETWEEN:

S. F.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Antoinette Cardillo

Claimant represented by: Jaswinder Johal

Teleconference hearing on: May 27, 2020

Date of decision: June 12, 2020

DECISION

The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[1] The Appellant is 32 years of age and has a grade 11 education. He described his main disabling condition as low back pain, leg pain, anxiety, depression, poor sleep, unable to concentrate, low energy, headaches and increased stress. He worked as a labourer since he arrived in Canada in 2008. He was last employed as a cook. He stopped working due to his medical condition following a work related accident. The Minister received the Appellant's application for the disability pension on April 11, 2018¹. The Minister denied the application initially and on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[2] To qualify for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant 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 Appellant's contributions to the CPP. I find the Appellant's MQP to be December 31, 2017.

ISSUES

[3] Did the Appellant's conditions result in the Appellant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[4] If so, was the Appellant's disability also long continued and of indefinite duration by December 31, 2017?

ANALYSIS

[5] Disability is defined 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

¹ GD2-27

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

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 Appellant meets only one part, the Appellant does not qualify for disability benefits.

Severe disability

[6] I must assess the severe part of the test in a real world context³. 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, past work and life experience.

[7] 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 is 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 work⁴.

i. Medical reports

[8] On March 10, 2017⁵, a report from Dr. Fennell, physiatrist, stated that the Appellant suffers from S1 radiculopathy on the left side.

[9] Reports from WSIB from October 2017 to May 2018⁶ said that after completing eight (8) weeks of treatment, the Appellant demonstrated slight improvement at first then achieved partial recovery. He was diagnosed with L5-S1 disc protrusion with left-sided radicular symptoms but no objective radiculopathy was found. Although full functional recovery was uncertain due to the persistence of symptoms, the specialists stated that the Appellant was hesitant to give enough details about his daily activities but he indicated that he felt a return to normal activities or work was possible within seven (7) to 12 months. The psychologist who performed psychometric testing commented that despite the Appellant's reports of memory issues, he did not show any

³ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁴ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁵ GD4-47

⁶ GD2-457, GD2-400, GD2-413, GD2-423 and GD2-431

observable significant concentration difficulty while responding to the interview questions. The Appellant psychometric profile was suggestive of a significantly exaggerated objective profile and that there were inconsistencies between his euthymic affect and his reported severe depressive and anxiety symptoms as well as significant tendency toward reporting the symptoms in an exaggerated and inconsistent manner. Overall, the Appellant had somatic symptom disorder with mild pain and subclinical features of adjustment disorder. His psychological symptoms were in part associated with a tendency toward catastrophizing his current pain symptoms and physical limitations. Fear, perceived disability and emotional distress were significant psychosocial barriers for the Appellant. In addition, the reports indicated self-imposed mobility restrictions and submaximal effort during testing. It was determined that the Appellant was capable of light duties with the proper pain management regime. A return to work on modified duties was offered (gradual return four (4) hours/day, increasing every two (2) weeks).

[10] A report dated April 3, 2018⁷ from Dr. Chowdry, family physician, indicated that the Appellant suffered from low back pain, anxiety and depression. His prognosis was guarded and he was waiting to see a neurosurgeon.

[11] On October 15, 2018⁸, a report from Dr. Zaitlen, neurologist, stated that the Appellant suffered from low back degenerative disc disease with nerve root lesion. The 2018 MRI showed small changes from the 2017 MRI. Dr. Zaitlen said that treatment options were discussed with the Appellant, more precisely, taking medication such as anti-inflammatories, muscle relaxants, and nerve agents; using physical techniques or technologies such as applying heat, massage, acupuncture; and procedures like injections or blocks. However, the Appellant had already tried most or almost all the options discussed with no improvement.

[12] Dr. Ugwunze, psychiatrist, stated in his reports from January 2018 to January 2020⁹ that the Appellant suffered from a depressive disorder and chronic back pain. He further noted that the Appellant stops taking his medication at times.

⁷ GD2-229

⁸ GD4-55

⁹ GD4-72 to 91

[13] On January 15, 2020¹⁰, an MRI of the lumbar spine showed that the Appellant had chronic L5-S1 small disc protrusion, with minimal change compared to two (2) previous MRIs done in December 17, 2015 and May 22, 2017¹¹.

ii. Testimony

[14] The Appellant testified that he was raised in Pakistan and has a grade 11 education. He arrived in Canada in 2008. He did not attend school or take any classes in Canada. He started working as a labourer. He held many different jobs such as a driver making deliveries, a labourer working in factories and restaurants. He never worked in Pakistan. He only speaks a little English but is able to understand work related instructions.

[15] He stopped working as a cook following an accident which resulted in severe back pain.

[16] He was seen by his family doctor. He was prescribed medication and referred to physiotherapy. He started physiotherapy sessions immediately after the accident, three (3) times per week. He also tried acupuncture as well as hot and cold therapy. He noticed however little improvement.

[17] He has gone to the hospital many times for his back pain. He has also seen many specialists and had injections which helped but he could not afford to continue paying for them.

[18] He also suffers from depression and is seeing a psychiatrist as well as taking medication.

[19] He stated that he feels pain everyday. He can barely walk when he gets up in the morning. He needs help to get dressed. He cannot do much during the day. He typically checks his emails, takes his medication and does some exercises to help reduce the pain. He cannot sit or stand for long, he therefore lays down most of the time. He also has difficulty driving.

¹⁰ GD4-8

¹¹ GD2-85

[20] He explained that after the accident, he tried to return to work but he was told by his employer that he could not continue because of his limitations. The Appellant stated that there was not many tasks he could do.

[21] He says that he has not been able to get another job because when he mentions that he has a back problem, no one wants to hire him. He added that he is not computer literate.

[22] Currently, he is not undergoing any therapy. He does take medication but they only give him short term relief.

iii. Residual capacity to work

[23] I find that the Appellant does not suffer from a severe disability.

[24] I am not convinced, based on the evidence and the Appellant's testimony that he does not have the ability to function in a vocational setting.

[25] The Appellant seemed reluctant to provide details about the accident or his return to work. He provided very little details on these issues when questioned at the hearing.

[26] The evidence on file indicates that a gradual return to work was offered. The Appellant only returned for one day and did not go back. At the hearing, the Appellant stated that his employer told him he could not work.

[27] The issue I have to determine is whether or not the Appellant his capable of performing any substantially gainful work. The medical reports do not indicate that he is incapable of returning to any work. I recognize that the Appellant has limitations and that he is certainly suffering from back pain and depression. However, that does not mean he is incapable of performing any substantially gainful work. A psychometric assessment of the Appellant indicated that he had a tendency toward reporting the symptoms in an exaggerated and inconsistent manner. The MRI lumbar spine reports from 2015 to 2020 showed very little

change in his condition. Based on the evidence, the Appellant is capable of light duties with the proper pain management regime. Of note, according to Dr. Ugwunze's report, the Appellant stops taking his medication at times.

[28] I base my finding on the medical report stating that the Appellant had significant tendency toward reporting the symptoms in an exaggerated and inconsistent manner. During his testimony, the Appellant did not convince me that he was suffering from a severe disability. The Appellant is seemingly reluctant to try to improve his physical condition and his psychological condition when he stops his medication at will. The Appellant is still very young and with the adequate pain management regime, there is no indication that his condition cannot improve. According to the medical reports, he was assessed and it was determined that he is capable of light duties with gradual increase over time. I also recognize that his language skills are very limited in English but at the hearing, he stated that he does understand instructions in English and he has worked for several years¹² before he submitted his disability pension application.

Prolonged disability

[29] Since I found that the Appellant's disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[30] The appeal is dismissed.

Antoinette Cardillo
Member, General Division - Income Security

¹² GD2-36