



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. E. v Minister of Employment and Social Development*, 2020 SST 716

Tribunal File Number: GP-19-1671

BETWEEN:

A. E.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Claimant represented by: Kaity Yang

Videoconference hearing on: June 16, 2020

Date of decision: July 8, 2020

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of November 2017. My reasons are as follows.

OVERVIEW

[2] The Claimant last worked as a full-time assistant manager at a retail store from June 2014 to May 2017. He indicated that he could no longer work as of that time because of chronic back pain due to multiple compression fractures of the spine, and knee arthritis. The Minister received the Claimant's application for the disability pension on October 15, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, he 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 MQP to be December 31, 2019.

PRELIMINARY MATTERS

[4] The Claimant submitted additional evidence a few days before the scheduled hearing. It included an updated report from his family doctor dated June 10, 2020. Given the Claimant's MQP and the fact that the report could not have been submitted at an earlier date, I allowed GD-12 and GD-13 for consideration. The Minister provided submissions related to those documents following the hearing. This has all been considered in my decision.

ISSUES

[5] Did the Claimant's conditions result in him having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2019?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2019?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged¹. A person is considered to have a severe disability if they are 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 that it is more likely than not that their disability meets both parts of the test. So, if the Claimant meets only one part then he does not qualify for disability benefits.

[8] I found both the Claimant and Witness to be credible. Their testimony was straightforward in answering questions related to the Claimant's work and health history, as well as the impact that his condition has had on his day-to-day life. I have placed equal weight on the oral testimony and on the evidence contained in the Hearing File.

Severe disability

The Claimant suffers from a serious cumulative health condition.

[9] I must assess the Claimant's condition in its totality. That means considering all of his possible impairments, not just the biggest or main impairment².

[10] According to an MRI of the right knee dated December 2018, the Claimant has chronic complex tears of the lateral meniscus and ACL. It also showed grade 4 chondromalacia patellae. An MRI of the spine in January 2019 showed compression fractures from T7-T12, degenerative disc disease, disc wedging, a disc herniation at L4-L5 putting pressure on the left L4 nerve, and

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

² *Bungay v. Canada (A.G.)*, 2011 FCA 47

minor disc bulging from C5-C7. The Claimant has been diagnosed with severe knee osteoarthritis, Scheuermann's disease of the spine, and class II obesity.

[11] The Minister has submitted that the Claimant retains capacity because his orthopedic surgeon did not describe an indefinite disability. The Claimant also has yet to pursue all treatment recommendations.

[12] Dr. Deakon, orthopedic surgeon, did assess the Claimant in 2018 for knee pain. He recommended weight loss, bracing, and injections. He felt that if the Claimant could lose 10 lbs, it would give him significant improvement. In early 2019, the Claimant saw another orthopedic surgeon, Dr. Zabita who advised him that knee surgery could not be done until he lost a significant amount of weight. It is important to note, however, that the orthopedic opinions are based only on the Claimant's knee condition. The knee problems represent only one part of the Claimant's overall health condition.

[13] I find that the Claimant has demonstrated effort to lose weight, but it has not been successful. He attended a medically supervised weight loss clinic in 2019, but he did not lose weight. He has tried many different diets, but they have not worked either. Unfortunately, he has continued to gain weight since 2017. This is due in large part to the chronic pain and functional limitations related to his knees and back. It really limits his ability to be active and exercise.

[14] The Claimant submitted that even if he were to have knee surgery to fix his knee ACL and meniscus, it would not change the fact that he has severe osteoarthritis. The only way to help that is by have a total knee replacement. Because of his young age, however, it is not an option.

[15] I find that Dr. Ghouse, physical medicine specialist, had a good analogy of the Claimant's health status in February 2020. He reported that although the Claimant is relatively young, he has significant pathological conditions. He is in a vicious cycle because his pain limits his activity, and that further increases his weight. Dr. Schal, at the medically assisted weight loss clinic, echoed Dr. Ghouse in September 2019. He reported that the Claimant's activity was limited because of his joint issues.

[16] The Claimant has attended a pain clinic where he had multiple epidural and nerve block injections in his back. They did not help. Physiotherapy, massage, and chiropractic has not helped either.

[17] The Claimant described that the pain in the middle of his back is constant, but the severity varies from day to day. Some nights he is not able to sleep at all because of it. He generally wakes up 2 to 3 times each night. His mid-back pain also affects his neck, and that causes headaches. Overall, the Claimant's condition has not improved since he stopped working. If anything, new problems seem to be developing every few months. For example, his condition all started with the spinal compression fractures, but then he started having right knee and then left knee pain in 2018. Then came the weight gain and depression, which has made everything worse. Even exercise makes his pain worse.

[18] At the time of the MQP the Claimant was taking muscle relaxants and Tylenol #3 for pain. They caused dizziness, fatigue, and stomach issues, but he has to take them to be able to function.

[19] Dr. Ghouse and the Claimant's family doctor have both been very supportive of the Claimant's application and inability to work. In June 2020, Dr. Ibrahim, the Claimant's long-time family doctor reported that the Claimant remained disabled from performing any occupation. Specifically, he was prevented from working because his spinal compression fractures could not be cured with any type of treatment. He also had marked impairment completing simple activities of daily living.

[20] I find that the Claimant has been compliant with recommended treatment to the best of his ability. He has tried medications, rehabilitation therapy, and pain injections without success. He has attended a pain clinic and medical weight loss clinic, but they have not helped. He cannot even be fit for a custom knee brace until he loses weight. I find that the Claimant's actual condition is a barrier to treatment. If he cannot exercise, he will not be able to lose weight. Diet alone has not helped. Even if the Claimant were to lose a significant amount of weight, surgery is only an option for his knee. There is no treatment for his back, which is his chief complaint. So, even if the Claimant were to lose a significant amount of weight and have surgery on his knee, I find that he would still be precluded regularly from any substantially gainful work.

The Claimant's condition has a big impact on his daily life.

[21] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents them from earning a living. It's not a question of whether they are unable to perform their regular job, but rather their inability to perform any substantially gainful work³.

[22] The Claimant enjoyed being active, playing soccer, and playing with his children before his pain started in 2017. Since then, he has not been able to sit for more than 30 minutes or stand for more than 15 minutes. He can only lift 5 lbs and he has a very hard time climbing any stairs. He cannot bend, and has difficulty reaching and looking overhead. Putting on shoes and socks is also very challenging. At home, all of the housekeeping and home maintenance is done by his wife. They used to share the household and caregiving duties. The Claimant's spouse has also had to find a job because they have no other income coming in.

[23] The Claimant worries about how he will wake up each morning. He has to plan each day around his pain and he cannot stick to any schedule. He rarely socializes with others because he does not want to have to lay down wherever he is. When his pain is bad, he has to lay down.

[24] Dr. Ibrahim listed the Claimant's restrictions in July 2019. Those restrictions included no sudden neck or back movement, no twisting or bending, no lifting/carrying or pushing/pulling more than 10 lbs, no running, no jumping, no kneeling, no prolonged sitting for more than 5 minutes without changing positions, and no walking for longer than 10 minutes.

[25] I accept that the Claimant's daily life is unpredictable and controlled by his pain. He has had to become sedentary. This is not by choice, but because he has no alternative. He cannot be active with his children, participate in sports, or perform simple activities of daily living without aggravating his pain. Clearly, his daily life has been profoundly impacted by his condition.

The Claimant is not realistically employable.

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[26] I also need to look at the severe part of the test in a real world context⁴. So, when deciding whether a person's disability is severe, I have to keep in mind factors like the Claimant's age, level of education, language proficiency, and past work and life experience.

[27] The Claimant came to Canada from Egypt in 2012. In Egypt, he completed a university degree in accounting. In Canada, he has only worked in retail sales and as a labourer. He was highly motivated to be successful in the workplace before his condition started. At his most recent job, he was promoted a few times to become the assistant store manager. He was even in talks with the district manager to become a store manager. His last job did involve a fair bit of heavy lifting and climbing stairs. It was physical. The Claimant's pain, however, has not let up since he stopped working in May 2017.

[28] I accept that the Claimant would work if he could. By not being able to sustain any posture for more than a few minutes or commit to any schedule, I find that he would not be a good candidate for re-training or for less physical work. He has not looked for another job because his condition has not improved.

[29] I conclude that the Claimant was suffering from a severe disability, as defined in the CPP, by December 31, 2019.

Prolonged disability

[30] I find that the Claimant's disability was also long continued and of indefinite duration by December 31, 2019. Despite consulting with several specialists and participating in a wide range of treatment, there has been little improvement since 2017. According to Dr. Ibrahim, his spinal condition is not expected to improve at all. Given the chronicity of the Claimant's symptoms and lack of improvement to date, I find little prospect that his condition will improve to the point that he could regularly return to any substantially gainful work.

CONCLUSION

⁴ *Villani v. Canada (A.G.)*, 2001 FCA 248

[31] The Claimant had a severe and prolonged disability in May 2017, when he stopped working. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension⁵. The application was received in October 2018 so the deemed date of disability is July 2017. Payments start four months after the deemed date of disability, as of November 2017⁶.

[32] The appeal is allowed.

Tyler Moore
Member, General Division - Income Security

⁵ Paragraph 42(2)(b) *Canada Pension Plan*

⁶ Section 69 *Canada Pension Plan*