



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DS v Minister of Employment and Social Development*, 2020 SST 712

Tribunal File Number: GP-19-139

BETWEEN:

D. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Kelly Temkin

Claimant represented by: Shyla Oates-Pennell

Videoconference hearing on: July 13, 2020

Date of decision: July 17, 2020

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of April 2017.

OVERVIEW

[2] The Claimant was 48 years old when he applied for a CPP disability pension in March 2018. He last worked as janitor for three months in 2017. He stated that his right leg was amputated below the knee when he was a three-year-old child. He reported that he had been unable to work since September 2017 because of his leg condition. At the hearing, he testified his other conditions included knee, back, and leg pain, along with a weak left hand and seizures. 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 be found disabled by the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. The Claimant's MQP is December 31, 2010.

[4] For the purposes of the CPP, 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. A person must prove that it is more likely than not their disability meets both parts of the test. If the Claimant meets only one part, he does not qualify for disability benefits.

ISSUES

[5] Did the Claimant's below the right knee amputation and other health conditions result in a severe disability, so that he was incapable regularly of pursuing any substantially gainful occupation by December 31, 2010?

¹ paragraph 42(2)(a) of the CPP

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

ANALYSIS

The Claimant's medical conditions interfered with his ability to work by the end of December 2010

[7] The Claimant testified in a straightforward and sincere manner. I found him to be genuine and his testimony was credible.

[8] He testified that at age 3 he suffered the amputation of his right leg below the knee. He cannot stand for long periods, has limited walking, cannot drive (due to seizures) and cannot sit for very long with a prosthesis on. He also has ongoing pain symptoms related to the amputation. He said that with the prosthetic leg he always feels pain at the bottom of his stump. He has soreness ambulating as well as back, hip and knee pain. He said that the pain wearing the prosthetic leg could reach 10 out of 10. He testified that he would need to leave his prosthesis off in order to manage his pain. The more he wore his prosthesis the more pain he created. His coping mechanism was to leave the prosthesis off as long as possible and avoid painkillers because the amount of medication he would need to take would be substantial and he was worried about addiction. He dislikes being outside in the cold in the winter due to a metal plate in his leg. Summer conditions create difficulties and pain due to humidity. He wears the leg when he brushes his teeth, shaves or gets groceries. He minimizes his pain by leaving the house as little as possible. He has very little social life because of his medical condition.

[9] The Claimant also tried for a new prosthetic leg but that did not help. About four years ago, with much effort he got funding for a new leg. He saw the prosthesis technician once or twice a week. In spite of his best efforts, the leg failed. He now has funding for a new leg, but so far, the attempts to create a suitable prosthesis have failed again. It takes about six months of trial and error to try to create a leg but it is not an easy process. At 12 years old, he was told that he might need another amputation later. A few years ago, a prosthetic specialist said to him that no doctor would touch his leg due to the anatomy. His leg feels like it is 70 and his residual limb is deformed.

[10] At 17, he contracted meningitis and was paralyzed on his left side. He had several surgeries. Despite rehabilitation therapy, his left hand never really came 100% back. This made using a computer difficult. He also had several grand mal seizures when he was in his late teens because of the meningitis. He had a few small seizures as an adult including one a year ago and one a few weeks ago. This is why he does not drive. He did not see the doctor for the small seizures.

[11] The Claimant described a typical day in 2010. He read the news, went on his computer for about half an hour, showered, watched TV and listen to music. Things were pretty much the same now.

[12] He testified his father had a heart attack and began living with his brother and him. His brother was mostly responsible for their father. The Claimant made extra food for his dad when he was making his own meals. He did the laundry for him. Eventually his father was hospitalized with dementia.

[13] The Claimant's healthcare providers confirmed the nature of his impairments. The family doctor writes that the Claimant had a below the right knee amputation in early childhood and a prosthesis since then. His relevant medical history reveals he had poor balance and could not stand for more than half an hour. He did not take any medications. There were no consultations or medical investigations planned. The family doctor gave him a poor prognosis.²

[14] I would have preferred to see medical evidence around the time of the MQP. However, the Claimant's right below knee amputation arose in childhood and I am satisfied this condition predates the MQP. I had the benefit of hearing evidence about the Claimant's longstanding disability and the impact his childhood amputation has on his ability to function as he ages. He lives with his older brother, rarely leaves the house, does not drive (due to seizures) and does not socialize. The Claimant must order his life in such a way that the pain of wearing his prosthetic leg does not overwhelm him. As a result, he is isolated and his mobility is extremely limited, which significantly restricts his ability to do his activities of daily living.

² GD2-56

[15] I am satisfied that the Claimant's disabilities and in particular his right leg below knee amputation interfered with his ability to work by the end of December 2010.

The Claimant lacked a regular capacity for substantially gainful employment by the end of December 2010

[16] The Minister submits that while the Claimant cannot return to his usual work due to his medical condition, the medical evidence does not show that he was unable to work at other jobs since his MQP.

[17] He ran a production lines making glass for 19 years. He stopped in 2009 because the plant closed. By this time, his attendance was horrible and he struggled to make it through the day. By the time he was 30 years old, his right leg started to get worse and working became more difficult. He tried to stay off his leg. By 2009, he was only able to work for a few weeks and then stay off his legs for three or four days.

[18] After 2009, he lived off his savings for some time. Eventually he went on welfare (Ontario Works). He was on the provincial disability pension (ODSP) for two years until he became ineligible because he received a small pension from his former employment.

[19] In 2017, he was on welfare and told to train and work as a janitor. He was afraid he would be cut off if he refused. Learning the new information was not difficult. However, during the classroom component of the training, it was tough to sit with his artificial leg on. He would need to leave the room for periods of 5 to 10 minutes and was always the last one to finish tasks because of the physical challenges. Once he was on the job site, tasks included things that he felt were not safe for him like vacuuming, being on ladders and scrubbing down on his knees. He took care to soak his leg in a pail of water and apply lotion during this time. After 11 weeks, he could no longer continue doing the job.

[20] The Claimant testified he has made efforts over the past ten years to find suitable work. He went to vocational services and a second careers program. He talked to many social workers and occupational therapist but nobody offered a suggestion about work that was realistic.

[21] I was struck by the efforts the Claimant has made to address his physical limitations and the obstacles he has faced trying to improve the quality of his life or his ability to work. His testimony shed light on the severity of his below knee amputation in the context of a whole person analysis.

[22] The severe criterion must be assessed in a real world context. 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.³ The Claimant was forty years old at his MQP and is fluent in English. He has a high school education and worked for the same employer for 20 years. None of these personal characteristics would have significantly limited his employment opportunities.

[23] However, the Claimant's work experience is confined to physical jobs, which he is no longer able to do. He has no previous office experience, lacks computer skills and has difficulties with typing. In addition, because of his limitations with sitting, I do not think he could regularly and consistently manage sedentary work at his MQP or today. Looking after his father is not in my view evidence of work capacity because his role was very limited. His ability to do very light household chores or grocery shop, which can be done at his own pace, cannot be equated with capacity to perform lighter work duties in the commercial marketplace.⁴

[24] While the Claimant was able to attend a retraining course in 2011, an ability to study does not automatically equate with an ability to work. I do not think that given his work experience and limitations with standing, sitting, balance and walking that any skills he acquires in the classroom will transfer into the real world. I see no basis for a finding that he has skills transferable to sedentary work.

[25] Based on the Claimant's work history and testimony, I believe he has a good work ethic. He worked for almost twenty years on a production line. Clearly, his medical condition deteriorated with age. Since 2009, he has made significant efforts to find work, including contacting various agencies that support persons with disabilities in looking for suitable

³ *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁴ *Morley v. MEI* (November 23, 1995), CP03296 (PAB). PAB decisions are not binding on me, but I find it persuasive.

employment. I believe he would be working if he could. He has asked various professionals including social workers and occupational therapists to help him find suitable work. He completed a co-op placement as a janitor but after trying for several months, it was impossible for him to continue the work due to his medical condition. I think his September 2017 attempt to work, while commendable, is a failed work attempt. He has shown that efforts to maintain employment were unsuccessful because of his health condition.⁵

[26] The Claimant suffers a lot of pain when he uses his prosthetic leg. He has made a lot of effort over the past 15 years to find a comfortable prosthesis without success. While I hope this new prosthesis will help him to function better, I think it would be speculative to make any conclusions about the outcome.⁶

[27] I find that the Claimant has established that it is more likely than not that he had a severe disability by the end of December 2010.

PROLONGED

[28] The Claimant had a right below knee amputation in childhood and the family doctor confirms his prognosis is poor.

[29] His disability is long continued and of indefinite duration. I therefore find that it is prolonged.

CONCLUSION

[30] The Claimant had a severe and prolonged disability by December 31, 2010, when he could no longer work due to his medical condition. 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 pension.⁷ The Minister received the application in March 2018,

⁵ *Inclima v. Canada* (A.G), 2003 FCA 117

⁶ *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB)

⁷ Paragraph 42(2)(b) *Canada Pension Plan*

so the deemed date of disability is December 2016. Payments start four months after the deemed date of disability, as of April 2017.⁸

[31] The appeal is allowed.

Kelly Temkin
Member, General Division - Income Security

⁸ Section 69 *Canada Pension Plan*