



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. M. v Minister of Employment and Social Development*, 2020 SST 735

Tribunal File Number: GP-19-877

BETWEEN:

S. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Jackie Laidlaw

Teleconference hearing on: June 25, 2020

Date of decision: July 11, 2020

DECISION

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

OVERVIEW

[2] The Claimant is a 54 year-old man who has had cerebral palsy (CP) since birth. He also suffers from depression, anxiety and alcoholism. He has worked over the years in a variety of jobs. In 2009, he left a good job in telecommunications after falling and breaking his foot. After the break, his balance has worsened. Two years after leaving the telecommunications job, he got a job as a road sweeper where he has made a less than a substantially gainful income¹ every year. The Minister received the Claimant's application for the disability pension on May 17, 2018. The Minister denied the application as the Claimant is still working. 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, 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 to be December 31, 2020. As the MQP is in the future, the Claimant must be found disabled as of the date of the hearing.

ISSUE(S)

[4] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the date of the hearing?

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

ANALYSIS

¹ In May 2014, section 68.1 of the CPP Regulations was added to provide a formula to determine a threshold for "substantially gainful occupation" which is essentially 12 times the maximum monthly retirement benefit.

[6] 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 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.

Severe disability

The Claimant's condition declined after 2009

[7] There is no dispute the Claimant has cerebral palsy. The CP affects his right side. Since birth, his right hand and arm shake. There is also no dispute he suffers from alcohol dependence and depression. The Claimant testified that the fall in 2009, which broke his right foot, caused his balance to decline to the point where he needs a walker to ambulate. Because of his lack of balance and his cerebral palsy, people think he is drunk when he is not.

[8] Because of his CP, his balance was already unsteady when he broke his foot. He required crutches and went off work for 12 weeks. When he returned to work, again due to his lack of balance, he broke his right ankle. He stated that the break was not handled well at the emergency department and so it did not heal properly. He took 14 weeks off work to tend to his ankle. He was fired because he could no longer climb ladders. He took one more year to try to heal.

[9] His family physician, Dr. Mark Clark, noted in August 2019 that as he ages his motor function would likely become more of an issue. He also noted that he has done very well managing a job in the past but now it is progressively difficult and, his physical limitations may limit any further employment.³

[10] Dr. Clark also noted in the medical report of May 2018 that his depression increased in the last year related to the CP and his decreased functioning.⁴

The Claimant has worked for a benevolent employer

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

³ GD 3 4 as per a medical note of August 29, 2019

⁴ GD 2 49 Medical report dated May 17, 2018

[11] His employer, J. S. of X wrote a letter in June 2020 indicating that his marked degradation of mobility affects his work. He needs help getting in and out of the machine equipment (street sweeper) though, when in it, he can operate it well. He also noted that his physical limitations impede his ability to operate water truck hoses, valves and hydrants and would not be able to work much longer.⁵

[12] The Claimant looked for work after taking 2010 and 2011 off to heal from his ankle and foot problems. His balance was so bad by that point he did not get any interviews for jobs. He got the job with X through his brother. J. S. knew he did not walk well but that he could drive the machinery without a problem. As J. S. wrote in his letter, his condition has deteriorated where he will not be able to work much longer.

[13] I accept that J. S. can be considered a benevolent employer⁶. The employer actually has to put the Claimant in the machine in order for him to do his job. It is highly unlikely he would find another employer willing to accommodate him like that.

The Claimant does not make a substantially gainful income

[14] 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’s 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 work⁷.

[15] The Claimant stated he typically works 60 hours every two weeks for five weeks in the spring. He stated there could be opportunities for more work but he cannot manage it. J. S. letter corroborates the testimony.

[16] His record of earnings shows that his best earning year was in 2007, making \$43,700, then it decreased in 2008 to \$26,125. He was working at the telecommunications company at the time. After that, he began working at X and from 2011 until 2018, he never made a substantially

⁵ GD 5 a letter from J. S. June 7, 2020

⁶ *Atkinson v. Canada (Attorney General)*, [2014] F.C.J. No 840, 2014 FCA 187 states that a benevolent employer is someone who will vary the conditions of the job and modify their expectations of the employee in keeping with his limitations. The reduced ability to perform at a competitive level is accepted by the benevolent employer and the employee is incapable regularly of pursuing any work in a competitive workforce.

⁷ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

gainful income. In fact, in 2017 and 2018 his annual income was below the disability basic exemption of the year.

[17] The Claimant did work, but did not make a substantially gainful income.

[18] I must assess the severe part of the test in a real world context⁸. 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.

[19] He is well educated, having gone to university but not graduating. He has always worked with his CP, in the past as an ambulance patient transfer services for seven or eight years, then as a telecommunications technician for 12 years. He was eventually fired from the telecommunications job after his balance and functioning decreased. It has already been shown that the Claimant is struggling in a job where all he has to do is sit in a machine and work the controls. However, he needs help to get into the machine and is fortunate to have a benevolent employer.

[20] It is highly unlikely that he will be able to return to any of the previous jobs he has done. His employer has already stated that he will be unable to work much longer, even with the generous accommodations. His doctor has stated his limitations and physical condition will limit further employment opportunities.

[21] The Claimant was very honest in his testimony. He has a great support system as letters were written from his brother and his 89-year-old father, as well as his employer. They all support his application and have made claims of his deteriorating condition.

[22] I commend the Claimant for continuing to work despite his limitations. I also find that he has not made a substantially gainful income in years as he is incapable of working at any other jobs.

[23] I find the Claimant has proved to have a severe disability that renders him incapable regularly of pursuing any substantially gainful occupation.

⁸ *Villani v. Canada (A.G.)*, 2001 FCA 248

Prolonged disability

[24] The Claimant has had CP since birth. It is a disease that is incurable.

[25] Dr. Clark has noted that his condition will continue to deteriorate as he ages. The evidence shows it has.

[26] I find the Claimant has a prolonged disability that is likely to be long continued and of indefinite duration.

CONCLUSION

[27] The Claimant had a severe and prolonged disability in August 2009, when he stopped working at a substantially gainful occupation. 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 pension⁹. The application was received in May 2018 so the deemed date of disability is February 2017. Payments start four months after the deemed date of disability, as of June 2017¹⁰.

[28] The appeal is allowed.

Jackie Laidlaw
Member, General Division - Income Security

⁹ Paragraph 42(2)(b) *Canada Pension Plan*

¹⁰ Section 69 *Canada Pension Plan*