



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *LK v Minister of Employment and Social Development*, 2020 SST 714

Tribunal File Number: GP-20-376

BETWEEN:

**L. K.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Connie Dyck

Teleconference hearing on: July 27, 2020

Date of decision: July 29, 2020

## **DECISION**

[1] The Claimant (L. K.) is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of November 2018.

### **Overview**

[2] The Claimant is 59 years old. He says he is unable to work because of back pain and leg numbness. He stopped working as a X in July 2018. The Claimant applied for a CPP disability pension in January 2019. The Minister denied his application. He appealed to the Social Security Tribunal.

[3] To qualify for CPP disability benefits, 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 (called the “MQP”). The calculation of the MQP is based on the Claimant’s contributions to the CPP. I find the Claimant’s MQP is December 31, 2021. Because the Claimant’s MQP date is in the future, I must decide if he was disabled by the date of the hearing (July 27, 2020).

### **Is the claimant’s disability both severe and prolonged?**

[11] First I have to decide if the Claimant’s disability is severe. Canada Pension law says “severe” means that a claimant cannot regularly work in any “substantially gainful” job because of the disability.<sup>[1]</sup>

[12] If the Claimant is able to regularly do some kind of work that is substantially gainful, then he is not entitled to a disability pension.<sup>[2]</sup>

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<sup>[1]</sup> The legal definition of “severe” is in s 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>[2]</sup> This is explained in a Federal Court of Appeal decision called [\*Klabouch\*](#).

[13] To decide on this, I have to look at the effect of the Claimant's medical conditions on his capacity to work.<sup>[3]</sup> I also have to look at the Claimant's background. This includes age, level of education, language, and past work and life experience. This is so I can get a "real world" picture of whether the disability is severe.<sup>[4]</sup>

[14] I have to think about two things:

- how the Claimant believes his health problems affect his capacity to work. This is the Claimant's personal evidence.
- what doctors and other medical professionals say about the Claimant's conditions. This includes evidence such as what a doctor has to say about the results of medical tests.

### **Is the Claimant's disability severe?**

[15] I have to look at whether the Claimant's disability prevents him from earning a living. The question is not whether the Claimant is unable to perform his regular job. I need to decide whether or not the Claimant can do **any** substantially gainful work.<sup>[5]</sup> This is called the Claimant's "capacity to work." I cannot just look at the diagnosis.<sup>[6]</sup> The key is how the Claimant's health affects daily functioning and capacity to work.<sup>[7]</sup>

### **Why the Minister denied the Claimant's CPP disability application**

[16] The Minister submits that the medical evidence does not show any serious pathology that would prevent the Claimant from doing suitable work within his limitations. This means he has work capacity. The Minister says that although the Claimant may not be able to perform his previous job as a X, which was a physically

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<sup>[3]</sup> The Federal Court of Appeal explains this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>[4]</sup> The Federal Court of Appeal explains how to understand the concept of a "severe" disability in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>[5]</sup> The Federal Court of Appeal explains this in a case called *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>[6]</sup> This is explained by the Federal court of Appeal in a case called *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>[7]</sup> The Federal Court of Appeal explains this in a case called *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

heavy occupation, he has not tried alternate work. That is why his application was refused.

### **Why the Claimant says he is unable to work**

[17] The Claimant says he has a curve in his spine, which has deteriorated over the years. He feels he has been unable to work since July 2018 because of severe scoliosis. He says his ability to sit or stand for at least 20 minutes is poor. He needs a cane to walk. He is unable to use a computer, carry light items, kneel or bend.<sup>1</sup> The Claimant says because of his limitations, pain and numbness, he is unable to work at any job.

### **The medical evidence supports that the Claimant is disabled**

[18] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment<sup>2</sup>. Also, the Claimant must provide some objective medical evidence to support a disability claim.<sup>3</sup>

[19] Dr. Abraham said the Claimant had diagnoses of degenerative disc disease/Sciatica, severe Scoliosis and a right shoulder injury.<sup>4</sup>

[20] However, I must consider the Claimant's capacity to work and not just the diagnosis of his conditions to determine whether his disability meets the definition of severe.<sup>5</sup> It is the functional effect of the Claimant's health condition on his ability to work that is key, not the nature of name of the health condition.<sup>6</sup> The Minister agrees the medical evidence supports that the Claimant would be unable to return to his job as a X. However, it is not a question of whether the Claimant is unable to perform his regular

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<sup>1</sup> This information is at GD 2-7-10 in the Claimant's application

<sup>2</sup> *Bungay v Canada (AG)*, 2011 FCA 47

<sup>3</sup> *Warren v Canada (AG)*, 2008 FCA 377

<sup>4</sup> Dr. Abraham's report is at GD 2-90 – GD 2-92.

<sup>5</sup> *Klabouch v Canada (MSD)*, 2008 FCA 33

<sup>6</sup> *Ferreira v Canada (AG)*, 2013 FCA 81

job, but rather the Claimant's inability to perform any substantially gainful work<sup>7</sup>. This is a reason why the Minister denied the Claimant's application. The Minister said the Claimant has capacity for lighter duty work. I agree that the Claimant's shoulder injury would not prevent him from suitable work. In fact, Dr. Abraham said that there had been significant improvement with physiotherapy. Although the Claimant may not be able to lift heavy objects, this would not interfere with suitable, lighter duty work.

[21] I also agree with the Minister that the Claimant's severe scoliosis condition would not meet the criteria of 'severe' as defined in the CPP. Dr. Abraham says that the Claimant has had this condition since his teenage years but that there is no significant impairment.

[22] However, I disagree with the Minister that the Claimant's degenerative disc disease/sciatica is not severe. I find that the medical evidence and the testimony of the Claimant support that the Claimant would be unable to work at any job in a real world context. The Claimant's symptoms started in 2016. He continued to work until July, 2018 when clinic notes report that his chronic back pain was getting progressively worse. Dr. Abraham said that he recommended the Claimant stop working.<sup>8</sup> In his appeal to the Tribunal<sup>9</sup> the Claimant reported that Dr. Abraham said he had capacity for light duty work in 2018. I was confused by this because Dr. Abraham said he told the Claimant to stop working in July 2018. I questioned the Claimant about his statement. He explained that he based his statement on information in the Minister's Reconsideration decision.<sup>10</sup> The third reason given by the Minister for not allowing the reconsideration was "Considering your work experience, you would have transferable skills for lighter physical work, on a part-time basis if necessary". The Claimant said he thought the Minister was referring to information in a letter from Dr. Ali. When I looked at the first two points in the reconsideration decision, I found this to be a reasonable assumption.

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<sup>7</sup> *Klabouch v Canada (AG)*, 2008 FCA 33

<sup>8</sup> The clinic note is at GD 2-109.

<sup>9</sup> This information is at GD 1-3.

<sup>10</sup> The reconsideration decision is at GD 2-42.

Both of the first two points refer to information from the Claimant's doctors. However, the third point, is the Minister's submission and not information provided by a doctor. The Claimant's assumption that the third point also referred to medical information is reasonable. For these reasons, I accept the Claimant's testimony that his doctor has never told him he has capacity for lighter duty or sedentary work. I find no evidence from any doctor that the Claimant has work capacity for lighter duty, sedentary or part-time work.

[23] The Claimant testified that in 2018, he was missing many days from work because of pain in his back and numbness in his legs. He would miss days every two weeks. By July 2018, the pain and numbness had increased to the point he was no longer able to work. It is true that his job involved prolonged standing and no light duty jobs were available, but based on his functional limitations as reported by both the Claimant, Dr. Abraham and Dr. Abd, I find that the Claimant does not have capacity for lighter duty or more sedentary work. He can only sit for 20 minutes without pain and then needs to stand up or lie down.

[24] The Claimant told me that he spends most of his day lying down because this is the most comfortable for him. He has sold his home and lives with his brother and sister-in-law. He testified that he relies on them from all of his basic activities of daily living such as cooking, cleaning and laundry.

[25] In January 2019, Dr. Abraham said that because of the Claimant's chronic low back pain and hip and leg pain, he was unable to sit or stand for more than 20 minutes. It was expected that his condition would not improve but would deteriorate.

[26] At the end of the year, in December 2019, the Claimant's capacity to sit and stand had not improved. It was Dr. Abd's opinion that the Claimant cannot work, even light duties, because he cannot sit for more than 20 minutes and cannot stand for more than 29 minutes. He also has a 50% limitation of forward bending.<sup>11</sup>

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<sup>11</sup> Dr. Abd's letter is at GD 1-5.

[27] The Claimant's condition is being treated with Tylenol extra strength, arthritis medication and rest. Although these treatments may seem conservative, they do not define the severity of the Claimant's condition. I considered that the Claimant has complied with all treatment recommendations. In fact, it was he who requested a referral to a specialist. Unfortunately, there are no further treatment options available to him.

[28] Based on his functional limitations, abilities and the restrictions as well as the accommodations, which would be required from an employer, I was not persuaded that the Claimant would have work capacity or the capacity to retrain.

***The Claimant's personal circumstances limit his capacity to work***

[29] I must assess the severe part of the test in a real world context<sup>12</sup>. This means that I consider the Claimant's personal circumstances such as age, level of education, language proficiency, and past work and life experience in combination with the health condition and resulting limitations.<sup>13</sup>

[30] I am satisfied that the Claimant's education, language proficiency, and life and work experience would significantly limit his ability to transition to a less physically demanding occupation. The Claimant is 2 months shy of 60 years old. He has a very limited work history. He has limited work experience, which has consisted of only physical type labour including working in construction and as a X for the past 23 years. These are physically demanding occupations, which the Claimant is unable to do and provide few, if any, transferable skills. Further, the Claimant has no computer skills and has never been employed in a sedentary type job. The Claimant has a grade 11 education with no other formal training or education.

[31] The Claimant is not required to satisfy me that he is unable to do any conceivable job, but any realistic job in the competitive workforce given his limitations. He is in

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<sup>12</sup> *Villani v Canada (AG)*, 2001 FCA 248

<sup>13</sup> *Bungay v Canada (AG)*, 2011 FCA 47

constant pain; is limited to sitting or standing for 20 minutes; has decreased mobility being able to walk a short distance with the use of a cane and is unable to drive a vehicle because of numbness in his leg.

[32] I am satisfied that the Claimant's education and life and work experience would significantly limit his ability to transition to any suitable occupation. Considering the Claimant's age and his limited work history in conjunction with his medical condition, he would likely be incapable of retraining or of performing a suitable job.

### **The Claimant's disability is prolonged**

[33] The Claimant's physical conditions have been long-standing. His back pain and leg numbness became progressively worse since 2016. By July 2018, he was no longer able to work at any job. His symptoms and function ability have not improved despite no longer working. The orthopedic surgeon stated that surgery was not an option.<sup>14</sup> There are no further treatment options planned for the Claimant. Further, there is no evidence to suggest that his condition will improve and he continues to be limited by pain and decreased ability to stand, sit or walk.<sup>15</sup> It is Dr. Abraham's opinion that the Claimant's degenerative disc disease and sciatica will not improve and possibly continue to deteriorate.<sup>16</sup> As a result, I find the Claimant's disability to be prolonged.

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<sup>14</sup> The surgeon's letter is at GD 1-6.

<sup>15</sup> Dr. Abd's letter is at GD 1-5.

<sup>16</sup> This is at GD 2-90.



## **CONCLUSION**

[34] The Claimant had a severe and prolonged disability in July 2018. Payments start November 2018, four months after the date of disability<sup>17</sup>.

[35] The appeal is allowed.

Connie Dyck  
Member, General Division - Income Security

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<sup>17</sup> Section 69 of the *Canada Pension Plan*