



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JM v Minister of Employment and Social Development*, 2020 SST 885

Tribunal File Number: GP-19-946

BETWEEN:

J. 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: July 14, 2020

Date of decision: July 27, 2020

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Claimant was in receipt of a CPP disability benefit as of August 2, 1995. His disability is HIV and AIDS. The benefit was suspended as of May 1, 2010 due to unreported T4 earnings from 2006-2009. The benefit was ceased on September 29, 2010, effective September 1, 2006. The Claimant appealed the decision to the OCRT on March 25, 2011. The hearing was adjourned on November 17, 2011. The Social Security Tribunal (SST) dismissed the appeal on August 14, 2015 with regard to the issue whether it was more likely than not that the Claimant ceased to be disabled as of September 2006. A leave to appeal was granted limited on the issue of whether the Claimant was employed in a substantially gainful occupation from 2006 to 2009. On September 21, 2017 the SST Appeal Division dismissed the appeal. The issue in this appeal was whether it was more likely than not that the Claimant ceased to be disabled as of September 2006. Therefore, a jurisdictional window exists between September 2, 2006 and the MQP of December 31, 2007 and continuously.

[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, 2007 and continuously.

ISSUE(S)

[4] Did the Claimant's conditions of HIV and AIDS, back pain, eye ulcers and PTSD (Post-Traumatic Stress Disorder) result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation between the jurisdictional window of September 2, 2006 and December 31, 2007, and then continuously to the present?

[5] If so, was the Claimant's disability also long continued and of indefinite duration between the jurisdictional window of September 2, 2006 and December 31, 2007?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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 still has HIV and AIDS

[7] There is no dispute that the Claimant suffers from AIDS and is HIV positive. In 1995, when he began receiving a CPP disability benefit, the disease was still relatively new and unknown and the treatment was onerous. As well, the mortality rate for persons with the disease was high.

[8] Today, the Claimant continues to see his HIV clinic doctor, Dr. Gill, whom he first saw in 1995. He is now down to only two medication daily that he takes for HIV. As it has been over 25 years since his diagnosis, I recognize that he is managing his condition well with medications monitored through the same doctor.

[9] He testified that he was capable of working with AIDS and HIV. While his employer was unaware of his disease, it did not affect his ability to work.

The Claimant has other conditions

[10] He testified that in 2004, 2005 and 2006 he was going through different drug studies. It was during this period he found out he had Hepatitis B. He also stated that he suffers from corneal ulcers in both eyes due to the HIV. This occurred while working between May 2006 to

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

November 2009. Between 2009 and 2018, he reported ongoing gastrointestinal (GI) issues, again due to the HIV.

[11] Finally, he outlined a traumatic event with his sister in 2012, which caused a traumatic brain injury and PTSD. He also noted that his time working in the military in 1977 caused PTSD. There is no medical information provided to substantiate that the Claimant continues to suffer from PTSD since 1977.

[12] I accept that there would be residual effects, such as GI issues and ulcers in his eyes due to the HIV. Unfortunately, the Claimant refused to provide consent to the Minister to get information on his medical condition between September 2006 and December 2010. He stated he felt they had all the information they needed and his diagnosis had not changed. As there is no supporting medical evidence regarding the GI issues, corneal ulcers or the PTSD, I am unable to determine that these conditions were medically severe and prevented him from working.

The Claimant was capable of finding and maintaining gainful employment

[13] In 1999, Dr. Labrie, a doctor at the AIDS clinic hospice, wrote that the Claimant is manipulative, not forthright, and tries to pull something over. He stated he never holds jobs for long due to an instable personality and is often fired for non-cooperative behaviour.²

[14] The Claimant is not claiming he is incapable of working due to a mental health issue, other than the PTSD from the incident with his sister. This incident happened in 2012, after his MQP, and the period he worked. As well, there is no medical information provided for the period between September 2006 and December 2007, or until he stopped working in November 2009, to indicate that he had or was treating an unstable personality trait. Therefore, while I do not question the opinion of Dr. Labrie, the reasons outlined for his inability to hold a job are not supported by any other medical information, or even supported by the testimony of the Claimant.

[15] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition³.

² GD 2 345 April 28, 1999 Dr.Labrie

³ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[16] In 2006, the Claimant felt like working. He was at home all the time and wanted to do something for four hours a day. He was on a CPP disability benefit as well as AISH (assured income for the severely handicapped). He testified to a disconnect between the two benefits and the threshold of income allowed. The CPP allows a recipient to make up to \$5,000 a year without the income affecting the benefit. The threshold for AISH is higher.

[17] He saw a job in the help wanted ads for a “groomer” at the airport working for ATS. The job is listed as a baggage handler but that is just the division under which the job is placed. The job required him to go on each grounded plane for 10 minutes and clean out the seats and the galley. He worked alone and there was no lifting or carrying required. It was part time, working from 11 a.m. to 1 p.m. daily. He worked on three to four airplanes.

[18] He did not apply for a full time position because he did not want to go over the income thresholds for CPP or AISH.

[19] However, he did work more than part time. He stated that at the time, there was the H1N1 virus and many people were off work. He worked more hours, working 11 at night to 7 in the morning cleaning airplanes. When he was called in at the last minute for extra hours he was paid time and a half.

[20] His employer did not know he was HIV positive. The only accommodation he requested, and received, was that the not clean bathrooms due to his immunity levels.

[21] He also got another job at the same time. The X office was across the hall in the airport. He applied and was hired to supply food and services to airplanes. The job was from 3 pm to 11 pm five days a week. He states other employees were harassing him at X so he quit. The shift also interfered with the shift at ATS. He only worked one month at X. There is no indication that he was unable to work due to his health conditions.

[22] He also stated co-workers at ATS harassed him and that is why he quit that job in November 2009. One person pulled a chair out from under him and he pulled his back. He

stated that his back is still not back to normal. Again, there is no medical information on his back condition and therefore I am unable to assess its severity.

[23] He did say he took a lot of time off due to his back injury and the harassment. The employment questionnaire from ATS⁴ indicates he only used 31 sick days over the span of his employment between 2006 and 2009. This amounts to roughly 10 days a year, which would be considered average. His work was good. He worked independently and only required occasional supervision. He worked part-time, as that was all that was available. The employer notes that he quit and left the job without any notice.

[24] He then received regular Employment Insurance (EI) benefits from January 31, 2010 to March 31, 2010. I agree with the Minister that when a person is receiving regular EI benefits they agree they are willing and able to work.

[25] There is evidence of work capacity and the Claimant was capable of obtaining and maintaining employment for three years. He did not stop working due to any medical condition. Rather, he quit for other reasons.

[26] I must assess the severe part of the test in a real world context⁵. 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.

[27] The Claimant found two jobs despite his conditions. His age, (48 at the time of his MQP), level of education (Grade 11), and his English language capability did not prevent him from working between September 2006 and November 2009. The same factors did not prevent him from obtaining his previous jobs such as a school bus driver, a valet driver or employment with the military or the commissionaire as he stated. As he could work with his conditions, there is no reason he would be prevented from working after he quit in November 2009.

[28] In 2006, he made \$8,186 at ATS and \$1,361 for the one month at X. His earnings in 2007 were \$12,987; in 2008 \$13,057 and in 2009 \$18,564. His earnings increased over the years, which he stated was from taking on more hours. These earnings are in the range of the

⁴ GD 2 259 July 2010

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

amounts of money he annually made from 1979 to 1995 before he received the CPP disability benefit. This was a part-time job and he did not have medical reasons he could not work full time. Full time shifts were not available in the job, and he did not want to risk losing his AISH or CPP disability benefits by working full time. Therefore, I find he was capable of working full time. If he had worked full time, he would have made more than he had in the past.

[29] The determination for “substantially gainful” cannot be decided by a one-size-fits-all figure. It requires a judgmental assessment, which could involve considering local income levels and cost of living, as well as other factors specific to the circumstances of the individual.⁶

[30] Considering inflation and other factors, he made roughly the same income in 2006 to 2009 as he made from 1979 to 1995. I conclude this would be considered substantially gainful income.

[31] The Claimant willingly applied for and obtained two jobs in 2006. He quit both due to interpersonal reasons and not because he was incapable of working due to his health, despite still having the HIV and AIDS. He was able to work regularly, taking an average of 10 sick days a year. The income he made was substantially gainful.

[32] I find the Claimant has failed to prove a severe disability that renders him incapable regularly of pursuing any substantially gainful occupation between September 2006 and December 31 2007 and continuously.

CONCLUSION

[33] The appeal is dismissed.

Jackie Laidlaw
Member, General Division - Income Security

⁶ *MSD v. Nicholson* (April 17, 2007), CP 24143 9PAB)