



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *WH v Minister of Employment and Social Development*, 2020 SST 1205

Tribunal File Number: GP-19-957

BETWEEN:

W. H.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Antoinette Cardillo

Teleconference hearing on: September 10, 2020

Date of decision: September 29, 2020

DECISION

The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[1] The Minister received the Appellant's application for the disability pension on July 24, 2018¹. The Appellant is 54 years of age. He completed a general educational development (GED) program to obtain a high school equivalency diploma, and a one-year basic welding diploma program. He also obtained a journeyman painter certificate. He described his main disabling condition as paralysis, pain, numbness and swelling in the right hand and arm, nerve damage in the right arm, a pinched nerve in the neck and numbness in some fingers on his left hand. The Appellant was last employed as a maintenance worker from November 14, 2005 to March 30, 2018 when he stopped working due to paralysis and nerve damage to his neck, right arm and right hand. He indicated on the Questionnaire for disability benefits² that he felt he could no longer work as of April 6, 2018. The Minister denied the application initially and on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[2] To qualify for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant 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 Appellant's contributions to the CPP. I find the Appellant's MQP to be December 31, 2021. In this case, given that the Appellant's MQP is in the future, I must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the hearing.

ISSUES

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

¹ GD2-21

² GD2-177

[4] If so, was the Appellant's disability also long continued and of indefinite duration?

ANALYSIS

[5] Disability is defined as a physical or mental disability that is severe and prolonged³. 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 Appellant meets only one part, the Appellant does not qualify for disability benefits.

Severe disability

[6] I must assess the severe part of the test in a real world context⁴. 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.

[7] 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 is 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 work⁵.

i. Medical reports

[8] Following a workplace injury in November 2017, the Appellant twisted his back and neck while holding a ladder. An x-ray report of the cervical spine dated November 6, 2017⁶ showed minimal narrowing of the disc space at C5-C6 suggestive of early degenerative process and the neural foramen appeared patent bilaterally at all levels.

[9] Physiotherapy reports⁷ from November 27, 2017 to January 3, 2018 indicate diagnoses of cervical spine degenerative disc disease, back strain and neck strain with radicular symptoms.

³ Paragraph 42(2)(a) *Canada Pension Plan*

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

⁵ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁶ GD2-72

⁷ GD2-84 to GD2-91

The physiotherapist noted that although the Appellant may have intermittent flare-ups related to degenerative disc disease in the cervical spine, this does not mean that he cannot return to work full-time, doing his full work duties. He was discharged from physiotherapy in January 2018 and cleared to return to pre-injury job.

[10] On April 13, 2018⁸, the Appellant experienced numbness in his right hand and his physiotherapist recommended that he return to work on modified duties.

[11] On May 8, 2018⁹, the Appellant was assessed by Dr. Maharaj, Neurologist, who noted that a computed tomography (CT) scan showed the Appellant had a narrow disc space at C5-C6. Dr. Maharaj's examination also revealed weakness in the right arm, wrist and fingers. An electromyography (EMG) study showed the Appellant had a significant radial nerve palsy with prominent involvement of the posterior interosseous branch of the radial nerve. He added that the Appellant would not be able to work comfortably or safely at his job as a maintenance worker because of hand weakness. Dr. Maharaj also noted that it would take six (6) to 12 months for a full recovery.

[12] The Appellant was seen by Dr. Malik, neurosurgeon on February 4, 2019¹⁰. He had been seen previously on July 9, 2018, November 21, 2018. Dr. Malik noted that numbness was the dominant complaint by the Appellant rather than pain. The Appellant's pain in his neck had largely abated, and even though he had residual sensory deficits in the right C6 distribution and some residual motor dysfunction, he did not appear to have a clear indication for surgical intervention. Dr. Malik indicated that conservative management was the preferable method of treatment and should include one or two (2) sessions of physiotherapy dedicated to exercises to strengthen the right wrist and right biceps, along with isometric tension exercises for his neck. In October 2019, Dr. Malik again noted that pain was not a prominent complaint, there is no clear indication for surgical intervention and a conservative management program was advised.

⁸ GD2-97

⁹ GD2-100

¹⁰ GD2-37

[13] On July 10, 2019¹¹, Dr. Milbum, family medicine, indicated in an office visit note and a WCB physician report form that the Appellant had multiple subjective complaints including right hip pain, non-specific pain in the neck, foot pain, right hand complaints, and new left hand numbness. He also noted a history of alcoholism and poor social functioning. He further noted that the Appellant's muscle bulk was 100% normal and symmetric in both arms. Dr. Milbum suggested that the Appellant's treatment plan should include exercise. Dr. Milbum reported that he did not believe that the Appellant was disabled. He indicated that the Appellant was capable of doing work in the heavy range.

ii. Testimonies – Appellant and Appellant's spouse

[14] The Appellant testified that he was a maintenance worker. He also held painting jobs. He explained that he had issues with his supervisors and had to take stress leave three (3) to four (4) times.

[15] He had a work injury. He was holding a ladder for another employee to go on a rooftop and it was a windy day. The ladder moved and as he was trying to hold it, his thumb and index fingers started tingling and he had neck pain. He went to the hospital and had physiotherapy treatments for nine (9) weeks. He was then cleared to return to work. He started with light duties and after a period, he returned to full duties but could not get on a ladder.

[16] In February 2018, he still had neck pain. He went on vacation and his hand paralyzed. When he returned he was referred to a neurologist, Dr. Malik.

[17] His condition with his neck and hands did not get better. He feels numbness from his elbow down to his right hand on a daily basis. He cannot do much. He also has had arthritis in his left foot for the past two (2) years and has to use a cane to walk. In addition, he started having anxiety attacks and began taking medication for this condition. He is also on a waiting list for counselling.

[18] He explained that currently, he suffers from a combination of mental and physical issues.

¹¹ GD4-102 and 158

[19] He explained that he is limited in what he could do in the workplace, he cannot walk up or down stairs, he cannot look up, he cannot climb ladders because he has vertigo and he cannot sit or stay lying down for long periods of time.

[20] The Appellant's spouse also testified and explained the Appellant's limitations.

iii. Residual capacity to work

[21] The Minister submitted that the Appellant's age, level of education, language proficiency, and past work and life experience was considered and that the Appellant's employability cannot be said to be adversely affected by these factors. He was 52 years of age at the date of application, he was proficient in at least one of Canada's two official languages, he had completed a GED program and obtained a basic welding diploma along with a journeyman painter certificate. While he may have some difficulty doing some of the work duties of his usual position as a maintenance worker, he has not presented any evidence to indicate that he could not do lighter work that is more suited to his limitations. It is important to note that not all forms of light work requires extensive retraining, however, the Appellant has not presented evidence to indicate that he could not retrain if necessary. Therefore, the Appellant does not have any barriers in the "real world" sense.

[22] It is not enough for the Appellant to prove that he has certain conditions. He must be able to demonstrate that, on or before the end of his MQP, those conditions made him incapable of working. Medical evidence is needed to demonstrate his disability and the effect it had on his ability to work. Additionally, the severity of the disability is not based on an appellant's inability to perform his usual work, but rather any substantially gainful occupation. The available medical evidence does not notate a serious condition that would support a conclusion that his medical condition made him incapable of doing all types of work.

[23] Based on the evidence, I find that the Appellant does not have a severe disability on the date of the hearing.

[24] I base my determination on the following medical reports:

- The physiotherapy report discharging the Appellant in January 2018 indicated that although the Appellant may have intermittent flare-ups related to degenerative disc disease in the cervical spine, it did not mean that he could not return to work full-time, doing his full work duties;
- Although in April 2018, the Appellant experienced numbness in his right hand and his physiotherapist recommended that he return to work on modified duties and in May 2018¹², he was assessed by Dr. Maharaj, Neurologist, who stated that the Appellant would not be able to work comfortably or safely at his job as a maintenance worker because of hand weakness, Dr. Maharaj also noted that it would take six (6) to 12 months for a full recovery;
- The Appellant was then seen by Dr. Malik, neurosurgeon, in July and November 2018 and again in February 2019¹³. Dr. Malik noted that numbness was the dominant complaint by the Appellant rather than pain. The Appellant's pain in his neck had largely abated, and even though he had residual sensory deficits in the right C6 distribution and some residual motor dysfunction, he did not appear to have a clear indication for surgical intervention. Dr. Malik indicated that conservative management was the preferable method of treatment and should include one or two (2) sessions of physiotherapy dedicated to exercises to strengthen the right wrist and right biceps;
- In July 2019¹⁴, the Appellant was assessed by Dr. Milbum, family medicine, who indicated that the Appellant had multiple subjective complaints including right hip pain, non-specific pain in the neck, foot pain, vague right hand complaints, and new left hand numbness. He further noted that the Appellant's muscle bulk was 100% normal and symmetric in both arms. Dr. Milbum suggested that the Appellant's treatment plan should include exercise. He stated that he did not believe that the Appellant was disabled. Dr. Milbum indicated that the Appellant was capable of doing work in the heavy range; and
- Finally, in October 2019, Dr. Malik again noted that pain was not a prominent complaint by the Appellant, there was still no clear indication for surgical intervention and a conservative management program was advised.

¹² GD2-100

¹³ GD2-37

¹⁴ GD4-102 and 158

[25] There is no question that the Appellant suffers from right hand numbness, he also has other physical issues. However, based on the medical reports, I cannot determine that the Appellant's conditions are severe and that these conditions render him incapable of any gainful occupation. The Appellant may not be able to perform the duties of his previous job as a maintenance worker, however, he is only 54 years of age, has an education and there is no indication he is unable to be retrained.

[26] I recognize that the Appellant testified that he now suffers from panic attacks, however, there is no medical evidence to support this condition.

Prolonged disability

[27] Since I found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[28] The appeal is dismissed.

Antoinette Cardillo
Member, General Division - Income Security