



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JD v Minister of Employment and Social Development*, 2020 SST 1125

Tribunal File Number: GP-18-2797

BETWEEN:

J. D.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Patrick O'Neil

Teleconference hearing on: September 23, 2020

Date of decision: September 25, 2020

DECISION

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

OVERVIEW

[2] The Minister received the Claimant's application for the disability pension on October 11, 2017. 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 meet the requirements that are set out in the CPP. More specifically, he must be found disabled as defined in the CPP on or before the end of his minimum qualifying period (MQP). The calculation of his MQP is based on his contributions to the CPP. I find his MQP to be December 31, 2013.

ISSUE(S)

[4] Did the Claimant's conditions result in him having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2013?

[5] If so, was his disability also long continued and of indefinite duration by December 31, 2013?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. The Claimant 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. He must prove on a balance of probabilities his disability meets both parts of the test, which means if he meets only one part, he does not qualify for disability benefits.

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

Severe disability

The Claimant's disability was not severe by December 31, 2013.

[7] The Claimant was fifty-five years old at his MQP. He was born in Columbia. He has a high school education from Columbia. He immigrated to Canada in October 1985. He attended college for two years, and university for one year in Canada. He is fluent in English and Spanish. He last worked as an engineer technician for a research company from February 14, 2000, until laid off January 28, 2011, when the company moved to the United States (U.S.). Prior to immigrating to Canada, he lived and worked in the U.S. from January 1979 until October 1985, as a bartender. Prior to acquiring work as an engineer technician in 2000, he worked in Canada as a labourer, and bartender. No medical conditions prevented him working in January 2011.

[8] The Claimant noted in the Questionnaire for Disability Benefits dated October 2, 2017² that he has been unable to work since May 6, 2013, due to depression, left shoulder and low back pain, ocular rosacea, insomnia, fatigue and memory deficits. He testified he sustained a gunshot wound to his left hand in January 2013, His left hand condition, and the conditions noted in the questionnaire are the impairments that prevent him from working. He did not look for work during the period after laid off in January 2011, and January 2013.

[9] The Claimant acknowledged the impairment to his left hand was the sole condition that prevented him working as at December 31, 2013. Onset of back, left shoulder, and right hip pain occurred after he fell down stairs in November 2015. Anxiety, depression, fatigue, insomnia, and resultant memory problems began after November 2015. He has suffered from right eye vision issues since 2016.

[10] The Claimant's only treatment for any medical condition prior to December 31, 2013, was surgery in February 2013, to repair the damage to his left hand from a gunshot injury. His surgeon recommended further surgery in June 2013, which the Claimant declined. He has not

² GD2 pages 100-106

seen a specialist for his left hand condition since. He has not had significant left hand pain since the surgery. He has restrictions relating to use of the left hand for lifting and carrying.

[11] Dr. Gerges, the Claimant's family physician since May 2017, completed the initial medical report dated September 10, 2017³. His sole diagnosis was depression. Dr. Gerges started treating him for depression in June 2017.

[12] Dr. Margaliot, surgeon, reported January 29, 2013⁴ he saw the Claimant regarding a left hand gunshot wound suffered on January 3, 2013. He is otherwise healthy and takes no medication. He scheduled surgery for the following week. Dr. Margaliot's operative report dated February 4, 2013⁵ reported the Claimant underwent surgery that day for repair of his left third, fourth, and fifth metacarpals, and tensor lacerations and adhesions.

[13] Dr. Margaliot reported April 25, 2013⁶ the Claimant is back to work part time on modified duties. He reports no significant hand pain. He can continue working, but needs a twenty-pound lifting restriction. He reported June 20, 2013⁷ that the Claimant has had a slow post-operative course, with evidence of delayed and non-union of the metacarpals. He is back to work on full duties as a computer programmer. He is going to Singapore next week for six months training. He has some residual pain but is able to function well. He recommended additional surgery, which the Claimant declined, as he believes he is doing well, and wants to go to Singapore and work there for six months. The Claimant has not seen Dr. Margaliot since June 20, 2013. He has not had further left hand surgery, or treatment since. He did not go to Singapore, as his employer selected a co-worker. He has not worked since. There is no report in the file related to the Claimant's left hand condition dated subsequent to June 2013.

[14] Dr. Le, eye specialist, reported April 6, 2016⁸ that she saw the Claimant regarding right eye problems that began three months ago due to blepharitis. The report of Dr. Le is consistent with the evidence of the Claimant to the effect onset of his vision problems began in 2016.

³ GD2 pages 84-87

⁴ GD2 pages 46-47

⁵ GD2 pages 48-51

⁶ GD2 pages 56-57

⁷ GD2 pages 59-60

⁸ GD6 page 11

[15] An ultrasound report of the Claimant's left shoulder and right hip dated May 27, 2017⁹ showed a suspected left AC joint separation, subscapularis tendinitis, partial left supraspinatus tendon tear, and no hip joint abnormality. Mr. Pathic, physiotherapist, reported June 5, 2017¹⁰ he saw the Claimant regarding right hip and left shoulder pain that began in the past three months. Physiotherapy records¹¹ confirm the Claimant began attending physiotherapy June 5, 2017, and has attended physiotherapy for left shoulder and right hip pain since.

[16] Dr. Cooper, psychiatrist, reported August 8, 2017¹² he saw the Claimant June 29, 2017 for assessment of his emotional state. He noted the Claimant worked in Canada at a laboratory and other companies for 20 years, but has not worked for four years. He fell in November 2015 and has experienced pain in his left shoulder and right hip since. He also complains of problems with his right eye. Overall, he is in good physical health. He has never seen a psychiatrist before. His memory seems slightly impaired. His concentration is fair. He appears of bright average intelligence. His judgment is intact. Dr. Cooper's diagnosis was major depressive disorder. He recommended Cymbalta. The Claimant is currently unemployable, and should be on some form of disability. He did not see a psychiatrist again until he saw Dr. Aziz on November 29, 2018¹³.

[17] Dr. Aziz reported November 21, 2019¹⁴ that the Claimant has suffered from a major depressive disorder for the past four years, with chronic and residual symptoms including fatigue and cognitive impairments. He first saw the Claimant on November 29, 2018¹⁵.

[18] Dr. Gerges reported February 21, 2020¹⁶ that the Claimant has a history of major depression, and treatment since 2017. He also suffered from chronic left shoulder, right hip and body pain since under his care in May 2017, and decreased vision in his right eye. He reported the Claimant is a candidate for ODSP due to his medical conditions.

⁹ GD6 page 2

¹⁰ GD6 page 32

¹¹ GD6 pages 28-29

¹² GD2 pages 65-69

¹³ GD6 pages 5-6

¹⁴ GD6 pages 2-3

¹⁵ GD6 page 5

¹⁶ GD6 page 4

[19] I must assess the severe part of the test in a real world context¹⁷. 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. The Claimant was fifty-five years old at his MQP, being years younger than the traditional age of retirement in Canada. He is well educated, is proficient in English, and has transferable skills acquired from employment, education, and life experiences. I find his personal factors did not affect his residual capacity to pursue suitable work not precluded by his left hand functional limitations by December 31, 2013.

[20] The issue I must determine is whether the Claimant had a severe and prolonged disability by December 31, 2013. The issue is not whether he became disabled after December 31, 2013, or is currently disabled.

[21] The Claimant stopped working in February 2011 for non-medical reasons, namely his employer closed. He claims he has been unable to work since May 2013 due to depression, back, left shoulder, right hip and left hand pain, fatigue, cognitive difficulties, and poor right eye vision. The evidence established the Claimant's back, left shoulder and right hip pain began after he fell in November 2015, poor right eye vision began in 2016, and depression with resultant fatigue and cognitive difficulties began in 2017. The only medical condition that predated his December 31, 2013 MQP was the left hand injury that occurred in January 2013.

[22] The surgeon who treated the Claimant regarding his left hand injury in early 2013 reported in April 2013, the Claimant is able to continue working subject to lifting restrictions. He reported the Claimant was working fulltime as a computer programmer when seen in June 2013. The Claimant at that time reported residual hand pain, but was able to function well and planned to go to Singapore to work for the next six months. He has not received treatment for any left hand condition since June 2013, and has not suffered from any significant hand pain since.

[23] I must assess the Claimant's condition in its totality, which means I must consider all of his possible impairments, not just the biggest impairments or the main impairment¹⁸. The conditions I must consider are those that existed by December 31, 2013, not conditions that began subsequently. The only condition that began by December 31, 2013 was the Claimant's

¹⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁸ *Bungay v. Canada (A.G.)*, 2011 FCA 47

left hand condition. The evidence of the Claimant's surgeon is that his hand condition did not preclude him working subject to restrictions when last seen in June 2013. There is no evidence his hand condition worsened since. I acknowledge the Claimant is likely currently unable to work due to cumulative effect of various conditions which began several years after the end of his MQP. I also acknowledge the Claimant's left hand condition results in limitations. The loss of the full use of one hand by a person who is otherwise able bodied does not prevent that person from seeking and obtaining employment in the real world¹⁹.

[24] 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 condition²⁰. The Claimant's hand surgeon reported in June 2013 that the Claimant was able to work subject to restrictions. There is no evidence his hand condition worsened by December 31, 2013, or since. I find the surgeon's reports evidence of work capacity. The Claimant did not made any significant effort to obtain employment by December 31, 2013, or since. I find he has not shown that efforts at obtaining and maintaining employment have been unsuccessful because of his health condition. As he has not shown that efforts at obtaining and maintaining employment have been unsuccessful because of his health condition, I am unable to find his disability severe by December 31, 2013.

[25] The onus is on the Claimant to establish on the balance of probabilities his entitlement to CPP disability benefits. I find he failed to establish he was incapable regularly of pursuing any substantially gainful occupation by December 31, 2013. Accordingly, I find he did not have a severe disability by December 31, 2013.

Prolonged disability

[26] As I found that the Claimant's disability was not severe by December 31, 2013, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

¹⁹ *Bines v. MHRD*, CP 14261 (PAB) (This decision is not binding on me, but I find it persuasive.)

²⁰ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[27] The appeal is dismissed.

Patrick O'Neil
Member, General Division - Income Security