



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MD v Minister of Employment and Social Development*, 2020 SST 1062

Tribunal File Number: GP-19-1280

BETWEEN:

M. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Teleconference hearing on: October 14, 2020

Date of decision: October 18, 2020

DECISION

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

OVERVIEW

[2] The Claimant was 61 years old when he applied for a CPP disability pension in June 2018. He last worked in the plumbing department of a hardware store. He stated that he had been unable to work since August 2017 because of a left knee injury, osteoarthritis, and cartilage damage as well as severe osteoarthritic pain in his right knee. He also stated that he had other health-related conditions and impediments. These included heart problems, high blood pressure, severe depression, and a liver condition.¹ The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] In his request for reconsideration, the Claimant stated that he had been unable to work from November 2012 until he started to work for a hardware store in March 2016.² In his written submissions, he stated that he had been unable to work since December 2012 because of severe liver attacks, sleep apnea, heart problems, and depression.³

[4] The Minister acknowledges that the Claimant was unable to work when he applied for CPP disability in June 2018. However, its position is that the evidence does not establish that he was unable to work as of December 2012, when he last qualified for the CPP disability pension. It also submits that his work at the hardware store demonstrated that he had the capacity to work after he last qualified for CPP disability.

[5] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.⁴ The Claimant's disability is severe if it causes him to be incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration.

¹ GD2-102

² GD2-13 to 14

³ GD3

⁴ Paragraph 42(2)(a) *Canada Pension Plan*

[6] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled by the end of his Minimum Qualifying Period (MQP) and that he continued to be disabled until the date of hearing.⁵ His MQP – the date by which he has to prove he was disabled – is December 31, 2012. This date is the last date when he had valid contributions to the CPP in four out the last six years.⁶

ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2012?
2. If so, is his disability long continued and of indefinite duration?

ANALYSIS

Severe Disability

[7] The Claimant stated that he was unable to work by the end of December 2012 because of severe liver attacks, sleep apnea, and heart problems. He also stated that his left knee was sore as of that time and that his depression started after he underwent an angioplasty in October 2012.

[8] The Minister stated that the Claimant's heart condition had been stable since his angioplasty in October 2012 and that he managed his sleep apnea with a CPAP machine. It acknowledged that the Claimant had a long history of cholangitis⁷, but stated that he had been able to work with this condition. The Minister also stated that there was no medical evidence of depression or knee osteoarthritis as of December 2012.

The medical evidence does not establish that the Claimant's medical conditions interfered with his ability to work by the end of December 2012

[9] The CPP disability is a social insurance regime based on contributions. The Claimant is covered only for conditions that became severe by the end of December 31, 2012. He is not covered for conditions that became severe afterwards.

⁵ Paragraph 44(1)(b) CPP

⁶ Record of Contributions: GD9-3

⁷ Inflammation of the bile duct system that carries bile from the liver and gall bladder to the small intestine

[10] Although the medical evidence supports that the Claimant now suffers from a severe disability, it fails to show that his health conditions interfered with his employability at December 31, 2012.

[11] In a recent decision, the Federal Court stated that, in order to succeed, a claimant must provide objective medical evidence of their disability at the time of their MQP. The Federal Court also stated that medical evidence dated after the MQP is irrelevant when a claimant fails to prove that they suffered from a severe disability prior to the MQP.⁸

Liver Attacks

[12] The Claimant testified that he began to suffer liver attacks after gall bladder surgery in 2002. He would feel sick, lose his appetite, be tired, have a fever, and feel pain and swelling in his abdominal area. He would be “completely knocked out” for five to six days, and then slowly regain his strength.

[13] The medical evidence supports that the Claimant suffered from long standing liver problems. However, it does not support that this condition was disabling by the end of December 2012.

[14] The first medical evidence of the Claimant’s chronic liver problems is the ERCP⁹ performed by Dr. Gopinath, gastroenterologist, in April 2005. Dr. Gopinath concluded that the Claimant had a transient obstruction only and that he could go back to work in a few days.¹⁰ In November 2005, Dr. Gopinath stated that the Claimant was doing well clinically with his chronic liver problems.¹¹ In February 2006, Dr. Gopinath performed a repeat ERCP. He concluded that a kidney stone had been the cause of his cholangitis.¹² In January 2012, Dr. Gopinath performed another ERCP and stated that the Claimant had no new clinical symptoms.¹³

⁸ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and CPP Regulations

⁹ An endoscopic retrograde cholangiopancreatography is a procedure used to diagnose disease of the gall bladder, biliary system, pancreas and liver. A bendable, lighted tube called an endoscope is used to examine the inside of the digestive system.

¹⁰ GD2-43

¹¹ GD2-42

¹² GD2-45

¹³ GD2-42

[15] The Claimant testified that he would undergo an ERCP when he suffered a serious liver attack. His last ERCP before the MQP was in January 2012. He did not undergo another ERCP until 21 months later in October 2013.¹⁴

[16] Despite his recurrent liver problems, the Claimant continued working until 2010. He stopped working because of “shrinking” business and a relocation of the office. He stated that his company “forced” him to quit without a package. He did not stop working because of his liver problems but because of issues related to his employer’s business. After leaving his job in 2010, he went on Regular Employment Insurance. In order to collect Regular Employment Insurance he had to certify that he was ready, willing, and able to work.

[17] I recognize that the Claimant suffered from longstanding liver problems and that he suffered episodes of liver attacks. However, he acknowledged that he had been able to continue working despite the attacks. There is no evidence to establish that they were of sufficient frequency and duration to have prevented him from regularly pursuing gainful employment.

Sleep apnea

[18] The Claimant was diagnosed with sleep apnea in May 2012. However, he acknowledged that he was able to control this by using a CPAP machine. He stated that his sleep apnea complicates the anesthesia required for his recent knee surgeries. But this would not have been significant as of December 2012.

Heart condition

[19] The Claimant underwent an angiogram and angioplasty in October 2012. His heart was stable until he suffered a second heart attack in June 2016, which was after he had returned to work. He was able to return to work about two months after his second heart attack.

Depression

[20] The Claimant testified that he discussed his depression with his family doctor after his October 2012 angioplasty. However, there is no medical evidence to support that this was a

¹⁴ Medical history chart prepared by Claimant: GD3-3- 4

significant medical condition as of December 2012. There is no evidence of his being treated for depression other than by prescribed anti-depressants. He acknowledged that his family doctor did not prescribe anti-depressant medication until 2017.

Knee Osteoarthritis

[21] The Claimant's main disabling condition when he applied for CPP disability in June 2018 was his bilateral knee osteoarthritis. In his disability questionnaire, he listed this as the only condition that prevented him from working.¹⁵ However, there is no medical evidence that his knee osteoarthritis was significant until 2015.

[22] In the CPP medical report, Dr. Fitzpatrick, family doctor, stated that bilateral knee arthritis was the Claimant's main medical condition. His knee pain worsened between 2016 and 2018.¹⁶ In September 2017, Dr. Catre, orthopaedic surgeon, stated that the Claimant's condition had deteriorated since he underwent left knee arthroscopic surgery in October 2015. In October 2017, Dr. Catre stated that because of his knee arthritis the Claimant was fit for only light duties in his "very manually labour intensive job." Dr. Catre was not willing to put the Claimant on full disability from an orthopaedic point of view.¹⁷

My Findings

[23] I must focus on the Claimant's condition as of the end of December 2012. In doing so, I must consider all of his possible impairments, not just his biggest impairments or main impairment.¹⁸

[24] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.¹⁹ The Claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.²⁰

¹⁵ GD2-102

¹⁶ GD2-59

¹⁷ GD2-65

¹⁸ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

¹⁹ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²⁰ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

[25] I recognize that the Claimant suffered from a chronic liver condition as of December 2012. However, he was able to work despite this condition. He controlled his sleep apnea by using a CPAP machine and his heart condition was stable. There is no medical evidence to support that he suffered from either depression or knee arthritis at that time

[26] I find that the Claimant's medical conditions, whether considered singly or together, did not prevent him from regularly pursuing substantially gainful employment by December 2012.

The Claimant was capable of working after December 2012

[27] The Claimant stated that he made several unsuccessful attempts to find work from 2010 until he found a job in March 2016.

[28] The unsuccessful attempts included:

- May 2011: a job fair where he looked for technical work such as being an auto mechanic or operating tabbing machines;
- March 2012: application to attend a home inspector course at Seneca College. He was not able to afford the course.
- February 2014: application to be a shop technician at Porter airlines.
- February 2015: application to be a plant operator at St. Michael's college.
- March 2015: application to be an inventory clerk for Shopper's Drug Mart.
- June 2015: application to be a receiver at East General Hospital.

[29] The Claimant did not know why these applications were unsuccessful, but stated that he would have been able to do the jobs if he had been hired. The inability to find work is not equivalent to the inability regularly to pursue substantially gainful employment because of a health condition.

[30] In March 2016, the Claimant started to work in the plumbing department at a hardware store. He worked 36 hours per week and earned approximately \$12 an hour. The work involved heavy physical labour. He placed heavy items on carts, climbed ladders, and operated a forklift. In June 2016, he suffered a heart attack and was off work for two months. He then returned to work until September 2017. He stopped working because of excruciating knee pain. He earned

\$12,949 for the months he worked in 2016 and \$15,254 for about nine months work in 2017. There is no evidence that he received any special accommodations at this work.

[31] I am satisfied that the Claimant was capable of regularly pursuing substantially gainful work after the December 2012 MQP.

The Claimant has failed to prove his disability was severe by the end of December 2012

[32] A disability is severe if it renders a claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assesses the severity requirement in a “real world context” and consider such factors as the Claimant’s age, education level, language proficiency, and past work and life experiences when determining his "employability".²¹

[33] The Claimant was 56 years old at the December 2012 MQP. This is about nine years before the usual retirement age. He was born in Pakistan. He came to Canada in 1998. He had extensive work experience in Pakistan. This included operating machines at a pharmaceutical company, working as a forklift and crane operator, working in an office for an oil company, and working as tool technician testing oil wells. In Canada, his work involved primarily working in a mailroom. I am satisfied that the Claimant had transferrable skills and that his personal attributes did not significantly limit his ability to pursue alternative employment.

[34] I have already determined that the Claimant’s medical conditions did not prevent him from regularly pursuing substantially gainful employment as of December 2012.

[35] The Claimant has failed to establish that it is more likely than not that he suffered from a severe disability in accordance with the CPP requirements.

[36] Since he has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

²¹ *Villani* 2001 FCA 248

CONCLUSION

[37] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security