



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *GB v Minister of Employment and Social Development*, 2020 SST 995

Tribunal File Number: GP-20-1005

BETWEEN:

G. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Nicole Zwiers

Teleconference hearing on: October 6, 2020

Date of decision: October 27, 2020

DECISION

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

OVERVIEW

[2] The Claimant stopped working when the construction season ended in November 2009. The Claimant was working as a seasonal construction flagger. The Minister received the Claimant's application for the disability pension on June 26, 2018. 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, 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, 2011.

ISSUE(S)

[4] Did the Claimant's conditions of bad knees, and back as well as COPD result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2011?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2011?

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

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

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 does not have a severe disability

[7] The Claimant testified that he was working seasonally as a construction flagger, holding the flag at a construction site. He stopped working when the season ended in November 2009. The Claimant testified that the job required him to stand 16 hours a day and his knees were getting sore. The Claimant further testified that he was not accommodated by his employer and was not allowed to sit on a stool at any time. He was supposed to get a break every 2 hours but that did not usually happen.

[8] The Claimant testified that in 2011 he was seeing his family physician, Dr. Slipp and had not been referred to a specialist of any kind. The Claimant testified that he saw Dr. Slipp a few times a year in 2011 to get prescription refills. The Claimant has not had any type of therapy for his knees or back because he cannot afford it.

[9] The Claimant described a typical day for himself in 2011, as of his MQP. The Claimant testified that he lived on his own and, with difficulty, would get out of bed after 2-3 attempts between 6 and 7am. He made himself tea and breakfast. He made his own meals and sat down to prepare food as needed. He would usually watch television and would visit his mom daily as she lived near him. The Claimant's mother passed away 4 years ago. Prior to her passing, the Claimant looked after his mom by getting her medications ready, doing housework including laundry and cleaning. The Claimant would usually go to bed at 9pm. The Claimant testified that he was in pain because of his knees and he found that amitriptyline helped reduce his pain and helped him sleep. He stopped taking it because he could not afford the medication. The Claimant testified that he was able to sleep 4 to 5 hours a night and usually felt rested with no need to nap during the day.

[10] The medical evidence from Dr. Slipp near the Claimant's MQP reflects that the Claimant was unable to find work. A clinical note from August 31, 2011 provides that the Claimant was unable to attain work due to his poor scholastic achievement. On December 13, 2012 Dr. Slipp

wrote that the Claimant wanted his CPP completed but Dr. Slipp commented that this would be difficult as the Claimant had no marked illness except poor scholastic achievement.²

[11] In the CPP Medical Report dated June 25, 2018 Dr. Slipp diagnosed the Claimant with bilateral knee pain, back pain and COPD.³ Dr. Slipp described the Claimant's conditions as ongoing knee pain noting that the x-ray suggests knee pain was due to mild osteoarthritis (OA). Dr. Slipp described the Claimant as a tall, pale, thin man with dental caries, hoarseness, and clear chest.⁴ The Claimant was noted to be taking two puffers and amitriptyline.⁵ Dr. Slipp's prognosis for the Claimant was gradual progression of knee and low back pain.⁶ Dr. Slipp provided that he first starting treating the Claimant for his main disabling condition in November 2009. An x-ray of the Claimant's bilateral knees in March 2017 showed mild OA of both knees and medial joint compartment.⁷

[12] In Dr. Slipp's clinical notes dated June 25, 2018 he noted that the Claimant was unemployable in the regular labour market because of his back pain and his COPD.⁸

[13] Dr. Slipp wrote a letter to Service Canada dated March 10, 2019. He provided that the Claimant has grade 10 education but functions at a grade 6 level. He described the Claimant as gradually becoming less adept at working as a flag man because of joint pain in his wrists and knees such that he could not stand all day. Dr. Slipp wrote that the Claimant was deserving of CPP disability benefits in Dr. Slipp's estimation.⁹

[14] In the Claimant's CPP Questionnaire he answered that he could no longer work as of April 25, 2010 due to his medical condition. He described his condition as bad knees and back. He described his impairment as finding it hard to stand for long periods of time. The Claimant also referred to his COPD as a health-related impairment.¹⁰ The Claimant described his functional limitations as follows: sitting is good; cannot stand for too long; can walk short

² GD2-49

³ GD2-68

⁴ GD2-69

⁵ GD2-70

⁶ GD2-71

⁷ GD2-75

⁸ GD2-43

⁹ GD2-36

¹⁰ GD2-78

distances; can lift or carry about 10 lbs for 3 feet; can bend half way; sleeps 3-4 hours per night; shallow breathing and finds it hard to breathe; and he does not have a driver's license. All other functions the Claimant described as good.¹¹ The Claimant listed his treating physician to be Dr. Slipp.

[15] Based on all the evidence, I find that the medical documents do not support a finding that the Claimant had a severe disability as of his MQP of December 31, 2011. The documents from Dr. Slipp show that the Claimant had mild OA in his knees, back pain and COPD. These conditions were not an impediment to the Claimant's ability to work as of his MQP. The Claimant's testimony was that he was helping his older mom on a regular basis with her medication, laundry, cleaning and cooking until the time of her death 4 years ago. The evidence is that the Claimant was managing his conditions as of his MQP and had capacity to work as I have explained below.

The Claimant had capacity to work

[16] I must assess the severe part of the test in a real world context¹². 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 43 years old at his MQP of December 31, 2011. He has grade 10 education and had held a series of unskilled labour positions since he stopped attending high school. The evidence at the hearing is that the Claimant stopped working in November 2009 when the construction season ended. At that time he had mild OA in both knees with pain in his knees and back. He also had COPD.

[17] At the hearing the Claimant testified that he did not have any particular difficulty learning when he was in school. He stopped going to school after grade 10 because his mom needed his financial support. The Claimant testified that he has no interest in returning to school or having any retraining. Dr. Slipp also reflected the Claimant's lack of interest in further education of any kind in the clinical notes. The Claimant testified that he did attempt to return to schooling to get his high school diploma but he only did this as he was required to in order to continue to receive social assistance. The Claimant testified that he does not like to be in crowds, including a

¹¹ GD2-79

¹² *Villani v. Canada (A.G.)*, 2001 FCA 248

classroom as he gets nervous. There is no further evidence of a medical diagnosis or treatment for anxiety related to nervousness.

[18] The Claimant testified that he is not interested in learning about computers and would only do so if he were required to in order to continue receiving social assistance. At the hearing the Claimant agreed that he may have been able to do work that allowed him to sit down but he was not able to do that with his flagging job, which required standing.

[19] The evidence is that the Claimant had capacity to work or retrain as of his MQP. Dr. Slipp actively tried to encourage the Claimant do further his education so that he could find work. In addition, Dr. Slipp's clinical notes reveal that Dr. Slipp did not think the Claimant was incapable of working as of his MQP. Dr. Slipp thought that the Claimant would not be a suitable candidate for CPP because his lack of education was preventing him from finding work at that time. I appreciate that the Claimant's condition of OA and COPD are progressively worsening conditions. The evidence is that at the time of the Claimant's MQP, he was capable of working and was a suitable candidate for retraining. Based on the Claimant's testimony and medical evidence, he also could have continued with flagging if he was accommodated to allow him to take breaks and sit intermittently.

[20] 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's 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 work¹³. As of the Claimant's MQP he was not prevented from earning a living by reason of his health conditions.

[21] 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 impairment¹⁴. The medical evidence and the Claimant's evidence is that his health conditions on which he bases his CPP application are: knee and back pain and COPD. Considering these three conditions

¹³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

together, I do not find that the Claimant had a severe disability or that he was incapable or working as of his MQP.

[22] 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 condition¹⁵. The Claimant has not worked since he stopped working in November 2009. The Claimant stopped working at the end of the season and not as a result of his health conditions. The Claimant did assist his mom on a regular basis with her home care until her death in approximately 2016 including cooking, cleaning, laundry and managing her medications. The evidence is that the Claimant had capacity to work but did not attempt to find employment. The Claimant has not shown that obtaining and maintaining employment was unsuccessful because of his health conditions.

[23] I find that the Claimant had capacity to work as of his MQP and that he did not have a severe disability. Having found that the Claimant did not have a severe disability, I do not need to address whether he showed that he had a prolonged disability.

CONCLUSION

[24] The appeal is dismissed.

Nicole Zwiers
Member, General Division - Income Security

¹⁵ *Inclima v. Canada (A.G.)*, 2003 FCA 117