



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DG v Minister of Employment and Social Development*, 2020 SST 1139

Tribunal File Number: GP-19-516

BETWEEN:

D. G.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Minister represented by: John Gebara

Teleconference hearing on: October 6, 2020

Date of decision: October 26, 2020

DECISION

[1] The Claimant is not entitled to Canada Pension Plan (CPP) disability benefits. This decision explains why I am dismissing the appeal.

OVERVIEW

[2] The Claimant is D. G.¹. He is a 32-year-old man who used to work in his family's fish market. He stopped working in early 2014 because he could no longer stand or sit for too long. He applied for CPP disability benefits in September 2014, and in his application he reported that he is unable to work because of chronic pelvic pain, cramping and heavy and irregular bleeding. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

[3] A Tribunal member heard the Claimant's appeal in September 2018. That member decided that the Claimant was not entitled to disability benefits because his disability was not severe and prolonged by his Minimum Qualifying Period (MQP) of December 31, 2016.

[4] The Claimant appealed that decision to the SST Appeal Division. In March 2019, the Appeal Division allowed the appeal, finding that the General Division had erred in law by not assessing whether the child rearing provision would be helpful in extending the Claimant's MQP. The Appeal Division referred the matter back to the General Division for redetermination.

PRELIMINARY MATTERS

The MQP changed from December 31, 2016 to December 31, 2018

[5] After the Appeal Division rendered its decision of March 2019, it took some time for the MQP to be sorted out. Initially, the Minister submitted that the child rearing provision would not be helpful to the Claimant because when he became eligible for the Child Tax Credit in March 2018 both children were over the age of 7². The Claimant then obtained a letter from the Canada Revenue Agency (CRA) saying that if the Claimant had applied for the Canada Child Benefit for

¹ When the Claimant filed the appeal with the SST, the Claimant's name was D. G. In early 2019, the Claimant wrote to the Tribunal and asked for a name and gender change (page AD2-1).

² Page IS5-1

the period from January 2011 to December 2017, he would have been determined eligible for the benefit under the *Income Tax Act*³. Based on the letter from the CRA, the Minister changed its MQP calculation. The Minister accepted that, with the child rearing provision, the Claimant's MQP could be extended to December 31, 2018⁴.

[6] Despite the change in the MQP, the Minister's recent submissions of June 17, 2020 refer to an MQP of December 31, 2016⁵. I asked the Minister's representative about this during the hearing. He said there is a mistake in the submissions about the MQP, and he acknowledged that the Minister accepts the MQP is December 31, 2018.

The Claimant withdrew his Charter challenge

[7] At the beginning of a hearing that was scheduled in June 2020, the Claimant asked for an adjournment so that he could raise a Charter argument in support of his appeal. I granted the adjournment.

[8] On September 3, 2020, the Claimant wrote to the Tribunal and said he was withdrawing his Charter argument⁶. On September 9, 2020, I wrote to the Claimant and informed him that I had accepted his withdrawal of the Charter argument. I explained that his appeal would now proceed as a regular appeal, meaning that I would not be deciding any Constitutional issues⁷.

Late-Filed Documents

[9] The filing deadline in this appeal was June 12, 2019. Between June 12, 2019 and the date of this hearing, both parties filed additional documents. With one exception, I accepted all of those late-filed documents into the record. I accepted the documents mainly because most of the new evidence was filed by the Claimant, and the Minister had time to review the documents and comment on them.

³ Page IS12-2

⁴ Page IS18-2

⁵ Pages IS22-1 to IS22-3

⁶ Page IS26-1

⁷ Page IS27-1

[10] The one document that I did not accept into the record is a Record of Earnings that was filed by the Minister in September 2020⁸. The Minister filed the document without a cover letter or explanation for why it was being filed. I decided not to accept the document into the record because it does not show anything new. In other words, the document shows the same earnings and contributions information that is set out in previously filed records⁹.

WHAT THE CLAIMANT MUST PROVE IN THIS APPEAL

[11] For the Claimant to succeed, he must prove that he has a disability that was severe and prolonged by December 31, 2018. This date is based on the Claimant's contributions to the CPP and the child rearing provision¹⁰.

[12] A disability is severe if it renders a person 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 death¹¹.

ANALYSIS

Severe disability

When the Claimant applied for disability benefits, he had functional limitations that affected work capacity

[13] When the Claimant applied for disability benefits in September 2014, he reported that he was unable to work because of chronic pelvic pain, cramping, and heavy, irregular bleeding. He explained that his pelvic pains were so intense that he could hardly stand most days or get out of bed. He also explained that he had stopped most physical activities, including running and weight lifting, because of pain and heavy bleeding.

[14] The Claimant's gynecologist, Dr. Hasen, confirmed the difficulties the Claimant was having. In a report dated September 24, 2014, Dr. Hasen said that the Claimant had chronic

⁸ Pages IS29-1 to IS29-2

⁹ See, for example, page IS22-4

¹⁰ The *Canada Pension Plan* calls this date the "Minimum Qualifying Period". See subsection 44(2) of the *Canada Pension Plan*.

¹¹ The definitions are found at paragraph 42(2)(a) of the *Canada Pension Plan*

pelvic pain, dysmenorrhea and suspected adenomyosis. He explained that the pain was diffuse, lower abdominal pelvic pain (most right-sided) with menses, and that the pain was worse with prolonged standing or activity. Dr. Hasen was hopeful that the pain would improve with treatment, but he said that if it did not improve then the Claimant might be referred to a pain clinic¹².

Dr. Hasen reported in 2018 that the Claimant's pain improved with surgery

[15] The Claimant tried several treatments to improve his pelvic pain and bleeding symptoms. Some treatments took place before he applied for disability benefits, while others took place after he applied for disability benefits. The treatments included oral contraception, an IUD, Lupron injections, medications, and marihuana. After trying all of that, the Claimant had a hysterectomy in April 2018.

[16] The medical evidence shows that the hysterectomy was helpful to the Claimant. I say this for two reasons.

[17] First, Dr. Hasen reported in May 2018 that the Claimant's chronic pain had recently been "surgically dealt with". He also implied that the Claimant could now work because he said the Claimant was unable to work from December 2012 to December 2017¹³.

[18] Second, Dr. Hasen's May 2018 report is not contradicted by any other medical opinion on record.

The Claimant asserts that his pain did not improve with surgery and it has only gotten worse

[19] The Claimant testified that the surgery did not help his pain. He said the only thing that changed after the surgery is that he stopped bleeding. He went from having chronic pelvic pain to chronic pain everywhere. The pain is only getting worse as he gets older.

¹² Pages GD2-55 to GD2-58

¹³ Page GD8-6

[20] The Claimant attributes his symptoms to the Lupron injections he had. He feels the Lupron destroyed what was left of his life. To support his argument, he provided a diagram that reportedly shows the areas of the body that Lupron affects¹⁴.

[21] The Claimant said that his first round of Lupron was in 2016 and the second round was in 2018. The medical evidence shows that the Claimant's first round of Lupron began earlier than what he remembers. I am not suggesting that the Claimant purposely provided incorrect information. I can appreciate how difficult it can be to remember dates. My point is just that there is a conflict between the dates the Claimant provided and the dates shown in the medical reports, and between the two I prefer the dates shown in the medical records. In any event, nothing turns on when the Lupron injections took place, because they were clearly done before the Claimant's hysterectomy in April 2018. According to the medical evidence, the first round of Lupron started in April 2013¹⁵ and the second round started in or about September 2017¹⁶. There was a gap between the two rounds because of the cost.

[22] The Claimant explained that his physical symptoms include back problems, constant bone and joint pain, chest pain, left knee pain, tingling feet and hands, muscle weakness, numbness, migraines, and vision changes. His symptoms affect his ability to dress, walk, drive, sit, stand, or perform simple daily chores such as laundry or making dinner. The Claimant says that he also has severe depression and anxiety.

[23] The Claimant's evidence was largely supported by the testimony of his father, G. G. G. G. testified that in December 2018, he saw the Claimant every day, as he lives only a 5-10 minute drive away. He spoke of the dramatic deterioration he has seen in the Claimant over the years. He has seen the Claimant lie on the floor crying due to excruciating pain that lasts for hours and hours. He said there is no doctor's report to attest to this, because a doctor was not there to see it. He blames the Lupron for the Claimant's pain and he said that if they had to do it all over again they would not have gone through with the Lupron.

¹⁴ Page IS30-4

¹⁵ Page GD2-60

¹⁶ Page GD6-1

The Claimant's disability was not severe by December 31, 2018

[24] The biggest challenge in this appeal is that the medical evidence simply does not support the oral evidence. This is important because medical evidence is needed to support a finding that a disability is severe¹⁷. When I consider the evidence as a whole, I find there is insufficient evidence to show that the Claimant's disability was severe by December 31, 2018. I have four reasons for saying this – namely, there are significant gaps in the medical evidence, treatment just recently began for the GERD-related symptoms, there is evidence of work capacity, and the Claimant did not make efforts to obtain and maintain employment. I will now explain each reason.

(i) There are significant gaps in the medical evidence

[25] The Claimant has had several relevant medical consultations for which no reports have been submitted.

[26] For example, the Claimant testified that he has attended two and possibly three pain clinics. He could not remember for certain whether he attended a third pain clinic and he acknowledged that he may have been confusing the third pain clinic with the cannabis clinic he attended. In any event, he said that he attended two pain clinics before his surgery in April 2018¹⁸, and at each pain clinic he was told that there was nothing that could be done aside from continuing with medicinal marihuana. This was because the Claimant had tried several medications in the past and had not been able to tolerate them. I do not have any reports from either of the pain clinics the Claimant attended. This is concerning, given that the Claimant's primary complaint is chronic pain.

[27] As a second example, the appeal file shows that the Claimant has been prescribed medical marihuana since at least December 2015¹⁹. Aside from some information about

¹⁷ *Villani v. Canada (Attorney General)*, 2001 FCA 248

¹⁸ The Claimant said he attended the first pain clinic in late 2015. He could not remember when he attended the second pain clinic, except that it was at some point before his surgery in April 2018.

¹⁹ Page GD4-2

dosages, I have very little evidence from the physician (Dr. Yong Sun Lee) who has been prescribing the marihuana. For instance, I know that Dr. Lee has prescribed the following:

- June 2016, Dr. Lee prescribed marihuana (the number of grams/day is illegible) for 90 days with a max THC content of 18% with some CBD²⁰.
- August 2016, Dr. Lee prescribed 3 grams a day for 180 days with a max THC content of 18% with CBD²¹.
- February 2017 and January 2018, Dr. Lee prescribed 3 grams a day for up to one year (THC 18%)²².

[28] However, I do not have any reports from Dr. Lee that speak, in any meaningful way, to the conditions for which the marihuana was prescribed and/or the benefits (if any) that the marihuana provides for symptom relief.

[29] As a third example, the Claimant testified that he attended physiotherapy for his left knee for eight months, and the physiotherapist prescribed a brace for his knee. I have evidence showing that the brace (a patellar-femoral joint stabilizer) was prescribed in May 2019²³. However, I do not have any reports from the physiotherapy sessions the Claimant attended. I also do not have any reports from any other health care practitioners, including the Claimant's family physician, about the efficacy of the treatment the Claimant received for his left knee or about whether alternative treatment options remain.

[30] As a fourth example, the Claimant testified that his vision changed severely in 2017 or 2018 and he had to go "back to back" for eye appointments. The Claimant also said he suffers from migraines. I do not have any medical reports about the Claimant's vision changes, and so I cannot assess the severity of this condition or how it affects the Claimant's functionality.

[31] As a final example, the Claimant testified that he had severe depression in December 2018 and that it has not improved since then. I do not have any reports that confirm a diagnosis

²⁰ Page GD8-5

²¹ Page GD8-4

²² Pages GD8-2 and GD8-3

²³ The page is not numbered but it is after page IS7-2

of severe depression. I have a prescription printout showing that the Claimant was prescribed Lorazepam and Escitalopram (10 mg) in 2020²⁴, but this was after his MQP. Even then, I do not have medical evidence that speaks to the severity of the Claimant's mental health conditions and how they affected his functionality by December 2018.

[32] The onus in this appeal is on the Claimant. It was open to him to file medical evidence about the above-noted consultations and conditions. The Claimant did not do so.

(ii) Treatment just began for the GERD-related symptoms

[33] The Claimant filed a letter from his family physician, Dr. Huidovici, dated September 25, 2020 saying that the Claimant has been assessed for abdominal pain, likely related to dyspepsia / GERD and that he has been referred to a gastroenterologist for consult and management²⁵. Because this letter is almost two years after the MQP, I asked the Claimant about when his symptoms started. He said he has been dealing with the GERD-type symptoms for some time, but because he is in so much pain all the time, he ignored the symptoms until he could not take it anymore. The Claimant said that he recently talked to his doctor about the symptoms and then ended up in ER a few days later. The doctor at the hospital gave him a prescription for acid reflux (Pantoprazole) and told the Claimant that it would take about four weeks to notice a benefit. The Claimant has not yet tried the medication for four weeks, and so it is too early to tell whether it will be helpful.

[34] The Claimant also said that the ER doctor referred him to a specialist to investigate his pancreas. At this point, any possible issue with the Claimant's pancreas is speculative. Moreover, I do not have medical evidence that it was an issue before the MQP.

(iii) There is evidence of work capacity

[35] The evidence shows that the Claimant had work capacity by December 31, 2018.

[36] First, Dr. Hasen reported in May 2018 that the Claimant's chronic pain prevented him from working from December 2012 to December 2017. He added that the chronic pain had been

²⁴ Page IS19-1

²⁵ IS30-3

“surgically dealt with recently”²⁶. This evidence tells me that by 2018 the Claimant’s pain had improved to the point where he could work. Otherwise, Dr. Hasen would presumably not have limited his comments about the Claimant’s inability to work to a specific period of time.

[37] Second, there are no other medical reports on record that say the Claimant could not work by December 31, 2018.

[38] In finding work capacity, I have considered the Claimant’s age, education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context²⁷.

[39] The Claimant’s personal characteristics would not have adversely affected his employability by December 31, 2018. At the time of his MQP, the Claimant was only 30 years of age. He thus had many years ahead of him before the standard age of retirement. The Claimant is also proficient in at least one of Canada’s two official languages, and has relevant work experience including work in customer service.

[40] As for education, the evidence is conflicting. At his hearing in September 2018, the Claimant testified that he has a grade 12 education, that he began working full time after he “graduated”, and that he graduated in 2006. At the hearing before me, the Claimant testified that he did not complete high school, and only completed grade 11. I do not have any documentation to resolve the conflict. However, I consider it unlikely that the Claimant would have forgotten in September 2018 (the date of his first hearing) that he did not complete high school. As such, I find it more likely than not that the Claimant completed grade 12. Having a grade 12 education is consistent with employability.

(iv) the Claimant has not attempted a return to work

[41] Where there is evidence of work capacity, a Claimant must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the health condition²⁸.

²⁶ Page GD8-6

²⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

²⁸ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[42] The Claimant has not returned to the workforce since 2014, and therefore he is unable to show that efforts at obtaining and maintaining employment have been unsuccessful.

[43] The Claimant told me that in either 2016 or 2017 he tried to upgrade his education through an independent learning centre, but he failed the program because he was not handing things in on time. I cannot equate this attempt with an effort to obtain and maintain employment. First, as I mentioned previously, the Claimant provided conflicting evidence about whether he completed high school, and I prefer the evidence he provided in September 2018. Second, the evidence the Claimant gave about the upgrading program is quite vague. For example, the Claimant could not remember how long he attended the program for.

[44] The Claimant asked me to consider the fact that X, Ontario consistently has the highest rate of unemployment in Canada. This is not a factor that I can consider. Socio-economic considerations, such as labour market conditions, are not relevant to assessing disability²⁹.

[45] The Claimant also asked me to consider the impact that Covid-19 has had on employment, and in particular the fact that there is a high risk to being employed. This might be a relevant consideration now, but it was not a relevant consideration by December 31, 2018. Again, I am required to focus on whether the Claimant's disability was severe by December 31, 2018.

The evidence does not support a closed period disability

[46] Given Dr. Hasen's report of May 2018 which states that the Claimant was unable to work from December 2012 to December 2017, I considered whether there is enough evidence to support a finding of a closed period disability. In the end, I have decided that there is not.

[47] First, Dr. Hasen's May 2018 letter is quite short and does not provide much in the way of detail. It is not clear, for example, whether Dr. Hasen was saying that the Claimant was unable to work at his usual job or whether the Claimant was unable to do any type of work he might be reasonably suited to perform. Second, Dr. Hasen's report is somewhat inconsistent with the Claimant's employment history. For example, Dr. Hasen said the Claimant was unable to work

²⁹ *Minister of Human Resources Development v. Rice*, 2002 FCA 47

from December 2012. However, the Claimant was in fact working at that time and he continued to work through to early 2014. Third, as I mentioned previously, I do not have reports from several consultations the Claimant had before 2018, including chronic pain assessments. Without those reports, or at least commentary on those assessments from another practitioner(s) such as the Claimant's family physician, I have insufficient medical evidence to support a finding of a severe disability.

[48] I cannot place significant weight on the oral evidence of the Claimant and his witness. Neither acknowledged any improvement with the pain after the surgery of April 2018, and this is at odds with what Dr. Hasen's May 2018 report suggests. Reports from other practitioners who may have been able to speak to the severity of the Claimant's disability have not been provided.

CONCLUSION

[49] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security

ANNEX

The following document is excluded from the record: Pages IS29-1 to IS29-2